“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)

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INTRODUCTION

[T]he man who smokes cigarettes in public places inflicts a grievous wrong on those about him. ... He clouds the atmosphere with fumes that, if they were made by the prosecution of a manufacturing business, would cause the people living near that factory to appeal to the board of health for relief, and the board would probably take measures to abate the nuisance.¹

Do you believe the tobacco trusts love these boys more than their mothers do? We think not. It is only a matter of business with them.²

Beside the controversy generated by the formation of trusts, the anti-cigarette movement paled to the significance of a high school debate.³

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¹“Cigarette Smoking,” Lowell Sun (MA), Jan. 8, 1897 (8:3).
³Robert Heimann, Tobacco and Americans 218 (1960).
The Cigarette Industry/Nicotine Trust in the Late Nineteenth and Early Twentieth Century: Production and Consumption Levels and Trends and Contemporaneous Views of the Impact of State Sales Bans

Among users of tobacco in other forms and non-users of the weed in any form, the feeling is pretty generally unanimous that cigarette smoking is one of the vilest and most suicidal habits of the present day.¹

“You want to know who our real enemy is? The plug-tobacco people. ... Why? Because they’ve got the allegiance of more consumers than we have. It’s our job to switch people to cigarettes.”²

[A]s a nation we are growing more and more addicted to the delights of nicotine....³

Robert L. King, who is now in jail under sentence of death, threatens that should the sentence be carried out, he will appear before the firing line smoking a cigarette. This looks very much like an adroit plan on the part of King to get the tobacco trust interested in seeing that the death sentence is not carried out. ...

But the trust is probably losing no slumber.... That grand old safeguard of the trusts, the injunction, is still in prime working order, and should there be any danger of their wares losing popularity through the carrying out of King’s threat, it will be an easy matter to enjoin him from smoking when he appears before the firing squad.⁴

Cigarettes were produced in the United States before the formation of the Tobacco Trust in 1890, but they represented a minuscule proportion of the tobacco industry. Nevertheless, even during this infancy of addiction the trade and the wider world wondered about their proliferation. In 1876, in the midst of a long and deep nationwide depression, the U.S. Tobacco Journal found it a “consolation” to notice at least “one branch of the tobacco trade in full activity and flourish.” Still, only “few people imagine to what an extent the manufacture

¹“Cigarette Smoking,” USTJ, vol. 22, Sept. 18, 1886 (3:1).
²Borden Deal, The Tobacco Men 245 (1965). This fictionalized account of James B. Duke and the Tobacco Trust, which originated in notes that Theodore Dreiser had made in 1932 in preparing a script for a film, ascribed these remarks to Duke at the meeting ca. 1889 at which he persuaded his chief competitors to join him in forming a trust.
⁴“The Cigarette’s Peril,” SLH, Oct. 30, 1900 (4:1) (edit.).
of cigarettes has grown within the past few years.” Previously the industry was “almost unknown,” the reason apparently being that, although domestic consumption had “increased largely,...the real course of activity” was the “great export demand” to Europe and especially South America. Whereas cigar production declined somewhat between 1874 and 1877, the manufacture of cigarettes more than quadrupled. To be sure, even by the latter year almost a dozen cigars were still being produced for every cigarette.

The Tobacco Journal interpreted the consumption of cigarettes in such “immense proportions” as “[o]ne of the signs of the hard times”: one of the consequences of the “financial depression” was that as a “matter of economy” many people smoked a package of [20] cigarettes in lieu of their former diet of three to six cigars. (A decade later the same journal explained the “growth of the habit...by the fact that...one can get twenty cigarette smokes for the cost of one cigar smoke.”) But cigarette production continued to expand even after the depression had morphed into the prosperity phase of the business cycle: the press reported that the number of cigarettes on which tax was paid had risen approximately 30-fold between fiscal years 1870 and 1880 from about 14 to 409 million. The figures prompted Bradstreet’s to observe in 1882 that whereas until recently their consumption had been confined “almost entirely to the foreign born portion of our population...[t]o-day more natives than foreigners smoke them.” With considerable exaggeration it added: “The Americans may be said to have become a nation of cigarette smokers.” (Even in 1911, when the press repeated that “[t]his nation of 90-odd millions is, indeed, a nation of cigarette smokers,” the claim was still premature, though by 1920, when over half of young males

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6Cigar production declined from 1,835,000,000 in 1874 to 1,816,000,000 in 1877, while cigarette production rose from 35 million to 157 million; manufactured tobacco and snuff stagnated. Calculated according to U.S. Bureau of the Census, Historical Statistics of the United States: Colonial Times to 1970, Part 2: ser. P 239-41 at 2:691 (Bicentennial ed. 1975).
7“Cigarettes and Cheap Segars,” USTJ 3(19):2:3 (June 19, 1877).
8“Cigarette Smoking,” USTJ, Sept. 18, 1886 (3:1) (vol. 22).
9Bradstreet’s 3(136) (80:1-2) Feb. 5, 1881 (untitled). Even more hyperbolic was the contemporaneous claim of the Raleigh News and Observer that: “Cigarettes have well nigh replaced cigars in popular favor.” At the same time it reported that physicians had declared cigarettes to be “more dangerous because the cigarette is smoked closer....” N&O, May 31, 1881 (2:1) (untitled).
10“Cigarettes,” Daily Times Press (Middletown, NY), May 11, 1911 (4:3).
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smoked cigarettes, and especially by 1929, when “[n]ine out of ten American men, it is said, smoke cigarettes as regularly as they read their newspapers,” it was much more plausible.) In any event, Bradstreet’s characterized the United States as “the heaviest cigarette producer in the world” and predicted that the industry would “steadily increase,” singling out exports for special mention.

The supply side of the cigarette industry was transformed by the introduction of the Bonsack cigarette-making machine in the 1880s, which as early as 1882 Bradstreet’s viewed as “promising to revolutionize the cigarette manufacturing industries of the world” by creating “very great” savings in time, labor, and tobacco. By the time W. Duke, Sons and Company began using it in 1884, the

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13[Untitled,] Bradstreet’s 3(136): 80:1-2 (Feb. 5, 1881). Nevertheless, two months later the *Tobacco Journal*, which was not the organ of the insurgent cigarette manufacturers, cast doubt on this report by claiming that prosperity’s return found “many smokers deserting the cigarette for the cigar.” It noted that many in the tobacco trade asserted that the foregoing data were “misleading, inasmuch as they represent a great deal of dead stock which it will take years to work off.” In this direction it mentioned that the Internal Revenue data on which the figures were based indicated manufacture rather than consumption. “‘Paper Cigars,’” *USTJ* 13(3):2:6 (Apr. 8, 1882). Two years later the *Journal* published a persiflage envisioning the annual consumption of 52 billion cigarettes within five years, the relegation of pipe and cigar smoking to a “few old fogies,” the invention of a machine that would produce five million cigarettes a day, whose owner would become a Vanderbilt or Jay Gould within five years. (The Bonsack machine had already been invented and James B. Duke would soon achieve robber baron status; 52 billion cigarettes would not be sold until 1919.) “Cigarettes,” *USTJ*, July 12, 1884 (2:6). For alternative data showing the same trend (from 16 to 533 million), see U.S. Bureau of the Census, *Historical Statistics of the United States: Colonial Times to 1970*, Part 2: ser. P 241 at 2:691 (Bicentennial ed. 1975).

14Bradstreet’s 6(229):327:2 (Nov. 18, 1882) (untitled). For a contemporaneous pessimistic evaluation of the past and future of cigarette making machinery, see “Cigarettes
machine was capable of producing 120,000 cigarettes a day, thus replacing 48 hand workers.\textsuperscript{15} The machine’s impact can also be gauged by the fact that, with the most highly skilled workers making 3,000 cigarettes a day, 30 of Bonsack’s machines “could have saturated the...market” by 1885. When “[o]utput soared [s]elling became the problem.”\textsuperscript{16} The solution, according to “Mr. Duke’s excellent advice,” was advertising, which could also extricate individual manufacturers from the “excessive competition” that Duke identified as the cause of the low prices that accounted for cigarettes’ “increased popularity....”\textsuperscript{17}

As cigarette production quintupled during the 1880s,\textsuperscript{18} the press sought the demand-side reasons for this “enormous” increase. The “hard times” argument, this time applied to the depression of 1882-85, reappeared, but manifestly became inadequate as the economy revived. No less an authority than Samuel Gompers, vice president of the Cigarmakers’ International Union, after declaring the fact of cigarettes’ being cheaper (than cigars) as the explanation,\textsuperscript{19} offered a more nuanced cultural interpretation, which, however, focused on cigar smokers’ reasons for switching to cigarettes (and thus, perforce, on higher-income men who smoked cigars) to the exclusion of the expansion of the universe of smokers, especially by means of addicting boys.\textsuperscript{20} Faulting his members’ employers’

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\textsuperscript{15}Cigarettes,” \textit{N-YDT}, Nov. 4, 1883 (13:4-5).


\textsuperscript{17}Cigarettes,” \textit{USTJ}, vol. 23, Feb. 12, 1887 (2:6). “[P]rodigal advertising” was also crucial for the Tobacco Trust’s gaining control of 98 percent of cigarette production by 1892. “Iron Heel of Monopoly,” \textit{NYT}, Dec. 28, 1892 (10). The article overstated the Trust’s share, which was only 87.9 percent that year and peaked at 94.7 percent in 1899. \textit{Report of the Commissioners of Corporations on the Tobacco Industry, Part III: Prices, Costs, and Profits}, tab. 52 at 153 (1915).

\textsuperscript{18}According to mimeographed reports of the Bureau of Internal Revenue the number of cigarettes (which confusingly included small cigars and large cigarettes) manufactured rose from 533 million in 1880 to 2.505 billion in 1890. U.S. Department of Agriculture, \textit{First Annual Report on Tobacco Statistics (With Basic Data)}, tab. 14 at 90 (Statistical Bulletin No. 58, May 1937).

\textsuperscript{19}Cigarettes,” \textit{USTJ}, vol. 23, Feb. 12, 1887 (2:6).

\textsuperscript{20}Boys purportedly began smoking from “a desire to appear what they call ‘manly.’” “Cigarette Smoking,” \textit{Christian Advocate}, Nov. 10, 1887 (6:3). Similarly unverified was the press claim in the mid-1880s that in New York cigarette smoking was “almost as prevalent among the girls as among the youths....” “Cigarette Smoking New York Girls,”
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failure to “‘recognize the principal wants of the smoking public—i.e., the desire for a short smoke’”—he specified to the United States Tobacco Journal in 1887 that: “It frequently happens that a man has say five minutes to wait for a train, or has a short walk from his house or office which will take that length of time. He knows well that if he lights a cigar he will throw it away presently. To gratify his appetite for smoking is his desire, but that is too expensive a way; consequently he turns to a cigarette, of which he gets ten for the price of a 5-cent cigar, and one of which for the time satisfies his craving for a smoke. That is but one instance however. It may be, again, that you go to a theatre, between the acts you feel like smoking. ... When you take into consideration the number of theatre-goers, and men who are out all day traveling from street to street, and who, as it were, smoke on the wing, you can see how the cigarette smoking increases.”21

In early 1896, when state laws prohibiting cigarette sales were either no longer in effect22 or yet to be enacted in Iowa, Tennessee, and elsewhere, the financial and general press reported that the decline in American Tobacco Company share prices from 80 to 77½ on February 26 in heavy trading in New York—which, in turn, depressed the general market—had been attributed to selling prompted by the passage of bills in the South Carolina and Kentucky House of Representatives establishing such bans.23 Having reported the day before that “an inside interest keeps selling on a feeling that the company is being hampered and damaged by the litigation and legislation and expected some bad news this week,”24 the Wall Street Journal declared in its brief analysis of tobacco stocks: “The legislation against the sale of cigarettes is a considerable

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USTJ, Sept. 18, 1886 (3:4).

21See below this ch. on the Washington State (1893) and vol. 2 on North Dakota (1895) statutes, which in the meantime had been judicially invalidated and mysteriously deleted from the state code, respectively.


23Quickly Snapped Up” and “Early Morning Gossip,” AC, Feb. 27, 1896 (6:1). See also “Tobacco,” WSJ, Feb. 26, 1896 (1:2). The newspaper report about Kentucky was correct, but that on South Carolina was not. See below ch. 8. Erroneous press reports about state cigarette bans were common around the turn of the century. For example, a Presbyterian family paper published in Louisville asserted that “thirteen States have prohibited the manufacture or sale of the cigarette within their borders,” listing in addition to the only two (Iowa and Tennessee) that had such laws in force 11 that had never enacted them, but omitting Washington and North Dakota, whose laws were no longer in effect. “The Prohibition of Cigarettes,” Christian Observer 89(8):171 (Feb 20, 1901).

bear factor.”

Although neither South Carolina nor Kentucky then or later ever enacted a general cigarette sales prohibition, Iowa did a few weeks later and Tennessee followed suit in 1897. In an interview with the Wall Street Journal in March 1899, James B. Duke, the Tobacco Trust’s head, whose name was familiar “[w]herever there are great capitalists,” putting on a brave face for the benefit of readers and investors, belittled the impact of state anti-cigarette laws:

Generally speaking the tobacco business is in a very satisfactory condition. While there are temporary annoyances, like anti-cigarette legislation..., they are not different from what [is] encountered in any industrial enterprise. They will have no effect upon the general welfare of our company.

In an important sense Duke was right: despite a declining rate of profit in the 1890s, the American Tobacco Company’s annual profit on tangible assets averaged 32.7 percent during the two decades between its formation and its court-ordered dissolution and never fell below 15 percent. Consequently, “even in its weakest and least remunerative years” it maintained and enjoyed the fruits of “essential monopolist dominance....” That the total return on $1,000 invested in the Tobacco Trust in 1890 amounted to more than $36,000 by 1908, even without reinvestment of dividends, revealed the “tremendous cumulative effect of these profit rates.” But with a very large capital investment to valorize, the Trust both faced an ever-pressing need and controlled huge assets with which to insure the requisite level of revenue and profits. In fact, by 1904 the Tobacco Trust was capitalized at about half a billion dollars, the second largest capitalization among

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26. See below ch. 6.
27. Both houses of the Kentucky legislature did pass an anti-cigarette bill in 1898, but the lieutenant governor vetoed it. See below ch. 6.
28. See below ch. 10, 5.
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U.S. industrial firms after the U.S. Steel Corporation. 32

Nevertheless, general state prohibitions on the manufacture and sale of cigarettes and special laws forbidding use by minors were in fact, pacè Duke, qualitatively different than the legal interventions facing any other companies except the liquor industry. The public, thanks to the federal excise taxes—the tripling of the rates of which in 1897-98 presumably depressed demand 33—collected and the data published monthly and annually by the Commissioner of Internal Revenue and disseminated by newspapers, knew that aggregate national production of cigarettes fell from sharply from 1896 to 1901. 34

Although comparisons are made difficult by changes in tax classifications of tobacco products during these years—before 1897 small cigars were included in small cigarettes as were large cigarettes before 1898—35—as well as by differing statistics collected on a fiscal and a calendar year basis, 36 and those including and

32John Moody, The Truth About the Trusts: A Description and Analysis of the American Trust Movement 453 (1968 [1904]). See also Ralph Nelson, Merger Movements in American Industry 1895-1956, tab. C-5 and C-6 at 161-63 (1959). Among non-industrials, the Pennsylvania Railroad System had a larger capitalization. Id. at 433. Although its capitalization was lower, the market value of the Standard Oil Company was greater as were its profits and profitability; the Tobacco Trust was, in addition, affiliated with the Standard Oil-Rockefeller interests. Id. at 69-96, 132, 203. On the corporate manipulations that led to the excessive valuation of ATC’s capital, see Report of the Commissioner of Corporations on the Tobacco Industry, Part II: Capitalization, Investment, and Earnings (1911); William Roy, Socializing Capital: The Rise of the Large Industrial Corporation in America 223-39 (1997).


34However, the dissent in the most important U.S. Supreme Court case upholding the validity of a state anti-cigarette law may not have known: it cited the “enormous” figure of 2.8 billion cigarettes manufactured in 1899 as evidence of their being legitimate commercial articles without revealing that production had fallen enormously within the space of only a few years. Austin v. Tennessee, 179 US 343, 368 (1900).

35U.S. Department of Agriculture, First Annual Report on Tobacco Statistics (With Basic Data), tab. 14 at 90 (Statistical Bulletin No. 58, May 1937). Whereas the production of small cigars reached the hundreds of millions, output of large cigarettes was minimal. If the classification of small cigars had not changed, the drop in cigarette production between 1897 and 1901 would have been only 28.8 percent rather than 45.3 percent. Jack Gottsegen, Tobacco: A Study of Its Consumption in the United States 26 n. 61 (1940).

36Manufacturing data on a calendar year basis (which included exports) showed a decline of 45.2 percent from 4,967,444,232 in 1896 to 2,722,979,167 in 1901. Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1901,
excluding exports, by any set of data the decline was impressive, ranging from 29.5 percent (4.967 to 3.503 billion) to 38.2 percent (3,674,027,490 to 2,271,622,626) just from 1898 to 1901. Thus, for example, the Statesville, North Carolina *Landmark* reported in 1900 that the “promoters of anti-cigarette crusades” regarded the more than 25-percent fall in production over the previous year “cheerfully,” adding that “others remark that the decline probably means nothing more than a temporary glut in the paper cigarette market.”

Inclusion of the very considerable exports, by virtue of overstating production that was available for domestic consumption, was misleading in terms of gauging the possible impact of anti-cigarette legislation. Exports doubled from 628 million in 1896 to a peak of 1.24 billion in 1899 before declining to 1.1 billion in 1900. Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1896, at 34 (House Doc. No. 11, 54th Cong., 2d Sess., 1896); Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1899, at 34 (House Doc. No. 11, 56th Cong., 1st Sess., 1899); Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1900, at 34 (House Doc. No. 11, 56th Cong., 2d Sess., 1901). According to a different set of export statistics maintained by the Commerce Department, cigarette exports rose from 634 million in fiscal year 1896 to 1.17 billion in 1899 before dropping to 1.16 billion in 1900. During these years exports to China tripled from 118 million to 358 million; by 1900 China was the largest importer of U.S. cigarettes, accounting for 31 percent. Department of Commerce and Labor, Bureau of Statistics, *The Foreign Commerce and Navigation of the United States for the Year Ending June 30, 1904*, vol. 2: *Imports and Exports of Merchandise, by Articles and Countries, 1894-1904*, tab. 6 at 730 (House Doc. No. 13, 58th Cong., 3d Sess. 1904). In contrast, imports were minimal.

yet another decrease a year later, *The Landmark* declared that “[t]he cigarette fiend is losing his hold,” but hinted that monopolization was a root cause: “[M]any persons roll their own cigarettes with many brands of cigarette paper furnished gratis by the manufacturers. The goods are now higher priced, and there is also less rivalry, which accounts for a great deal of the lessening of output.”

The Woman’s Christian Temperance Union itself, the nationwide engine of anti-cigarette agitation, was acutely aware that “[t]he use of the cigaret is decreasing.” Eliza B. Ingalls, the longtime national superintendent of the organization’s anti-narcotics department and “perhaps the most attractive apostle that the anti-tobacco crusade has developed,” informed the WCTU’s annual meeting in 1900 that withdrawals from factories for consumption had fallen from 4,403,798,737 in 1896 to 2,639,899,780 in 1900, while truthfully observing that these figures “must not be considered wholly a decrease in the use of cigarettes, as many smokers now roll their own cigarettes.” Praising Iowa and Tennessee for having “the best laws,” she declared the strategy that a century later was reforged among anti-cigarette activists: “We must make the smoking of cigarettes disreputable.” By the beginning of 1902 she cheered her troops in a circular letter predicting that: “‘If we work quietly, easily and keep at it, the cigaret will be driven out of existence in ten years. If half our membership work earnestly, we will kill the cigaret trade in two years.’” Even though the membership let her down, she was nevertheless pleased with the “marvelous” results that “a large number” of WCTU members had achieved.

And Duke himself knew that his American Tobacco Company’s output, which had risen by almost 50 percent since its formation, from 2,788,778,000 in

Revenue districts of the city.... These show a falling off of fully 25 per cent” between 1899 and 1900.

41“Consumption of Cigarettes Decreasing” *Landmark*, Jan. 29, 1901 (1:3).
42*Thumb Nail Sketches of White Ribbon Women* 50 (Clara Chapin ed., 1895).
43*Report of the National Woman’s Christian Temperance Union: Twenty-Seventh Annual Convention...October 17th-22d, 1902*, at 274.
1891 to 4,142,373,000 in 1896, plummeted 19 percent during the following five years: 1897: 3,939,675,000; 1898: 3,872,006,000; 1899: 3,547,430,000; 1900: 3,380,125,000; 1901: 3,354,653,000. Neither the industry as a whole nor the Tobacco Trust exceeded the production volume of 1896 until 1904.\textsuperscript{45} To be sure, this steep and prolonged decline, which was never even matched during the Depression of the 1930s\textsuperscript{46} or the years following the Master Settlement Agreement with the tobacco companies in 1997 when “historic” drops occurred,\textsuperscript{47} was less precipitous than that of non-Trust independent firms, whose production from 1897 to 1899 fell by 80 percent, from 987,602,000 to 197,545,000, causing their share of total production to tumble from 20.0 to 5.3 percent.\textsuperscript{48} But these output data all included the Trust’s considerable export and foreign manufacturing business.\textsuperscript{49} (Ingalls, who was aware that “our export trade is increasing,” nevertheless assured the WCTU convention in 1899 that “[a] few more years of active earnest work and this evil will be outlawed.”)\textsuperscript{50} The total number of cigarettes sold by the Trust in the United States fell much more sharply—from 3,094,531,000 in 1896 to 1,990,911,000 in 1901 or by 36 percent—and failed to regain and exceed the volume of 1896 until 1906 (3,211,277,000). Similarly, domestic cigarette profits peaked at $3,529,777 in 1895, plummeted 53 percent to a low of $1,645,903 in 1902, and did not surpass the first peak until 1907 ($3,550,399).\textsuperscript{51}

Duke was questioned about the drop in cigarette output at the tail end of the


\textsuperscript{46}Cigarette consumption in the U.S. fell by 13.8 percent from 119.3 billion in 1930 to 102.8 billion in 1932. Centers for Disease Control, “Consumption Data” on http://www.cdc.gov/tobacco/research_data/economics/consumption1.htm (visited Nov. 22, 2006).


\textsuperscript{49}Around the turn of the century almost a third of the entire production was exported. Report of the Commissioner of Corporations on the Tobacco Industry, Part I: Position of the Tobacco Combination in the Industry 57 (1909).

\textsuperscript{50}Report of the National Woman’s Christian Temperance Union: Twenty-Sixth Annual Meeting...October 20-25, 1899, at 232 (1899).

decline in May 1901. Testifying before the United States Industrial Commission (which Congress had established in response to the public outcry over industrial monopolization), Duke, asked whether “adverse state legislation had anything to do with decreasing the number cigarettes consumed,” replied: “In some instances it has, but that has not affected the consumption very much.” Duke placed the blame for the near halving of output during the previous three years on the increase in the federal tax from 50 cents to $1.50 per 1000 cigarettes, though he added: “That did not stop the consumption of cigarettes, because now nearly everybody has a package of paper with his package of tobacco, and he makes them himself. I think the consumption has been increasing.” The tobacco that consumers bought to make their own cigarettes was, Duke observed, “the granulated tobacco we manufacture....” Before the tax increase, ATC “had been selling cigarettes to the dealer so he could resell them to the consumer at 20 for 5 cents. But on account of the increased price necessitated by the new tax, the


\[\text{Report of the Industrial Commission on Trusts and Industrial Combinations 13:326} \] (57th Cong., 1st Sess., H. Doc. No. 182, 1901). The tax increases from 50 cents to $1.00 and to $1.50, respectively, were imposed by the Dingley Tariff Act of July 24, 1897, ch. 11, § 10, 30 Stat. 151, 206, and An Act To provide ways and means to meet war expenditures, 30 U.S. Statutes at Large, Act of June 13, 1898, ch. 448, § 3, at 448, 449-50. Congress repealed the Spanish-American War tax in 1902 and lowered the tax to $1.08. 32 U.S. Statutes at Large, Act of Apr. 12, 1902, ch. 500, § 3, at 96, 97. A half-century later an official company history still hewed to the same line, not even mentioning state laws, but speculating that in 1900 “cigarette distribution was by no means national; Duke himself may have wondered whether” cigarettes “represented a big-city fashion, possibly a passing one.” American Tobacco Company, “Sold American!”—The First Fifty Years 24-25 (1954). To be sure, Duke’s account cannot be reconciled with a contemporaneous news report that a week after the tax was increased by 50 cents, ATC raised the price of its principal brand by 30 cents: “The reason for the increase was given by the company as a desire for more profits.” The report’s conclusion was not prophetic: “The consumption of cigarettes in the United States is enormous, and the increased prices will result in large profits to the manufacturers.” “Price of Cigarettes Advanced,” Landmark (Statesville, N.C.), Aug. 20, 1897 (4:6).

\[\text{Report of the Industrial Commission on Trusts and Industrial Combinations 13:320} \] (57th Cong., 1st Sess., H. Doc. No. 182, 1901). Whether related to this substitution for manufactured cigarettes or not, a strong increase in the production of smoking tobacco by the Tobacco Trust took place between 1897 and 1901 that exceeded the increment accounted for by its takeover during these very years of many independent producers. Report of the Commissioner of Corporations on the Tobacco Industry, Part III: Prices, Costs and Profits, tab. 19 at 84 (1915).
cigarette business has shrunk nearly two-fifths, I should think. ... The decrease has been mainly due to the knocking out of the 20 for 5 cents rate.” The Bureau of Corporations later confirmed that the Trust’s profits had decreased between 1897 and 1901 while “the tax increased very decidedly.”

And surely the enormous drop in cigarette consumption from 1897 to 1902 cannot be accounted for by statutory bans on sales in two relatively sparsely

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55 Report of the Industrial Commission on Trusts and Industrial Combinations 13:319-20 (57th Cong., 1st Sess., H. Doc. No. 182, 1901). According to Elmo Jackson, “The Consumption of Tobacco Products: A Descriptive Analysis: United States, 1900-1940” at 75 (Ph.D. diss., Harvard U., 1942), the federal tax increase was “ruinous to the sale of that class of brands which were retailing at 5¢ per box of 20. He instanced the Trust’s Cycle brand, sales of which fell from 600 million in 1897 to 40 million in 1900. Duke’s testimony was not reconcilable with a contemporaneous news report that in order to “drive independent cigarette manufacturers out of business, and thus destroy competition,” ATC had implemented a new plan to “offer to dealers a certain brand of cigarettes at $1.50 per 1,000, which enables the retailer to sell the brand in packages of 20 for 5 cents. As the present internal revenue tax on cigarettes is $1.50 per 1,000 it will be seen that the trust is absolutely giving the goods to dealers. As the trust has an unlimited supply of money and the independent manufacturers are usually men of small means comparatively, it is probable that this latest effort to destroy competition will succeed if persisted in.” Landmark (Statesville, N.C.), Apr. 16, 1901 (1:3) (untitled).

56 Report of the Commissioner of Corporations on the Tobacco Industry, Part III: Prices, Costs and Profits at 155-56 (1915). For the profit figures, see id. tab. 53 at 155, tab. 55 at 158, tab. 56 at 161. A high official of the American Tobacco Company who later became the president and CEO of its successor wrote in 1960 that there was “no way to gauge the effect of this legislative flurry on sales, which began to rise again in 1901, when the tax was lowered to 1.08¢ per pack. In 1909, when the last of the state laws against cigarettes was enacted, national sales were double the figure of five years before.” Robert Heimann, Tobacco and Americans 215 (1960). The first claim might not have been true for someone with access to ATC’s sales records for the prohibitory states; the second claim was incorrect: Utah and Idaho enacted bans in 1921. Richard Kluger, Ashes to Ashes 240 (1996), characterized Heimann as ATC’s “resident intellectual” and “a master dispenser of denial and disinformation.” Heimann’s doctoral dissertation in sociology was based on a class analysis. See also “Robert K. Heimann Is Dead at 71; Former Chief of American Brands,” NYT, Feb. 14, 1990 (B5). Elmo Jackson, “The Consumption of Tobacco Products: A Descriptive Analysis: United States, 1900-1940” at 10 (Ph.D. diss., Harvard U., 1942), asserted that “statutes making illegal the consumption of certain tobacco products have...played a small part in shaping the development of tobacco consumption,” but that “effort spent in assessing their role would be uneconomical.”
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populated states (plus the Territory of Oklahoma). Yet the considerable litigational and lobbying/bribery resources that the ATC devoted to combating such legislative measures before, during, and after these years—as early as 1894 the press had reported that the cigarette trust’s “lobby in Washington [D.C.]...is second in size and boodle only to that of the sugar trust” strongly suggests that the Trust regarded them as more injurious than Duke let on.

Another factor contributing to the decline in consumption, at least according to some contemporaries, was state legislation prohibiting sales to minors.

Moreover, the Tobacco Trust’s recruitment of cigarette smokers during this period experienced a decided set-back in tandem with that encountered by the U.S. Army: physicians conducting examinations of volunteers for the Spanish-American War in 1898 determined that whereas “outside of the ranks of cigarette smokers there are even fewer rejections than in the days of the civil war[,] among habitual users of the cigarettes the rejections are about 90 per cent.”

And overall, according to one physician who surveyed the results, “the excess

57 At the outset of the 1905 state legislative session (during which Indiana, Nebraska, and Wisconsin would enact cigarette sales bans), the New-York Tribune observed that: “It appears from recently compiled statistics that the number of cigarettes sold in this country at present is less by about a billion than it was ten years ago. Whether this decrease may be attributed to the operation of the anti-cigarette laws, to the power of public sentiment, to the placing on the market of a great number of cheap cigars..., or to all three causes would be hard to determine.” Evening News (Ada, OK), Jan. 19, 1905 (2:1) (untitled) (reprinted from New-York Tribune (New York)).


59 As late as 1924, a stock brokerage was still stressing that the 20-fold increase in cigarette production since the 1900 had been “achieved in the face of continual campaigns of agitation against its use, despite hostile legislation in many states, and heavy increases in taxation....” Chas D. Barney & Co., The Tobacco Industry 19-21 (1924). Perhaps the boldest and most unorthodox causal claim was the contemporaneous ATC stock analysis in the Wall Street Journal (appearing less than a week after the governor had approved the bill prohibiting the sale of cigarettes in Iowa) that speculators were driving the anti’s campaign: “There is still a persistent short interest which refuses to cover. A strong effort has been made to force covering, but it has not succeeded. This short interest is largely responsible for the attacks upon the property in Legislatures and in the courts, and is responsible in large measure for the bearish talk.” “Tobacco,” WSJ, Apr. 10, 1896 (2:2).

60 “The Deadly Cigarettes,” Macon Telegraph, July 14, 1898 (5:3-5 at 3-4) (the article was originally commissioned by the Nashville American). To be sure, the article claimed that this loss had in part been compensated for “among middle-aged men and fashionable women” among whom “the habit...is very likely to find its more prolific ground and its most ardent devotees.”
Cigarette Industry/Nicotine Trust

of rejections is due to the large number of young men applying for enlistment who have become victims of the cigarette habit.” 61 Eliza Ingalls, zealously availing herself of the propagandistic boon furnished by the datum that cigarette smokers had been responsible for raising the aggregate rejection rate from 15 percent during the Civil War to 25 percent in the Spanish-American, observed in the WCTU’s house organ:

The American Tobacco Company is now making great effort to deny this statement. For many years this company did not think the efforts made by the W.C.T.U. were of sufficient interest to notice, but they have changed their ideas since forty-two states and the District of Columbia have passed laws forbidding the sale of tobacco to minors, and four state legislatures have passed laws forbidding the manufacture, sale or importation of cigarettes. The trust has also become alarmed because so many anti-cigarette leagues have been organized. These leagues throughout the country are becoming very pronounced enemies of the cigarette trade; in New York alone there are 250,000 young Americans pledged against indulgence in the vice of cigarette smoking. 62

What Duke did not adduce in favor of the Tobacco Trust’s long-run profitability was its customers’ addiction. In 1887, three years before he had monopolized the industry, Duke chose to deny its reality when asked by a tobacco trade journal, in connection with the death of a medical student who had smoked 60 cigarettes a day, whether cigarette smoking was injurious. While conceding that “over-indulgence” penalized a man who was “a hog and can never be satisfied in the use of a stimulant,” Duke rebuked the lack of will power:

“True, it is hard sometimes to break oneself of a habit, which, if practiced any length of time, becomes fascinating. Now I chew tobacco, and use an ounce of it a day. I can’t explain why I use it other than by than saying that it has become to me like smoking is to others, an attraction or a consoling habit, but I know I can stop it, although it might be hard, and any man can break himself of the cigarette habit.” 63

However, as the stock brokerage Chas. D. Barney & Co. observed in the mid-1920s: “Once formed, the habit of cigarette smoking, in the great majority of cases, has a tendency to become permanent, and, therefore, the millions who in recent years adopted cigarette smoking, as well as the many thousands of maturing men who each year form the practice, are likely to be constant cigarette

61. “Many Volunteers Rejected,” NYT, May 11, 1898 (3) (quoting Dr. Benjamin King, who had been an examining physician during the Civil War).
smokers throughout their lives.” And with the assistance that “[o]pinions from medical authorities that the cigarette was not harmful in its effects on adults” gave to breaking down the “prejudice” against cigarettes,\textsuperscript{64} Barney could reassure investors at the outset of the Great Depression that “the smoking habit is one that is not acquired, and readily discarded as a matter of style. Economy may dictate a change in the form in which tobacco is used, but it does not eliminate the habit. Here is the soundness and strength of the industry.”\textsuperscript{65} Nor was this insight born of hard times. In 1924 the same stock brokers reported that: “Once formed, the habit of cigarette smoking, in the great majority of cases, has a tendency to become permanent, and, therefore, the millions who in recent years adopted cigarette smoking, as well as the many thousands of maturing men who each year form the practice, are likely to be constant cigarette smokers throughout their lives.”\textsuperscript{66}

In his Report on the Tobacco Industry, the Commissioner of Corporations in 1915 gave full credence to the contemporary notion that: “The year 1896 marked a turning point in the cigarette industry. A decline in output occurred at that time which seems to have been due in part to adverse legislation. Several States had placed laws upon the statute books either prohibiting or making more difficult the sale and consumption of cigarettes.” To be sure, the commissioner linked the recovery in production—the “second turning point in the cigarette business”—of 1901 to the alleged fact that: “Much of the adverse State legislation...appears to have spent its force by that time.”\textsuperscript{67} However, since the general prohibitory laws of Iowa (1896) and Tennessee (1897) were still in effect, and a new wave of such statutes began to be enacted in the first decade of the twentieth century in Oklahoma (1901 and 1905), Indiana (1905), Wisconsin (1905), Nebraska (1905), Arkansas (1907), Washington (1907), Kansas (1909), Minnesota (1909), and South Dakota (1909),\textsuperscript{68} it is unclear why production explosively expanded during those very years, increasing by 174 percent from 1900 to 1910.\textsuperscript{69}

In early 1907, the United States Tobacco Journal found the jump in sales from 1901 to 1906 all “the more remarkable in the face of the pronounced and

\textsuperscript{64}Chas. D. Barney & Co., The Tobacco Industry 22 (1924).
\textsuperscript{66}Chas. D. Barney & Co., The Tobacco Industry 22 (1924).
\textsuperscript{68}See vol. 2.
unrelenting hostility of a half a [sic] dozen state legislatures which have ostracized not only the manufacture, but also the handling and consumption of cigarettes....” Whereas cigarettes’ overtaking of cigars between 1893 and 1897 had been ascribed to hard times and the panic of 1893, when the “broad masses” could not afford cigars and turned to cheaper cigarettes to “appease their craving for a smoke,” prosperity prevailed in the middle of the first decade of the twentieth century.70 By August 1907, the Tobacco Journal viewed the increase in sales by almost 1.4 billion cigarettes within one year as “simply bewildering. The more so because the manufacture and sale of cigarettes has been absolutely prohibited by legislative acts in three or four states, and in a number of other states largely restricted.” The Journal luxuriated in the irony: “But it seems that the stricter the ban put on, and the wider the area of ostracism of the cigarette the more does it flourish and prosper. ... If legislative restriction and prohibition of cigarette smoking lead to such marvellous [sic] results then the cigarette industry should bless the legislatures that smote it.”71

In recommending in 1907 that cigarette smoking be prohibited among persons under 21 on board U.S. Navy ships, Admiral Presley Rixey, the Surgeon General of the Navy, reported that since the Spanish-American War the “habit” had “spread to incredible proportions.” To be sure, while decrying the “serious impediment to robust health in the navy” that cigarette smoking was becoming, Rixey opined that “it is not the cigarette itself, but its intemperate use which is to be condemned and corrected.”72 The increase by almost 2 billion cigarettes

70. “The Rise of Our Cigarette Industry,” USTJ, Feb. 9, 1907 (8:1). The article offered improved composition of cigarette tobacco derived from large imports of Turkish tobacco as the explanation. Contrary to the article’s claim, no state law prohibited adult consumption of cigarettes.


72. “May Deprive Navy of Its Cigarettes,” NYT, Nov. 24, 1907 (5). See also “Intemperate Use,” USTJ, Nov. 23, 1907 (5:2). An (addicted) sailor interviewed by the Times observed that “when you once get to liking the little sticks there’s nothing that can take their place”—especially “‘with none of your women folks or girl friends to break the monotony....’” A battleship commander agreed that “‘if you want to stop these youngsters from smoking you will have to lock them up....’” “May Deprive Navy of Its Cigarettes,” NYT, Nov. 24, 1907 (5). In spite of Rixey’s report, the press reported that 48,000 cigarettes (plus 20,000 cigars and 1,000 pounds of chewing tobacco) were being loaded onto just one naval ship for sale in the canteen, against which the Anti-Cigarette League was mobilizing. “Tobacco for Pacific Cruise,” NYT, Nov. 18, 1907 (5). Interestingly, however, Rixey’s report noted that a three months’ supply of cigarettes for a crew of 700 amounted to 87,000, which would have been little more than one per person per day (in addition to 1,500 books of cigarette papers and 1,200 pounds of smoking tobacco). “May Deprive
from 1909 to 1910, “in spite of...a widespread movement against cigarette smoking throughout the country,” prompted the press to declare that, with the United States having become “a nation of cigarette smokers,” denouncing “the cigarette as a ‘coffin nail,’ as a passport to perdition, seems to increase its popularity.”

(One circumstance often adduced was that the “increased popularity” of brands manufactured from Turkish leaf was “a very important factor” in “[t]he great revival in the cigarette industry after 1901...”)

One possible explanation is that the number of cigarette smokers and the average number of cigarettes they smoked in the much more populous non-prohibitory states increased at a rate that far more than compensated for any possible loss of markets in the smaller prohibitory states.

The population of the latter at their peak prevalence in 1909 (11 states) accounted for only 21.1 percent of the total national population.

If it was true that as late as 1910 smokers in New York...
City “accounted for 25 percent of all cigarettes sold in the U.S.”, the opportunities for expanding the market were legion regardless of its curtailment in some less populous states.

78Richard Kluger, *Ashes to Ashes* 62 (1996). As with many of the empirical claims in this book, Kluger provided no source for this one. When asked whether he could identify the source, Kluger replied: “[S]orry I can’t recall this one item among thousands in the book. But odds are I didn’t make it up.” Email from Richard Kluger to Marc Linder (June 23, 2006). A pro-smoking apologist author who self-touted his book in the back-cover blurb as “meticulously researched” although he cited scores of alleged facts and direct quotations without any documentation whatsoever and where he did document revealed embarrassing ignorance of primary sources, rewrote Kluger’s sentence without even acknowledging him. Christopher Snowdon, *Velvet Glove, Iron Fist: A History of Anti-Smoking* 35 (2009). In 1886, a New York City tobacconist quoted by the *Tobacco Journal* made a back-of-the-envelope calculation that half of the three-fourths of adult men in the city who smoked were confirmed cigarette smokers, which 100,000 men consumed 40 cigarettes a day or, in the aggregate, 1.46 billion a year. “Cigarette Smoking,” *USTJ*, vol. 22, Sept. 18, 1886 (3:1-2). Since only 1.607 billion cigarettes were produced in 1886, either New Yorkers (implausibly) accounted for over 90 percent of consumption or at least one of the tobacconist’s assumptions (in particular that half of adult male smokers smoked cigarettes) was wildly erroneous. Arthur F. Burns, *Production Trends in the United States Since 1870*, tab. 44 at 298 (1934). In 1896, the New York *Sun* stated that New York “enjoys the distinction not only of making but of smoking more cigarettes than any other state,” whereas the other two leading manufacturers, North Carolina and Virginia—the only two tobacco-growing states the great bulk of whose crop went for cigarettes—made “cigarettes for consumption elsewhere, not for home use.” The paper also noted that cigarette smoking was not general, but “restricted to a very small fraction of the whole population, mostly in the cities and large towns.” “Cigarettes by the Million,” *Syracuse Daily Standard*, Mar. 12, 1896 (5:6-7) (reprinted from *The Sun*).
The Woman’s Christian Temperance Union’s Quasi-Health-Based Anti-Cigarette Strategy

[T]he liquor traffic’s twin brother, the tobacco habit....¹

[A]t the afternoon session of the American Federation of Labor, the fraternal delegates from the W.C.T.U. were given the floor..., the convention voting to cease smoking while the women were present.²

The W.C.T.U. has endeavored to crush the cigarette evil by asserting that opium, cannabis indica, and other narcotics were present in cigarettes. Vice can not be cured by misrepresentation. The only narcotic present is nicotine....³

It is not an easy or an encouraging matter to attempt to influence the adult population of our land, but it should be the plan and policy of every Woman’s Christian Temperance Union to push the work among children. This is the secret of growth in all great reforms.⁴

“Almost every State, at some time or other, has had its anti-cigarette bill, the late Lucy Page Gaston and her followers having been the leaders in the campaign. The antis, however, made their ideas stick in only a few spots—Kansas, Iowa, Indiana and Mississippi.”⁵

Regardless of whether they opposed cigarette smoking, physicians and scientists in the late nineteenth and early twentieth century held many biological

⁵Lin Bonner, “Why Cigarette Makers Don’t Advertise to Women,” Liberty Magazine, 3(24):55-57 at 55 (Oct. 16, 1926) (reprinted in Advertising and Selling, 7:21, 46, 48 (Oct. 20, 1926)). The quotation was attributed to “[o]ne of the biggest men in the industry, who does not want his name mentioned for the reason that the makers do not advertise to the fair sex openly....” Id. Mississippi never enacted such legislation, many other states did, and the WCTU rather than Lucy Gaston was the driving force. Historians’ repetition of this latter claim, not based on research in primary sources, continues. E.g., Trial Testimony of Prof. Louis Kyriakoudes at 1155-56 (Mar. 17, 2003), in Eastman v Brown & Williamson Tobacco Corp. (Cir. Ct. 6th Judicial Cir. Fla., Civ. Case No. 97-5968-CI-11; Allan Brandt, The Cigarette Century 46 (2007).
and physiological views of physical and mental disease caused by cigarette smoking that were, in retrospect, scientifically absurd. In particular, an epidemic of press reports in the late nineteenth and early twentieth century recorded an epidemic of deaths from insanity caused by cigarette smoking. For example, The New York Times published a stream of seemingly preposterous articles on (deaths from) insanity caused by cigarette smoking. In 1905 an editorial in the Journal

6. The Report of The Lancet Analytic Sanitary Commission on American Cigarettes,” Lancet 2:1607-1609 at 1607 (1899), after duly mocking the “amusing” press reports of death from lunacy and insanity, stated that “on investigation being made there was no foundation for the statement that death was due to cigarette smoking. In each case it was made perfectly clear that the cause of death had no relation to smoking at all.” Unfortunately, it failed to cite any such investigations.

7. E.g., “Victims of Cigarette Smoking,” NYT, Aug. 30, 1891 (16); “Made Crazy by Cigarettes,” NYT, Mar. 24, 1897 (2); “Smoked Himself Crazy,” NYT, Apr. 13, 1897 (1); “New Jersey Boy a Suicide,” NYT, May 24, 1897 (10); “Insane Through Cigarette Smoking,” NYT, Aug. 23, 1898 (12); “Insane from Cigarettes,” NYT, July 26, 1900 (2); “Insane from Smoking Cigarettes,” NYT, Nov. 4, 1900 (1); “Crazed by Cigarettes,” NYT, May 21, 1906 (2). One newspaper quoted the medical superintendent of a state hospital in Virginia as attributing the increase in insanity largely to cigarette smoking among the youth “during their early years and development, when the brain is tender and plastic and easily affected by the noxious inhalations issuing through and around the nerve centers.” “Cigarettes and Insanity,” Idaho Avalanche, Apr. 17, 1896 (?:2). Earlier still, in the mid-nineteenth century, before the rise of mass cigarette smoking, in connection with claims that physicians in the United States put annual deaths from tobacco use at 20,000 and that their German counterparts attributed one-half of all deaths between the ages of 18 and 35 to “the waste of the constitution by smoking,” the press reported that these doctors found that by deranging the “nervous powers,” tobacco exerted “a disastrous influence on the mind.” “Medical and Sanitary Items,” North American and United States Gazette, May 24, 1855 (1:7). Although in retrospect the claim that cigarette smoking caused insanity may seem absurd, a recent medical journal article that found that people with a mental disorder in the previous month smoked 44.3 percent of all cigarettes consumed in the United States observed that some studies had raised questions about the “direction of causality.” In contrast to the theory that mentally ill persons smoked as a way to self-medicate psychiatric symptoms, such studies had, for example, determined that prior smoking was associated with an increased risk of childhood and adolescent smoking, “but not vice versa”; another study found that smoking preceded the onset of schizophrenia in most schizophrenics who smoked. Karen Lasser et al., “Smoking and Mental Illness: A Population-Based Prevalence Study,” JAMA 284(20):2606-10, at 2609 (Nov. 22-29, 2000). More than a century earlier, a physician who claimed that “I know whereof I speak” seemed torn between accepting that tobacco caused fatal insanity and asserting that whereas the “robust and healthy” who led an active outdoor life could use tobacco “with apparent impunity,” “the neurasthenic and the psychopath have no business either to smoke
of the American Medical Association, sarcastically rebuking “intemperate temperance advocates” who “from time to time have attempted to pass laws prohibiting the use of certain forms of the weed in various states,” positively referred to “much evidence” indicating “the stimulating and sedative effect of smoking in moderation.” The Journal claimed that on the mouth and tongue the effects were “in the main, minor,” and that in general “serious consequences” resulted only from excessive use, but even then “severe lesions are rare....” Nevertheless, even the daily press presciently reported in 1898 not only that nicotine—which constituted “the narcotic element of the tobacco that the taste of the smoker craves”—unduly affected the heart, which “struggles to manage the accelerated blood,” but that cigarettes could cause lip and tongue cancer and weaken the lungs. Such early-twenty-first-century anti-smoking advocates as the Surgeon General and Smoking OR Health might well be proud to appropriate the journalistic “ultimatum” of the 1890s that “‘you cannot smoke and live.’”

In the contemptuous view of some late twentieth-century social scientists and historians, “the prime motivation for the attack on cigarette smoking” by the Woman Christian Temperance Union and similar groups was “moral” in the sense that it was based on the belief that cigarettes corrupted and “could lead to even worse behavior,” or at best was founded on the claim that cigarette smoking stunted adolescents’ growth. To be sure, bizarre and ignorant claims abounded

or chew.” L. Bremer, Tobacco, Insanity and Nervousness 6, 10, 4-5 (1892). Unable to determine whether cigarettes contained a constituent “endowed with special properties as a nerve and brain-poison,” he did nevertheless point to the “generally conceded...well-nigh universal habit of cigarette smokers to ‘inhale’ and thus to multiply the chances of nicotine absorption.” Id. at 10*.

5*The Effect of Tobacco on Health and Disease,” JAMA, Sept. 18, 1905, reprinted in JAMA 244(12):1328 (Sept. 19, 1980).

6*The Deadly Cigarettes,” Macon Telegraph, July 14, 1898 (5:3-5 at 5). In 1895 Dr. J. C. Mulhall of St. Louis described how a boy “quickly acquires nicotine tolerance.” J. Mulhall, “The Cigarette Habit,” New York Medical Journal 62:686-88 at 687 (1895), Bates No. 2083034657. To be sure, the same cigarette-smoking physician opined that: “Tobacco, in its ordinary use, at most produces a slight hyperaemia or insignificant catarrh in the health throat.” Id. at 687.

7*Harvey 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 (Summer 1980). A professor of political science at MIT, Sapolsky was a consultant to Philip Morris. Curtis Judge (president of Lorillard) to James Fyock (R. J. Reynolds) (Sept. 14, 1983), Bates No. TI04820026. Sapolsky found it “terribly unfair” that smoking was prohibited at bar exams, in hospital emergency room waiting rooms, therapists’ offices, and jury rooms. Harvey Sapolsky to Bill Ruder (June 20, 1983), Bates No. TI04820027.
among anti-smoking groups. A humorous specimen was on display at the June 1894 monthly meeting of the Chicago Central WCTU, which, as the subhead in the Chicago Tribune had it, was “Horrified by the Cigaret Evil.” Though members had already known that the effects of cigarette smoking were “exceedingly bad,” they had “no conception of the real extent of the horror until “[s]ome women gave an account of their personal observations of the deadly effect of the paper-encased abominations....” The pre-eminent herald of these horrifying tidings was Mrs. Harriet B. Kells, who had been head of the Mississippi WCTU and editor of its state newspaper, but rose through the national ranks to become National Superintendent of the Press Department. Of her Belle Kearney, another Mississippi WCTU figure, said that she was “one of the brainiest, most cultured and advanced women of the South, who had made her record as an educator, and afterward became distinguished as a leader of thought in the National Woman’s Christian Temperance Union....” An official WCTU publication characterized her as “a thinker with the world’s best thought.” Kells’s sole source of intelligence on youth smoking was a friend who was a school principal in Vicksburg, whose letters related how her pupils’ eyes had grown dull, “their limbs palsied, their cheeks sallow, as they were stricken by the

“[P]rofessional historian” Louis Kyriakoudes, who testified in many cases on behalf of plaintiffs suing tobacco companies (and who erroneously focused on Lucy Page Gaston to the exclusion of the WCTU as having “spearheaded the cigarette prohibition movement”), asserted that that movement offered a “moral based critique” and stated that “I’m not aware of one [critique] coming from a medical basis.” E.g., Trial Testimony of Prof. Louis Kyriakoudes at 1133, 1155, 1158 (Mar. 17, 2003), in Eastman v Brown & Williamson Tobacco Corp. (Cir. Ct. 6th Judicial Cir. Fla., Civ. Case No. 97-5968-CI-11 Similarly, it was not the case that “[w]ith issues of class, ethnicity, age, and gender so obviously underlying concerns about tobacco use, the chief objectionable effects of tobacco were behavioral rather than physiological.” Lee Anderson, “Headlights upon Sanitary Medicine’; Public Health and Medical Reform in Late Nineteenth-Century Iowa,” Journal of the History of Medicine and Allied Sciences 46:178-200, at 197 (Apr. 1991). R. Alton Lee, “The ‘Little White Slaver’ in Kansas: A Century-Long Struggle Against Cigarettes,” Kansas History 22(4):258-67 at 260 (Winter 1999-2000), condescendingly included “some” anti-cigarette “crusaders” who “argued with more emotion than scientific method” that cigarettes “were dangerous to one’s health” among reformers whose “sincerity...should be accepted, just as in the current debate of creationism versus evolution.”

12 Belle Kearney, A Slaveholder’s Daughter 135 (1900).
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plague. They rapidly turned into semi-idiots, perfectly powerless to help themselves.” Warming up to her subject, Kells then read these extracts from the principal’s letters:

If cigaret smoking is what I believe it is then I am forced into the conviction that there will be no more men raised in this community. So far as my observation goes, and my opportunities are exceptional, there are almost no boys between the ages of 5 and 10 who do not smoke. Older than 10 only a few have escaped. In this section of the country at least this evil is worse than the alcohol habit, for it seems actually to threaten extermination. There are babies, two of them only 5 years old, who say they have been smoking for two years and the statement is corroborated by their elder brothers. One of the little ones was a pouting lipped cupid two years ago, now his tiny face is pinched and wrinkled and his mouth hands loose and relaxed like an old man’s. In a public school recently the teacher called up a boy for inspection who was 10 years old who said he had been smoking for five years. The dark stunted little creature walked from his seat to the platform with the aid of a cane, on which he leaned.... He told us his body was covered with sores.

“Many of the women shuddered at the disclosures,” but a local Chicago member revealed that that picture “would apply to Chicago if it were a little blacker.” Thereupon the group adopted a resolution urging Illinois and the nation to “direct their efforts to the annihilation of the poisonous cigaret as an article of commerce....”

However, in contrast to such comic-book-like presentations and later scholarly sneering, one medico-scientific point that anti-cigarette organizations got right ad nauseam in their propaganda was that cigarettes were more injurious than cigars or pipes because, by and large, only cigarette smokers inhaled and almost all cigarette smokers inhaled. For example, Reverend George S. Ball, a Unitarian clergyman, and long-time temperance advocate and member of the Massachusetts legislature, observed on the floor of the House of Representatives, during a debate in 1892 on a bill to prohibit the sale and manufacture of cigarettes, of the poisonous nicotine: “The cigarettes are smoked in a peculiar way. The smoke is inhaled and thus the nicotine, through the lungs,

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14 W. CT, June 8, 1894 (2).
15 W. CT, June 8, 1894 (2).
16 W. CT, June 8, 1894 (2).
17 For brief confirmation at the beginning of the twentieth century, see “The Anti-Cigarette Crusade,” Outlook 67(11):607-608 at 608 (Mar. 16, 1901).
18 State Prohibitory Convention,” Congregationalist and Boston Recorder, Aug. 25, 1870 (1:5-6 at 6).
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goes into the circulation and affects the whole system.”

Contemporaries, such as the editorialist of The New York Times, noted that it was difficult to say why cigar and pipe smokers as a rule did not inhale, while cigarette smokers did, but insisted that “it is an acknowledged fact that it is so.” Much later, addiction researchers explained that prior to the twentieth century, when tobacco was snuffed, chewed, or smoked in pipes or cigars, tobacco was air-cured and produced an alkaline smoke from which some nicotine may be absorbed through the buccal and nasal mucosae without any need for inhalation into the lungs. The absorption of nicotine from all these routes...is very similar. There is a slow increase to relatively low blood nicotine levels and, in particular, no puff-by-puff nicotine peaks in the case of non-inhaled smoking. The smoking of a whole pipe or cigar in this way provides but a single relatively nonintense pharmacologic reward or reinforcement.

With modern cigarettes made from flue-cured tobaccos [t]he acidity of the smoke makes buccal adsorption negligible, so that to obtain a pharmacological effect it is necessary to inhale. The smoke is...less irritating and therefore easier to inhale than the smoke from pipes or cigars or, indeed, cigarettes containing air-cured tobacco. [R]apid absorption through the lungs produces, with each inhaled puff, a bolus of blood containing a high concentration of nicotine, many times higher than the levels...obtained by slower absorption of far larger quantities of nicotine.

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19. “Cigarettes to Go?” BDA, Feb. 27, 1892 (5:1). The inchoate and self-contradictory nature of the etiological framework that even the foremost physicians created at this time for understanding the impact of cigarette smoking was reflected, for example, in the following statements by Dr. Charles Loomis Dana, the leading neurologist in the United States. On the one hand, he agreed that: “Inhaling is the most pernicious feature in the contracting of this habit. Once acquired, it takes on the shape of a mania, and becomes as difficult to control as the opium or morphine habit.” For example, Dana found it remarkable that some cigarette inhalers transferred this practice even when they took up cigar or pipe smoking. On the other hand, he found it necessary to instruct “‘the popular mind’” that cigarette smoking “‘doesn’t particularly hurt the lungs or throat....’” Allan Forman, “Cigarette Question,” Salt Lake Herald, Apr. 10, 1892 (5:1-5 at 4).

20. Cigarettes,” NYT, Aug. 14, 1887 (4) (edit.).

21. M. Russell and C. Feyerabend, “Cigarette Smoking: A Dependence on High-Nicotine Boli,” Drug Metabolism Reviews 8(1):29-57 at 53 (1978). As one of the post-World War II pioneers of research into disease caused by smoking observed of the importance of the increase in cigarette and decrease in cigar and pipe smoking from the 1920s to 1960: “Smoke from cigars and pipes is heavy and as a rule slightly alkaline. Few people can inhale it without coughing or becoming dizzy or nauseous. Cigarette smoke, on the other hand, is relatively light, nearly neutral and can be inhaled readily. Most habitual cigarette smokers inhale to some degree, and heavy cigarette smokers tend to inhale deeply.... Only 7 per cent of the cigarette smokers among the men [in a large study]


23A publication of the Methodist Episcopalian church reprinted a medical note in 1891 stating that the seriousness of cigarette smoke inhalation lay in “the utter hopelessness of the habit.... Once a cigarette inhaler, always one. In this respect it resembles with painful similarity the opium habit” and differed from the use of the pipe, cigar, tea, beer, or whisky in being “incurable” inasmuch as the patient, no matter long he stops, “invariably returns to his love.” “Cigarette Smoking a New Morbid Habit,” *Medical Record*, reprinted in *Christian Advocate* 66(34):564 (Aug. 20, 1891).

24Richard Kluger, *Ashes to Ashes* 39 (1996), woefully misstated the chronology of progress by situating “the earliest glimmers of scientific insight into the peculiarities of cigarette smoking” in the latter half of the first decade of the twentieth century. See also below ch. 3.

25“Cigarette Smoking,” *USTJ* 2(14) Nov. 7, 1876 (2:4) (republished from Bradstreet’s).

26“Cigarette Smoking,” *N-YDT*, Jan. 21, 1878 (2:2).
that “[m]ore than 90 per cent of the men who smoke cigarettes habitually inhale the smoke.”

The most forward-looking analysis appeared, of all places, in the U.S. Tobacco Journal (whose hostility to cigarettes may have been attributable to the competitive threat they posed to the cigar industry), which in 1886 quoted at length a tobacconist in New York City who, after calling cigarette smoking “the vilest, filthiest, most disgusting and most injurious form of using tobacco,” calmly calculated: “A confirmed cigarette smoker...will use...twenty a day. Now, estimating it very mildly, he will take at least eight puffs of every cigarette, so that one day he will take 100 puffs, and in a year 58,400—or giving him the benefit of another margin—50,000 inhalations, which means 50,000 of those sickly yellowish spots deposited on the delicate membranes of the lungs in a single year. ... That is exactly the way an habitual smoker goes to work to poison his entire system. Think what the condition of his lungs after ten years or even five years of steady smoking. They must be coated with this foul nicotine tainted deposit as thoroughly as though it was laid on with a varnish brush.”

27 “Why Cigarettes Are Injurious,” N-YDT, Nov. 4, 1883 (4:2). See also “The War on Cigarettes,” USTJ, 28, Sept. 7, 1889 (4:4) (reprinted from the Boston Globe) (stating that (“[t]he only serious danger in cigarette smoking, more than other forms of the tobacco habit, is the quite general practice of inhaling the smoke of cigarettes”); “The Cigarette Vice,” Greensboro Patriot, Jan. 17, 1894 (1) (reprinted from Harper's Weekly) (copy furnished by Greensboro Public Library); Clark Bell, “The Cigarette,” Medico-Legal Journal 15:443-85, at 457 (Mar. 1898) (quoting a letter from Prof. Harold Moyer, a neurologist in Chicago, stating that the majority of cigarette smokers inhaled deeply); “Doctors Disagree About Cigarettes and Bicycling,” CT, May 22, 1898 (25); Charles Hubbell, “The Cigaret Habit—A New Peril,” Independent, 56(2881):375-78 at 375 (Feb. 18, 1904) (adding “the fact that a very large number of physicians in every community are addicted to the cigaret and the inhaling habit, and naturally are handicapped in the influence that they should exert in...suppressing this alarming evil”); “Testing the Boy Who Smokes Cigarettes,” NYT, Feb. 27, 1910 (Sunday Mag. at 12:1-7 at 3, 5) (“with few exceptions the young smokers are inhalers”). William McKeever, a philosophy professor at Kansas State Agricultural College, alleged that cigarette smoking in boys “partly paralyzes the nerve cells at the base of the brain” and thus “makes the victim regard with indifference the sacred promise he has ever made to any one...” Although he was “not quite ready to deny any mature man the right to smoke,” he was “unwilling to concede him the right to permit his youthful son to take up the practice before maturity is reached.”

28 “Cigarette Smoking,” USTJ, vol. 22, Sept. 18, 1886 (3:1). More than a century later, one of the leading public health economists studying tobacco, who called cigarette smoking “the ‘dirtiest,’ most deadly form of nicotine delivery ever created,” observed that smokers “suck into their lungs contains as many as 6,000 chemical compounds, over 50 of which are known human carcinogens. The list of chemicals inhaled by smokers every time they puff on a cigarette includes ammonia, arsenic, benzene, carbon monoxide,
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the fact had become sufficiently conventional wisdom that even the Wisconsin Supreme Court adduced inhalation as one of the chief grounds of disapproval of cigarette smoking.29

formaldehyde, hydrogen cyanide, radioactive polonium-210, and toluene. A typical pack-a-day smoker inhales these chemicals 10 or more times per cigarette, or more than 200 times per day. Over a year, pack-a-day smokers suck these chemicals into their lungs 73,000 times, having smoked 7,300 cigarettes. Over a 50-year smoking ‘career,’ commonly beginning around the age of 15, a smoker inhales these 6,000 chemicals 3.65 million times, having consumed more than a third of a million cigarettes. It is not surprising that smoking kills half of its life-long devotees. What is perhaps more surprising is that it does not kill the other half.” Kenneth Warner, “Will the Next Generation of ‘Safer’ Cigarettes Be Safer?” Journal of Pediatric Hematology/Oncology 27(10):543-50, at 543, 544 (Oct. 2005).

Goodrich v. State, 133 Wis. 242, 247 (1907). Nevertheless, a much bally-hooed lecture by a lawyer before the Medico-Legal Society in Nov. 1897—whose point of departure was the claim that “the innocuousness of the cigarette” was a “self-evident truth”—stated that “[t]he inhalation question was disposed of” in 1883 in The Lancet by Meyer Dutch, who had written that “the inhaled smoke rarely passes beyond the bronchi?” and that “[i]f any smoke enter the air vesicles...it must be a very small quantity indeed, for as a rule it is nearly immediately expelled, and there is no time for diffusion.” W. H. Garrison, “A Brief for the Cigarette,” Medico-Legal Journal 15:280-91 at 287, 288 (Dec. 1897). Garrison’s assertion that Dutch’s mini-communication had “disposed of” a scientific controversy demonstrated how untrustworthy his arguments were since all that Dutch had sought to do was ask whether his observations corresponded with those of “any” of the journal’s readers. His first observation was that inhaling cigarette smoke resulted in the deposition of carbonaceous particles on the upper part of the larynx and pharynx: “I have known some cigarette smokers to suffer from continual ‘hawking,’ the phlegm being very nearly black.” He then hedged the statement that Harrison ripped out of context and abbreviated: “The smoke, if I judge correctly, rarely passes beyond the bronchi, as the result of which slight attacks of asthma occur.” Meyer Dutch, “Cigarette Smoking,” Lancet 1:1028 (June 9, 1883). Little wonder that “[o]ne man proved to his satisfaction that Lawyer Garrison had received a retainer to make this plea in the interest of the cigarette manufacturers.” T.D.C., “The Cigarette Question,” Cincinnati Lancet-Clinic n.s. 40:347-48 at 347 (Apr. 2, 1898). A review of the lecture in Scientific American concluded: “Thus science lays another robust falsehood in the dust. The cigarette smoker may henceforth enjoy his rings of smoke in peace of mind.” “‘A Brief for the Cigarette,’” Canadian Journal of Medicine and Surgery, 3:295-96 at 296 (1898) (reprinting Cyrus Aldrich, Scientific American). One of the responses to Garrison’s “Brief”—written by Harold N. Moyer, a neurologist and professor at Rush Medical College, who agreed that there was “a wholly unfounded prejudice against the use of the cigarette in this country which has been reflected in the legislation in some of our States”—focused on the issue of inhalation, which he regarded as “one of [the cigarette’s] chiefest dangers” because “[t]he majority
To be sure, inhalation was often also the only medical fact that anti-tobacco advocates got (largely) right. (Some scientists, however, did come to an early understanding of some aspects of smoking-related disease causation. For example, Scientific American reported in 1889 that William Dudley, a chemistry professor at Vanderbilt University, had demonstrated “the actual cause of the mischief, namely, the cigarette smoker’s absorption of the carbonic oxide and other gases, causing deoxidation of the blood....”) This combination of scientific accuracy and pure phantasy was illustrated by Helen Bullock, who presided over the WCTU’s narcotics department. In 1889 in the course of a lecture at a Baptist church in Minnesota she mentioned inhalation together with...
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the addition of opium as the chief sources of the injuries inflicted by cigarette smoking; moreover, she embedded this deleterious character in the alleged manufacture of cigarettes largely from cigar stubs: since, as the cigar grew shorter while being smoked, the nicotine became “too strong for the endurance of the smoker. Thus tobacco which is too strong for an adult is turned into a cigarette for the use of boys.”

The melange of rational and irrational health- and class-control-related components of the WCTU’s campaign against cigarette smoking was conspicuously visible in a resolution adopted by the Bangor Maine local in 1897 in connection with the state legislature’s consideration of an anti-cigarette bill:

As human beings, we want pure air to breathe in the streets and all other places and the cigarette continually trespasses upon our rights..., and we are often sickened by the fumes of its poisonous ingredients. ...

As tax-payers, and as law-abiding and temperate citizens, loyal to the widest welfare of the community, we object to any other citizens debauching themselves mentally and physically with cigarettes, while the whole community, including ourselves, is held responsible for the care, and taxed for the relief and support of the insane, defective, depraved and dangerous classes. While these classes are becoming a heavier burden to society every year, we protest that the cigarette ought not to be allowed to continue its work of impairing the brain-soundness and industrial ability of men, thus at once recruiting the dependent classes, and reducing the power of society to take care of them.33

In spite of the partly primitive scientific-health basis on which the campaign against cigarettes was conducted, the narrow strategy of the WCTU and other groups was not irrational34: since cigarettes at that time accounted for such a

32”The Narcotic Weed,” SPDN, Nov. 4, 1889 (2:2). In 1888, according to the Lancet, “a rumour gained currency [in Britain] that cigarettes contained a large proportion of opium,” prompting the medical journal Lancet to appoint a commission to study the matter with the result that “no trace of opium” was found. Despite this finding, about 1891 the “indictment” transplanted itself to the United States. “The Report of The Lancet Analytic Sanitary Commission on American Cigarettes,” Lancet 2:1607-1609 at 1607 (1899). For the original article, which detected “not a trace” of morphine, see “Report of The Lancet Analytical Sanitary Commission on Egyptian Cigarettes,” Lancet 2:785-86 (Oct. 20, 1888).


34As late as the 1930s, the author of a doctoral dissertation on the WCTU could still contend that: “In common with the rest of the country the W.C.T.U. was deeply prejudiced against the cigaret, as being especially dangerous to health, [sic] and morals. The prejudice against this particular form of tobacco did not begin to give way till the World
minuscule proportion of total tobacco consumption—for half-decades between 1880 and 1909, cigarettes, by weight, consumed between 1 and 3 percent of the tobacco product compared with 56 to 41 percent for chewing tobacco, 24 to 27 percent for cigars, and 14 to 25 percent for smoking tobacco— it was imaginable that a window of opportunity existed during which prohibiting and actually stopping their use by adults was legally, politically, socially, and behaviorally achievable. Hence the focus on “creating a prejudice against cigarette smoking in the country.” Then as now this causal demonstration-effect direction from adults to children was seen by the most radical anti-smoking activists as the key to preventing children from starting to smoke. (In sharp contrast, Lucy Page Gaston insisted that “anti-cigarette” was a misnomer as applied to her crusade inasmuch as it was an anti-tobacco movement encompassing a pledge to abstain from using any form of tobacco until the age of 21; yet not only did this approach potentially heighten interest in smoking as
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a marker of maturity, it expressly disavowed any interest in dealing with the source: “It aims at the curtailment of no man’s liberty,” but only at protecting “childhood and youth at a period when they stand in greatest need.”) Frank Irish, the president of the National Anti-Cigaret League, put the point during a lecture tour of Iowa in 1902 under the direction of the WCTU: “Tobacco using parents and teachers should remember constantly that in training a child a single ounce of example is worth more than a whole ton of precept.” And three-quarters of a century later, one of the medical giants of tobacco-caused disease investigation repeated: “As long as members of a society continue to smoke cigarettes, young people will continue to experiment with tobacco and, for many, casual experimentation may lead to acquisition of a habit that persists for most of their lives.” And since cigar and pipe smoking appeared to be a much less likely entry-level initiation for minors than the cigarette—“the McDonald’s of the tobacco trade, the fast food of smoking”—the possibility of a future smoke-free society seemed plausible, especially since even in the 1880s, as was still the case more than a century later, it was widely known that a “boy who grows up to

39. For Anti-Tobacco Leagues,” CT, Feb. 9, 1898 (12).
43. In 1991, 89.0 percent of all persons 30-39 years old who had ever smoked first tried a cigarette by age 18. Office on Smoking and Health, U.S. Dept of Health and Human Services, Preventing Tobacco Use Among Young People: A Report of the Surgeon General tab. 7 at 65 (1994). But see Pamela Ling and Stanton Glantz, “Why and How the Tobacco Industry Sells Cigarettes to Young Adults: Evidence from Industry Documents,” AJPH 92(6):908-16 at 914 (June 2002), who point out that: “The tobacco industry has long been aware that ‘anti-smoking attitudes the [children] have learned in school and elsewhere can be unlearned or replaced by pro-smoking norms held by others their own age or a little older.’ Working to delay smoking initiation among youths while allowing it to continue among young adults has little long-term benefit” (quoting 1972 internal Philip Morris Co. document).
manhood without contracting the tobacco habit will not, as a general rule, be likely to fall into that habit in his adult years.” As late as 1907, the Wisconsin Supreme Court observed that the kind of tobacco used for manufactured cigarettes was “originally selected because of adaptability to inhalation, but also serv[ed], by reason of its mildness, to remove the protection which nature placed in the way of acquiring habits of use of the more vigorous tobacco commonly used in cigars. Before the day of the cigarette, mastery of the tobacco habit was obstructed by agonies of nausea usually sufficient to postpone it to a period of at least reasonable maturity.” (Snuff and chewing tobacco—the latter accounting for a very large proportion of all tobacco use—were more difficult to deal with.)

The problem with cigars as a nicotine uptake device was vividly depicted by an Iowa newspaper at the beginning of the cigarette era in 1881:

> The facilities enjoyed by boys for learning to smoke are much greater than they were twenty years ago. Then a school boy had to pool in with two others and buy a strong three cent cigar, and cut it up, and the second whiff would make his diaphragm flop over and play mumbletypeg with his palate, he would turn pale, lean over a fence and give away to his feelings. Now the stores keep mild cigarettes, with just enough tobacco in to keep his stomach right side up, to begin on, and after he has got so his eyes stay in their sockets, a stronger one is sold to him, and he thus forms the habit gradually, without those soulstirring scenes we used to enjoy behind the barn of a summer evening. Verily, boys of the present day have a soft thing.

In its more streamlined version, the WCTU’s justification for a universal ban on cigarette sales was straightforwardly oriented toward effective enforcement: “As sane and impartial observers we see that a law which forbids a sale to persons of a certain age while permitting it to persons of another age is vastly more difficult of administration than a law forbidding the sale altogether.”

44. “The Deadly Cigarette,” Frank Leslie’s Illustrated Newspaper, Aug. 12, 1882 (386:2-3) (edit.).


46. Guthrie Vedette (Panora), Feb. 10, 1881 (1:4) (copy furnished by Merle Davis). In a somewhat later stylized newspaper account, a father on discovering that his eight-year old son smoked cigarettes indignantly asked him who had taught him to smoke; the boy replied that the father smoked all the time, that he had tried to smoke cigars, but that they made him sick. “Go to Fight Cigaretts,” CT, Feb. 23, 1897 (12).

47. “Anti-Cigarette Bill,” BDWC, Mar. 2, 1897 (3:7) (letter to editor by J. J. Bucknam, recording secretary, Bangor, Maine WCTU). The unreflective contrasting view was advocated at length editorially a year later by the Boston Evening Transcript after a general anti-cigarette bill had passed the Massachusetts House: “To prevent the young
However, the politically more complex underlying design of the WCTU’s strategy was nicely (if atypically) captured by a letter to the editor from Elizabeth Preston, the long time head of the North Dakota WCTU—a figure of towering importance in that state’s late-nineteenth and early-twentieth-century history. Preston stood firmly in the aforementioned tradition of insisting on the “well known fact that cigarettes are made from stumps of cigars and quids of tobacco raked out of spitoons and gutters”—a “delectable mixture...prepared for use by adding opium, Havana flavoring made from the tonca bean, which contains a deadly poison, brandy, rum and other drugs” all wrapped in paper “made from the filthy scrapings of rag pickers...and then treated with a preparation of arsenic and lead, to give the appearance of rice paper.”

from using tobacco it is not necessary nor just to forbid its use to adults...” “The True Bill Against the Cigarette,” Boston Evening Transcript, Mar. 23, 1898 (4:4) (edit.). The newspaper’s animus was clearly on display in its insinuation that anti-cigarette bills were promoted to extort money from cigarette manufacturers. Id.; BET, Mar. 30, 1898 (4:1) (untitled edit.).

Preston was president from 1893 to 1933. Helen Tyler, Where Prayer and Purpose Meet: The WCTU Story, 1879-1949, at 275 (1949).

Calculated according to Report of the National Woman’s Christian Temperance Union Twenty-Fourth Annual Meeting...Oct. 29 to Nov. 3, 1897, at 182-83 (1897) (1.1 percent). The report compared membership data for 1897 with the 1890 population census data.


Elizabeth Preston, BDT, Feb. 8, 1901 (2:3-4 at 3) (letter to the editor). Exactly the same day that Preston’s letter appeared Dr. Leonhardt, a physician, speaking at a school meeting on cigarettes in Lincoln, Nebraska, stated: “It is a mistake to tell boys that cigarettes are made from barn sweepings, cigar stubs and the refuse of tobacco. Tell the truth. Boys are not fools.” To be sure, he added that boys knew that “the habit is a fastidious one.” “Make War on Cigarettes,” Nebraska State Journal, Feb. 11, 1901 (6:3). However implausible the claim that cigarettes were made from discarded tobacco products, by the first decade of the twentieth century a number of cities had adopted virtually identical ordinances making it unlawful both to pick up any cigar or cigarette butt with the intent of selling it to be used in any form of manufactured tobacco and to use any such stubs in manufacturing any form of tobacco; they also made it unlawful for parents knowingly to permit their children under 18 to pick up butts. The Municipal Code of the City and County of Denver: Approved April 12, 1906, §§ 1009-1013 at 385-86 (1906). See also The Revised Municipal Code of Chicago of 1905, §§ 1086-89 at 309-10 (1905); Revised Ordinances of the City of Peoria, Illinois, §§ 1007-11 at 398-89 (1910).
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Writing on February 8, 1901, the day after the North Dakota House had killed one anti-cigarette bill, Preston offered the bill’s interstate-commerce-clause-caused leakiness as a refutation of libertarian opposition and then tacked on a utilitarian argument for adult sacrifice:

The only objection we have heard to the measure is that it will deprive cowboys and Russians of their one luxury. The passage of this law will not prevent any individual from having shipped to him cigarettes or cigarette papers in original packages for his personal use, any more than the prohibition law prevents a man from having shipped to him from outside the state a case of beer for his own use.

With all deference to the Russians and cowboys, we cannot but believe it far better to save the North Dakota boy, even though it deprives them of a “luxury,” or puts them to some inconvenience to obtain it.

A petition submitted to the North Dakota Senate in 1903 in support of an anti-cigarette bill was even more revelatory. Its authors, the missionary and anti-liquor prohibitionist superintendent of the Fort Berthold Indian Reservation and his wife, argued: “Let our legislators set the standard high and our people will follow. Our older men ought to be willing to sacrifice in the indulgence of a bad habit for the sake of our children who are being dwarfed in body and soul by its indulgence.” So long as relatively few “older men” smoked cigarettes, while the vast majority smoked pipes or cigars or chewed tobacco, little sacrifice would have been involved.

at least one cigarette smoker avenged himself by telling “cigarette phobias of the colored brothers I have seen in New Orleans and Key West deftly rolling the wrapper until they come down to the pointed tip, and then placing the cigar between their thick lips, against their moist tongue, and giving it a dexterous twirl the pointed tip is finished and securely fastened. I’ve seen thousands of cigars made in that way, and I never place one in my mouth that I do not feel as if I were kissing a large, fat Key West negro at second hand.” Allan Forman, “On the Cigarette Habit,” Galveston Daily News, Apr. 10, 1892 (10:1) (article published in numerous newspapers that same Sunday including the Salt Lake Herald and Denver Daily News).

52Legislative Gossip,” BDT, Feb. 8, 1901 (2:2); State of North Dakota, Journal of the House of the Seventh Session of the Legislative Session 236-37 (1901) (Feb. 7).

53State of North Dakota, Journal of the House of the Eleventh [sic; should read Seventh] Session of the Legislative Session 156 (1901) (Feb. 8).

54BDT, Feb. 8, 1901 (2:3-4 at 4) (letter to the editor).

be required of them because the anti-cigarette movement was careful to leave these other “bad habits” untouched except in statutory bans affecting minors only. This strategy of placing a burden on a modest proportion of adult tobacco users in order to protect children found its counterpart a century later in state laws and municipal ordinances totally prohibiting cigarette vending machines everywhere (even in places into which it was unlawful for persons under 18 to enter), thus inconveniencing some adult smokers in order to eliminate one source of unlawful access to cigarettes to minors.

In 1904 this sacrificial strategy was articulated even more precisely and bluntly in the Canadian House of Commons by William Scott Maclaren, a liberal member from Quebec, who was the chief sponsor of a resolution to bring in a bill to prohibit the import, manufacture, and sale of cigarettes nationally:

> Of course we know that objection is made that you are depriving the grown-up people of the privilege, or the pleasure...of smoking cigarettes. Well, I appeal to the good sense of this House. There are many other forms in which tobacco can be used, and if gentlemen cannot forego the pleasure of smoking cigarettes for the purpose of helping the boys of this country, I am mistaken in the calibre of the men who occupy seats in this House. As I said, there are other ways in which people may use this narcotic if they feel inclined to do so.

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56 When Maine in 1889 prohibited the sale of cigarettes rather than “tobacco in any form” to minors under 16, the state WCTU identified as the turning point a speech by a one senator “who dwelt ‘touchingly’ upon the way it would affect some of his constituency—country traders, who sold a great deal of tobacco; delivered, in most instances, to the boys. This had more weight than the petitions of hundreds of educators[,] presidents of colleges, members of school boards, teachers, etc., and many thousands of others. However we are thankful for the little bit granted in this direction.” “Legislative Enactments in Maine,” US 15(12):4 (Mar. 21, 1889).

57 A newspaper editorial some years later in connection with the introduction of a statewide cigarette sales ban bill in Georgia shifted the terms of the trade-off by claiming that “the net result would be that thousands of men would be deprived of an innocent pleasure...not in order that a few degenerates should be deprived of their ‘poison,’ but in order that these latter should be compelled to get it outside the law and so with added circumstances of depravity.” “Time to Draw Line, Says Sun, on Freak Legislation,” AC, July 23, 1914 (4:4) (reprinted from Sun (New York)).


59 E.g., San Francisco Municipal Code, art 19D, § 1009.1(a) and (b) (effective 1997), on http://www.municode.com/content/4201/14136/HTML/ch019d.html

The national WCTU’s longtime Superintendent of Anti-Narcotics, Eliza Buckley Ingalls (1848-1918), ever so dimly grasped the existence of a problem (“Like father, like son. Where will it end?”), but her exclusively moralistic approach disabled her from thinking through the political and behavioral underpinnings of a solution to the critical intergenerational emulation. (After a limited formal education, Ingalls was admitted by special waiver at the age of 14 to the International Order of Good Templars, a temperance organization, moving seamlessly into the WCTU in 1879 in St. Louis, where the next year she married Frederick Henry Ingalls, a prominent merchant and prohibitionist, whose “active sympathy and financial assistance...contributed in no small measure” to her WCTU activities. In addition to heading the St. Louis District WCTU for 27 years, she led the national organization’s anti-narcotics department for more than two decades.)

Thus in 1904 she explained to the national convention that: “If it were possible to so interest the Christian men of this country that they would...
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abandon the use of tobacco, our battle for the boys would be won.” The following year she bemoaned the fact that the WCTU was not “taking the highest possible stand” on the tobacco question because it refused to include tobacco in its pledge for honorary (i.e., male) members, whose smoking “set a fearful example to our boys.” Women members refused to take the step lest it reduce the group’s honorary membership. Ingalls, in contrast, advocated for “asking Christian temperance men to refrain from leading boys into the tobacco and cigaret habit.” Without offering the slightest empirical or even probabilistic basis for her odd belief, she opined that: “If only men could see how their influence is causing ruined lives for our boys, I believe they would rather their noses were cut off than walk about with a pipe or cigaret between their lips.”

In 1907 Ingalls optimistically, but again bereft of any realistic strategy to convince adult cigar smokers to quit for the sake of preempting boys’ uptake of cigarette smoking, argued that “formerly our women were quite willing to condemn the cigaret, but loath to attack tobacco. They are now realizing it is not consistent to ask the boy to refrain from cigaret smoking, when his father, his teacher, and alas! sometimes his pastor, smoke cigars, and so the fight upon tobacco grows stronger.”

By more than a century the WCTU also anticipated the reconceptualization of smoking as a “pediatric disease” by Dr. David Kessler, the commissioner of the Food and Drug Administration, which the CEO of R. J. Reynolds called a stroke of “tactical brilliance. ... We couldn’t beat that.” The WCTU’s approach—which it supplemented with the gendered moral opprobrium attaching to any tobacco use by females—was pragmatic so long as cigarettes remained

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63 Report of the National Woman’s Christian Temperance Union: Thirty-First Annual Convention...November 29 to December 4, at 249 (n.d. [1904]).
64 Report of the National Woman’s Christian Temperance Union: Thirty-Second Annual Convention...October 27 to November 1, 1905, at 273-74.
65 Report of the National Woman’s Christian Temperance Union: Thirty-Fourth Annual Convention...November 8-13, 1907, at 266.
68 For example, as late as 1928, the Iowa WCTU protested the speaking engagement at the State University of Iowa of Rev. Agnes Maude Royden, an English minister, who had previously worked on behalf of women’s suffrage in Iowa, on the grounds that her cigarette smoking set a bad example. E.g., Ida B. Smith (Iowa WCTU president) to Walter Jesup (SUI president) (Jan. 7, 1928), in File: Letters in re Maude Royden, SHSI, Iowa
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a marginal commodity. From 1890 to 1896, the first years of the Tobacco Trust, the output of cigarettes almost doubled—from 2,505,167,610 to 4,967,444,232—while the proportion of all leaf tobacco used in their manufacture rose from 3.1 percent to 5.8 percent. The year 1896 marked the enactment (in Iowa) of the first enduring general cigarette sales prohibition law followed the next year by another in Tennessee, which some contemporaries (improbably) viewed as having occasioned the 45.2 percent drop in output to 2,722,979,167 by 1901. The ensuing reversal in production did not regain and exceed the level of 1896 until 1907. Similarly, cigarette manufacturers’ share of total leaf tobacco consumption did not regain and exceed the peak level of 1896 until 1911.69 Interestingly, 1909 (midway between 1907 and 1911) also marked the end of the last major wave of state general anti-cigarette enactments: once the increase in cigarette production and use in the six to eight years preceding U.S. entry into World War I70 became seemingly irresistible and cigarettes ceased to be a

City. By 1923 the United States Tobacco Journal was claiming that “woman’s smoking is producing tremendous and increasing revenue for the tobacco trade. ... No matter what Madam Grundy says, female consumption of tobacco products is a factor to be reckoned with by everyone engaged in any branch of the tobacco business, and by every investor in tobacco securities. Over and above the normal male birth rate and arrival at maturity, an accession of new business amounting to a healthy fraction of the entire present total is possible from the other sex alone in the not distant future.” “The Ladies, God Bless ‘Em,” USTJ 99(11):4:2 (Mar. 17, 1923) (edit.). In 1926, on the cusp of open advertising of cigarettes to women, “[o]ne of the biggest men in the industry” confided to a writer that manufacturers feared to engage in such advertising lest “‘they may draw the lightning of the busybody element that brought about prohibition—the long-haired men and short-haired women whose lives are incomplete unless they are stage-managing the lives and actions of all the rest of us.’” Lin Bonner, “Why Cigarette Makers Don’t Advertise to Women,” Advertising and Selling, 7:21, 46, 48, at 21-46 (Oct. 20, 1926).


70 Without gainsaying the social-psychological impact of the spread of cigarette smoking among U.S. soldiers in Europe on its prevalence in the United States after the war, it is important to note that quantitatively the proliferation antedated the war. See Tennant, The American Cigarette Industry, fig. II at 16. As Jack Gottsegen, Tobacco: A Study of Its Consumption in the United States 29 (1940), noted: “[Cigarettes were becoming fashionable prior to the World War. This event, contrary to the usual belief, was not responsible for the shift to the cigarette,” although the war did “extend the conditions responsible for a further expansion of the cigarette market.”
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marginal novelty—the number of the new “modern” Camel cigarettes shipped in the last prewar year of 1916 exceeded total output of all cigarettes in any year before 1909—the WCTU’s strategy lost its political and behavioral plausibility, and repeal replaced enactment on legislative agendas.

Just prior to the introduction of Camel in 1913, the United States Tobacco Journal did its obeisances to the manufacturers’ “genius,” which had had to deal with the fact that consumption of cigarettes was “not responsive to any hankering of the human heart. Many men have lived more or less happy lives without ever having smoked a cigarette in the whole course of their existence.” In particular, although the American public had not known that it wanted cigarettes a few years earlier, cigarette manufacturers had so enlightened the public that by early 1913 per capita annual consumption reached 150: “[S]o completely are cigarette manufacturers masters of the situation that they control the public as a conductor does his orchestra. At the wave of the publicity baton men smoke up, first on this brand, then on that, at the pleasure of the cigarette men.”

A reflection of these changed circumstances and perceptions was a “revolutionary” (but in fact severely watered-down) “campaign against the smoking habit” that a “prominent” WCTU member launched in Cedar Falls, Iowa, in 1913: “Advancing the belief that young boys are induced to form the cigarette habit wholly through the power of example set by the adult smokers,” Mrs. J. M. Fisk and “more than 150 of the most prominent society and church women” published a “pointblank request that ‘the men who must smoke refrain from doing so on the streets or in other public places.’” Fisk was clearly guided by an important social-psychological insight, the mere public articulation of which usefully initiated “a general discussion of the smoking habit and...focused the attention of every boy in town upon the question.” Yet, not only did this approach acquiesce in the continued sale and use of cigarettes, it also countenanced fathers’ (and other adult men’s) smoking in the non-public place of the home—in this context hardly a “spot secluded from the public view”—which presumably formed the matrix of emulation.

74“Would Stop Smoking in Public,” Evening Gazette (Cedar Rapids), Nov. 20, 1913 (13:6-7). Some smokers talked about turning the request into a boomerang by demanding that “women refrain from appearing in public places excepting with faces free from artificial beautifiers.” Id.
PART I

THE FIRST WAVE OF ADULT PROHIBITORY LEGISLATION: STATE MEASURES TO BAN CIGARETTE SALES AND PUBLIC CIGARETTE SMOKING: 1889-1899

Has the dude made the cigarette unpopular, or the cigarette made the dude unpopular? It must be that the cigarette has suffered from the association, for the legislatures of several states are adopting laws prohibiting the manufacture and sale of the article.\textsuperscript{75}

\textsuperscript{75}SPDG, Feb. 8, 1893 (4:1) (untitled edit.).
## Table 1: Years in Nineteenth Century in which One House of State Legislature Passed a Bill Generally Prohibiting Cigarette Sales (or Public Smoking,* Use,** or Possession*** or Both Houses Did and Governor Vetoed It****

<table>
<thead>
<tr>
<th>Year</th>
<th>States</th>
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<tr>
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<tr>
<td>1892</td>
<td>MS*</td>
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</tr>
<tr>
<td>1899</td>
<td>AR</td>
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In addition, between 1900 and 1913 one house of the following state legislatures also passed such a bill: 1901: DE, WI, NH, IL, MN****; 1903: DE, WI, AL; 1906 OH, MD; 1907: WI*, MO; 1908: OK*; 1909: MT, IL; 1911: CO, NV, IL; 1913: MO. The bill passed in 1908 by the House in Oklahoma (which did not achieve statehood until 1907), did not limit the ban on cigarette smoking to public places. See below ch. 16.
Map 1: Years in 19th Century in which One House of State Legislature Passed a Bill Prohibiting Cigarette Sales (or Public Smoking, Use, or Possession) or Both Houses Did and Governor Vetted It.
<table>
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<td>Year</td>
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<td>1927</td>
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Note: Oklahoma did not become a state until 1907.
Map 2: Years in which State Laws Generally Prohibiting Cigarette Sales Were in Effect
The First Successes Fail: 1889-1892

There will be in the near future, we predict, a crusade inaugurated against both the use and manufacture of cigarettes.¹

Next to the Trust the favorite butt of legislation has been the cigarette, but the anti-cigarette measures enacted by the various states are too numerous, complicated and farcical to be discussed here in detail. Suffice it to say, that they have been about as effective as other sumptuary legislation. They have brought much money into the pockets of lawyers and the consumption of the commodity has steadily increased.²

The Trust’s response to the threat of anti-cigarette legislation was strategic. The years 1895, 1896, and 1897, in the words of the Report of the Commissioner of Corporations,

constituted one of the most interesting periods in the history of the Combination. Before 1895 the development of its cigarette business had been the leading interest of the company. The effect of State legislation hostile to the cigarette business, among other causes, led the company to begin in 1895 an energetic campaign for a large proportion of the plug [chewing] business of the country.³

By 1908, in the course of testifying at the judicial proceedings that ultimately led to the dissolution of the Tobacco Trust, James Duke himself was more forthcoming about the impact of state anti-cigarette laws than he had been in his booster-like interview with the Wall Street Journal nine years earlier.⁴ On direct examination, his lawyer, Junius Parker, ATC’s associate general counsel, led him through the following colloquy on February 25, as Duke lay, “propped up with

¹“Dangerous,” Newark Daily Advocate (Ohio), Jan. 16, 1893 (8:3).
⁴See above ch. 1.
pillows,” in bed in his bedroom, “surrounded by physicians and nurses,” in his Fifth Avenue mansion, because he had allegedly been too ill to appear in court, though “he did not appear to be particularly weak.” Duke sought to explain why the Tobacco Trust had expanded into other types of tobacco products such as plug chewing tobacco—the war over which from 1894 to 1897 the company had been able to finance from its “immense profits from its cigarette business”—and all-tobacco cigarettes (also called little cigars):

Q. What was the reason for your desire to make the whole line of tobacco; was it because of the apprehension of change of taste or legislation directed against some one or the other?

A. Yes; take the matter of cigarettes. There is a great deal of opposition to cigarettes, trying to pass legislation against them.... We thought from the way the legislation was going all over the country that the paper cigarette was going to be knocked out and we wanted to be prepared with an organization of people and machinery and brands to go ahead with the all tobacco cigarette to take the place of the paper ones. .... [W]e carried the cigarette business of the American Tobacco Co. up to about four thousand million a year and they kept trying to pass so many of these laws all over the country that we sort of let up on our activity to push the cigarette business and pushed other lines of tobacco, and that business went down to somewhere around two thousand millions a year.

Q. Almost cut in two?

A. Yes. After that we got in the Turkish cigarette business and it is growing again. Last year we increased six or seven hundred million and the cigarette business last year is the largest in the history of the business. That is all by work, pushing, advertising and attracting people’s attention to it.

In spite of Duke’s and Parker’s vast exaggeration of the decline of cigarette production during the latter half of the 1890s, they both drew great comfort for the future of cigarette profits from advertising’s perceived power to increase the

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5J. B. Duke’s Bedroom Serves as a Court,” NYT, Feb. 26, 1908 (7). See also, “President James B Duke Testifies in Bed on Behalf of His Own Corporation,” USTJ, vol. 69 (Feb. 29, 1908): 1. The testimony was taken at 1009 Fifth Avenue in Manhattan, which had been the house of his brother, Benjamin N. Duke, who, however, moved into a hotel; at the 1910 Census of Population, James Duke was returned as living there with his wife, mother-in-law, and nine servants. Amusingly, while the other residents were returned as being able to speak English, the census taker recorded James Duke as speaking “Tobacco.” Thirteenth Census of Population of the United States (HeritageQuest Online).


prevalence of cigarette smoking:

A. ... The manufacturer of tobacco sets the fashion for the consumer of tobacco just as the manufacturer of hats sets the fashion for women’s hats. I think there is about 6 lbs. of tobacco per capita consumed in this country, and in England it is two, and in some other countries it is four or five pounds, depending on the push of the manufacturers to hold their business.

Q. Why is it greater in America?

A. Because of the push, advertising and drive we put back of it. The American Tobacco Co. spends millions of money every year in building its business.

Q. Is that spent in tearing down business of competitors?

A. No; we want the competitors to go on. I think we make more money than if we had a monopoly of the business. I know it is the case of the cigarette business because when we had so nearly all of it it was cut in half in four and five years and as soon as we had competitors we built it up again. There are plenty of people now in America that don’t consume tobacco. If there is enough work put back of them we will make them all consume it.\textsuperscript{8}

Duke’s disingenuous remarks about competition may be discounted in the context of the government’s antitrust suit against the American Tobacco Company. They nevertheless reveal that, contrary to the mendacious claims of his late twentieth-century corporate successors that cigarette advertising sought merely to lure existing smokers away from competitors’ products rather than to persuade nonsmokers to start smoking,\textsuperscript{9} Duke’s profit, accumulation, and marketing strategy was predicated on the necessity of expanding the base of consumers.

Even more central to Duke’s grand plan to make everyone in America a cigarette smoker was insuring that state legislatures not interfere with the Tobacco Trust’s low consumer prices or the lawfulness of manufacturing or selling cigarettes altogether. These vital questions were initially posed in the early 1890s, which witnessed the first nationwide wave of bills that either imposed a prohibitorily high cigarette sales license tax or outright prohibited the sale and manufacture of cigarettes. In connection with two such bills filed in the New York State legislature,\textsuperscript{10} one newspaper perceptively argued in an editorial

\textsuperscript{8}United States v. American Tobacco Co., 221 US 106 (1911), Record, IV:404 (italics added).


\textsuperscript{10}In 1893 Republican John M. Diven, the superintendent of the Elmira Waterworks (and in 1891 the president of the American Waterworks Association), introduced a bill in the Assembly to ban the manufacture and sale of cigarettes in the state after January 1, 1894. After giving the bill a hearing, the Public Health Committee reported it favoring
First Successes Fail: 1889-1892

that:

The passage and enactment of either bill would deal a very severe blow to the gigantic Trust which has practically the whole trade of the country in its hands and chokes the retailers everywhere into absolute submission to its terms, forcing them in fact to sell at retail at prices that are not fairly remunerative, the object being to sell all the greater quantity and bring the cigarette into still more general use in place of pipes or cigars.

With a $50 license fee the retail dealers would give up the sale of cigarettes, unless they could get them at a reduced rate from the Trust, or sell them at a higher rate to the public; but as the public, that is, the consumer, is always the one to pay the taxes in the end, it is to be expected that any increase in the price would seriously affect the sale of cigarettes; for thousands on thousands have gotten into the habit of smoking them on account of their cheapness as compared to the cost of cigars.\(^1\)

Little wonder that for years tobacco dealers virtually everywhere ban bills were introduced both complained that the Trust was forcing them to sell a commodity that generated for them a disproportionately low (or no) profit margin and expressed an expectation that if cigarettes sales were suppressed, their profits would rebound because they would sell more of other kinds of tobacco.\(^2\)

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\(^1\)“Against the Cigarette,” *Brooklyn Citizen*, Feb. 26, 1893 (4:5) (edit.). The editorial was partly reprinted as “The Deadly Cigarette,” *Hudson Evening Register*, Mar. 1, 1893. Ironically, the *Citizen*, a Democratic paper, which did not support sumptuary legislation for adults, argued that over time “the cigarette smoker may generally be trusted to come to the conclusion of all those to leeward of him within smelling distance, that the cigarette is a nuisance.” The editorialist’s proposed solution was to “smash the Trust, and restore competition, so that a much better quality of cigarette could be obtainable....”

\(^2\)For example, in 1895 when the Wisconsin Assembly was considering imposition of a $100 license tax on cigarette dealers, retailers opined that there was “‘no money in handling cigarettes.... The manufacturers must have a market for their goods, while we
Moreover, if the Trust, like many physicians and the bulk of the anti-cigarette movement, believed that cigarettes, because of their greater inhalability, were much more likely to addict users than other forms of tobacco, 13 it had all the more reason to make them the centerpiece of its consumer marketing strategy.

In this Part the breadth of the national legislative environment during the 1890s is sketched out in some detail by focusing on a variety of substantive measures in terms of process, region, and tobacco-beholdenness. 14 This overview will serve to refute assertions not only based on no primary source research, but fabricating non-existent data, such as the claim that cigarette sales ban laws/bills had been passed/filed “almost exclusively in the mid-west, where cigarettes had never been popular to begin with. On the East coast, in the tobacco growing states and in the biggest cities, anti-smoking sentiment was weak and it was in these places that cigarette consumption rocketed.” 15

In 1893 Washington became the first state to enact an across-the-board ban on the sale of cigarettes, but that legislation was in no way a quirky response to unique local circumstances. That strong anti-cigarette sentiments had been percolating up throughout the United States and solidifying into collective action organizations was visibly on display in the passage of anti-cigarette bills by one legislative chamber in Michigan, Arkansas, Pennsylvania, and Mississippi as well as legislative investigations in Massachusetts and Georgia between 1889 and 1892.

The First Legislative Chamber to Pass a Sales Ban: Michigan House 1889

The Michigan House has passed a bill to bar out the deadly cigarette. The Wolverine dudes might as well join the procession and go to Oklahoma. 16

The prohibition of the manufacture or sale of cigarettes by an act of the Michigan Legislature is about as small and silly a piece of legislation as the article legislated against. It would be just about as proper to order by law that all people shall wear ear-muffs when...
the thermometer registers less than thirty degrees. It cannot be denied that cigarettes are injurious when used to excess, but so are cigars, and so is pretty much everything that man eats or drinks. But even if injurious to the individual who uses them intemperately, cigarettes cannot be said to be in any way prejudicial to society..., so there is absolutely no ground for such legislation. The mind of the Michigan legislator must be wonderfully constructed if it can evolve a good and legal reason for the passage of such a bill.17

Antipathy among some Michiganders and their legislators to tobacco smoking long antedated the advent of the Woman’s Christian Temperance Union and other organizations that combated cigarettes. As early as 1850, Representative Hovey K. Clarke (1812-89), a leader of the state anti-slavery movement and founder of the Republican Party,18 offered a resolution to the House instructing the Committee on Drugs and Medicine to “inquire whether the practice of smoking in this hall be not detrimental to the health of members.” After another member had moved to amend the referral to the Education Committee instead, the House adopted it.19 Whether that change was choreographed or not, Clarke himself turned out to be the chairman of the latter committee, and two days later he made the following satirical report, which the House accepted:

[T]he resolution assumes as a fact that the practice of smoking does prevail in the Hall of the House of Representatives; and, as there is some ambiguity in the kind of smoking alluded to, your committee desire for greater explicitness to say that the stove pipes are not, as has been intimated, in any degree to blame; they perform their duty in a manner perfectly satisfactory to all concerned. But, unfortunately, the same cannot be said of all pipes in use here; for there are many, which from the odor they emit, may be reasonably


18Clarke, a lawyer who was a Democrat until 1848, when he became a Free Soiler before joining the Republican Party in 1854, was also a Presbyterian elder of some importance. Presbyterian Reunion: A Memorial Volume: 1837-1871, at 522-23 (1870); A. Van Buren, “Memoir of Hovey K. Clarke,” in Michigan Historical Collections 18: 326-28 (1891) (reprinted from Detroit Tribune, July 23, 1889); “Hovey K. Clarke,” Detroit Free Press, July 23, 1889 (5); “The Late Hovey K. Clarke,” DFP, July 24, 1889 (8); John Patterson, “Hon. Hover K. Clark [sic],” in Proceedings of Third Michigan Legislative Reunion 56-57 (1890); John Patterson, “Marshall Men and Marshall Measures in State and National History,” in Historical Collections: Collections and Researches Made by the Michigan Pioneer and Historical Society 38:200-79 at 221, 261, 263-65, 270-73, 276-78 (1912); Michigan Biographies 1:176 (1924). Several of these publications were made available by Janice Murphy of the Library of Michigan.

suspected of a diligent pursuit of a most disagreeable vocation from a time whereof the
memory of the present smokers runneth not to the contrary. They are daily growing worse,
and by the aid of various combinations of tobacco, of every variety of offensiveness, the
practice, in the language of a distinguished British statesmen, “has increased, is increasing
and ought to be diminished.”

As to its influence on the health of the members of this House, your committee can
only give their opinions inferentially.

If that which produces nausea of the most disagreeable kind, if that which pollutes the
air so as to be unfit for the respiration demanded by nearly a hundred pair of lungs from
six to eight hours a day, and if the currents of air which are created by the lowering of the
windows in order to modify in some degree the evil, be detrimental to health, then there
can be no doubt that the smokers and the smoked are all in the same category of danger,
from which there is no escape for the latter, but in the forbearance and gentlemanly
consideration of the former.

There is another consideration which your committee feel bound to urge, suggested
probably by the relation which they hold to the educational concerns of the State, which
is, that a practice which would not be tolerated for a day in any district school in the State,
can hardly be justified in this Hall, even by all the intelligence, wisdom, genius, talents,
patriotism, good looks and good manners which are here collectively embodied, and your
committee will not believe that even the most helpless victim of this most pernicious
practice will upon due consideration persist here, in what even on a steam boat, “abaft the
shaft,” would be regarded as an offence justifying the summary administration of the police
of the boat.

Your committee would observe further, that as there is often in the practice of
smoking a degree of “involuntary servitude,” from which it is even more difficult to escape
than for an intelligent slave to follow the north star to freedom, against which a portion of
your committee might desire to provide by the most positive prohibitory enactments, yet
they are willing to set an example of forbearance in the pressure of this particular measure,
which they hope will be appreciated by the House, and on the contrary, they suggest that
the application of the remedy be left to the courtesy and sense of propriety of each
individual member and officer of this House.20

Clarke’s strategy, or at least willingness, to use sarcasm to persuade the
addicted to leave their nonsmoking colleagues unsmoked apparently failed to
achieve long-term protection of those who came after him, thus prompting an
ongoing struggle in the House over exposure to tobacco smoke. In 1861 the
House unanimously adopted a resolution that “the practice of smoking in this Hall
is ungentlemanly, prejudicial to the health of members, and disgusting to those
who do not indulge in the filthy and disgusting habit.”21 Having gotten that

(Mar. 20) (1850).

21Journal of the House of Representatives of the State of Michigan: 1861, [1:]682
First Successes Fail: 1889-1892

fulmination off their chests, at the next legislative session in 1863 anti-smokers secured the unanimous adoption of a somewhat more practical hortatory resolution: “That the atmosphere of this Hall is sufficiently impure without the introduction of the poisonous fumes of tobacco smoke; and that the members of this House be requested to desist from that practice in this Hall and its ante-rooms, as a nuisance to the majority of the House.”22 Two years later Methodist clergyman William Brockway offered a similar resolution, but withdrew it before it came to a vote: “Whereas, An atmosphere highly charged with tobacco smoke is very sickening and offensive to some members of this body, therefore, Be it resolved, That gentlemen be kindly and respectfully requested not to smoke in this hall.”23 Legislators’ antipathy to smoking was echoed at the Michigan Constitutional Convention in 1867, when 26 citizens of the small town of Grand Blanc presented a petition requesting that in the state constitution itself “the smoking of tobacco in any form, by any person or persons, be prohibited in the streets and other public places of the State.” Dealing with such a question was handed over to the legislature when the convention accepted its select committee’s judgment that it was a matter for “legislative discretion...”24 Finally at the next legislative session in 1869 the House finally took the step of positively banning smoking by adopting a resolution that “no smoking shall be hereafter allowed upon the floor of this House, by any members or employés of this House, during the session of this Legislature.”25 But just a week after the House had renewed the resolution at the outset of the 1871 session,26 it adopted this resolution offered by farmer Cornelius Knapp: “Whereas, An existing rule of this House, prohibiting all smoking in the Representative Hall, has been repeatedly violated,” Resolved, That the Sergeant-at-Arms of the House be instructed to enforce the rule strictly, in all cases, both in the Hall and in the committee rooms

24 Journal of the Constitutional Convention of the State of Michigan: 1867, at 327, 398 (1867). The three named petitioners were, according to the population census, all farmers. Alexander Davis, who offered the anti-smoking resolution in 1861, represented Grand Blanc.
adjoining, whether the House is in session or not.”

These struggles, both as to compliance/enforcement and as to whether to adopt a ban each session at all went on for decades in the House. (The Senate in 1873 finally adopted a resolution that smoking not be permitted in the chamber during that legislative session. In 1903 the Senate incorporated the ban, which the presiding officer was required to enforce, in its rules.) For example in 1891 the session’s only ban resolution was tabled, while two years later one to ban smoking in the hall of the House was rejected before a ban during session was adopted the next day. The conflictual character of the issue was especially intense at the next session in 1895, when, after the House—99 of whose 100 members were Republicans—had adopted a resolution offered by anti-smoking militant Fremont Chamberlain to instruct the Sergeant-at-Arms to prohibit smoking on the House floor (including the committee of the whole), it rejected the following resolution:

**Resolved,** That smoking be allowed at evening sessions in committee of the whole.

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29 *Michigan Official Directory and Legislative Manual: For the Years 1903-1904*, at 85 (Fred Warner comp. 1903)


The House then fended off one final attack in the form of an appeal to majority rule: asserting that the majority of members who were “users of the fragrant weed” had “bowd in deference to and...acquiesced in the wishes of a minority of the House for the past ten weeks,” saltmaker Oramel Fuller vainly sought permission to smoke during sessions between 3 and 6 and 8 and 12 p.m.\textsuperscript{34}

In 1881, numerous taxpayers petitioned the legislature, “in the interest of temperance and cleanliness, to...enact a law prohibiting the sale and use of tobacco around our beautiful capitol....” When the House’s only response was to refer the petition to the committee on railroads,\textsuperscript{35} one Prudence Cook and others submitted a more sarcastic petition to both bodies:

\begin{quote}
We do not wish to deprive our law-makers of the luxury and benefit, if they so consider it, of the smoke or extract of the pretty plant, when growing, but vile when dried. The danger of such a calamity is not imminent, as it can be procured in not less than one hundred places in the city of Lansing.

Therefore we consider it an outrage on the taxpayers to appropriate any portion of our splendid capitol, costing us nearly two millions of dollars, to the sale of tobacco.

We believe “consistency is a jewel,” and if you will not prohibit the sale of tobacco, why not convert the State house into one grand salesroom and allow every known commodity to be retailed, including the sale of that “poisonous fluid” that the people of Michigan, 70,000 strong, are pleading to have manufactured for sacramental, medicinal, and mechanical purposes only.\textsuperscript{36}

Repling in kind, the Senate Committee on State Capitol and Public Buildings reported that it had hovered around the gentleman who had charge of this branch of legislative business (by request of many members), and brought their pathetic eloquence to bear upon his susceptible nature,—pointed out to him the everlasting ruin of which he was the unwitting promotor and abettor; painted in glowing colors the enormity of his action, and the fearful retribution that was liable to burst upon him at any time with the power and rapidity of an earthquake. To the momentum thus acquired we added our united moral persuasion, and at last the genial gentleman, who had been the humble cause of offense to the petitioners (while contributing to the comfort and satisfying the desires of those members of the legislature who inhale the smoke and extract the juices of the weed that is “pretty when growing, but vile when dried”), graciously informed us that the bright rays of the god of
\end{quote}

\textsuperscript{34}\textit{Journal of the House of Representatives of the State of Michigan: 1895, 2:1230 (Mar. 27)} (1895).

\textsuperscript{35}\textit{Journal of the House of Representatives of the State of Michigan: 1881, 1:437 (1881) (Feb. 22) (Sen. Rule 12)}.

\textsuperscript{36}\textit{Journal of the Senate of the State of Michigan: 1881, 2:716 (1881) (Apr. 15)}.  

60
day and the moonbeams on the waters should no longer be polluted with the aroma of
tobacco sold by him.

[T]he said gentleman has removed his tobacco case from “our beautiful capitol,” and
with smiling and serene countenance meets the frowns and sneers of persons inquiring for
cigars;... and if they insist, politely refers them to the “not less than one hundred places in
the city of Lansing where they can be accommodated.”

... That the cause is gaining ground is manifest by the thousands of cigar stubs that lie
in windrows on either side of the main walk, where they have been thrown by smokers ere
they enter the portals of “our beautiful capitol.”

Progressing from the Senate’s adoption of the committee report, in 1883
Michigan became the first state to enact a rigorous Scientific Temperance
Instruction law. Its passage was due to the vigorous, innovative, and
comprehensive petitioning and lobbying tactics and strategy of the state and
national WCTU, which, as the Michigan Plan, became a model for the
organization’s successful campaigns in many other states. (The state WCTU’s
membership peaked at 8,790 or 4.49 per 1000 residents in 1887, before ebbing for
several years and reattaining that plateau by 1892.) The WCTU also prepared
in Michigan itself a well-functioning network that could advocate for other
related legislation. At that same session both houses adopted resolutions to
prohibit tobacco smoking in their respective chambers. At the next regular
session in 1885, both houses by substantial majorities passed a “bill to prohibit
the use of tobacco by teachers or pupils of public or private schools in and around
school rooms or upon school grounds.” This early and significant imposition

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39 1883 Mich. Pub. Acts No. 93, § 1 at 89. A few months earlier Vermont had enacted
the first such law, but it lacked numerous mandatory features. See below ch. 9.
40 Jonathan Zimmerman, Distilling Democracy: Alcohol Education in America’s
41 Ann-Marie Szymanski, Pathways to Prohibition: Radicals, Moderates, and Social
Movement Outcomes fig. 10 at 176, tab. 19 at 178 (2003).
42 Journal of the House of Representatives of the State of Michigan: 1883, 1:110
(1883) (Jan. 11); Journal of the Senate of the State of Michigan: 1883, 1:302 (1883) (Feb
23) (vote of 26 to 3). The Senate adopted a similar prohibitory resolution in 1887.
(1885) (June 16) (vote of 57 to 17); Journal of the House of Representatives of the State
of Michigan: 1885, 2:1829-30 (1885) (June 16) (vote of 57 to 17); Journal of the Senate
of place restrictions on smoking failed of enactment only because of a procedural/scheduling misstep.\textsuperscript{44}

In 1889, relatively early on in a concurrent nationwide legislative process,\textsuperscript{45} Michigan enacted a statute prohibiting selling or giving cigarettes or any other form of tobacco for smoking or chewing to any minor under 17 years of age (subject to an exemption for written parental orders).\textsuperscript{46} This first statutory intervention would also be the last for twenty years. Much less well known is that at the same session the House of Representatives became the first state legislative chamber in the United States to pass a general anti-cigarette bill applicable to adult men.

The first bill to be introduced prohibited selling, giving, or furnishing tobacco in any form to minors.\textsuperscript{47} As amended and recommended for passage by the Committee on State Affairs, the bill was almost identical with the eventual enactment.\textsuperscript{48} Shortly after this committee action, another bill, H.B. 584, was introduced by Democrat Samuel P. Jackson\textsuperscript{49} of Monroe County, the state’s southeastmost, bordering on Toledo, making the sale or keeping for sale of tobacco to anyone under 17 years of age illegal.

\textsuperscript{44}Three days after both houses had passed the bill, the Senate informed the House that the Secretary of the former had retained the bill until then on notice given by a senator that he would move to reconsider the vote; he apparently never did, and the House tabled the bill the last day of the session. \textit{Journal of the House of Representatives of the State of Michigan: 1885, 2:1337 (1885) (June 16) (vote of 17 to 11)}.

\textsuperscript{45}See below ch. 9.

\textsuperscript{46}1889 Mich. Pub. Acts No. 77, § 1 at 82-83.

\textsuperscript{47}\textit{Journal of the House of Representatives of the State of Michigan: 1889, 1:223 (1889) (H.B. 132 by Jeremiah Rogers, Jan. 29)}.

\textsuperscript{48}\textit{Journal of the House of Representatives of the State of Michigan: 1889, 1:324 (1889) (Feb. 13); File No. 75 H.B. No. 132 (text as furnished by Janice Murphy, Library of Michigan Reference, June 29, 2006)}. The enactment included a willfulness requirement for violations.

\textsuperscript{49}Jackson, who was born in 1817 and had previously served two terms in the New Hampshire legislature, moved to Monroe County in 1883, where he operated a paper manufacturing business and which he represented in the House of Representatives from 1889 to 1892. At the 1880 Census of Population he was returned as a retired merchant living in Manchester, New Hampshire. HeritageQuest. Talcott Wing, \textit{History of Monroe County, Michigan} 354 (1890); Michigan Historical Commission, \textit{Michigan Biographies} 1:438 (1924); \textit{Official Directory and Legislative Manual of the State of Michigan for the Years 1889-90}, at 647 (1889); \textit{Official Directory and Legislative Manual of the State of Michigan for the Years 1891-92}, at 594 (1891).
cigarettes a misdemeanor. A week later the House adopted a resolution offered by Jackson that the Speaker appoint a three-person committee “to correspond with leading members of the medical profession and superintendents of the public schools in this State, with a view to obtaining knowledge of the mental and physical effects caused by the habitual practice of smoking cigarettes.” The next day Jackson was appointed together with Republicans William Baker and Abiram Salisbury. Interestingly, the latter two were both physicians, an occupational status that presumably shaped their attitude toward cigarette smoking by youth. While Jackson’s special committee was at work, the House accepted the report of the Committee on State Affairs recommending that H.B. 584 pass without amendment. It is unclear why, but two weeks later Jackson himself successfully moved to re-refer his bill to the Committee on State Affairs, which then reported it with amendments and a “do pass” recommendation back to the House, which concurred in them. The committee substitute now read:

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53Baker, a member of the House from 1887 to 1890 from Berrien, received his medical education at the University of Michigan and Rush Medical College in Chicago. Official Directory and Legislative Manual of the State of Michigan for the Years 1889-90, at 634 (1889); Michigan Historical Commission, Michigan Biographies 1:42 (1924). In 1889, he unsuccessfully ran for speaker of the house. “Now for the Senator,” EN, Jan. 2, 1889 (1:3-4). Salisbury, a physician, surgeon, and druggist, who was born in 1841 and also attended medical school at the University of Michigan, had also been county physician, superintendent of the poor, and mayor of Midland before his single term in the House. Official Directory and Legislative Manual of the State of Michigan for the Years 1889-90, at 656 (1889); Michigan Historical Commission, Michigan Biographies 2:260 (1924).


First Successes Fail: 1889-1892

SECTION 1. The People of the State of Michigan enact, That any person, or persons, who shall engage in the manufacturing of cigarettes in this state, or any person who shall directly or indirectly, by himself, his clerk, agent or servant, or any agent or traveling salesman, who shall sell or offer for sale, furnish, give or deliver cigarettes composed in whole or in part of tobacco, or any substitute shaped in the form of the cigarette, with or without a wrapper, containing narcotic elements, or any paper known as rice paper, the usual wrapper of cigarettes, or any paper designed or intended for the wrapper of cigarettes, shall be deemed guilty of a misdemeanor.

Sec. 2. Any person, or persons, violating any of the provisions of section one of this act shall be deemed guilty of a misdemeanor, and on conviction thereof by any court of competent jurisdiction shall be punished by a fine of not less than twenty-five nor more than one hundred dollars, and costs of prosecution, or by imprisonment in the county jail not less than ten days nor more than ninety days, or both such fine and imprisonment, in the discretion of the court.57

In the interim Representative Salisbury had a petition from numerous of his Midland constituents printed in the House Journal:

We the undersigned, teachers and pupils in the Midland city schools, watching with deep interest the fate of the bill now before you relative to the sale of cigarettes to minors, do most respectfully petition your honorable bodies to enact such laws as shall tend to check the increasing use of tobacco.

We realize, as perhaps none outside the school-room can, the debilitating and demoralizing effect of tobacco on the minds of children. The victims of the habit are quite likely to fall behind their classes, lose interest in their studies, leave the school and join the army of street loafers.

The effect of our instruction in this matter is often counteracted by those who are allowed to put the tobacco in their hands.

We, therefore, respectfully petition you to enact a law which shall make it unlawful for any person to sell or give tobacco in any form to minors.58

Interestingly, both this petition and the replies solicited by Jackson’s committee focused on the health consequences for minors and did not even allude to the need for cutting off access for adults—even though H.B. 584 was a universal sales ban not limited to minors and the Chicago Tribune called it “an iron-clad bill” that would be “Bad for Michigan Dudes.”59

57File No. 251, House of Representatives, No. 584, Substitute recommended by Committee on State Affairs (Mar. 27, 1889) (copy furnished by Library of Michigan).


59"Bad for Michigan Dudes,” CT, Apr. 8, 1889 (2).
Six and a half weeks after it had been appointed, Jackson’s special committee on the cigarette bill was able to report to the House on the more than 100 replies it had received from school superintendents and a large number of “eminent medical men” in response to the following questions:

1. Have any facts come to your notice which would lead you to form an opinion relative to the subject of the above resolution?
2. Have you reason to believe that the practice is common among the pupils of your schools, or is it confined to a small number?
3. If any are in the habit of smoking the cigarette, do you notice any signs of impaired mental ability to do school work?
4. What effects, if any, have you observed in regard to the health of those who indulge in this habit?
5. If a physician, would you please give your experience and observations and opinion as to the evil effects of cigarette smoking.  

Succinctly summarizing, the special committee commented that the respondents’ “uniform testimony” was that “the effect of the cigarette habit on the young is one that stunts the growth, benumbs the mental faculties, causes nervousness, weakens the action of the heart, etc.” Quoting “from some of the letters received which characterize the answers of all in regard to the effects of the cigarette habit,” the committee highlighted the statement of a “Dr. Hammond, of New York, than whom there is no higher authority,” which was a stereotypical mélange of incipient scientific-medical findings and nonsense:

“That no speedier method for rendering existence painful is more efficacious than to smoke cigarettes and inhale the fumes into the lungs. The action of the brain is impaired thereby, the ability to think, and in fact all mental concentration is weakened. Neuralgia, especially about the face, throat diseases, nasal catarrh, serious affections of the eyes, dyspepsia, and above all, interruption in the normal action of the heart are among the consequences resulting from cigarette smoking. Investigation shows that the cigarettes sold in this country are, as a rule, vilely adulterated and with substances even more injurious than tobacco. In the city of Washington I saw a few days ago, a wretched looking child scarcely five years old smoking a cigarette and blowing the smoke through his nostrils. His pale, pinched face was twitching convulsively, his little shoulders were bent, and his whole appearance was that of an old man.”

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62Journal of the House of Representatives of the State of Michigan: 1889, 2:1204. Oddly, the committee members introduced this quotation by noting that they had “been
Among those replying was Dr. John Henry Kellogg, of Battle Creek, militant anti-masturbationist and later co-inventor of corn flakes, who wrote: “The use of cigarettes is, according to my observation, a growing evil among school boys. I have observed numerous cases of weak heart, nervous exhaustion and general debility in boys and young men due to the use of cigarettes. I am sure that all intelligent parents and teachers will thank you for introducing this bill, and I sincerely hope it will become a law through the action of the Legislature.” The committee also included testimony about children and adults whose cigarette smoking had caused death from blood poisoning or turned them into a “raving maniac.”

Having spared the House a recitation of the full testimony “from the highest authority,” which was “all in one direction” and would have filled “a large volume,” Jackson and his colleagues summarized the evidence as showing that “this habit is increasing daily and its effects are ruinous to the health and morals of the young” and—in verbiage that even newspaper editors could not resist quoting—that if something is not done to stop it, in a few years, instead of having a State inhabited by men such as we have been proud of in the past, men who we are proud of today, men who have made the great State of Michigan what she is today, we will have a State filled with imbeciles.

The special committee then characterized as “inevitable” the conclusion that “the increase of the habit is alarming and that the time has come for radical legislation.” By “radical” Jackson and his two colleague presumably meant H.B. 584, which banned the sale of cigarettes to adults too. The Davenport Morning Tribune commented that the committee’s summary had “astonished” the House, which then by unanimous consent immediately called up the bill for a third reading. The vote in favor was an overwhelming 74 to 3, whose impressiveness was undercut only slightly by the failure of

referred to Dr. Hammond”—as if one of their respondents had merely quoted Hammond rather than Hammond’s having directly replied to the committee.

65 E.g., “Editorial Gossip,” New Era (Humeston, IA), May 1, 1889 (1:1).
68 Against the Cigarette,” Davenport Morning Tribune, Apr. 12, 1889 (2:4).
Jackson’s motion to order the bill to take effect 30 days after its approval. The national weekly organ of the WCTU immediately reported the vote on its front page, but did not claim any credit for passage. The Detroit Evening News poured its editorial sarcasm on the vote, charging that: “Two-thirds of the stories of the dangers of cigarette smoking come from people interested in cigars and smoking tobacco, and most of the other third are pure fiction.” Taking an undifferentiated libertarian-Darwinian position that failed to distinguish between children and adults as well as between the death of cigarettes and of their smokers, the newspaper allowed as there were good and bad cigarettes just as there was good and bad beer and whisky. However:

Prohibiting the good for the purpose of prohibiting the bad is bad political economy. If the people were left alone they would in time discriminate between the good and bad and the bad would die a natural death. But over and above all these considerations, what business is it of the legislature whether people smoke cigarettes or not, good, bad or indifferent?

The Detroit Free Press resented the legislature’s acting in loco parentis and especially in loco patris. Quoting the comment of a New York newspaper directed at a no-cigarette-sales-to-minors bill and trivializing the issue, the Michigan paper concurred that the state had no business forbidding “boys [to] pick[ ] their teeth with forks or to compel them to keep their hair combed, their nails trimmed or their shoes tied....”

Although Republican Governor Cyrus Luce, who had lost many thousands of votes at his re-election because of his “sturdy and uncompromising sentiments in favor of temperance and against the liquor traffic,” had announced that he would...
sign the bill if the Senate—which his party controlled 24 to 8—passed it, its reception there was distinctly less than welcoming. The Committee on Public Health, after recommending that an amended substitute for the House no-cigarettes-for-minors bill do pass, in an extraordinary step for a state legislative committee, actually gave “some of the reasons” influencing its decision:

First, The bill as passed by the House discriminates against tobacco in one of its forms and allows its sale to minors and all other persons in any form except when rolled up into a cigarette. The boy of 5 to 16 years is allowed to purchase with impunity the vile and villainous cheap cigar, containing five to ten times the amount of poor tobacco contained in the ordinary cigarette, and, therefore ten times the amount of nicotine, and yet is forbidden to purchase any amount of tobacco when put in the form of a cigarette. Your committee believe that tobacco in all its forms should be kept from the youth of our land, and therefore submit this substitute.

Second, The House bill provides that no cigarette or any substitute shaped in the form of a cigarette shall be sold to any person. Your committee believes that the bill, if allowed to become a law, would be inoperative and would be evaded, by simply changing the form, and making it up in some different form to evade the above provision.

Third, Under the provisions of the House bill, the tobacco from which cigarettes are made, can be sold to any person either a minor or those of mature years, and would simply put them to the trouble of making them roll their own cigarettes. Your committee believe that not only the so-called deadly cigarette, but the material from which they are made, should be kept from all persons, until they arrive at years of discretion.

Fourth, Your committee has been entirely unable to determine where the cigarette leaves off, and the cigar begins.

Cigarettes are sold upon the market precisely the same shape as a cigar, only smaller, and if the House bill should become a law cigarettes would cease to be sold, but the consumption of small cigars would increase enormously.

Fifth, The House bill prohibits the sale of anything shaped in the form of a cigarette,

1889-90, at 612 (1889).


76 No Cigarettes for Michigan,” CT, Apr. 12, 1889 (7).

77 Journal of the Senate of the State of Michigan: 1889, 1:700 (1889) (Apr. 18). The committee substitute made several changes, but the Senate committee of the whole tabled it, recommending instead passage of the original bill. Id. at 750 (Apr. 24). According to a press account, the vote was 13 to 5. “Fighting a Meat Inspection Bill,” CT, Apr. 25, 1889 (5). The substitute, inter alia, raised the age of legal purchase to 18, made it illegal to “buy for” a minor, and increased the fine and extended the term of imprisonment. File No. 126, Senate, Senate Substitute for House Bill No. 584 (file no. 251), reported by Committee on Public Health (Apr. 18, 1889) (copy furnished by Janice Murphy, Library of Michigan, June 29, 2006).
which would make it a misdemeanor to sell cubebs, rolled in the form of a cigarette, which are used largely for medicinal purposes. For these and other reasons your committee are of the opinion that the substitute offered by them should take the place of the House bill.\footnote{78}{\textit{Journal of the Senate of the State of Michigan: 1889}, 1:700-701 (1889) (Apr. 18).} 

To the extent that the Senate committee detected valid defects and omissions in H.B. 584, they could easily have been remedied by merging the two bills, thus making it illegal to sell any kind of tobacco to minors and cigarettes to anyone. In this way, the starter drug would have disappeared from the in-state market together with the male adult models whom minors might have been tempted to imitate, without infringing on the perceived right of adult men to smoke or chew any other kind of tobacco, which was regarded as a lesser risk of adolescent uptake. Perhaps many legislators did advocate this twofold approach: not only did the House by a 53 to 30 vote pass its no-tobacco-for-minors bill two weeks after passage of H.B. 584,\footnote{79}{\textit{Journal of the House of Representatives of the State of Michigan: 1889}, 2:1414-15 (Apr. 25).} but immediately after the Senate had passed the House no-tobacco-for-minors bill by a vote of 20 to 8, it voted 17 to 9 to postpone indefinitely consideration of H.B. 584, thus dealing it a mortal non-concurrence.\footnote{80}{\textit{Journal of the Senate of the State of Michigan: 1889}, 1:815-17 (May 7); \textit{Journal of the House of Representatives of the State of Michigan: 1889}, 2:1527-28 (May 8).} 

The Michigan WCTU was disgusted with, but not surprised by, the government’s abject failure to enforce the no-sales-to-minors law. Nevertheless retaining her sense of humor, the press superintendent for the Flint district in early 1891 mocked the efforts to pass the bill and the all too foreseeable return to the status quo:

“It is quite amusing to see how some of the laws passed by Michigan’s law-makers are quietly and tacitly ignored on all sides. At the last session a furor was created over the injurious effect of cigarette smoking on young boys. Wise scientists and deep thinkers were called upon to advance opinions. Lobbying delegations were set to work to pass that bill alone. No effort was spared to do all that was possible towards a law that was to rescue the small boys from the pernicious influence of the brain softening cigarette that is
capable of such disastrous results. Statesmen worked themselves into frenzies in
denunciation of the terrible pest, and at last the law was safely piloted through. Fathers
and mothers heaved sighs of relief and the state rejoiced. The coming generation was
saved to posterity! It was a glorious record.

But the result was hardly proven worth the cost. For a time the venders of the weed
may have adhered strictly to the law, but as days passed their consciences relaxed as to the
probability that any one would sue them, and in a few months the sale of the all-powerful
cigarette was as vigorous as before, and now no pretense whatever is made toward even
the merest observance by the dealer. Fenton’s streets are thronged with the cigarette
smoker in his teens, and he buys his weed at the shops as brazenly as the oldest. Nine, ten,
twelve or fourteen years of age, it makes no difference; the youngest is served as promptly
and with as much desire for the continuance of his custom as the man who buys a cigar,
and no one dreams of a prosecution.”

This anonymous ironic critic was not at all reticent about assessing gendered
blame and promising gendered reform:

“The women of the W.C.T.U. never encounter a...small boy smoking or chewing the
forbidden weed, but some man or small boy reminds us of our duty as a member of the
W.C.T.U. ... Ever since Adam’s transgression, the women have been shoved to the front
to do the work of renovation which men stood in fear of. We are ready to obey the
mandate; the women know no fear, for their hands are clean of this law-breaking, soul-
defiling, home-destroying and heart-breaking curse.”

In the event, 1889 marked Michigan’s closest approach to enactment of a
radical cigarette sales ban, but in 1897, the year after the successful initiative in
Iowa, the anti-tobacco movement in Michigan launched another vigorous

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in an untitled paper by the unnamed superintendent). Fenton is a small town about 10
miles from Flint.
83 On Feb. 21, 1893, Republican Charles H. McGinley of Minden City introduced S.B.
344 in the Senate to regulate the sale, manufacture, and use of cigarettes, but on his own
motion the bill was tabled that same day. (The Library of Michigan lacks this bill: “This
most likely means that the bill never made it out of committee. During that era, it was the
committees that wrote the bills and they did not get file numbers until they requested
them.” Email from Janice Murphy, Library of Michigan (Nov. 27, 2006).) Later that day
he introduced S.B. 422, prohibiting the sale or the keeping or offering for sale of
 cigarettes, so called, or any similar article, which was read a first and second time and
referred to the Judiciary Committee. Section 1 of the bill provided: “That it shall be
unlawful for any firm, partnership corporation, person or individual within the jurisdiction
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legislative effort. Unsurprisingly, the state WCTU’s officers and members played a prominent role in petitioning the legislature to take action.\(^{84}\) One of these petitions, submitted by the organization’s superintendent and superintendent of narcotics and several hundred of its members as well as by scores of Christian ministers and school principals and teachers, was published in the *Journal of the House of Representatives*:

> Inasmuch as deterioration of character and health of our citizens must seriously interfere with national prosperity and security, and believing from the numerous and increasing instances of death and insanity resulting from the cigarette habit that the future of our public is greatly endangered thereby; therefore, we...do earnestly pray that your honorable body enact such a law as shall forever prohibit the manufacture and sale of cigarettes within the limits of the State jurisdiction, with all needful provisions for enforcement of the same.\(^{85}\)

Many of these WCTU petitions—including the one quoted—were presented by Republican Representative Fremont C. Chamberlain, an attorney from the western end of the Upper Peninsula, a mining and forestry region, who also introduced the principal bill and led the forces seeking passage.\(^{86}\) Chamberlain’s
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advocacy of a prohibition of the sale of cigarettes was presumably strongly influenced by his experience as a school teacher for 12 years before becoming a lawyer.\textsuperscript{87}

Several bills were introduced in the House. House Bill No. 3 modestly provided for the “taxation and regulation of the business of manufacturing, selling, keeping for sale, furnishing, giving or delivering” cigarettes, cigars, or tobacco to minors.\textsuperscript{88} House Bill No. 268 outright prohibited those activities (except manufacturing).\textsuperscript{89} House Bill No. 416 prohibited the same activities (including manufacturing) but only with regard to cigarettes.\textsuperscript{90} Several weeks after the last of these bills had been introduced, the House adopted the recommendation of the Committee on Public Health to substitute a consolidation of H.B. No. 416 and H.B. No. 268.\textsuperscript{91} After the sponsor of H.B. No. 416 had successfully moved to refer the bill back to committee,\textsuperscript{92} the House, without a roll call vote, adopted a new committee recommendation that imposed H.B. No. 3’s limitation to minors on H.B. No. 268/416.\textsuperscript{93} After surviving a motion to strike out

\textsuperscript{87}Michigan Historical Commission, \textit{Michigan Biographies} 1:159 (1924). Chamberlain was a House member from 1893 to 1900.

\textsuperscript{88}\textit{Journal of the House of Representatives of the State of Michigan} 1897, 1:103 (1897) (Republican William D. Kelly, Jan. 13).

\textsuperscript{89}\textit{Journal of the House of Representatives of the State of Michigan} 1897, 1:362 (1897) (Fusionist Dewitt Vought, Feb. 9).

\textsuperscript{90}\textit{Journal of the House of Representatives of the State of Michigan} 1897, 512 (1897) (Fremont C. Chamberlain, Feb. 17).

\textsuperscript{91}\textit{Journal of the House of Representatives of the State of Michigan} 1897, 2:1030 (1897) (Mar. 10). The wording of the title of the consolidated bill was identical with that of No. 416. A week later \textit{The New York Times} ran in its “What the Papers Say” column a piece from the Chicago \textit{Chronicle} erroneously claiming that “Michigan has not only prohibited the manufacture of cigarettes, but their sale and use.” The paper went on to comment: “Of course, if legislators wish to amuse themselves by passing such laws, there is nothing to prevent them, but the measures will never stand the test of any court of review.” “Anti-Cigarette Laws,” \textit{NYT}, Mar. 19, 1897 (6). A Michigan paper also claimed that the House Public Health Committee had “agreed to favorably report a most sweeping anti-cigarette bill” that prohibited manufacture, sale, or use: “They cannot, under this bill, be brought into the state.” “Finding Fault,” \textit{Marshall Statesman}, Mar. 19, 1897 (2:1).

\textsuperscript{92}\textit{Journal of the House of Representatives of the State of Michigan} 1897, 2:1374-45 (1897) (Mar. 25). It is unclear why Fremont Chamberlain wanted to “discharge the committee of the whole from the further consideration of” the consolidated bill. \textit{Id.} at 1374.

\textsuperscript{93}\textit{Journal of the House of Representatives of the State of Michigan} 1897, 2:1533-34
the section providing for punishment of minors who illegally bought cigarettes, consolidated H.B. 268/416/3 was agreed to by the overwhelming majority of 72 to 5. As passed, the bill provided, according to the next day’s news account, that “any boy under 17 caught using tobacco in any form or any youth under 21 found using cigarettes” was subject to escalating fines and, after repeated violations and a finding of incorrigibility, to 90 days’ incarceration in county jail or the Industrial Home.

Now diluted to a ban on sales to minors only, the bill was sent to the Senate, which had already similarly watered down its own S.B. 148, but referred it back to committee without having voted on it. By a unanimous vote of 28 to 0 the Senate then agreed to the House bill as amended by the Senate Public Health Committee. By a vote of 67 to 10, the House concurred in the Senate amendments, the chief of which appears to have been lowering from 21 to 17 the age below which the aforementioned punishment applied.

On taking office as governor in 1897, the progressive urban social reformer Hazel Pingree, who had been mayor of Detroit from 1890 to 1897, faced a state legislature that “was overwhelmingly Republican and was not favorably disposed to reform; like its G.O.P. predecessors in 1893 and 1895, it was a bulwark of conservatism.” Though a Republican himself, he had become anathema to many businessmen in Detroit, and powerful economic interests looked especially to the state Senate to quash bills imposing railroad regulation and equal taxation of corporation property, and stricter factory inspection and child and women labor regulation that Pingree might push through the House of Representatives.

As mayor of Detroit, Pingree the socio-economic reformer had ignored the

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(1897) (Apr. 8). Neither the House Journal nor the Detroit Free Press shed light on why the House made this crucial change.

(1897) (Apr. 22).

“IT WAS EASY!” DFP, Apr. 23, 1897 (1:3-4). Unfortunately, neither the legislative journals nor the newspaper printed the verbatim text of the bill.

(1897) (Apr. 27-28).

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“[m]oral questions” to which civic uplift groups gave priority. Thus he “had no desire to enforce the Sunday saloon-closing law, and prostitution was tolerated by his administration as a ‘necessary evil.’” He also vetoed the school board’s adoption of bible readings for the curriculum because he eschewed the religious strife that such a program would trigger between proponents, on the one hand, and opponents, on the other, among Jews, Catholics, thousands of German atheists, and some Christians.101

As governor, Pingree appears to have pursued a similar course, which was amply on display in his (expected)102 veto message of May 10, explaining why he was returning without his approval the consolidated bill prohibiting the sale of tobacco to or use of tobacco by minors under the age of 17. (Remarkably, at the beginning of the year press reports circulated that the governor-elect had expressed the belief that “‘a law ought to be passed to put into jail not only the man that sells cigarettes, but the one that is caught smoking them. If they pass such a law I’ll sign it.’”)103 He preferred the existing law as “more carefully guarded” on the grounds that the proposed bill would not permit “children...even on the written orders of their parents...to be used as messengers to buy tobacco in any form.” Pingree failed to explain how he reconciled his support for the existing exemption for parents with his “full sympathy with” the bill’s intended impact on “those of full age who throw any temptation of the kind covered by the bill in the way of children.”104

In particular to section 3, which imposed a series of escalating fines on repeat-offender boys under 17 years of age who bought or were given tobacco culminating in imprisonment in the county jail or Industrial Home for Boys for the fourth offense, Pingree, who in general held advanced penological views,105 reacted intensely negatively:

I have already expressed my opinion as to the arrest and imprisonment of children, and the

102 “Fool Him!” DFP, May 11, 1897 (1:7).
103 “Cigarette Smoking,” Lowell Sun, Jan. 8, 1897 (8:3). Later in the month a Michigan paper stated that an anti-cigarette bill “severe enough to suit even Governor Pingree” would be presented to the legislature that made it a felony to sell, use, or possess cigarettes subject to one year’s imprisonment. “Brevities,” Daily Chronicle (Marshall, MI), Jan. 27, 1897 (3:1).
probable effects of such arrest and imprisonment upon their future lives. I believe it to be the duty of the State to guard them in every possible way against temptation. The sale of cigarettes or any other article by which children are tempted to injure themselves, should as far as possible, be prohibited. The remedy for the evils aimed at is the punishment of those of full age who are concerned in the transaction, and who make money by it, regardless of the injury that it may do to others, instead of the arrest of those who are so young that they do not appreciate the nature of crime, and who may be turned into criminals by forced association with them.106

Although Pingree accepted that both the existing law and the bill were aimed at an “evil” and he appreciated the proposal’s “good intentions,” he bridled at branding as criminals children below the age of 17 and their forced association with criminals in jail. Even the fine, which was large enough to make it impossible for children to pay and thus would be borne by parents, would serve only to bring the former into “public disgrace.” In the case of a boy convicted of a fourth offense and imprisoned in county jail or the Industrial Home, “all hope for the boy’s future life is ended.” Then veering off onto the moralistic course he had apparently avoided as mayor, Pingree bemoaned that once jailed, such boys “will be removed from the sacred associations of home. They must even worship God under guard.” Pingree’s otherwise plausible belief that “[i]n most cases, boys who indulge in mischievous habits reform themselves when they reach an age where the importance of taking care of themselves and securing the respect of others becomes apparent to them” appeared inappropriate as applied to an addiction that the anti-cigarette movement had correctly identified as so powerful that its prevention was vastly preferable to trying to cure it. The governor also had recourse to a trope that over time became a refrain (albeit directed at adults) among many who advocated substituting licensure for the prohibitionist regime: “Every child should be taught that law is sacred, and that the statutes of the State are entitled to obedience and respect. To teach this lesson we must avoid making laws which are easily evaded and which, on account of their severity, are not respected.” Finally, Pingree revealed his socio-economic reformist colors by insisting that: “The real criminals are those who manufacture and sell the articles named, instead of the children who are tempted and yield to the temptation.”107

Yet the governor formulated no plan of his own incorporating even sharper fines against commercial violators. Whether Pingree the social reformer would have approved a straightforward Iowa-type general prohibition of the sale of

cigarettes as embodied in the original bill shorn of penal sanctions for children is unknown.

As soon as Pingree vetoed the bill, the Independent Women Voters’ Association petitioned the House to pass the bill over his veto. Another organization of independent women voters of Detroit presented a similar petition, urging passage in order to create “a great, good and moral condition of our city.” Representative Chamberlain led the forces seeking an override. The House devoted half an hour, according to the sarcastic account in the Detroit Free Press, to “an attempt to pass the bill to jail boys for smoking cigarettes.... There were many women in the audience, and the effort of the Gogebic representative [Chamberlain] smacks of grand stand play. He tore the air a while and...managed to get about one-fourth of the votes cast.”

In his exaugural message in 1901, Pingree—who at a banquet he had given in December to end his political career barred cigarettes—attacked “the present system of unjust, inequitable and iniquitous laws” which redounded to “the detriment of the great masses of the laboring classes and farmers and those of small properties who are unable to speak and act for themselves,” and predicted that “unless those in charge and in whose hands legislation is reposed do not [sic] change the present system of inequality, in less than a quarter of a century there will be a bloody revolution in this great country of ours.”

In contrast, Pingree’s conservative successor, Governor Aaron Bliss, whose central message was economy in appropriations, exhorted the legislature at the

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111 “Pingree to Give a Banquet,” CT, Dec. 18, 1900 (2). Nevertheless, in an invitation to senators Pingree mentioned that during the previous year he had “enjoyed the best cigaret I ever smoked” at the McKinley White House, where “[o]f course...I had to take it. I will have some tonight.” “Pingree Jokes at Court,” CT, Dec. 19, 1900 (1).
112 Journal of the House of Representatives of the State of Michigan 1901, 1:85 (1901) (Jan. 3). See also “Pingree Says Farewell,” NYT, Jan. 4, 1901 (5).
114 “Pingree Says Farewell,” NYT, Jan. 4, 1901 (5).
in the conclusion of his inaugural message immediately following Pingree’s: “Firmly believing that the growing use of cigarettes is a menace to the youth of Michigan, I call the attention of the legislature to the evil, and advise the most stringent legislation possible, in order that the sale of cigarettes may be discouraged if not prohibited.” In an interview Bliss offered some background information shaping his boy-centered position:

“In a general way I have known that the continued use of cigarettes has a very demoralizing effect upon the victims of the habit. It requires no wonderful power of observation to bring one to that conclusion.

As a rule, and possibly because of the very cheapness of the article, the cigarette is responsible for the acquirement of the tobacco habit by a large number of boys, and it is quite likely that many of them would defer contracting the habit were it not for the existence of the noxious article. ...

I confess that the spectacle of a small boy puffing at a cigarette gives me a shock every time I see it. ... It is a habit that is rarely broken, a fact which demonstrates that the use of cigarettes is more dangerous than other habits.

We surround the sale of liquors with restrictions so that the young man may not acquire the habit, but the cigarette is to be had everywhere. The boy who sells papers for a living may buy them, and in the very nature of the article they cannot be kept away from the youth so long as they are to be sold.

It is a great evil and the state should do everything possible to prevent it.”

Because Bliss’s wife was “actively connected with the management of the Industrial Home for Girls at Adrian...quite a large proportion” of whose inmates were said to be “habitual users of the cigarettes” who “rarely yield to the efforts for reformation,” Lucy Page Gaston’s Anti-Cigarette League prematurely took heart: “With such a man and woman in the gubernatorial mansion, Michigan should lead the nation in the work of protecting the youth from this arch fiend.”

The new governor’s recommendation, according to a somewhat inaccurate account in the Chicago Tribune, prompted the introduction of several bills, one of which sought prohibition, whereas the authors of two others, which imposed license fees of $50 and $200, respectively, believed that “more good can be accomplished by limiting the sale of the articles to as few as possible. The argument is that the great damage to the health of boys is accomplished through

117 “Governor Bliss Against Cigarettes,” Boy 2(1):9 (Jan. 15, 1901).
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the sale of cigarettes by every little corner dealer in small lots.”

Editorialists elsewhere took note and heart: “The war on cigarettes takes on new importance when the governor of a state in his inaugural address recommends legislation which will prohibit their sale...” But the initiative nevertheless came to nought. One bill introduced in the House of Representatives shortly after the inaugural proposed prohibition of sales and manufacture of cigarettes, while another included cigarette paper. The latter’s author also introduced a measure to license the sale, keeping for sale, or giving away of cigarettes in original packages subject to penalty for violations. The latter two made no progress, but, after undergoing “sundry amendments,” the first, now prohibiting “the sale or giving away of cigarettes or cigarette paper to any person in the State of Michigan,” passed the House by a unanimous 77 to 0 vote, but the Senate non-concurred in it.

Similarly, in 1905 a bill to regulate the manufacture and sale of cigarettes passed the House by a vote of 70 to 1 (while one to prohibit the same died there), but when the Senate tried to substitute a prohibition bill for the House regulation bill, it lost 14 to 16. Not until 1909 did Michigan finally enact a

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119 Colorado Transcript (Golden), Mar. 6, 1901 (2:1) (untitled edit.).
126 Journal of the House of Representatives of the State of Michigan: 1905, 1:360, 388,489, 501, 789-90, 806 (1905) (H.B. 401 and 429) (by Ming and Gordon). According to “Adopts Anti-cigarette Bill,” Washington Post, Mar. 31, 1905 (1:6), Ming’s bill to regulate would have “prohibit[ed] the sale and use of cigarettes” and was similar to the one that had just passed in Indiana.
127 Journal of the Senate of the State of Michigan: 1905, 1:326, 654, 796-97,822-23 (1905) (S.B. 203 and 114); Journal of the Senate of the State of Michigan: 1905, 2:1158-59 (1905). In 1907 the House by a vote of 43 to 3 defeated a bill that would have
more stringent law, albeit limited to cigarettes, lifting the age to 21 below which it was illegal to sell or give to anyone.128 Michigan also adopted the provision proliferating among the states making it unlawful for those under 21 to smoke cigarettes in public subject to a judicially discretionary punishment of a maximum of $10 or five days in county jail, which had triggered Pingree’s veto.129 Like other states, Michigan, too, refusing to “interfere” with parental “rights” to undermine their children’s health, carved out an exemption from the criminalization of those who harbored and aided and abetted underage smokers on their property for parents and guardians “in the rearing and management of their minor heirs or wards within the bounds of their own private premises.”130 Repeated attempts were made in the 1910s to enact a general anti-cigarette bill, but the bills were never able to pass both houses of the legislature.131

The First Southern Chamber to Pass a Sales Ban: Arkansas Senate 1891

John Watham; Montgomery County, Circuit Court; convicted, October, 1908, embezzlement; penalty imposed 2 years in penitentiary; action by Governor, pardoned; date of action, August 19, 1909; reason, pardon granted on recommendation of Judge, Prosecuting attorney, and Sheriff, and on showing made that this party is cured of cigarette habit which is alleged caused him to commit this crime.132

practically suppressed the sale of cigarettes “Anti-Cigarette Bill Killed,” USTJ, May, 25, 1907 (7:4).

1291909 Mich. Pub. Acts No. 226, § 3, at 411-12. The judge could suspend the sentence if the minor informed on whoever furnished him with the cigarettes and that person was convicted. This proviso was repealed six years later. 1915 Mich. Pub. Acts No. 31, at 42.
Arkansas experienced considerable turmoil during the 1880s as economic disaster pushed 75,000 farmers, organized as the Agricultural Wheel, to advocate, on the state level, for railroad, telegraph, and telephone rate regulation, a usury law, an end to convict labor and corporate employment of armed men, and prohibition. Democrats’ failure to accommodate these demands legislatively prompted the Wheel to build a class-based third party with blacks and labor unions, which came to fruition in 1888, in the wake of the Democratic governor’s assistance in breaking a railroad strike in 1886, with the support of the Knights of Labor in the form of the Union Labor Party. In addition to demanding state intervention to regulate corporations and mines, end convict labor, and limit immigration of Chinese laborers, the new organization attacked Democrats by calling for the elimination of the electoral fraud in which they had pervasively engaged. Although on a fusion ticket Republicans supported the Union Labor gubernatorial candidate in 1888—an election at which the third party came closer to ousting the Democrats from political power than would occur for decades, and UL won 15 and Republicans 11 seats in the gerrymandered 95-member House and only failed to gain more because of the white supremacist Democrats’ electoral fraud—the fused parties’ legislative representation slipped in 1890. With some farmers objecting to the alliance with Republicans, they instead formed an Arkansas branch of the (Southern) Farmers’ Alliance, whose analysis of agricultural distress and the “brutality of industrial capitalism” facilitated its morphing into the People’s Party by 1892.133

In 1889 the Arkansas legislature had enacted a relatively weak statute prohibiting selling or giving away tobacco in any form to anyone under 15 years of age.\textsuperscript{134} Apparently, however, even this very limited intervention was excessive for a majority in the House, which in 1891 voted 37 to 25 to repeal the no-sales-to-juveniles law.\textsuperscript{135} In contrast, for their own sake, members did not care to be exposed to tobacco smoke, as witnessed by the chamber’s governing rules, which provided that: “Smoking in the House during session hours is strictly forbidden.”\textsuperscript{136}

The repeal bill was introduced by Tom Miller Mehaffy, a Methodist, lawyer,\textsuperscript{137} and future Arkansas Supreme Court justice, who, as a senator in 1893, would play a prominent pro-tobacco role.\textsuperscript{138} Also a member of the Little Rock school board, “this patriarch of the bench and bar” would later be extolled as “one of the most public spirited citizens of the state.”\textsuperscript{139} Remarkably, of the chamber’s 10 black Republicans, eight voted against the repealer and not a single one voted for it, while the only two white Republicans supported the bill and the four white Union Laborites split.\textsuperscript{140} Mehaffy’s backward-looking initiative came to nought,

\textsuperscript{134} 1889 Arkansas Acts ch. 21, at 20.
\textsuperscript{137} Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1890, at 78 (1891).
\textsuperscript{138} See below ch. 6.
\textsuperscript{139} Among Arkansas Leaders 14 (Lex Davis comp., H. Barnes. ed. n.d. [1934]). In various official and unofficial contemporaneous documents his name was spelled both “Mehaffy” and “Mehaffey.”
\textsuperscript{140} Journal of the House of Representatives, State of Arkansas: Twenty-Eighth Session, 139-40 (Jan. 26) (1891). The sole black Democrat, B. F. Adair, did not vote. Five of the 13 Democrats opposing repeal were Methodists, but only six of 33 Democratic supporters were.
however, when, a week later, the Senate—which also operated under a no-smoking rule\textsuperscript{141}—by a vote of 17 to 7, supported a motion by Edgar Kinsworthy (who in the next session would play a significantly different part in shaping the course of a general cigarette sales ban bill) to postpone the bill’s discussion indefinitely.\textsuperscript{142}

In the meantime, in a Senate massively majoritized by Democrats, who controlled 29 of 32 seats,\textsuperscript{143} 33-year-old Democrat Samuel A. Miller, a lawyer and Methodist,\textsuperscript{144} introduced Senate Bill No. 105 “to prohibit the sale of cigarettes and cigarette packages [sic] in the State of Arkansas.”\textsuperscript{145} Son of a large (1,000-acre) land owner, Miller had attended the state university for two years before teaching school in 1875 and then served a law office apprenticeship in his hometown of Van Buren, a town in northwestern Arkansas about a fourth the size of Little Rock. He was an active member in the Methodist Episcopal Church South,\textsuperscript{146} which in 1844 had split off from the national church over slavery\textsuperscript{147} (when “the Northern majority resolved that slavery was a moral sin and therefore came within the purview of the church and that bishops of the church could not be slaveholders”).\textsuperscript{148} Less than two weeks after its introduction the full Senate passed the bill on third reading by a nearly unanimous vote of 21 to 1, the lone

\textsuperscript{141}Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1890, at 241 (1890) (Rules for the Government of the Senate of Arkansas, Rule 41) (“nor shall smoking be allowed during sessions of the Senate”).

\textsuperscript{142}Journal of the Senate of Arkansas: Twenty-Eighth Session 135 (Feb. 3) (1891).

\textsuperscript{143}Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1890, at 76 (1891) (one Republican and two Union Laborites occupied the other seats).

\textsuperscript{144}Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1890, at 76 (1891).

\textsuperscript{145}Journal of the Senate of Arkansas: Twenty-Eighth Session 104 (Jan. 29) (1891). The word “packages” was apparently a typographical error, which Miller offered an amendment to change to “papers” on second reading and which the Senate adopted. Id. 182 (Feb. 9).


\textsuperscript{148}Paul Buck, The Road to Reunion: 1865-1900, at 58 (1937). In reaction, southern delegates declared the necessity of forming a separate southern church “to enable them to perform their proper function of preaching the gospel to a slave-owning community.” Such a church was established in 1846; similar divisions sundered the Baptist and Presbyterian churches. Id. at 58 (quote), 59-61.
Nay being cast by another Democratic Methodist lawyer. Unsurprisingly, given the House’s attempted repeal of the no-sales-under-15-year-olds law, the House killed S.B. No. 105 by referring it to the Practical Medicine Committee, whose recommendation that it not pass was the chamber’s final action. However, the anti-cigarette forces did not abandon this struggle, and two years later came much closer to achieving this objective.

In the meantime, they undertook one further tobacco control measure: when a bill to require the teaching of history in schools reached the Senate floor, Kinsworthy offered an amendment to add this required subject: “Physiology and hygiene with special reference to the action of alcohol and tobacco upon the human system.” This mandate, which was part of the WCTU’s Scientific Temperance Instruction program, which by the end of the century would be enacted in every state, was in fact more stringent than most laws in that it specifically mentioned tobacco. Indeed, when the Arkansas legislature finally

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149 *Journal of the Senate of Arkansas: Twenty-Eighth Session* 191-92 (Feb. 10) (1891). Benjamin Harris cast the Nay.

150 A Methodist Episcopal church newspaper in neighboring Louisiana incorrectly reported that the Arkansas legislature had enacted a law to prohibit the sale of cigarettes and cigarette papers. “General News Items,” *Southwestern Christian Advocate* (New Orleans), Mar. 19, 1891 (3:2).


152 *Journal of the Senate of Arkansas: Twenty-Eighth Session* 248 (Feb. 18) (1891).

153 See below ch. 9. The role of the WCTU in Arkansas in anti-cigarette legislation is unclear. Although a state organization was founded in the late 1870s and was involved in women’s suffrage and anti-liquor campaigns, the formation of the male Arkansas Prohibition Alliance in the 1880s, which excluded women, diminished the latter’s participation.
Passed its in 1899, the prescribed subjects encompassed only alcoholic drinks, stimulants, and narcotics. However, in 1891 not even a majority of the Senate favored it: Kinsworthy’s motion was tabled by a motion offered, bizarrely, by, of all senators, the chief general sales ban advocate, Miller. Presumably it was not coincidental that Kinsworthy’s mother-in-law, Mrs. F. L. Sutton, was the Arkansas State WCTU’s corresponding secretary.

To be sure, these abortive forays into tobacco regulation were only a sideshow to what, together with the bill to constrict voting by blacks (and poor whites), was the session’s legislative pièce de résistance—Arkansas’ contribution to the first wave of Jim Crow enactments, which segregated railway coaches in the majority of southern states between 1887 and 1891. Ironically, one of the practical roots of this movement was tobacco use on railroads, the networks of which proliferated in the South during the 1880s: “Trains ran cars of two classes: in the first-class car rode women and men who


154 1899 Arkansas Acts ch. 52, at 81.
156 Woman’s Chronicle 5(47):5 (Jan. 21, 1893) (untitled).
159 C. Vann Woodward, Origins of the New South, 1877-1913, at 212 (1971[1951]). Woodward perceived segregation on railways as an example of a paradox of southern history—namely, that racially discriminatory barriers increased in tandem with the rise of political democracy for whites, the late 1880s and early 1890s being “the years when the Farmers’ Alliance was first making itself felt in the legislatures of these states.” Id. at 211-12.
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did not use tobacco, while in the second-class car rode men who chewed or smoked, men unaccompanied by women, and people who could not afford a first-class ticket. To travel in the second-class car was to travel with people, overwhelmingly men, who behaved very differently from those in the car just ahead. The floors were thick with spit and tobacco juice, the air thick with smoke and vulgarities. The “problem” presented by railroads to a white-supremacist society lay in the fact that blacks were “seeking first-class accommodations where women as well as men traveled, where blacks appeared not as dirty workers but as well-dressed and attractive ladies and gentlemen.” The bill’s introducer, Senator John Tillman, confirmed this viewpoint by sarcastically rejecting the “objection...urged by the colored people to this measure...that it does not compel railroads to provide first and second class fare on their lines, so that there may given to the better class of negroes an opportunity to avoid riding with inferior specimens of their own race. They insist upon a setting up of class distinctions which the white people will not attempt for themselves. ... They say they want those who never use soap separated from those who do use soap. They want us to draw the soap line. [T]he negro should not become too aggressive nor too bold to dispute the evident superiority of his white neighbor.” Senate Bill No. 2 required railways to provide “equal but separate and sufficient accommodations for the white and African races, by providing two or more passenger coaches for

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160 Edward Ayers, The Promise of the New South: Life After Reconstruction 137 (1993 [1992]). In the wake of Tennessee’s passage in 1891 of a law requiring railroads to provide racially segregated cars two black men complained that they and their families had to run a gauntlet of smoke and tobacco juice when boarding trains because their section was divided by a partition from the white smoking area. Rogert Hart, Redeemers, Bourbons, and Populists: Tennessee 1870-1896, at 164 (1975).

161 Edward Ayers, The Promise of the New South: Life After Reconstruction 140 (1993 [1992]). During House floor debate on the Arkansas railroad seating segregation bill, R. C. Weddington, a black Republican and teacher, observed that “the more he ["the negro"] educates his taste, it seems the more obnoxious he becomes....” Weddington opposed the bill “because we do not believe that we will get equal accommodation as the bill requires.” He based this belief on his personal experience with the operation of such a law in Mississippi, where the cars set aside for “colored people” were “as filthy as the most filthy place I ever saw....” Nevertheless, the “persons belonging to the white race, who seek seats among the colored people, are not your best people, they are not your aristocrats, but are those among you...known as ‘subordinates and inferiors’—those addicted to immoral habits, such as drunkenness, profanity and profligacy.” “Legislative,” AD, Feb. 18, 1891 (6:1-5 at 2).

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each passenger train” and imposed a fine of $10 to $200 for any person “insisting on going into a coach...to which by race he does not belong....” Segregational line-drawing was supposed to be enabled definitionally by providing that a person in there was a “visible and distinct admixture of African blood shall...be deemed to belong to the African race....” The bill passed the Arkansas Senate on January 29 by a vote of 26 to 2, the Nays being cast by the sole Republican, George W. Bell, who was black, and one of the two Union Laborites. The House followed suit on February 17, 1891, by a strict party-line vote of 72 to 12, all the Republicans (10 of whom were black) accounting for all of the Nays, whereas even the three voting Union Laborites all supported the Jim Crow law.

The First Legislative Chamber to Pass Both a Sales Ban and a Public Smoking Ban: Pennsylvania House 1891

Again, a bill to regulate the sale of cigarettes to the small boys pops up serenely. ... The Oil City Blizzard says...it will probably be passed, and then sink softly into the same innocuous desuetude which pervades the blue law statute which makes it a crime for a man to kiss his wife on Sunday. If the small boy wants to smoke he will get there in spite of the Pennsylvania legislature or any other August body, and will calmly puff his lung destroyer in the face of the most awful decrees which it is in their power to enact.

An Act for the protection of the health of persons addicted to the smoking of cigarettes.

Even more so than their counterparts in other states, by the time the

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163 1891 Arkansas Acts ch. 17, §§ 1, 2, and 4, at 15, 16, 17. Black House Republicans taunted their white racist Democratic colleagues by offering amendments that, inter alia, added coaches for the Mongolian, Malay, and Indian races (S. Dawson) and defining persons in whom there were “visible signs of white blood” as “belonging to the white race” (H. Williams). Journal of the House of Representatives, State of Arkansas: Twenty-Eighth Session 187 (1891).

164 Journal of the Senate of Arkansas: Twenty-Eighth Session 106 (Jan. 29) (1891). The other Union Laborite voted Yes.


166 Warren Ledger, Feb. 27, 1891 (4:1) (untitled edit.).

167 1903 Pennsylvania Laws No. 110, at 154. This very brief statute, which recited that cigarette smoking was injurious to the health of the young, imposed a fine of $100 to $300 for selling cigarettes to anyone under 21.
Pennsylvania House and Senate began considering radical prohibitory anti-cigarette legislation in 1891, a majority of their members had long displayed a lack of tolerance for exposure to tobacco smoke at their workplaces. Ever since 1881, Senate Rule 43 had read: “No person shall be permitted to smoke tobacco within the Senate chamber during the session of the Senate.” 168 Far hoarier was House regulation of smoking. On December 13, 1816, a week after it had been appointed to prepare rules for the government of the House, a committee presented its report, which included Rule XXX: “It is not permitted to any person to smoke segars at any time within the bar of the House.” 169 When the full House considered the rules on December 18, most did not require discussion, but Rule XXX was the subject of extensive debate. The House agreed to a motion by Democrat Samuel Bond and Federalist Michael Graeff to substitute “chamber” for “bar”—a change that spatially expanded the scope of the smoking ban. More significant was the motion by Philadelphia County Democrats William Rogers and John Neff (both of whom voted for the rule) to substitute “tobacco” for “segars”; by agreeing to this change the House universalized the smoking ban. Finally, the House further demonstrated its will not to dilute the ban when it disagreed to the motion by Democrats Ner Middleswarth and William Anderson (both of whom voted against the rule) to cut back coverage by limiting the operation of the ban to times “when the house is in session.” On a roll call, the House adopted the rule as amended by a vote of 66 to 23, Federalists voting somewhat more heavily in favor than Democrats (79.3 percent versus 71.7 percent); three of the four voting representatives from Philadelphia, the country’s second largest city, voted Yea, as did both physicians in the House. 170 When the House began considering anti-cigarette measures in 1891, its own internal Rule 44 still provided that: “It is not permitted to any person to smoke tobacco, at any time, within the chamber of the House.” 171

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171 Smull’s Legislative Hand Book and Manual of the State of Pennsylvania: 1891, at 609 (Thos. Cochran comp.). See also Journal of the Twenty Ninth House of Representatives of the Commonwealth of Pennsylvania 68 (Rule XXVI) (1818-19). “The Rules for the Government of the House of Representatives of the Commonwealth of Pennsylvania House and Senate began considering radical prohibitory anti-cigarette legislation in 1891, a majority of their members had long displayed a lack of tolerance for exposure to tobacco smoke at their workplaces. Ever since 1881, Senate Rule 43 had read: “No person shall be permitted to smoke tobacco within the Senate chamber during the session of the Senate.” 168 Far hoarier was House regulation of smoking. On December 13, 1816, a week after it had been appointed to prepare rules for the government of the House, a committee presented its report, which included Rule XXX: “It is not permitted to any person to smoke segars at any time within the bar of the House.” 169 When the full House considered the rules on December 18, most did not require discussion, but Rule XXX was the subject of extensive debate. The House agreed to a motion by Democrat Samuel Bond and Federalist Michael Graeff to substitute “chamber” for “bar”—a change that spatially expanded the scope of the smoking ban. More significant was the motion by Philadelphia County Democrats William Rogers and John Neff (both of whom voted for the rule) to substitute “tobacco” for “segars”; by agreeing to this change the House universalized the smoking ban. Finally, the House further demonstrated its will not to dilute the ban when it disagreed to the motion by Democrats Ner Middleswarth and William Anderson (both of whom voted against the rule) to cut back coverage by limiting the operation of the ban to times “when the house is in session.” On a roll call, the House adopted the rule as amended by a vote of 66 to 23, Federalists voting somewhat more heavily in favor than Democrats (79.3 percent versus 71.7 percent); three of the four voting representatives from Philadelphia, the country’s second largest city, voted Yea, as did both physicians in the House. 170 When the House began considering anti-cigarette measures in 1891, its own internal Rule 44 still provided that: “It is not permitted to any person to smoke tobacco, at any time, within the chamber of the House.” 171

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Pennsylvania’s unprecedented dual attack against cigarettes was launched on January 27, 1891, when Representative John H. Fow introduced House Bill No. 205 and 206, both of which, notably, were referred to the Vice and Immorality Committee—a choice that arguably may have entailed an ideological judgment on the bills’ underlying animus against cigarettes in preference to referrals to the Public Health and Sanitation Committee, though Fow himself was, for example, actively seeking to overturn ancient blue laws. H.B. No. 205 provided that, as of January 1, 1892, it would be unlawful for any person, corporation, or firm to “sell or offer for sale or expose for sale or cause to be sold made or manufactured” in Pennsylvania “cigarettes made of tobacco or any other substance.” The penalty on conviction for committing this misdemeanor was a mandatory fine of not less than one thousand dollars “and [sic] imprisonment for not more than one year “or either or both within the discretion of the court.”


173 For the membership of the House and Senate Committee on Public Health and Sanitation, see Smull’s Legislative Hand Book and Manual of the State of Pennsylvania: 1891, at 726, 705.


Fow’s other bill was even more radical, making it “unlawful for any person to smoke burn or use upon the highways streets avenues lanes alleys courts and sidewalks of this Commonwealth any cigarette made of tobacco or any other substance.” The bill also provided that a violator “upon conviction before any justice of the peace alderman or magistrate in a summary proceeding forfeit and pay the sum of ten dollars...with costs and stand committed until the same is paid.”

The 39-year-old Fow (1851-1915) was a Philadelphia lawyer who in 1882-83 had been a member of the Democratic State Committee, a two-term member of the Philadelphia City Council in 1885 and 1887, and the first president of the Democratic State League in 1888 before being elected that year to the first of six terms in the state House of Representatives. To be sure, as a leading Democrat—just before the session got underway, rumor had it that he might receive “the complimentary Democratic caucus nomination for Speaker of the House”—his influence was limited: during the 1891 session Republicans enjoyed significant majorities in both chambers, controlling 31 of 50 Senate seats and 122 of 204 seats in the House. Despite Republicans’ having held a majority in the Senate every year but one since the Civil War and every year but two in the House, Pennsylvania still remained a two-party state in the sense that “Democrats could and did win if enough reform Republicans bolted”—even though the Republican “machine” was far from being above falsifying returns in order to maintain its majorities. (To be sure, Pennsylvania was only one

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176 Legislature of Pennsylvania, File of the House of Representatives, No. 205, Session of 1891, Mr. Fow, in Place, Jan. 27, 1891 (copy provided by the State Library of Pennsylvania).


178 “Mr. Brooks Is Hopeful,” North American, Jan. 5, 1891 (1:5). Fow responded to the rumor by observing: “‘You can’t blame me because I am popular.’”


As an easily caricatured “characteristic figure” of the legislature, Fow was nevertheless a press favorite who could “talk louder, longer and with more vehemence than any of the other 203 [House] members.” As a result, “Fog Horn” Fow, in spite of his intelligence and fact-laden oratory—which made the official stenographer’s brain “go round in a mad whirl”—was, according to an independent Republican paper, regarded by some members as “such a good fellow” that they did not accord his arguments the “reverence to which they are entitled.”

According to another Republican newspaper, Fow “served as a legislative agent for the principle that corporations are above the Constitution....”

Fow’s initiative appears to have been driven by his concern for children. In 1892 he received a public acknowledgment from Dr. L. Webster Fox, a leading ophthalmic surgeon, who, in the course of an address to the Franklin Institute on eyesight, declared: “I do not wish in a public lecture...to speak of a great benefactor, but I must say that if any man deserves the thanks of a generation, it is John H. Fow...for bringing about the law prohibiting the sale of cigarettes to boys.”

Fox was presumably referring to the law, passed during Fow’s first term in 1889, which prohibited the sale of cigarettes to anyone under 16, imposing a maximum fine of $300 on violators. One in a national wave of WCTU-
inspired enactments launched in the early 1880s,188 the proposal was introduced by two Republican lawyers. Senator Joseph Woods introduced S.B. No. 123 making it a misdemeanor to “sell give or in any way dispose of any tobacco in any form or shape or mixture thereof” to anyone under 16 and imposing a penalty of a maximum $300 fine and maximum imprisonment of two months.189 Under Representative Caleb Thompson’s H.B. No. 360 it was not lawful to “furnish by sale gift or otherwise tobacco cigars or cigarettes” to under-16-year-olds. Proof of guilt was rendered more difficult by requiring that violations be knowing or wilful, and punishment was weaker, the fine ranging between $5 and $50 and no imprisonment being imposed.190

The House Public Health and Sanitation Committee quickly reported Thompson’s bill with a negative recommendation, and the next day the House recommitted it to committee.191 In contrast, S.B. No. 123 was making progress. Two days after the press had reported that the no-cigarette-sales-to-boys bill was important, seemed to be becoming more so every day, and would “unquestionably pass” because many legislators thought that it was incumbent on them to help “blot out this pernicious habit,”192 the Senate Vice and Immorality Committee reported S.B. 123 without amendment.193 After the adoption of several weakening but not fatal amendments on second and third readings, the conviction and sentence under the law did not take place until 1891, when a dealer in Philadelphia was merely required to pay $30 in costs because his employees, in his absence, had sold cigarettes to boys. Purportedly the court would also have fined him had the costs not been “so large.” The reporting newspaper claimed that the outcome would “serve to make dealers particular to whom they sell the cigarettes.” “Latest News in Brief,” Tyrone Daily Herald, Mar. 2, 1891 (8:2-3). However, a proceeding had taken place at the end of December against a seller in Reading. “The Cigarette Nuisance,” North American, Dec. 26, 1889 (2:1).

188 See below ch. 9.
189 Legislature of Pennsylvania, File of the Senate, No. 123, Session of 1889, Mr. Woods, in Place, Feb. 6, 1889 (copy provided by the State Library of Pennsylvania); Journal of the Senate of the Commonwealth of Pennsylvania 203 (Feb. 6) (1889).
190 Legislature of Pennsylvania, File of the House of Representatives, No. 360, Session of 1889, Mr. Thompson, in Place, Feb. 12, 1889 (copy provided by the State Library of Pennsylvania); Journal of the House of the Commonwealth of Pennsylvania 328 (Feb. 12) (1889). Section 2 empowered justices of the peace and aldermen to try cases.
192 “Legislation at Harrisburg,” Agitator (Wellsboro), Feb. 19, 1889 (2:3).
193 Journal of the Senate of the Commonwealth of Pennsylvania 293 (Feb. 21) (1889). The bill passed its first reading the next day. Id. at 310 (Feb. 22).
Senate unanimously passed the bill by a vote of 29 to 0.\textsuperscript{194} Following the demise of H.B. 360, the House Vice and Immorality Committee, to which S.B. No. 123 had been referred, quickly reported it as committed.\textsuperscript{195} At its second reading on April 2 House members offered numerous amendments to the Senate bill. The House first rejected amendments that, inter alia, would have confined coverage to boys, struck out the willfulness standard for violations, made it a misdemeanor for minors to misrepresent their age to obtain tobacco, and created an exemption for minors who had orders from their parents. Then Fow intervened with a motion to substitute “sell cigarettes” for “wilfully sell give or in any way dispose of any tobacco in any for or shape or any mixture thereof,” thus limiting coverage to cigarettes. After a Republican had unsuccessfully sought to toughen Fow’s amendment by making it unlawful also to give cigarettes to under-16-year-olds, a Democrat tried to kill the bill by moving to postpone further consideration indefinitely, but it was defeated 56 to 106. Following adoption of Fow’s amendment with 106 Yeas, the House rejected a killer amendment by Democrat George Skinner, a lawyer-tanner, virtually to ban cigarette sales by prohibiting them to anyone under 60, and prepared the bill for its final reading.\textsuperscript{196} A month later the House by an overwhelming vote of 127 to 24 passed the bill with Fow’s amendment,\textsuperscript{197} in which the Senate unanimously concurred (34 to 0) the same day.\textsuperscript{198} Why successful advocacy of an amendment worded “so that all kinds of tobacco could be sold to minors excepting cigarettes”\textsuperscript{199} made Fow deserving of generational gratitude in Dr. Fox’s view is unclear—unless it was the ban on the sales of cigars and pipe tobacco to minors that had killed off H.B. No. 360.

For at least one Republican editorialist writing on the day of the bill’s passage the ban could not have come soon enough since smoking “nasty cigarettes [was] the vice of the day,...dudeing our boys and girls. Effeminate-looking boys

\textsuperscript{194}Journal of the Senate of the Commonwealth of Pennsylvania 321-22, 385-86 (Feb. 26 and Mar. 12) (1889). Woods himself successfully moved to insert a wilfulness standard; on third reading imprisonment was struck out.


\textsuperscript{196}Journal of the House of the Commonwealth of Pennsylvania 903-906 (Apr. 4) (1889). With Fow’s intervention the House passed the bill by “amending it so as to apply only to cigarettes.” “Pennsylvania Legislature,” \textit{HT}, Apr. 5, 1889 (1:5).

\textsuperscript{197}Journal of the House of the Commonwealth of Pennsylvania 1395-96 (May 2) (1889). The 24 Nays were evenly divided between Democrats and Republicans, who held 60 and 144 seats, respectively.

\textsuperscript{198}Journal of the Senate of the Commonwealth of Pennsylvania 890 (May 2) (1889).

\textsuperscript{199}“Our Harrisburg Letter,” \textit{Gettysburg Compiler}, Apr. 9, 1889 (2:2); see also “The State Legislature,” \textit{Daily Morning Patriot} (Harrisburg), Apr. 5, 1889 (1:8).
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st[ru]tting about with viler smelling cigarettes in their mouths, a nuisance to everybody, would be bad enough, but well-informed physicians say that cigarette smoking has largely increased pharyngeal, bronchial and catarrhal troubles, which are fast laying the seeds of phthisis, filling our hospitals and cemeteries with consumptives faster than an epidemic.” Though the information might have come with more grace from a source that was not profiting from the phenomenon, a tobacconist may have been all the more reliable for his material interest in pointing out that the “cigarette habit...da[d] enormously increased the numbers...smoking and the amount of tobacco consumed, not only by this addition to the ranks of smokers, but out of all proportion the amount smoked by those who were only moderate cigar-smokers before, have now become cigarette fiends.”

In pressing an anti-cigarette campaign Fow was manifestly not pursuing any broad-based sumptuary program, since in February he presented petitions signed by 40,000 Philadelphians asking that the 1794 Sunday law be modified and in 1893 he introduced a bill to grant licenses to sell liquor in public parks. Moreover, in 1891 he was the target of nuisance proceedings for owning a building in which liquor was allegedly sold in violation of the state high license law. Indeed, Fow himself, as will be related below, smoked tobacco.

“The war against the cigarette [wa]s on”, nevertheless, as Fow’s bills proceeded in tandem through the House and the press noted that—as would be the case in other states as well—some tobacconists were “quite indifferent to the anti-cigarette law. They don’t want to sell cigarettes, anyhow.” After the Vice and Immorality Committee had reported them “as committed,” and they had proceeded to the first reading, on April 8 both went to a second reading, which

200“Cigarettes,” Tyrone Daily Herald, May 2, 1889 (4:3).
201“Pennsylvania Legislature,” Indiana Progress (Indiana, PA), Feb. 11, 1891 (2:7).
204“Pennsylvania Legislature,” Agitator (Wellsboro), Apr. 15, 1891 (2:2-3).
205Before the Pennsylvania House took up its dual bans, seven of 17 voting state senators in neighboring New Jersey voted for an absolute prohibition of sales subject to a fine of at least $20. “Cigarettes Are Vindicated,” News (Frederick, MD), Feb. 18, 1891 (1:6) (introduced by Sen. Fowler of Cumberland County).
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sparked “considerable debate.” As soon as H.B. No. 205 was taken up, Democrat Samuel Wherry offered an amendment to include cigars in the sales/manufacture ban, which the House rejected. Since Pennsylvania was the largest manufacturer of cigars in the United States, accounting for 28 percent of all production (but manufactured only a minuscule number of cigarettes), the amendment seemed to be designed as a bill-killer despite Wherry’s animus against smoking. An economic dreamer Wherry was in any case not: a Princeton graduate whose hobby was political economy, he had, during the previous session, been the Democratic leader and enjoyed some power despite his party’s minority status by virtue of his acknowledged expertise in revenue tax laws. The debate then generated a series of additional amendments, the first of which, Republican Ward Bliss’s amendment to weaken the fine by converting the $1,000 floor into a ceiling, the House adopted. Republican newspaper reporter E. A. Coray, Jr., stopped this flow of amendments long enough to ask Fow whether his bill was not sumptuary legislation. The question appeared to be rhetorical, but Fow managed to avoid the obvious admission by concocting a definition that was discontinuous with centuries of policy: “[I]t is not sumptuary legislation, because it does not take away from any one that which is necessary to his health or his happiness. Sumptuary legislation is that which assumes control over a man so far as his method of living is concerned, his eating.” Unclear is why no

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209“Cigarette Legislation,” Lebanon Daily News, Apr. 9, 1891 (4:3). The fact that Pennsylvania at the time was the only state whose legislature produced a Congressional Record-like verbatim record of its debates makes it possible to capture their tenor and spirit in an incomparably more comprehensive way than other states’ extraordinarily spotty and often random press coverage ever permitted.


211Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1892, at 26 (1892). Firms in the state manufactured 1.2 billion cigars but only 4 million cigarettes in calendar year 1891.


215The OED defined a sumptuary law as “regulating expenditure, esp. with a view to restraining excess in food, food, dress, equipage, etc.” Oxford English Dictionary 10:150 (1961 [1933]).

216Legislative Record for the Session of 1891, at 1:1358 (1891). The claim that sumptuary legislation applied only to food was patently incorrect, but even if Fow had
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been willing to abandon it and admit that silk clothing was no more food than cigarettes, while arguing that cigarettes were, unlike silks, unhealthful, he would still have been unable to overcome the problem that liquor prohibition was sumptuary legislation. Following this interrogatory interlude, the House refused to strike out the penalty of imprisonment as proposed by Democrat William Ziegler and rejected Democrat John Dunkle’s killer amendment that would have applied the ban only to cigarettes “made of any other substance than tobacco,” but did agree to the amendment offered by Democrat G. Morris Eckels (a druggist-physician) to except cigarettes used for “medicinal purposes.”

The weak link that Fow’s antagonists did focus on was the so-called original package doctrine, which was to become the mainstay of the litigation campaign that the new Tobacco Trust mounted against all state cigarette prohibitory statutes. Democrat Peter Weber, a German-born dry-goods merchant, initiated this attack by noting (incorrectly) that the bill’s objective was “no doubt...to prevent excessive cigarette smoking,” but because “the bulk of cigarettes” were not manufactured in Pennsylvania, the bill “would not prevent the [sic] use” since they could be imported by mail or express. Turning his sympathies to producers, Weber objected to “throwing a burden upon those who are engaged in a manufacturing business as legitimate as any other,” especially since “as long as they are manufactured anywhere else I cannot see the benefit” of H.B. No. 205. Fow replied that the benefit could be seen by examining the state’s licensing laws regarding intoxicating liquor: “You cannot prevent, under this bill, any man from bringing cigarettes into this State, but if anyone undertakes to sell them he will be amenable under this act. Cigarettes are now sold in our confectionery stores, and by the peanut venders on our streets, and that will all be stopped under the provisions of this bill.”

Fow’s response, conflating two different regulatory/prohibitory regimes, made little sense: although a high cigarette license would presumably have forced the kind of low-volume sellers (who often sold to

been willing to abandon it and admit that silk clothing was no more food than cigarettes, while arguing that cigarettes were, unlike silks, unhealthful, he would still have been unable to overcome the problem that liquor prohibition was sumptuary legislation.

220 It is unclear which manufacturers Weber imagined burdened.
221 Legislative Record for the Session of 1891, at 1:1358 (1891).
children) Fow had mentioned out of the business, H.B. No. 205, as a prohibitory and not a license law, would not have generated such a differential impact. Instead of criticizing Fow’s misunderstanding of his own bill, lawyer-legislators debated judicial interpretations of the judicially created original package doctrine. Democrat Frank Kimble asked Fow whether cigarettes sent into Pennsylvania “in a bundle” would not qualify as an “original package, under the decision of the Supreme Court” (which no one identified during floor debate). 222 After Fow had (correctly but evasively) replied that the case dealt with a “package brought into the State and sold in its original form as a package,” Kimble tried to trap Fow into admitting the uselessness of his bill by asking more specifically whether, “where cigarettes are manufactured in another State and shipped in small bundles into this State that would not constitute an original package, and whether all cigarettes are now sold in original packages....” Wide awake and nimble, Fow slipped out of the trap: “[N]o, they are sold in packs. There are places in Philadelphia where a school boy can buy them for one cent.” 223

The interrogation was then handed over to Republican J. Howard Morrison, a Philadelphia lawyer, who immediately established his bona fides by asserting that he was speaking “without fear or favor” because he did not use cigarettes. In fact, his principal concern was that H.B. No. 205, like several other (unidentified) House bills, “discriminate[d] against the manufactures of Pennsylvania”—a rather implausible scenario since cigarette manufacture was virtually nil anyway. Switching over to a different argument, Morrison attacked the bill on the pragmatic grounds that it would allegedly “not prevent the sale of a single cigarette within the borders of this State.” The basis for this claim was his lawyerly insight that “[t]he original package law”—a misnomer since no legislature, but the Supreme Court itself had devised the doctrine—“as defined by the Supreme Court is this: that any bundle of goods put up together—such as a dozen cigarettes—and sent into this State, no matter if there are a thousand

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222 Legislative Record for the Session of 1891, at 1:1358 (1891). That case was Leisy v Hardin, 135 U.S. 100 (1890). For an amusing lawyerly critique of the slipshod logic of that opinion, see David Currie, The Constitution in the Supreme Court: The Second Century, 1886-1986, at 32-34 (1990). For a discussion of the case, see below ch. 11.

223 Legislative Record for the Session of 1891, at 1:1358 (1891). The Republican Gettysburg Star and Sentinel, which was unable to resist interweaving its editorial judgment that the picture was “simply disgraceful,” reported that the debate had brought forth the statement that “any page in the Legislature could buy a cent’s worth of cigarettes at the cigar stand in the rotunda of the capitol.” “Notes from Harrisburg,” Star and Sentinel (Gettysburg), Apr. 14, 1891 (2:4). It is unclear whether it was conflating Fow’s above-quoted statement and his other statement that “even in the rotunda of this capitol a man can buy a cigarette.” Legislative Record for the Session of 1891, at 1:1358 (1891).
cigarettes in a box without cover, each of those packages would be original packages [and] could be sold.” Consequently, out-of-state manufacturers would, under H.B. No. 205, (continue to) be allowed to “send their original packages of cigarettes” to Pennsylvania where they could be sold in any tobacco store. Shifting grounds once more, Morrison now justified his opposition to the bill by reference to his belief that “every man who wants to sell a cigarette made of tobacco or otherwise has a right to do it” in spite of “[t]he fact that cigarettes may be unhealthy...or made of impure substances.” If such facts were the driving force behind Fow’s measure, then instead of remedying them “in this roundabout way,” which “would simply result in transferring to some other State that business, without in any way diminishing their sale in Pennsylvania,” he should file a bill to punish adulteration directly. Morrison concluded by pleading for an end to “[t]his line of legislation” because “we are driving too many manufacturers out of the State.” Fow refuted this latter assertion by stressing that there was “not a cigarette factory in this State that would be affected by this act. It will affect the gentlemen who have there [sic] manufacturies [sic] in Richmond, and other cities out of this Commonwealth, who send around their souvenirs to the youth of Pennsylvania to the corruption of their morals.”

Fow also faulted Morrison for not having read the Supreme Court’s (unidentified) original packages cases “understandingly,” which, he insisted, “decided that an original package could be shipped into the state for the consumer, but not for the purpose of sale. ... It...was decided that there could be no sale of any article that was prohibited by the laws of the State from being sold, but that the laws of the State could not prevent the consignee from receiving such property and using it for himself.” Morrison went on to the offensive in pointing out that the existing no-cigarette-sales-to-under-16-year-olds law was being violated in Harrisburg and every other town in the state and then accusing Fow of dereliction of duty in not insuring punishment for the offenders. If, instead of sidetracking himself with this irrelevant personal attack, Morrison had asked Fow to justify depriving adult men of cigarettes in order to prevent children from gaining access, he might sparked a fundamental discussion about the need for a universal sales ban altogether. Without divulging how he could possibly have known, Morrison concluded the debate by defending his reading comprehension of Supreme Court decisions and dogmatically asserting that “I know cigarettes are done up in small bundles of a dozen each, and these bundles are placed in a larger package, and

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224 Legislative Record for the Session of 1891, at 1:1358 (1891).
225 “The Legislature,” HT, Apr. 8, 1891 (1:4-5).
there is no cover on the box, each one of those bundles is an original package and can be sold as such."

In fact, U. S. Supreme Court rulings regarding congressional interstate commerce power and the mechanics of the bizarre original package doctrine were, at the time, unstable: Fow may have overstated his argument concerning the disposition of commodities imported into a state, but by the end of the decade he would be vindicated, whereas Morrison’s original packaging contentions, which remarkably matched the shipping choreography that the Tobacco Trust would be implementing for litigating challenges to state bans on cigarette sales, would be wholly discredited by the Supreme Court.

After the House had agreed to the bill as amended and transcribed for its third reading, it moved on to H.B. No. 206; Wherry (who ultimately voted against H.B. No. 205 and did not vote on H.B. No. 206) trotted out his killer amendment again, this time seeking to delete the words “any cigarette made of,” thus prohibiting the smoking, burning, or use of any kind of tobacco on the streets and all other named public places. His even more radical ban (which would, for example, have included chewing tobacco) was motivated by his judgment that “tobacco is a worse evil than alcohol” and his desire that it be recorded that he opposed “tobacco in all forms. Although not a crank on the subject, he thought it unwise to say a person should not smoke tobacco wrapped in clean rice paper and yet permit the smoking of that vegetable encased in the original leaf or drawn through a foul-smelling pipe.” Without citing any sources, he insisted that

226 Legislative Record for the Session of 1891, at 1:1358-59 (1891). Fow expressed the belief that there was only one small cigarette factory in Pennsylvania, located in Philadelphia, which made “most of the cigarettes out of the stumps that the Italians gather in the early morning out of the streets of Philadelphia.” Id. That not a single state legislator had an Italian name may have made it easier for Fow to make the claim. Without attributing the remark to Fow, one newspaper reported that floor debate had produced the (even more extravagant) claim that “cigarettes made in the larger cities were composed of cigar stumps and refuse tobacco thrown away in the streets and picked up as a business by Italians.” “The Legislature,” HT, Apr. 8, 1891 (1:4-5).

227 See below Part II.


229 Journal of the House of Representatives of the Commonwealth of Pennsylvania 825 (Apr. 8) (1891); Legislative Record for the Session of 1891, at 1:1359-60 (1891). “The Legislature,” HT, Apr. 8, 1891 (1:4-5), indicated (mistakenly) that Wherry’s amendment added only cigars.

230 Legislative Record for the Session of 1891, at 1:1359-60 (1891).

the most carefully prepared statistics of the world...show that there is no plant so deleterious to the human system as tobacco. I am minded of the opium trade in China, and I want to say that the tobacco trade of the more civilized and Christianized Nations is a worse evil than that.

It is shown that it deteriorates the physical system; that it permeates and affects it for generations. It has been proven by the statistics of the German and French universities that the men who come from families in which the tobacco habit is fixed, are lacking in mental vigor and not able to stand the intellectual strain that the members are who come from families who are not addicted to its use.232

Three Democratic lawyers quickly rose, not to critique Wherry’s Lamarckian turn, but to pepper him with sarcasm about tobacco’s alleged stupidifying effects. First, George Skinner, the aforementioned lawyer-tanner, asked Wherry whether he “attribute[d] the lack of intellectual force in this body to the fact that we are about all smokers....”233 (If empirically accurate—and no one was recorded as challenging the claim—the fact that virtually all of the House members smoked tobacco underscores Fow’s audacity, which may have been tempered by the smokers’ willingness to ban smoking in the chamber.) Next, William Gillan, who had been a grocer and director of the Chambersburg public schools for six years before becoming a lawyer,234 asked Wherry whether he knew that Jeremiah Black, “one of the greatest men Pennsylvania ever produced, “was an inveterate smoker until the day of his death....”235 (Black, a Pennsylvania Supreme Court justice, had been President Buchanan’s attorney general and secretary of state.)236 Finally, David Roper wanted to know “whether General Grant was a man of small intellect” and whether Wherry did not know that Grant “smoked more than any other man in this country.” Wherry’s response to these “pettyfogging questions” was that they “answer themselves,” thus dispensing him from saying anything other than referring his interrogators to his previous statement, which proved his argument. Having thus dispatched his critics (at least by his own lights), Wherry concluded by admitting his failure to understand why the bill prohibited smoking cigarettes “in the faces of ladies and gentlemen upon the public street” but not cigars: “I am here to say that it is a violation of good manners to smoke upon the

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232 Legislative Record for the Session of 1891, at 1:1359 (1891).
233 Legislative Record for the Session of 1891, at 1:1359 (1891).
235 Legislative Record for the Session of 1891, at 1:1359 (1891).
public streets,” and although he would not “question the character of anyone who does it, I still want to go upon the record...by saying that it is an unmanly and ungentlemanly thing to do...”

Despite the availability of some contemporaneous medical-scientific evidence justifying heightened health concerns about cigarette smoking, Fow did not rise to the occasion to defend either of his bills’ omission of non-cigarette tobacco.

After the House had rejected Wherry’s amendment, it agreed to Eckels’ renewed “medicinal purposes” amendment (by a vote of 90 to 35), rejected Morrison’s killer amendment exempting citizens of Pennsylvania, passed the bill on second reading, and sent it on to a third reading, but not before Republican Philadelphia lawyer Frank Riter had unleashed a critique that 120 years later may still resonate with some:

To say that a man should be fined for smoking a cigarette upon the highways, streets or alleys of this Commonwealth is such an infringement of the common rights of mankind that I do not think this House will put itself in a position of endorsing such a view. Is this House going to put itself upon record as saying that a man cannot smoke a cigarette excepting in the field or in his house? It is really too absurd to argue about.

On final passage three weeks later the press reported that both of Fow’s bills “went through with a puff,” but in fact only H.B. No. 205’s passage was relatively frictionless. In contrast, the circumstances surrounding passage of the anti-public smoking measure were bizarre inasmuch as Fow opened the debate by revealing that: “I introduced these bills at the instance of an association of ladies and I do not think this last bill is a very good bill myself and I move it be indefinitely postponed. [Cries of ‘No, no, no.’]” Unfortunately, Fow shed no further light on the bills’ requester, but his remark suggests the possibility that the WCTU stood behind both anti-cigarette measures, although reports by the Pennsylvania state organization to the national WCTU did not mention the anti-cigarette bills. Instead, Fow went on to insist that he agreed with H.B. No.

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237 Legislative Record for the Session of 1891, at 1:1359 (1891).
238 Journal of the House of Representatives of the Commonwealth of Pennsylvania 825 (Apr. 8) (1891); Legislative Record for the Session of 1891, at 1:1359-60 (1891).
239 Legislative Record for the Session of 1891, at 1:1360 (1891). See also “The Legislature,” HT, Apr. 8, 1891 (1:4-5) (quoting Riter as calling the bill “nonsense”).
240 “Affairs at the State Capital,” Agitator (Wellsboro), May 6, 1891 (2:2).
242 Legislative Record for the Session of 1891, at 2:1932 (Apr. 28) (1891).
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206’s critics: “[T]here have been a great many comments made on this bill through the newspapers of this Commonwealth, calling attention to the fact that it is sumptuary legislation and unconstitutional in some of its features. I agree with that idea. I did not draft the bill and don’t know anything about who did prepare it.” Ignoring Fow’s apostasy, Philadelphia Democrat John Donahue, a boilermaker by trade and building contractor who had been a House member since 1879, declared that he hoped that the bill would pass because “[t]he smoking of these things which they call cigarettes upon the highways, I think is a complete nuisance.” This view flowed from his understanding that cigarettes were made of old and ground-up stumps that were “put into a nice looking piece of paper and sold to our young dudes to smoke. [Laughter].” At the other end of opinion, Philadelphia Republican and Assistant City Solicitor Henry Walton urged on his colleagues the need “to call a halt [Cries of ‘no, no, no’] and not [to] pass such farcical legislation...” Hardly one to let an inconsistency slip by unassailed, Wherry asked Walton whether that halt should not have been called when H.B. No. 205 was being debated. Walton agreed—because it “wipes out industries that have been built up in the State of Pennsylvania without any compensation whatever”—but aspired to assail others’ inconsistencies: Since there was scarcely a House member who as a boy did not smoke corn husks on the streets and highways, for the chamber now to prohibit citizens from smoking paper-wrapped tobacco in the same places was “beneath...the dignity and honor and [‘no, no, no’] you might as well pass a bill here to-day prohibiting the manufacture and sale of cigars, or to prohibit the smoking of a pipe which is considered almost a necessity.”

Much of the press was convinced that House passage of H.B. No. 206 was a lark. For example, as far as the Patriot was concerned, the House had acted “in a facetious mood,” prompting the newspaper to predict that both bills would “probably be promptly killed in the Senate.” The Republican Philadelphia...
Inquirer passed on corridor gossip to the effect that “the members of the House thought the gentleman with a voice was not so enthusiastically in favor of the bills as he would have it appear. That’s why they insisted upon passing them finally. It is doubtful if the bills will receive serious consideration in the Senate.” \(^{248}\) And the Republican Tyrone Daily Herald reported that the House had passed Fow’s bills in an “uprorious [sic] mood” despite Fow’s not wanting the smoking bill passed. \(^{249}\)

In the event, Fow’s bills secured majorities of greater than two thirds—109 (69 percent) to 49 for H.B. No. 205 and 115 (68 percent) to 53 for H.B. No. 206. \(^{250}\) Indeed, despite his opposition to the bill of mysterious provenience, even Fow voted for the latter. The vote was not at all strictly along party lines, but prominent differences nevertheless separated Republicans and Democrats as well metropole and periphery. \(^{251}\) With respect to the typical Democratic opposition to and Republican support for sumptuary legislation, the 1890 Republican state platform urged on Congress the “immediate necessity” of passing legislation that would prevent the importation of intoxicating liquor into Pennsylvania contrary to the state’s regulatory and restrictive legislation, whereas the Democratic state platform was silent on the issue of prohibition. \(^{252}\) Whereas 72 and 73 percent of Republicans voted for H.B. No. 205 and 206, respectively, the corresponding figures for Democrats were 65 and 60 percent. However, the data for Philadelphia (which accounted for about one-fifth of the state’s population and of House seats) present a considerably different profile: only 38 percent of voting Philadelphia Republicans (who held 34 of the county-city’s 39 seats) \(^{253}\) supported H.B. No. 205, while 55 percent favored H.B. No. 206. In contrast, Fow’s four

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\(^{248}\)“Gossip of the Corridors,” Philadelphia Inquirer, Apr. 29, 1891 (5:5).


\(^{251}\)Party affiliation was taken from http://staffweb.wilkes.edu/harold.cox/legis/109H.pdf, as corrected (and supplemented) by Smull’s Legislative Hand Book and Manual of the State of Pennsylvania: 1891, at 707-16. The three fusionists from Bradford County are not included in the Republican or Democratic totals below.

\(^{252}\)Smull’s Legislative Hand Book and Manual of the State of Pennsylvania: 1891, at 121. On congressional enactment of such an Original Packages Act in August 1890, see below ch. 11. For a Democratic newspaper’s editorial endorsement of Fow’s bills, see “State Legislation,” Warren Ledger, May 1, 1891 (4:1-2) (edit.).

\(^{253}\)“The Philadelphia Republican machine was without question one of the most awesome organizations of its kind ever constructed.” Walter Burnham, The Current Crisis in American Politics 143 (1983[1982]).
fellow Philadelphia Democrats followed his lead: none opposed either bill, all supporting 206 and three 205. Thus if the Philadelphia Republicans are segregated out, 88.5 percent of voting non-Philadelphia Republicans supported the anti-sales bill and 81 percent the anti-smoking bill. Separating out in addition the Pittsburgh House contingent (composed of seven Republicans and one Democrat) reveals that 91 and 82 percent, respectively, of non-metropole Republicans voted for the bills.\textsuperscript{254} Representatives also manifestly perceived significant differences between the two bills inasmuch as 11 who opposed the sales ban supported the public smoking ban, while 13 who opposed the latter supported the former.

Before the House had “gallantly sent” Fow’s bills on to the Senate,\textsuperscript{255} that chamber had passed its own bill, introduced by Republican lawyer Williamson McKnight Williamson,\textsuperscript{256} which imposed a $50 annual license on cigarette sellers (whose applications had to be endorsed by five “reputable citizens of the ward borough or township” in which the business was located); violators were subject to a $50 fine and imprisonment, at judicial discretion, of 10 to 60 days, as well as permanent revocation of their licenses.\textsuperscript{257} However, after Senate passage by a vote of 30 to 3,\textsuperscript{258} the House postponed it to death at the end of the session.\textsuperscript{259}

Like the House, the Senate referred both H.B. No. 205 and 206 to its Vice and Immorality Committee, which reported them without amendment.\textsuperscript{260} After they had gone through their second reading,\textsuperscript{261} they were killed at the end of the

\textsuperscript{254}Republicans’ House majority shrank to 80 to 73 outside of Philadelphia and Pittsburgh.

\textsuperscript{255}“Affairs at the State Capital,” Agitator (Wellsboro), May 6, 1891 (2:2-3).

\textsuperscript{256}Smull’s Legislative Hand Book and Manual of the State of Pennsylvania 671 (1891).

\textsuperscript{257}Legislature of Pennsylvania, File of the Senate, No. 114, Session of 1891, Mr. Williamson, in Place, Feb. 2, 1891 (copy provided by the State Library of Pennsylvania) (§§ 2, 6, and 8); Journal of the Senate of the Commonwealth of Pennsylvania 226 (Feb. 2) (1891). The bill also imposed the same penalty on licensed or unlicensed persons who sold cigarettes to minors under 16 and conferred on such minors parents or guardians the right to prosecute a civil action for a $250 penalty (§ 7).

\textsuperscript{258}Journal of the Senate of the Commonwealth of Pennsylvania 695-96 (Apr. 6) (1891) (Democrats casting all three Nays).

\textsuperscript{259}Journal of the House of Representatives of the Commonwealth of Pennsylvania 1747 (May 22) (1891).

\textsuperscript{260}Journal of the Senate of the Commonwealth of Pennsylvania 1028 (Apr. 29), 1399 (May 22) (1891).

\textsuperscript{261}Journal of the Senate of the Commonwealth of Pennsylvania 1473 (May 25), 1510, 1512 (May 26) (1891); The Legislative Record for the Session of 1891, at 2:2967 (May
session on third reading by a successful motion for indefinite postponement by three-term Democrat Milton Henninger, a former county district attorney. Because he saw no difference between cigarettes and cigars, he argued that: “You might as well say that cigars cannot be manufactured.” More importantly, he rehearsed the traditional Democratic anti-sumptuary line: though he did not use tobacco in any form, some of his neighbors did: “I will not regulate my fellow Senators or any other citizen of this Commonwealth with reference to what they shall use.” By a vote of 24 to 8 his colleagues agreed to postpone H.B. No. 205 indefinitely. The other bill, banning public use of cigarettes, transcended Henninger’s practical experience: “Why I never saw such legislation introduced in Pennsylvania before. I think the other House passed this bill as a joke.” After he had asked who would introduce such a bill and heard Fow’s name, the Senate agreed to postpone H.B. No. 206 indefinitely as well.

Events on the last day of the five-month session raise further questions about the seriousness of Fow’s initiative as well as the stringency of the 75-year-old House no-smoking rule. Comparing the scene in the House to a “circus,” the Democratic Patriot depicted the members as a band of jail-breaking giddy juveniles on the last day of school “having a high old time” with practical jokes. Fow himself took a lively interest in a giant cracker which exploded under a window of the chamber. The odor of gunpowder drifted into the room, and a gentleman on the Republican side of the house arose and with great indignation protested against the members smoking. Then everybody laughed.

Then Representative Fow concluded that he would like to smoke anyhow, and he moved that rule 44 be suspended. Mr. Burdick objected, and Mr. Fow asserted that “this house is too mean to agree to anything.” Nevertheless, everybody who desired to smoke did so.

After recess two Philadelphia politicians took seats in front of the clerk’s desk and puffed away vigorously at fragrant havanas. Sergeant-at-Arms Hoopes attempted to make them stop, but they only did so when they were ready.

Whatever his personal attitudes toward smoking may have been, Fow forged

25) (1891). H.B. No. 205 was held up briefly by a motion to reconsider.


263On Henninger, see Smul’s Legislative Hand Book and Manual of the State of Pennsylvania 666 (1891).

264The Legislative Record for the Session of 1891, at 2:3267 (May 27) (1891).

265“Like a Circus,” Patriot (Harrisburg), May 28, 1891 (4:5-6).
The First Two Legislative Chambers to Investigate Cigarettes,
After Hearing Scientists Refute (Trivial and False) Criticisms,
Initially Refuse to Ban Their Sale

The war on the cigarette smoker which has been raging for years in congress, in state legislatures and elsewhere has been the immediate cause of bringing on the investigations. 266

At the outset of the 1890s legislatures in two very different states, Georgia and Massachusetts, actuated by a public outcry over the poisonous effects of cigarettes on smokers, set chemists the tasks of scientifically analyzing the components of cigarettes tobacco, any adulterations added to it, and the paper in which it was wrapped. Their findings that allegations that ingredients such as opium were added to the tobacco could not be substantiated helped undermine an initial scientific basis for the formation of a public policy supportive of a manufacturing and sales ban and helped defeat the first legislative forays—despite the fact that some of these very scientists acknowledged the existence, even absent adulteration, of inhalation-related health risks unique to cigarette smoking. Later in the 1890s, when physicians focused on these physiological impacts of unadulterated cigarettes, the lower houses of both states passed anti-sales ban bills.

Georgia House 1891

The Georgia legislature is now tackling the small but mighty cigarette. The best thing they can do is to let the cigarette alone; the more dudes it kills the better off Georgia and the rest of the union will be. 267

The Georgia Senate killed the cigarette bill passed by the House 19 to 12. So the dudes can continue to addle their alleged brains. 268

265See below ch. 6.
267“The Georgia Editor,” AJ, Nov. 6, 1893 (4:2) (untitled editorial reprinted from Montgomery News (Alabama)).
268Semi-Weekly Interior Journal (Stanford, KY), Nov. 7, 1893 (3).
First Successes Fail: 1889-1892

On July 13, 1891, 52-year-old Representative William Asa Sinquefield, a former teacher, and, like a large proportion of his House colleagues, a farmer, filed a bill to “prohibit the manufacture and sale of cigarette tobacco, cigarette material and substitutes to evade the law against the manufacture and sale of cigarette tobacco and cigarette material” and to make it a misdemeanor to offer for sale or furnish such materials, which was referred to the Temperance Committee. Like many other recently elected Georgia legislators, Sinquefield, too, was a member of the Southern Farmers’ Alliance, a mass protest organization and forerunner of the Populist party, into which it was transformed by the early 1890s. Indeed, the Georgia Alliance, which supported, inter alia, government ownership of railroads, telegraphs, and telephones and abolition of the convict lease system, and whose membership by 1890 reached 100,000, succeeded in electing so many members that year that the state general assembly was known as the Farmers’ Legislature; purportedly 31 of 44 senators and 137 of 174 representatives during the 1891 session were Alliancemen. (Nor was Georgia

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271 Journal of the House of Representatives of the State of Georgia at the Adjourned Session of the General Assembly, at Atlanta, Wednesday, July 8, 1891, at 98 (July 13) (1891).
273 A History of Georgia 296 (Kenneth Coleman ed. 2d ed. 1991 [1977]). Georgia was one of four states (Alabama, Florida, and North Carolina being the others) in which representatives elected with the Alliance’s help held legislative majorities in 1890. Edward Ayers, The Promise of the New South: Life After Reconstruction 246 (1993 [1992]). By 1890 Georgia was also one of four states (the others being Arkansas, Florida, and Mississippi) in which more than half of “all eligible people—rural folk” over 21—joined the Alliance; more than 40 percent of the same group joined in Alabama, South Carolina, North Carolina, Texas, and Tennessee. Id. at 220. The precise extent of the significant majority that Alliance members gained at the Georgia House and Senate elections in 1890 has been subject to dispute. William Holmes, “The Southern Farmers’ Alliance and the Georgia Senatorial Election of 1890,” Journal of Southern History 50(2):197-224 at 206-207 (May 1984). Regardless of their numerical majority, Alliance members, only a minority of whom were radicals, failed to enact political-economically transformative legislation during the 1891 session. Id.
unique: the 1890 elections produced Alliance domination of the legislatures in Alabama, Florida, Mississippi, North Carolina, South Carolina, and Tennessee as well.) Sinquefield was not simply an “allianceman,” but had also organized several counties in his section of the state. His interventionist proposal to ban the sale of “these noxious articles” was, at least in part, rooted in his having personally “seen the effects of the habit in those with whom” he had “intimate relations.” The prohibitory horizons of this “zealous” Baptist and father of 12 children also extended to alcohol, as demonstrated by his speech at the Georgia Temperance Association convention, which took place a fortnight after he had filed his bill: “Today...I had the pleasure of performing a duty which has made this day one of the happiest of my life. And that duty was voting for a bill prohibiting the sale of whisky within three miles of any church outside of incorporated towns.”

Although Sinquefield’s primary focus was youth, he was also eager to ban cigarettes altogether. As he explained a month after he had introduced his bill, when it was becoming clear that both the House Temperance Committee and the House as a whole—whose rules since at least 1857 had provided that “No member shall smoke in the House”—lacked a majority that shared his original strict and comprehensive intent, he observed that although he did not “know what they will do with my cigarette bill,...the principal object is to keep cigarettes from minors, and if it will do that after it is amended, it will accomplish what I desire. I have testimonials from the most prominent physicians in the state as to the evil results of cigarettes, and I would like to see them out of the entire state and country.” However, Sinquefield, like his counterparts elsewhere and later in the United States, failed to engage the crucial issue as to why “the grown up

[1960]).

275Theodore Saloutos, Farmer Movements in the South 1865-1933, at 116 (1964 [1960]).


277“Etched and Sketched,” AC, July 24, 1891 (4:5-6 at 6). The word “noxious,” which was deeply recessed in the gutter of the tightly bound volume from which the microfilm was made, is only partially legible and has been speculatively reconstructed here.

278Clark Howell, History of Georgia 3:467 (1926).


First Successes Fail: 1889-1892

men” should not be allowed to “smoke cigarettes until they are cold in death if they wish to do so, but...the protecting line” should be drawn “so close around minors that they cannot smoke cigarettes at all.”

To be sure, Georgia, like Alabama, South Carolina, Florida, and Mississippi, was not a significant tobacco-growing state. Moreover, anti-cigarette government intervention applicable to adults had already gotten underway in Georgia. At the beginning of April, Atlanta Alderman James G. Woodward (1845-1923), a printer at Atlanta newspapers and longtime member, activist, and official of the Atlanta Typographical Union with a national profile, who in 1898 became the “working man’s mayor” in the first of his four terms as mayor, had been preparing a strategy for preventing boys from becoming addicted to cigarettes that evolved into a general prohibition. To achieve the goal of separating “the youthful smoker and the ‘coffin-tack’,” Woodward, than whom “no man of his day was more influential or commandingly a factor in city politics,” announced that he would introduce an ordinance in the council to make smoking by minors a punishable offense subject to a heavy penalty. The ordinance, which was referred to the police committee and city attorney, in addition to making it unlawful for minors to smoke cigarettes in Atlanta,

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282“Major Bacon on Cigarettes,” AC, Aug. 13, 1891 (4:5).
283At the 1890 census, Georgia produced only 264,000 pounds compared to 222 million in Kentucky. U.S. Department of the Interior, Census Division, Abstract of the Eleventh Census: 1890, tab. 10 at 131-32 (2d ed. 1896).
284Not until November and House passage of the bill did the national newspaper of record acknowledge that the “anti-cigarette movement has reached Georgia....” “Small Talk,” NYT, Nov. 7, 1893 (4).
285W. Wardlaw, “Atlanta, GA,” Typographical Journal 25(5):497 (Nov. 1904); Georgia: Comprising Sketches of Counties, Towns, Events, Institutions, and Persons, Arranged in Cyclopedic Form 3:625-26 (Allen Candler and Clement Evans eds. 1906); Thomas Deaton, “James G. Woodward: The Working Man’s Mayor,” Atlanta History 31(3):11-23 (1987). It is difficult to situate the political-economic and social character of Woodward’s anti-cigarette proposal: although “one of the most powerful politicians of the period” and involved in a bitter “class-conscious” election campaign in 1891 in which blacks allegedly played an important part in defeating the working-class elements, by the following year he was the first to demand the white primary. Eugene Watts, The Social Bases of City Politics: Atlanta, 1865-1903, at 30 (1978).
286“Cigarette Smoking,” AJ, Apr. 6, 1891 (7:6).
287Lucian Knight, History of Fulton County Georgia: Narrative and Biographical 167 (1930).
288“Cigarette Smoking,” AJ, Apr. 6, 1891 (7:6).
subjected anyone convicted by the recorder of selling or giving cigarettes or cigarette materials to a minor to a fine of not less than $25 and/or to work on city public works for not less than 25 days. Minors convicted of being caught smoking cigarettes or “representing to any dealer or any other person” that they were 21 years old in order to obtain cigarettes or cigarette materials were subject to a fine of one dollar for the first offense and between five and 25 dollars for additional offenses and/or to work on city public works for not less than 10 days. The press predicted that the ordinance would pass the council “with all ease” following a unanimous police committee report favoring passage, but in fact the council voted 9 to 8 to postpone it indefinitely.

After Councilman William H. Hulsey (1838-1909), a criminal lawyer and a former Atlanta mayor, had secured this indefinite postponement of the proposed ordinance, Woodward declared that it was not “dead yet’... I may have it in a different shape, but the results will be the same.” He was confident of its ultimate adoption because almost every father he had met wanted it and for a fortnight he had been “besieged with letters from mothers and sisters, asking me to push the measure through and save those dear to the writers.” Fishing a specimen from “one of the best families in the city” out of a big bundle, he read it aloud for a Constitution reporter. The stereotypical tale of a son who had been “one of the brightest boys in the high school” until he began smoking cigarettes nevertheless perceived addiction as a key problem:

“My poor boy has been an invalid for two years, and though the doctors say he will come up all right, I have about abandoned all hopes. They tell me that the spinal affection was produced by cigarette-smoking and I believe it is true. Why? Because I have found more than one half-smoked cigarette in his bed. He would go to sleep smoking one, wake up, light a fresh one, and drop asleep again smoking it. Stop it, and every mother in Atlanta will thank you.”

Woodward himself, based on unspecified “‘investigation,’” had found that “‘cigarette-smoking grows upon a person just like opium-eating.’” That boys he knew of in Atlanta were “actually compelled by that habit to get out of bed at night to smoke a cigarette” constituted proof enough for him that “‘[t]here must be something wrong in the manufacture of the cigarette to create this insatiable

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292On Hulsey, see Green Bag 21(7):371 (July 1909).
293“In the City Hall,” AC, Apr. 23, 1891 (5).
294“In the City Hall,” AC, Apr. 23, 1891 (5).
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appetite. Smoking a pipe or a cigar does not do it. 
Although Woodward would soon be in a position to learn that cigarettes’ addictiveness did not result from their being opium riddled, but, rather, from differential patterns of inhalation, his exclusive prohibitory focus on cigarettes—which he shared with the WCTU and virtually the entire anti-tobacco movement of the era—rested on a rational kernel in terms of public health impacts and on the expediency of not interfering with the consumer sovereignty of tens of millions of adult male cigar and pipe smokers and smokeless tobacco users, while at the same time (unwittingly) ignoring the deleterious health consequences of all non-cigarette tobacco use. For the time being, Woodward’s strategy rested on the prediction that a boy would “leave cigarettes severely alone” if he knew that he would be “arrested if caught smoking them.” Punishing boys, however, would not suffice: in addition to making “the habit odious,” Woodward also saw a need for eliminating the supply by means of financial disincentives and an outright ban, although he did not even bother to try justifying depriving men of cigarettes for the sake of boys: “I am in favor of making the tax so high that cigarettes will not be sold in Atlanta. And I want a state law enacted which will exclude them from Georgia.” The arch-working-class alderman’s optimism derived from the support that the city’s leading capitalists such as Sam Inman and “a dozen such representative men” gave him: “Give me that backing and I’ll whip the world.”

Then on May 4, Woodward announced shortly before the general council meeting that day that “not by a long shot” had he “abandoned his fight on cigarette smoking.” At that session he introduced an ordinance to: enforce the state law banning cigarette sales to minors; impose a license tax of $200 to sell cigarettes; impose a fine of $100 for adulterated goods; and require the city attorney to take the steps necessary to secure legislation fixing the license at $2,500 or prohibiting the sale of cigarettes. Then at its session on June 16, at which the council considered an ordinance to levy and assess taxes for Atlanta for the fiscal year ending June 30, 1892, “Colonel” B. F. Abbott—a key figure among


296Atlanta semi-bicameral general council was composed of a board of alderman and a board of councilmen, the former serving three-year and the latter two-year terms. Thomas Deaton, “James G. Woodward: The Working Man’s Mayor,” Atlanta History 31(3):11-23 at 11 (1987).


the forces seeking to thwart regulation of cigarettes whose interventions are
detailed below—representing the city’s cigarette dealers, presented two petitions,
one for wholesalers and one for retailers, and in vain requested a reduction in the
proposed $200 annual license tax for cigarette dealers (or dealers in cigarette
paper or cigarette tobacco). Abbott, who on behalf of a hundred dealers
protesting such “class legislation,” claimed that the proposal was “unjust and
discriminatory” because only “a few men would pay the extra tax and thus
monopolize the trade.” Moreover, dealers outside the city’s jurisdiction and in
the suburbs “would sell cigarettes with impunity” with the result that instead of
reducing the sale of cigarettes, the license tax would “simply drive a number of
the smaller men out of the business.” Councilman Hulsey claimed to be
opposed to the sale of cigarettes, but, echoing dealers’ complaints, deemed the
license tax wrong because it would “put the trade in the hands of a few. It will
create a monopoly” and he was opposed to monopolies. Woodward strenuously
opposed Hulsey’s motion to reduce the license tax to $25 and prevailed after
“the friends of the deadly weed stood firm” and the council also added the “hope
that the legislature will pass an absolutely prohibitory law.” A few days before
the license tax went into effect dealers themselves opined that it would slash the
500 to 1,000 firms that had been selling cigarettes to at most five or six; some had
already stopped selling when their supply was exhausted, while others calculated
that at a 1.5 cent profit per pack they simply did not sell enough packs to justify
paying the $200.

299 “Only License Taxes,” AC, June 16, 1891 (9:3).
301 “Only License Taxes,” AC, June 16, 1891 (9:3).
303 “Cigarettes in the City,” AC, June 26, 1891 (7:1). A dealer would have had to sell
more than 13,333 packs annually (or 44 packs daily excluding Sundays) to break even.
(An ordinance went into effect at about this time prohibiting the sale of cigarettes on
Sundays. “No Sunday Selling,” AC, May 31, 1891 (21:1).) Therefore, a thousand dealers
would have had to sell 13,333,000 packs a year to break even. The 133,330,000 cigarettes
would have worked out to 6,592 per male 16 years of age and older in Atlanta, a figure far
in excess of per capita consumption ever reached in the United States and impossibly in
excess of any plausibly imaginable cigarette consumption in Atlanta in 1891. In other
words, the market could not have sustained 1,000 dealers profitably selling cigarettes after
having paid a $200 license tax. The figure on Atlanta’s male population was calculated
(on the assumption that one-fifth of 15-19 year-olds were 15) according to U.S.
Department of the Interior, Census Division, Report on the Population of the United States
at the Eleventh Census: 1890, tab. 8 at 114 (1897).
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One week after the $200 license tax had gone into effect on July 1, the press reported that it had become a “great deal harder to get a package of cigarettes” in Atlanta: whereas previously consumers were able to drop into almost any store (including all stores that sold tobacco) to buy cigarettes, the high license tax had caused the a huge drop in the number of firms selling cigarettes from about 1,500 to the 10 that had paid for the license. Of the latter some increased the price, for example, doubling that of a package of Duke cigarettes from five to ten cents. For licensees who did not increase the selling price: “To make this amount [$200] means the sale of over ten thousand packages of cigarettes, as not as much as two cents is made on each pack.” The twofold impact of the vast constriction in the geographic spread of sales locations and hence in buyers’ convenience (and presumably in overall supply) and the doubling of prices meant that the sale of cigarettes in Atlanta had, the Constitution reported, been considerably limited. Correlatively, “the wagers of the hot war against the article feel some better. But they are not satisfied yet, and say they are going to have the sale stopped altogether.”

Three weeks later, the General Council unanimously adopted an ordinance that Woodward introduced repealing the ordinance that had just gone into effect and substituting for it an even more stringent one that anathematized cigarettes by providing, inter alia, that “the traffic in cigarettes, or cigarette materials, be classified and separated from the ordinary and legitimate modes of dealing in cigars and tobacco, and that the extreme limit of $200 be charged as a license to sell cigarettes, or cigarette materials, in the city of Atlanta, and that no license shall be issued for a longer time than three months.” The ordinance also “charged” and “instructed” the police to “most rigidly enforce and bring to trial all parties who violate” the ban on selling cigarettes to minors. “Western Beef,” AC, July 21, 1891 (5:3).

“The Cigarette Tax,” AC, July 10, 1891 (4:2) (edit.). “To make this amount [$200] means the sale of over ten thousand packages of cigarettes, as not as much as two cents is made on each pack.” The twofold impact of the vast constriction in the geographic spread of sales locations and hence in buyers’ convenience (and presumably in overall supply) and the doubling of prices meant that the sale of cigarettes in Atlanta had, the Constitution reported, been considerably limited. Correlatively, “the wagers of the hot war against the article feel some better. But they are not satisfied yet, and say they are going to have the sale stopped altogether.”

“Only Ten Sell Them,” AC, July 7, 1891 (5:5). Three days later the Constitution self-contradictorily editorialized that someone who should be “posted” had stated that cigarette consumption had increased 10 percent since the license tax had gone into effect. The only explanation that it offered for this counter-intuitive development was speculation about “forbidden fruit,” adding that “the cigarette manufacturers, who are the most extensive advertisers in the world, do not seem to be troubling themselves at the result of this manner of advertising.”

“From Our Notebook,” AC, July 23, 1891 (5:4). The Constitution’s libertarian opposition to government regulation of adult behavior spilled over into that of children as well: while not resisting a ban on the sale of...
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cigarettes to boys, the editor opined that the best “law” to prevent a boy from smoking was a paddle in a sturdy parent’s hands. “The Cigarette Tax,” AC, July 10, 1891 (4:2) (edit.). The next day the paper reported that two more dealers had been issued licenses, putting the total number at a dozen. “A Busy Appearance,” AC, July 11, 1891 (9:1). Other out-of-state papers also published the article. E.g., “High License in Cigarettes,” Evening Bulletin (San Francisco), July 29, 1891 (1:8).

306 SPDG, July 19, 1891 (4:4) (untitled). Other out-of-state papers also published the article. E.g., “High License in Cigarettes,” Evening Bulletin (San Francisco), July 29, 1891 (1:8).

307 More About Cigarettes,” AC, July 26, 1891 (20:2).

308 “After Cigarette Smokers,” AC, June 24, 1891 (2:2).


310 “No Cigarette Smokers Wanted,” Sacramento Daily Record-Union, Nov. 24, 1890 (1:7).
apply.” And even the Constitution, which was hostile to regulating adults’ access to cigarettes, editorially advocated banning smoking on street cars.

In what the Tobacco Trust—shortly before the legislative session opened the Atlanta Constitution reported that the American Tobacco Company had just bought two of the largest manufactories in the United States and claimed to manufacture 98 percent of all cigarettes—would codify as an anti-regulatory protocol throughout the United States, within 10 days of Sinquefield’s having filed his prohibitory bill, it was already “exciting much attention...from the cigarette manufacturers.” It would not, the Atlanta Constitution reported, come up for some time in the House Temperance Committee because the factories had requested a delay in order to “prepare their argument,” which would (presumably) be wielded by the counsel they had employed, who would enable them to initiate a “hard fight.” In the meantime, Sinquefield, had spoken to many House members, who were “‘heartily in favor’” of his bill, and secured “‘strong testimonials as to the importance of enacting such a law from the doctors....’”

The possibility that Sinquefield’s anti-cigarette initiative did not enjoy solid support even within the larger prohibitory movement emerged at the aforementioned convention of the Georgia Temperance Association (which changed its name to Georgia Prohibition Association on the second day) when, following Sinquefield’s speech, “Mrs. Abbott” made a short address as representative of Fulton County (Atlanta). Astonishingly, she excoriated his proposed ban measure: “‘That nefarious cigarette bill..., now before the House, has my everlasting anathemas written across its face. If, as has been said, the brightest legal talent in the state has been employed to defeat it I only hope that they will succeed.’” Unfortunately, the Constitution failed to mention her reasons for anathematizing the total sales ban, but the likelihood that her

311AC, June 7, 1891 (7).
312“Street Car Reform,” AC, July 6, 1891 (4:1).
313“Combining Interests,” AC, May 3, 1891 (14:1).
314“Etched and Sketched,” AC, July 24, 1891 (4:5-6 at 6).
317The next day the Constitution claimed that a “well-known temperance speaker” had opposed the bill because she mistakenly thought that it permitted cigarettes to be sold. “In and About Atlanta,” AC, July 31, 1891 (4:5). Since Abbott’s husband was the chief lobbyist against the bill, it seems unimaginable that she could have been so fundamentally confused about the bill. This version also implausibly presupposed that such a temperance activist not only was woefully misinformed about a very high-profile legislative initiative going on at that very moment, but that she spread her ignorance in front of Sinquefield
without triggering a correction (reported by the newspaper). Nevertheless, if accurate, this version raises the interesting possibility that Abbott and her husband were actively opposing each other’s position. To be sure, such a scenario would hardly have been unusual: at this time in Georgia husbands’ support of WCTU activists was the exception. Leslie Dunlap, “In the Name of the Hole: Temperance Women and Southern Grass-Roots Politics, 1873-1933,” at 103 (Ph.D. diss., Northwestern University, 2001).

Her lengthy obituary in the *Constitution* managed to avoid all mention of her manifold prohibitory activities. “Mrs. Abbott Dead,” *AC*, Dec. 28, 1893 (7:1). Even more vacuous was her even lengthier eulogy, which did, however, allude to her “looking after the neglected classes,” specifically, “[p]itying” the condition of a group of “Chinamen” and “yearning for the joy of leading them into the kingdom of truth and grace....” “Her Ideal Realized,” *AC*, Dec. 29, 1893 (7:1-2). Abbott had earlier published a novel that conferred on her a modest reputation as an author. Belle Abbott, *Leah Mordecai* (1875); Mel Colquit, “Three Southern Women Have Made a Mark,” *BDT*, Oct. 3, 1890 (3:3).

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By the beginning of August, as the “fight on cigarettes seem[ed] to be growing,” the Constitution asserted without specification that since Georgia led in “many reform improvements,” it might “practice what so many preach—the abolition of cigarettes.” In approaching Sinquefield’s bill, the House Temperance Committee was investigating not only cigarettes’ effects, but also their ingredients, about which it requested information from the state chemist. This quest was, in the newspaper’s view, “an entirely original step, and will settle one muchly-argued point”—namely, whether cigarettes were composed of “shavings saturated with tobacco spit, opium, arsenic and other poisons, or whether it is tobacco.” In entrusting this quasi-supererogatory analytic task to George F. Payne, M.D., who after serving as state chemist from 1890 to 1898, was president of the American Pharmaceutical Association (1902-1903) and dean of the Atlanta College of Pharmacy, the Temperance Committee both insured that a well-credentialed scientist would place his imprimatur on a commodity that it was in fact not inclined to ban and initiated a wave of duplicative chemical analyses in other states. Ironically, although prohibitory advocates said that “they know the effect, and that’s enough,” their desire to know the contents being merely “a matter of information,” in the event, the finding that the Tobacco Trust did not add other substances to the tobacco dominated the debate, illogically eclipsing the view of cigarettes’ “death-dealing qualities” based on an etiology that had nothing to do with such alleged adulteration. Just how militant and self-assured prohibitionists were on the eve of Payne’s divulging his findings emerges in the Constitution’s report that no matter what’s in them, there’s going to be a big fight to get them out of the state. That’s

University Manuscript, Archives, and Rare Book Library, which holds the organization’s papers, no reference to the bill or any other substantive information on the WCTU’s position. Email from Kathy Shoemaker to Marc Linder (Jan. 30, 2010). A master’s thesis, based on annual convention reports, stated that by 1902 the Georgia WCTU “condemned cigarettes and all forms of tobacco usage as vociferously as alcohol. The W.C.T.U. unsuccessfully petitioned the legislature for an anti-cigarette law for the next eighteen years.” Glenda Rabby, “The Woman’s Christian Temperance Union in Georgia, 1883-1918” at 52 (M.A. thesis, Florida State U., 1978). More generally, according to the same author, the Georgia group, at least by the time of the 1891 cigarette ban bill, had not unfolded a broad array of non-temperance-related activities and, in particular, adopted, even later, a relatively backward position on women’s suffrage.

321“What’s in a Name?” AC, Aug. 5, 1891 (3:3).
323“What’s in a Name?” AC, Aug. 5, 1891 (3:3).
what many legislators say, and they add that cigarettes will have to seek other brains to devour that those of the Georgia youth. That is, unless the brain of the Georgia youth is so far gone that he will send to another state and import the devourer.

Mr. Singuefield [sic] has received letters from physicians from all over the state, giving opinions as to the effect of cigarette smoking. Judging from these opinions, there must be many brains growing very soft, unless, as one physician wrote, the softening took place before any one began smoking them. This physician couldn't give an opinion as to the effect on the brain, as he had never seen anybody with a brain smoke a cigarette.

“There will be no fight,” said one legislator. “The legislature is a sensible body of men, and is just going to unanimously vote to do away with cigarettes.”

After analyzing various brands for several days, on August 6 Payne made his report to the committee to the “amusement and instruction,” according to the Atlanta Constitution, of a “large crowd of legislators and some others”:

Everybody around the capitol seemed interested in the matter, and crowded around to hear the chemist’s statement. The anti-cigarette men listened eagerly as Dr. Payne began; the cigarette men looked as if they didn’t know what to expect, and everybody looked interestingly [sic] on, almost breathlessly awaiting the chemist to enumerate the many and deadly poisons inhabiting the little articles.

That Payne found no morphine, opium, hashish, or any other poisons except nicotine and oil of tobacco was, in the view of the Constitution, “undoubtedly a surprise” because “it had been stated so often that arsenic, morphine and opium were components of cigarettes that a great many people, hearing no official denial, had come to the conclusion that it was true to some extent.” (For example, an article making the national rounds in the press just a few months before the hearing claimed that the “main reason why the cigarette obtains so fatal a power over young men is because of the opium in it. ... Misery, insanity, or

324“What’s in a Name?” AC, Aug. 5, 1891 (3:3).
327“No Poison,” AC, Aug. 7, 1891 (7:1).
Committee members, “anxious to prove [sic] all about cigarettes,” “began firing cross questions,” which, unfortunately, the press failed to identify (other than one asking what sort of thing chlorophyll was, which “sounds like a poison”). Payne concluded that there was no more poison in a cigarette than a cigar, the one poison, nicotine, being deadly in the sense that a man would be killed if he swallowed “his quid of tobacco.”

Following the questioning several non-legislators staked out positions for and against the bill. For a contemporaneous local readership the Constitution did not need to append biographical sketches, but such background information 120 years later reveals that these three advocates were hardly run-of-the-mill Georgians; on the contrary, they were all extraordinarily well-known and influential public figures. The “Hon. A. O. Bacon” who argued against the sales ban on the grounds that the country was free and “every man a sovereign” was Augustus Octavius Bacon (1839-1914), a lawyer who had been a member of the Georgia House of Representatives from 1871 to 1886, eight of which years he was Speaker; he was also a U.S. senator from 1895 until his death. When he arrived back in his hometown of Macon, “Major” Bacon gave an interview to a local paper in which he elaborated on his argument in Atlanta:

I do say that it is the most undemocratic paternalism to say to a grown up man you shall not smoke a pure cigarette because it disagrees with you, or for a legislature to say to a manufacturer, you shall not make or sell these cigarettes because some of our constituents may inhale them and die of tobacco-heart or diseased circulation. It is the same thing as saying to the farmers of Georgia you must not raise tobacco, which is one of your most money-making crops, because we think tobacco is generally obnoxious and is not good for men to smoke.

But before Bacon even reached this anti-paternalist approach, which, in Georgia as elsewhere, failed to engage, he opened his remarks by insisting that, contrary to what some in Macon may have regarded as “a small thing” he had gone to Atlanta to talk about, in fact he had spoken about a “mighty big
thing”—namely, “trying to save the states of Virginia, Georgia and Carolina a total annual revenue of $4,000,000,” which was “the income derived by the farmers of these three states from the sale of 15,000,000 pounds of tobacco purchased by the manufacturers of cigarettes, and used by them in the manufacture of what” some were “pleased to call the ‘death stick.’” Consequently, Bacon’s mission to Atlanta had not been to “protect...the men who want to make cigarettes, but the income derived from the tobacco used in the cigarettes....”333 Bacon did not reveal who had paid him to lobby the Temperance Committee, but his mention of Georgia in the same breath with Virginia and North Carolina was disingenuous since Georgia’s total tobacco output amounted to 0.003 percent of that of the other two334 and the flue-cured Bright tobacco that was used in cigarettes was not produced at all in Georgia in 1891.335

Also arguing against the bill was, unsurprisingly, Abbott, though the Constitution failed to preserve any of his arguments for history. Benjamin Franklin Abbott, one of Atlanta’s most successful lawyers and a member of the state House of Representatives from 1884 to 1885336 was also representing cigarette dealers petitioning the city council to reduce the cigarette license tax, though just the previous year, when, in the mayor’s absence, he had spoken on behalf of the city of Atlanta at the National WCTU convention held there in 1890.337 In the event, from the tenor of the committee hearing, the Constitution immediately concluded that Sinquefield’s bill “will be defeated in committee,...the only question” being whether there would be an adverse report or a new bill.338

It seems highly plausible that Abbott and/or Bacon were the aforementioned counsel whom the Tobacco Trust had employed to fight Sinquefield’s bill. Indeed, the details surrounding another chemist’s report make it virtually certain

333“Major Bacon on Cigarettes,” AC, Aug. 13, 1891 (4:5).
334Calculated according to U.S. Department of the Interior, Census Division, Abstract of the Eleventh Census: 1890, tab. 10 at 131-32 (2d ed. 1896).
335Tobacco Institute, Georgia and Tobacco 21-24 (1973), on http://www.archive.org/stream/tobaccohistoryse09toba#page/n1/mode/2up (visited Jan 30, 2010).
338“Notes About the Capitol,” AC, Aug. 7, 1891 (7:3).
that Abbott did perform the role of the Trust’s chief lawyer-lobbyist in Georgia. John M. McCandless, who would succeed Payne as the state chemist in 1898, was an analytical and consulting chemist whom the Atlanta Board of Health made its own; for a time he also held a professorship at a medical college in Atlanta.\footnote{The Official Sketch Book: Containing Short Biographies of State-house Officers, United States Senators, Members of the General Assembly, and of the Governor’s Military Staff: 1898-’99, at 27-30 (1899), on http://dlg.galileo.usg.edu/georgiabooks/pdfs/gb0449.pdf (visited Feb. 3, 2010); Georgia’s Public Men: 1902-1904, at 36-38 (Thomas Loyless comp. n.d.).} The same day that the Constitution interviewed Payne, it devoted a column to an analysis that McCandless had done for the American Tobacco Company and that Abbott used in his argument before the Temperance Committee. The newspaper did not publish the report itself, but it did reprint in its entirety the letter from McCandless to Abbott, dated August 3 (three days before Payne completed his study and testified before the committee) that “[t]ransmitted” the analysis to Abbott, which he, in turn, presented to the committee. The newspaper observed that Payne’s testimony did not bring out certain essential points produced in McCandless’s report that accounted for the “universally observed [injurious?] effects of cigarette smoking.” McCandless analyzed two of the three brands that Payne was studying (Latest English and Richmond Straight Cut, and substituted Cameo for Duke’s), making the same findings with regard to the absence of opium, morphine, and arsenic. McCandless went beyond Payne in emphasizing that there was “no necessity for adulteration with opium and arsenic when we consider the poisonous nature of the nicotine which exists in the tobacco and of other poisonous bodies generated by destructive distillation in the act of smoking.” In particular, smoking generated from the tobacco prussic acid (i.e., hydrogen cyanide), formic, acetic, propionic, butyric, and [carbolic?] acid, in addition to the poisonous pyridene bases, including picoline, lutidine, collidine, and others. McCandless added that smoking also produced “very considerable volumes” of carbon dioxide and carbon monoxide gases, the latter being “particularly poisonous” when they were drawn into the lungs, entered the bloodstream, and combined with hemoglobin. He characterized it as an almost established fact that to carbon monoxide more than to any other [poisons?] present in tobacco smoke were to be ascribed “the deleterious effects upon the cigarette smoker because he inhales....” All of these poisons were also present in cigar smoke, but those smokers did not inhale. Consequently, he confirmed “a foundation for the popular prejudice against the vice of cigarette smoking, [and it is the ?] manner in which the much anathematized [?] rolls are smoked.”\footnote{“The Cigarette Again,” AC, Aug. 9, 1891 (14:6). The question-marked words in}
obvious question—to which there is no obvious answer—raised by McCandless’s report is what would possibly have motivated Abbott or ATC to present this scientific indictment of cigarette smoking, to which physicians and scientists would not add much during the next several decades, to a legislature considering whether to prohibit the sale of cigarettes.

The only one of the three advocates before the House Temperance Committee who made a speech for the bill was “Judge Hines,” that is, James Kollock Hines (1854-1932), an 1872 graduate of Harvard Law School, who returned to Georgia, where he became solicitor general of the Middle Judicial Circuit, in 1884 House member for Washington County (which Sinquefield represented), from 1886 to 1890 a judge in the same circuit, and president of the board of trustees of Emory College. After having astonished the press by publicly advocating government ownership of the means of transportation and communication and all other quasi-public businesses so that they would be operated as cheaply as possible for the public welfare, Hines, an “unusual combination of ‘respectability’ and earnest radicalism” sought and received

square brackets are an attempt to decipher the last few characters on each line of the column that on the microfilm disappear into the gutter of the tightly bound originally making them illegible; guessing at them proved to be easier in some instances than others. No library is known to have retained a run of the original bound volumes. Telephone interview with Georgia Newspaper Project, University of Georgia (Jan. 27, 2010). The same illegibility mars the electronic version purveyed by ProQuest, which was presumably produced from the same microfilm.

341 The identification and characterization of the various poisonous chemical compounds in the letter, which were apparently not based on McCandless’s own analysis, did not originate with McCandless, whose brief account of the acids and bases suspiciously overlapped with that in a then standard textbook: Alexander Blyth, Poisons: Their Effects and Detection: A Manual for the Use of Analytical Chemists and Experts 1:247† (2d ed. 1885 [1884]), which, in turn, was based on analyses performed in Germany in the early 1870s. For example, Hermann Vohl and Hermann Eulenberg, “Ueber die physiologische Einwirkung des Tabaks als narkotisches Genussmittel, mit besonderer Berücksichtigung der Bestandtheile des Tabakrauchs,” Archiv der Pharmacie 2d ser. 147(2): 130-67 (1871), analyzed the pyridene, picoline, and collidine in (cigar) tobacco smoke and observed the swiftly lethal consequences of infusing or injecting them into animals such as pigeons and rabbits (in one case a pigeon was exposed to picoline fumes). On more recent analysis of these toxic compounds in smoke, see U.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 79-97 (n.d.). Carbon monoxide’s affinity to hemoglobin was also well known.

342 Lucian Knight, A Standard History of Georgia and Georgians 5:2488-89 (1917).
343 C. Vann Woodward, Tom Watson: Agrarian Rebel 263-64 (1972 [1938]).
some support from the Alliance legislative caucus in 1890 for U.S. senator. By 1894 he became a Populist and, at Tom Watson’s direction, the party’s gubernatorial candidate. Unfortunately, the Constitution also failed to record what arguments Hines, who spent the last 10 years of his life as a Georgia Supreme Court justice, advanced in favor of a general cigarette sales ban. The several letters from physicians that were read to the Temperance Committee before adjournment were presumably those that Sinquefield had solicited. Despite the fact that many favored the bill, the Constitution reported that it “now looks as if the bill will not be recommended” because both Payne’s report and the speeches “had effect....”

Having “‘half believed’” what he had heard about non-nicotine poisons in cigarettes, Payne himself was “‘somewhat surprised’” by his own findings. Two days after the hearing he nevertheless explained to the Constitution, as many in the anti-cigarette movement had repeatedly done already and as his counterpart in Massachusetts would do the following year, that

“a cigarette is no more harmful in itself than a cigar, but I consider the habit much worse on account of the way they are smoked. Few cigar smokers inhale the smoke, and the nicotine in the smoke only comes in contact with the mouth.

Any cigarette smoker will tell you that he doesn’t enjoy a cigarette without he inhales every puff of smoke deep down into his lungs. Here there is an immense amount of spongy surface exposed, and the nicotine is absorbed in large quantities.

That’s where the injury of cigarette smoking comes in, as nicotine is a deadly poison.”

To be sure, Payne then nullified the seriousness of his own warning against the special dangers of cigarette smoking by tacking on the belittling addendum that “every nation uses something of the kind, and it seems that men, from time immemorial, have craved narcotics. Each nation has its own, and America’s is,

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345 “Judge Hines Becomes a Populist,” NYT, Apr. 17, 1894 (4); C. Vann Woodward, Tom Watson: Agrarian Rebel 264 (1972 [1938]).


347 “The Cigarette Again,” AC, Aug. 9, 1891 (14:2) (confusingly two different articles with the same headline appeared on the same page). Without elucidating the etiology, Payne went on to opine that in addition to causing tobacco heart, nicotine softened the brain.

348 See above ch. 2.

all in all, about the least harmful of all.” In the wake of Payne’s report Sinquefield’s bill was much discussed, but the Temperance Committee was reportedly going to water it down significantly: “The main thing many seem to want to accomplish is to prevent minors from their use, and as there is a law preventing the sale, or giving cigarettes, to minors, it is probable that the outcome will be some scheme to enforce the law.”

At this crucial juncture in the bill’s fate the Constitution came out editorially against the universal sales ban on the grounds of unenforceability, prematurely (and erroneously) asserting not only that it violated the interstate commerce clause, but that “cigarettes in original packages of any size could be shipped to any person...in Georgia from any point outside of the state. Under such a law Chattanooga, for instance, would loom up as a great cigarette market, and do a rushing business into Georgia.” Despite the newspaper’s extensive reporting on the chemists’ observations on the health effects of cigarette smoking, the editorialist rhetorically asked why the state should interfere with adult men’s “right” to “use tobacco in its least injurious form—so far as smoking is concerned—in the shape of cigarettes.” Although it may have been true in terms of sales that a “sweeping law against cigarettes would, if enforced, simply play into the hands of the cigar men,” the Constitution could not rely on Payne or McCandless for the proposition that a smoker deprived of his cheap half-penny cigarette “containing scarcely any nicotine” would merely exchange it for a five-cent cigar, which would “poison his system with a much larger quantity of nicotine.”

In the event, the committee did report a substitute for Sinquefield’s bill merely requiring that superior court judges charge grand juries at each session on the existing law making it penal to sell to minors. A week later the House

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350“The Cigarette Again,” AC, Aug. 9, 1891 (14:2). Payne’s opinion was based on the assertion that although nicotine was deadlier and more dangerous than morphine, whereas “a man’s nature will not allow him to smoke more than a certain amount a day,...the morphine habit continues to grow, the system allowing and calling for more and more.” In fact, already in the late nineteenth century studies revealed tolerance to nicotine, although the tolerance is not complete. U.S. Department of Health and Human Services, The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General 45-46 (1988).


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passed the committee substitute by the overwhelming majority of 94 to 10. Little wonder that “the cigarette men [we]re jubilant over their success in preventing the passage of the original act,” but the Constitution left the public to wonder about the identity and tactics of those pressure lobbyists.

In the midst of the defeat of Sinquefield’s bill, the Constitution reported that the cigarette-selling industry would renew its efforts to pressure the Atlanta council to roll back the license tax at its session on August 17, when the cigarette’s “friends” would base their petition on the monopoly that the ordinance had allegedly created. The paper also speculated that State Chemist Payne’s analysis would doubtless also shape the council’s decision. In the event, sellers turned out to be concerned with the other shoe that Woodward had dropped back in May when he proposed that the city secure state legislation either empowering the city to set the license tax at $2,500 or banning sales altogether. Back in early June the council had published a notice in the press that it would apply to the state legislature for passage of a bill authorizing Atlanta (and Fulton County) to charge a license fee of up to $2,500 or to prohibit the sale of cigarettes and cigarette materials. Consequently, on July 10, three days before Sinquefield acted, John B. Goodwin, the Atlanta city attorney, who also represented Fulton County in the House (and two years later would become mayor), introduced precisely such a bill (which also covered “any preparation of tobacco that is intended as a substitute to evade the law against cigarettes”), which the Constitution characterized as “intended to squelch the cigarette nuisance.” Since the outright prohibitory initiative had just failed, dealers, apparently fearing that the city government would pursue the former course, consequently petitioned the council to rescind the resolution requesting the legislature to act. The council

later the House General Agriculture Committee recommended that the bill to prevent the manufacture or sale of cigarettes not pass. Id. at 505 (Aug. 15). For the text of the no-sales-to-minors law, see 1889 Georgia Laws at 149, 154.


356 “Notice of Local Legislation,” AC, June 6, 1891 (9:3).


358 Journal of the House of Representatives of the State of Georgia at the Adjourned Session of the General Assembly, at Atlanta, Wednesday, July 8, 1891, at 81 (July 10) (1891).

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accorded Benjamin Abbott, the sellers’ lawyer, the privilege of a hearing. Referring to the concurrent legislative proceedings, he asserted that Payne, having collected “samples of as many brands as he could procure in the city,” had submitted a “searching analysis” that “proved beyond peradventure that cigarettes do not contain deleterious or poisonous substances, but are made of the purest sort of tobacco.” This claim was fundamentally false since Payne had emphasized how poisonous nicotine was, but Alderman Woodward focused on other issues. After pointing out that even the $2,500 license tax “would not run trade away from Atlanta” because it did not affect wholesalers, Woodward took issue with Abbott’s characterization of Payne’s analysis as having encompassed 80 cigarettes:

“There are about two hundred and sixty brands in the market. He has not, therefore, analyzed one-half of the brands. Why did he not analyze the ‘Duke of Durham?’ [sic] There are twice as many of this brand smoked in Atlanta as any other. If all the chemists on earth were to swear that cigarettes are harmless, I would not believe them. I see the results before me. I would rather consult an undertaker on this subject than to hear the fine-spun theories of chemists who are paid to make analyses. I can see the boys in the streets who are going to destruction. The victims are all around us. I have had at least one hundred young men declare to me that it was absolutely impossible for them to quit the pernicious habit.”

Woodward’s energetic advocacy was noteworthy for its extraordinary skepticism, even of the state’s own chief chemist, in the immediate wake of Duke’s formation of the Tobacco Trust. Nor would it be fair to ascribe his perception of the possibility of capitalist corruption of scientists to sheer dogmatism: after all, he did not claim that, no matter what chemists found, cigarettes contained opium and arsenic, but rather that they were harmful. That such criticism was being espoused by a long-time labor union official merely underscored the fact that the anti-cigarette movement was hardly confined to the WCTU and its ideological environs. In fact, Woodward and the WCTU were or would have been strange bedfellows inasmuch as “his intimate association with alcohol and prostitutes made the moral reformers consider him a foe of

360”Dr. Martin Resigns,” AC, Aug. 18, 1891 (6:1-2).
361”Dr. Martin Resigns,” AC, Aug. 18, 1891 (6:1-2). Woodward appears to have been confused since in fact Payne had analyzed only three brands, but one of them, as Benjamin Abbott was careful to induce Payne’s assistant to state in writing, was Duke’s Durham. “That Cigarette Analysis Again,” AC, Aug. 15, 1891 (5:2). A contemporaneous account of the analysis going on in Payne’s office named at least six brands that he was studying. “What’s in a Name?” AC, Aug. 5, 1891 (3:3).
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decency.”362 At the beginning of his first mayoralty, after he had been denounced from the pulpit as a “‘drunken sot, libertine and a gambler,’” 363 for example, the city council contemplated impeachment proceedings against him and asked for his resignation, prompting him to promise “not to take another drink during his term of office.”364 Moreover, his mayoral veto of a high liquor tax on saloons was ascribed to his own alcoholic proclivities.365 Ultimately, a biographer concluded, Woodward did “not fit the traditional mold of a Progressive era reformer,” because, although he attacked inefficiency in government and special privileges and monopolies while advocating the initiative and referendum, he opposed other “constructive measures....” Perhaps the anti-cigarette campaign of this “champion of organized labor” can be understood in the context of his entry into Atlanta politics in the mid-1880s when the labor movement was “trying to make itself respectable with a strong prohibitionist stance.”366

During the ensuing discussion councilman Hulsey strongly favored granting the petitioners’ request, while another councilman-lawyer, Porter King, who a few years later became mayor, agreed on the grounds that there was no reason to single out Atlanta for special legislation. Unalterably opposed to cigarettes was councilman J. C. Hendrix, a real estate businessman, who insisted on rejecting the petition.367 Unlike Alderman Woodward, “Captain” Hendrix was pursuing a WCTU-like dual prohibitory strategy encompassing alcohol as well, as revealed by his active participation at the aforementioned Georgia Temperance/Prohibition Association convention, at which he successfully moved on July 30 that, since the legislature that very day was to consider the bill requiring the teaching in common schools of alcohol’s effects on the human frame, which was of “deep interest” to Georgia temperance proponents, the convention adjourn and as a body

364 “Mr Woodward Swears Off,” NYT, Aug. 15, 1899 (1:5). Later, the WCTU, which “prayed for defeat of Woodward,” insured his defeat as the Democratic mayoral candidate because of his sojourn in the city’s red light district. “Mayor Woodward Defeated,” NYT, Dec. 3, 1908 (1:4).
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March off to the House to listen to the legislative discussion. In the end, the limits of the anti-cigarette coalition became visible in the 11 to 3 vote to abandon pursuit of legislative intervention to suppress the sale of cigarettes by means of a prohibitively expensive license; the only vote that Woodward and Hendrix were able to attract was that of physician Charles Ernest Murphey, who was also a professor of children’s diseases.

Massachusetts House 1892

It may make the boys happy to know that cultured Massachusetts has come to the rescue of their beloved but much-abused cigarettes.

An eminent expert in chemistry testifies before the legislative committee...considering the expediency of further legislation to suppress the cigarette that this article is not as injurious as the cigar. This is contrary to the popular impression, but it wouldn’t be expert testimony if it wasn’t. It will not be difficult to obtain equally eminent expert authority for the statement that cigarettes are warranted to kill at forty rods.

The Massachusetts House of Representatives passed a bill (which they subsequently reconsidered and killed) totally prohibiting the sale of cigarettes in the State. It is difficult to believe that the legislators were seriously contemplating an attempt to deprive adults of the right to buy and smoke cigarettes. The “arguments” for the measure were too silly and puerile to carry weight even with the average politician. It is suspected by some of those familiar with the dark and devious ways of legislators that the passage of the absurd bill was merely a gentle hint that they must expect to share their “surplus value” with the powers that be, from whom all things legislative proceed.... It is certainly less humiliating to think that we are governed by a set of self-seeking, “enlightened egoists,” who believe that might is right, and that there is nothing inherently vicious or ignoble in the practice of fraud, blackmail, and like arts, than to think that we are at the mercy of imbeciles and hopeless idiots.

In 1892, at the other end of the continent in California, the San Francisco Call

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371 “War Against Cigarettes,” Call (San Francisco), Feb. 19, 1892 (1:3).
373 To-Day (Boston) 4(82):58 (Mar. 24, 1892) (untitled edit.). The House, as discussed below, did not pass the bill.
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took note of the fact that virtually on the same day the legislatures in Massachusetts and Mississippi had taken “widely different actions” in the “War Against Cigarettes.” On Friday, February 12, the Joint Committee of the Massachusetts Legislature on Public Health, following a hearing on the contents of cigarettes, refused to recommend passage of a bill to ban their manufacture or sale, whereas on Monday, February 15, the Mississippi House of Representatives passed a bill making it a misdemeanor to smoke cigarettes in public. This ideological juxtapositioning of the archetypal Yankee and Confederate states concealed both the considerable support that the cigarette control movement enjoyed in Massachusetts and the superficial character of the latter state’s “exhaustive inquiry,” which in fact merely repelled the bogus allegation that cigarettes were adulterated with opium and various other poisons.

Massachusetts House of Representatives action was initiated on January 14, 1892—a dozen years after the legislature had finally repealed its 1818 law that, for fire prevention purposes, had penalized smoking or having in one’s possession a lighted pipe or cigar on any street, lane, or passage way or on any wharf in Boston—when, on the motion of 37-year-old Democrat Horace Emery Clayton, a clerk who had been employed by the Boston Five Cents Savings Bank for 18 years and lived in Cambridge, where he had been a member of the Common Council before joining the House in 1889, it was ordered that the Public Health Committee “consider the expediency of prohibiting the manufacture and sale of cigarettes within the limits of the Commonwealth of Massachusetts.” The Massachusetts hearing took place in the context of the nationwide legislative campaign that the Woman’s Christian Temperance Union had been conducting for several years. The Massachusetts WCTU, a self-designated “purity”-centric “indefatigable conservator of the home,” which lauded itself for having been instrumental in securing passage of such laws as the compulsory teaching in schools of the physiological effects of alcohol and other narcotics and prohibiting the sale of tobacco to minors, petitioned the legislature in 1892 for legislation

374 “War Against Cigarettes,” Call (San Francisco), Feb. 19, 1892 (1:3).
375 “War Against Cigarettes,” Call (San Francisco), Feb. 19, 1892 (1:3).
379 Katharine Stevenson, “Massachusetts,” in “Organization and Accomplishments of
to prevent smoking by persons under 16. On January 25, Republican Representative George Ball, a Unitarian clergyman and veteran temperance advocate, presented the WCTU officers’ petition, which was also referred to the Public Health Committee.

The WCTU’s impact on the legislative drive in Massachusetts was also reflected in the fact that the organization’s state superintendent of narcotics, 38-year-old Ella Aldrich Gleason, who was licensed as a Baptist preacher that same year (and eventually climbed the hierarchy to serve back-to-back four-year terms as state WCTU vice president and president beginning in 1913), participated alongside the committee members in the questioning of chemist James Babcock. To be sure, her quest to identify the presence of alcohol in tobacco, which Babcock denied at every turn, was as trivial and beside the point as the insistence that manufacturers spiked cigarettes with opium.

When the Joint Standing Committee on Public Health questioned Professor James Babcock—who smoked cigars but could not learn how to smoke cigarettes—on February 12, it already had at its disposal three written reports

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the Woman’s Christian Temperance Union in Illinois, Massachusetts, New York, North Dakota, Ohio, and Virginia,” Annals of the American Academy of Political and Social Science 32:514-18 at 516-17 (Nov. 1908). Interestingly, whereas several petitions for woman suffrage submitted to the Massachusetts legislature in 1892 called for wide-ranging changes, including equal political rights for all citizens irrespective of sex, the WCTU’s petition was limited to “the right to vote in relation to licensing the sale of intoxicating liquors....” Journal of the House of Representatives of the Commonwealth of Massachusetts:1892, at 706 (Apr. 15) (1892).

“State Prohibitory Convention,” Congregationalist and Boston Recorder, Aug. 25, 1870 (1:5-6 at 6).


Benjamin Austin, The Prohibition Leaders of America 131 (1895). At the 1900 Census her husband William H. Gleason was returned as a rubber manufacturer.


First Successes Fail: 1889-1892

A detailed account of the hearing that appeared a year later erroneously stated that it had taken place before Congress. “The Cigarette,” BA-H, Feb. 7, 1893 (4:4); “Cigarettes,” MA, Feb. 7, 1893 (2:1-2). The writing and placement of this article, which was published during the brief interim between passage of a cigarette sales ban bill by the Alabama House and its consideration by the Senate, was probably the work of the Tobacco Trust. See below ch. 4. One of the members alluded to “the hearing the other day” at which he had requested Babcock to buy and analyze cigarettes, but it is unclear when this hearing took place and what occurred at it. Likewise, WCTU member Gleason mentioned statements that had been made earlier that day during a morning session. Testimony of James F. Babcock on the Manufacture and Sale of Cigarettes, Before the Joint Standing Committee on Public Health, February 12, 1892, in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 16, 28 (n.d. [1892]), Bates No. 950297842.


Ironically, whatever the accuracy of the chemists’ findings (including Payne’s aforementioned analysis), which had been prepared in other states for other entities, detecting no adulterations such as morphine or other alkaloids of opium, strychnine, arsenic, copper, lead, or hashish in cigarette tobacco or paper. 387

386 A detailed account of the hearing that appeared a year later erroneously stated that it had taken place before Congress. “The Cigarette,” BA-H, Feb. 7, 1893 (4:4); “Cigarettes,” MA, Feb. 7, 1893 (2:1-2). The writing and placement of this article, which was published during the brief interim between passage of a cigarette sales ban bill by the Alabama House and its consideration by the Senate, was probably the work of the Tobacco Trust. See below ch. 4. One of the members alluded to “the hearing the other day” at which he had requested Babcock to buy and analyze cigarettes, but it is unclear when this hearing took place and what occurred at it. Likewise, WCTU member Gleason mentioned statements that had been made earlier that day during a morning session. Testimony of James F. Babcock on the Manufacture and Sale of Cigarettes, Before the Joint Standing Committee on Public Health, February 12, 1892, in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 16, 28 (n.d. [1892]), Bates No. 950297842.

of the absence in cigarettes of any trace of arsenic, white lead, copper, or other poisons, years later increasingly sophisticated analytic techniques enabled scientists to identify all of these metals (and dozens of others) in tobacco plants, as a result of their presence in the soil, fertilizers, or agricultural sprays, as well as in cigarette smoke. For example, at one point in the history of cigarette manufacture and use, between 2.2 and 8.6 percent of the arsenic in cigarette tobacco was transferred into smokers’ respiratory tracts.

The committee, which was composed of two senators and seven representatives (including two physicians), had in Babcock a highly credentialed local witness, who had been a chemist for three decades, a professor at two universities, and state assayer. Babcock did not submit the results of his analyses showing that the specimen cigarettes contained no opium, morphine, strychnine or “other drug or poison foreign to tobacco” and that the paper wrappers lacked any trace of arsenic, white lead or other poison until five days after the hearing, but his live testimony made it clear that “[t]he trouble with tobacco is nicotine, that is the poison.... [N]icotine is the thing that does whatever damage comes from the excessive use of tobacco.”

Massachusetts Legislature on Public Health 2-9 (n.d. [1892]), Bates No. 950297842.

Since it was addressed “to whom it may concern,” the identity of the addressee/requestee is unclear. Wiley presented the same findings concerning opium and arsenic, but also analyzed nicotine content. Harvey Washington Wiley became the chief advocate of the Pure Food and Drug Act of 1906.


neither the physicians on the committee nor the WCTU representative exhibited any interest in Babcock’s explanation of the health dangers peculiar to cigarette smoking that might have been expected to prompt support for more stringent regulation, if not prohibition, of cigarette selling:

[T]he mild tobacco which is present in a cigarette is in a form [such] that it can be taken into the lungs without excessive, immediate irritation, and it thence passes into the circulation and passes in rapidly. ... The ordinary tobacco of a cigar is a tobacco which, except by a very confirmed old smoker, cannot be taken into the lungs and brought into the circulation in that way, probably from the more active character of the smoke.... Hence has arisen the common prejudice that cigarettes are more injurious than cigars. That is true only to the extent that the smoke is inhaled. Inhalation of tobacco...is far more effectual than merely taking it into the mouth and bringing the smoke in contact with the mucous surfaces there.... [To] the extent that the tobacco in a cigarette is adapted to inhalation...to that extent the use of cigarettes is more injurious than the use of cigars....

To be sure, Babcock may well have undermined committee members’ (as well as prevented his own) understanding of the need for special regulation of cigarettes by opining that: “One man will smoke a cigarette and will get whatever satisfaction is to be derived from it, and another man will smoke a larger cigar, and derive the same pleasure. One takes his medicine in one way, and another takes it in another.” Legislative inaction was also likely to follow from Babcock’s expressing at length his opinion that boys were largely immune from this health risk based on (alleged) facts that lay wholly outside his professional

950297842.

393Testimony of Professor James F. Babcock, in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 20, 21 (n.d. [1892]), Bates No. 950297842. In fact, as later studies have revealed, cigars, most of which “contain nicotine in quantities equivalent to several cigarettes,” “have the capability to provide high levels of nicotine exposure whether or not their smoke is inhaled.” Moreover, the higher pH of cigar tobacco/smoke may cause a higher proportion of nicotine to be available for absorption through the mouth, nose, and throat, making it unnecessary for cigar smokers to inhale deeply in order to absorb substantial amounts of nicotine. Reginald Fant and Jack Henningfield, “Pharmacology and Abuse Potential of Cigars,” in U.S. Department of Health and Human Services, Cigars: Health Effects and Trends 181-93 at 182-83, 186 (1998).

expertise:

The old smoker, the Cuban, the confirmed cigarette smoker, smokes his cigarettes in the scientific way, if I may call it so. He draws the smoke in to his lungs, and he holds it there as long as he can conveniently, and then he parts with it reluctantly, letting it out through his nostrils, in order to bring it in contact with all the absorbing surfaces which it is possible for him to do; but the boy that buys the cigarette, although he may eventually acquire that habit, does not smoke a cigarette in that way. He smokes it just the same as I would. I do not say that some do not, but I mean to say that generally he does not know how, and I do not know how. While I recollect very well as a boy that a five-cent cigar would make a fellow so sick that he would never want to smoke until he was a good deal older, and perhaps never; I venture to say that the character of the tobacco which is in a cigarette to-day, is such that a boy ten years old and less may smoke it without feeling the slightest sickness to his stomach...because he smokes it as a man smokes a cigar.

The *Boston Daily Advertiser* opined that Babcock’s testimony had given “rather of a setback” to “certain of the good people” of Massachusetts whom young people’s use of cigarettes had caused “a good deal of anxiety” and had therefore “petitioned the legislature for a law to prevent it.” The *Boston Herald* went even further, condescendingly judging that although the hearing had “given the female reformers a fine opportunity to air their learning on the subject of narcotics...Prof. Babcock...carried too many guns for them.” A week after the hearing the Public Health Committee issued an “inexpedient to legislate” report (as well as a leave to withdraw report on the WCTU’s petition to ban tobacco use by minors). A week later, the House had “quite a debate” on the committee report, suggesting to the *Boston Daily Advertiser* that it was the cigarette that was “in peril” after “its deadly properties were partially exposed.” Initially the


396 “Against Passes,” BDA, Feb. 13, 1892 (5:3). To be sure, Clayton’s universal sales ban bill was much more comprehensive.


398 *Journal of the House of Representatives of the Commonwealth of Massachusetts:1892*, at 302 (Feb. 19) (1892). The House accepted the latter report a few days later. Id. at 316 (Feb. 23). The Senate then concurred. Commonwealth of Massachusetts, *Journal of the Senate for the Year1892*, at 294 (Feb. 26) (1892); “The Legislature,” BH, Feb. 27, 1892 (2:6).

399 “Cigarettes to Go?” BDA, Feb. 27, 1892 (5:1).
House voted to postpone discussion of the Public Health Committee’s report that it was “inexpedient to legislate,” but Clayton, “the avowed and active enemy of the cigarette...ha[d] plenty of supporters,” and on his motion the vote was reconsidered and the motion to postpone defeated. Then, with the question of accepting the committee report pending, Clayton moved to amend the report by substituting his bill, House, No. 119—as he had given notice of doing two days earlier. The bill provided that: “No person shall manufacture or sell or expose for sale cigarettes with paper wrappers, or cigarette tobacco in any form” and imposed a $100 fine for each offense. During the ensuing debate on the motion to substitute, ironically the two physician members of the Public Health Committee, Republican Dr. Albert Blodgett (House chairman of the committee) and Democrat Dr. Edgar Dodge, opposed Clayton’s motion on the grounds that the “testimony before their committee convinced them that there were no great dangers lurking in the cigarette” because analyses had found “no opiates.... Both abhorred cigarettes themselves, but they could not conscientiously recommend prohibitive legislation. The prevention of cigarette-smoking must depend on the moral sentiment of the community.” In contrast, the aforementioned George Ball, who was “opposed to the use of tobacco in any form,” emphasized the important medical point that Babcock had made but that the doctors had ignored: “The cigarettes are smoked in a peculiar way. The smoke is inhaled and thus the nicotine, through the lungs, goes into the circulation and affects the whole body.”

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401 “Cigarettes to Go?” BDA, Feb. 27, 1892 (5:1).
402 Journal of the House of Representatives of the Commonwealth of Massachusetts:1892, at 349 (Feb. 26) (1892). The original typewritten bill bore the handwritten notation that Clayton “gives notice that he will move to substitute this bill for the report of the committee on Public Health inexpedient to Legislate.” Commonwealth of Massachusetts, An Act to prohibit the manufacture and sale of cigarettes and cigarette tobacco (Feb. 26, 1892) (copy furnished by Massachusetts Archives). The vote of the committee (four of whose members were republicans and three Democrats) was consistent with the members’ vote on the bill on March 16: four voted against and two for the bill.
404 House No. 119 (n.d. [Feb. 26, 1892?]).
405 A. M. Bridgman, A Souvenir of Massachusetts Legislators: 1892, at 119 (1892).
406 Thirty-nine year-old Dodge had attended Harvard Medical School and been graduated from Dartmouth Medical College. A. M. Bridgman, A Souvenir of Massachusetts Legislators: 1893, Vol. II at 155
407 “Cigarettes to Go?” BDA, Feb. 27, 1892 (5:1).
system.” Following the debate the bill overcame a fatal procedural hurdle when the House did substitute Clayton’s bill for the committee report. (That same day the Senate accepted the House report of the Public Health Committee, leave to withdraw, on the Massachusetts WCTU’s officers’ petition for legislation prohibiting those under 16 to use tobacco.)

A week later the House engaged in another short debate that produced no concrete result, but did offer a broader sense of the range of views on cigarettes. While one Republican argued that further discussion would merely waste time because the House would never pass such a ban bill, one Democrat disagreed because he regarded cigarettes as dangerous weapons in young people’s hands, destroying both health and morals. Yet another Democrat, as an opponent of cigarettes supported the principle underlying Clayton’s proposal, but nevertheless deemed the bill inadvisable. Finally, one Republican’s characterization of the bill as “ridiculous” led another Republican to observe that since the chamber had been willing to legislate in favor of porgies and mackerel, it was “about time to do something for our children.” The emergence, during the run-up to the vote on the bill’s third reading, of a new anti-cigarette champion caused a stir in the press. It was, as far as the Fitchburg Daily Sentinel was concerned, a wonder that the house has twice stood by the bill to forbid the manufacture and sale of cigarettes. While grasping this point and adding that “the temptation to continuously smoke” was much greater among cigarette smokers, one Boston editorialist nevertheless bizarrely asserted that it would be “far better” if Turkish tobacco were used in cigarettes. “Cigarette Smoking,” BH, Feb. 15, 1892 (4:3). The inchoate and self-contradictory nature of the etiological framework that even the foremost physicians created at this time for understanding the impact of cigarette smoking was reflected, for example, in the following statements by Dr. Charles Loomis Dana, the leading neurologist in the United States. On the one hand, he agreed that: “Inhaling is the most pernicious feature in the contracting of this habit. Once acquired, it takes on the shape of a mania, and becomes as difficult to control as the opium or morphine habit.” For example, Dana found it remarkable that some cigarette inhalers transferred this practice even when they took up cigar or pipe smoking. On the other hand, he found it necessary to instruct “the popular mind” that cigarette smoking “doesn’t particularly hurt the lungs or throat....” Allan Forman, “Cigarette Question,” Salt Lake Herald, Apr. 10, 1892 (5:1-5 at 4).

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cigarettes. Efforts have been made to laugh it down and to argue it down, but somehow the house has had a good majority for it. One of the queer features of the debate has been that Mr. Chance of Boston, a tobacconist, is a champion of the bill on the ground that cigarette smoking is hurtful to young people and he is willing to give up his profits in order to have the law passed. It is yet too much to expect that the bill be enacted.\(^{412}\)

As a Boston Democrat Charles Chance was an unlikely candidate for this role—after all, the fact that only four of the 47 other Boston representatives voted Yea on third reading ultimately produced the bill’s defeat.\(^{413}\) Referring to the tobacconist’s stance that “there was something higher and nobler in life than addling the brains of the young” as an example of how the Massachusetts legislature had treated the measure “as a moral question,” the \textit{St. Paul Daily Globe} editorialized that the bill—which it erroneously reported the legislature had passed “almost unanimously” two days before the House had even voted—would help out the Prohibitionists’ national party platform, into which cigarettes were expected to be incorporated.\(^{414}\)

By the time the “anti-cigarette war was waged” on March 16 on the House floor in the form of a vote on final passage, “it was a pretty general opinion that if it [H. 119] were to be killed at all it must be in the senate.” The bill’s opponents were led by Democrat Salem Charles,\(^{415}\) a Boston lawyer, whose most salient arguments evaded the central issues of the impacts of the smoking and availability of cigarettes. Instead he “warned the house that every man who voted

\(^{412}\)“Letter from Boston,” \textit{Fitchburg Daily Sentinel}, Mar. 10, 1892 (4:1-2). On March 8, Chance moved to amend the bill so that the sales ban encompassed “cigarettes with paper wrappers or cigarette paper in any form” instead of “cigarettes with paper wrappers or cigarette tobacco in any form.” Overall this change would appear to have weakened the measure (but to have benefited tobacco sellers). The motion by Clayton, the bill’s author, to table the bill and the amendment lost, and the House then adopted the amendment by a vote of 91 to 11 and ordered the bill to its third reading. \textit{Journal of the House of Representatives of the Commonwealth of Massachusetts:1892}, at 405 (Mar. 8) (1892). Chance was a barber and a master workman in the Knights of Labor. A. M. Bridgman, \textit{A Souvenir of Massachusetts Legislators: 1892}, at 100 (1892).

\(^{413}\)Only three other Democrats and one Republican representing Boston voted for the bill. See below.

\(^{414}\)\textit{SPDG}, Mar. 14, 1892 (4) (untitled edit.). In fact, the 1892 Prohibition Party platform contained no reference to cigarettes. For the text, see \textit{The Daily News Almanac and Political Register for 1893}, at 136-37 (9th Year; Geo. Plumbe comp. 1893).

\(^{415}\)Charles had moved on Mar. 9 to reconsider the previous day’s vote to order the bill to a third reading, but the motion lost. \textit{Journal of the House of Representatives of the Commonwealth of Massachusetts:1892}, at 410 (Mar. 9) (1892).
for the measure would endanger his chances of re-election” and that the bill was a “deliberate attempt to break up an industry” in Massachusetts.416 The most powerful argument that Republican Sylvester Roe, the principal of Worcester High School from 1880 to 1890,417 apparently thought he could marshal in the bill’s defense was that its opponents had been unable to devise any attacks that had not already been hurled at liquor prohibition. Seemingly aware that this argument might not win any votes—he “did not stop to consider whether it is politic or not”—he was indifferent to the outcome: “Is it right? That was the question. Massachusetts has led. Massachusetts must lead. He cared not what men said of the ridiculousness of the measure.” Democrat Frank Francis of New Bedford, another cigar and cigarette dealer, stated that the bill “would be a great help to his business,” but he nevertheless opposed “such a prohibitive measure on principle.” On the verge of launching his national legislative career—including 32 years in the House (six of them as speaker) and a term as senator—Republican Frederick Huntington Gillett, a former Massachusetts assistant attorney general, introduced the libertarian element that Charles had neglected: he regarded the bill as “the first of many repressive measures that were likely to be brought forward. The next in order, and just as reasonable, would be one prohibiting men taking off their winter flannels before the first of July.”418 That the attempted analogy between prohibiting adult men from not wearing long underwear in the spring and prohibiting the sale of cigarettes was based on the preposterous implicit assumption that smoking cigarettes was as universal and natural as adjusting clothing to the changing seasons did not prevent the bill’s surprise defeat. The 73 to 113 House vote against H. 119 exhibited very distinct party lines: 59 Republicans were joined by only 14 Democrats casting Yeas, whereas the Nays were virtually equally divided between 56 Republicans and 57 Democrats. Thus, while slightly more than half (51 percent) of Republicans favored the ban, fewer than one-fifth (19.7 percent) Democrats did. Even more prominent than party was the pull of the metropole: of the 48 members representing the city of Boston 18 were Republicans, of whom 16 voted Nay and only one Yea. Irish ethnicity and Catholic religion were presumably also markers of opposition to prohibition: for example, all seven House members whose surnames began with “Mc” or “O’” and voted were Democrats and cast Nays.419

416“Cigarettes Win,” BDA, Mar. 17, 1892 (8:3).
417A. M. Bridgeman, A Souvenir of Massachusetts Legislators: 1892, at 100 (1892).
418“Cigarettes Win,” BDA, Mar. 17, 1892 (8:3).
419Journal of the House of Representatives of the Commonwealth of Massachusetts: 1892, at 458-60 (1892). Party affiliation was taken from the handwritten annotations made in a copy of of Commonwealth of Massachusetts, Manual for the Use
In analyzing this vote it is well worth reflecting on what might well be a unique data set for the nineteenth century: in 1892, 1893, and 1894, *A Souvenir of Massachusetts Legislators*, an annual publication that continued for many years, presented figures on the number of House and Senate members who smoked. In 1892, 22 of 40 or 55 percent of senators smoked in contrast to 151 of 240 or 63 percent of House member. In 1893, 28 of 40 or 70 percent of senators smoked, while “only” 136 of 240 or 57 percent of representatives smoked. In 1894, exactly the same number of representatives smoked, while the number of smoking senators declined to 25 or 62.5 percent. That fewer than three-fifths of the prime-age males in the legislature of a highly urbanized eastern state smoked any form of tobacco during these three years is interesting in its own right, but since the proportion for 1892 was only two percentage points higher than the proportion of members who voted against H. 119, it raises the tantalizing question as to whether smoking itself might have been a or even the crucial variable. Unfortunately, however, the compendium did not identify individual smokers.

After the bill’s unexpected defeat in the House, the *Fitchburg Daily Sentinel* offered an explanation based on considerable statehouse talk about “corruption” in connection with H. 119. Though the talk lacked the requisite definiteness to support “bringing any specific charges,” the paper alleged that “many keen-eyed men have no doubt that there exists in the house a sort of organized gang of Irish Democrats, mostly from Boston, who tried to blackmail cigarette manufacturers to give them money to defeat the bill.” When the (unidentified) manufacturer “being negotiated with rebelled against paying the high sum asked and said he would put his money into the senate and kill the bill there,” the “strikers for money determined that the senate should not get the money” and “killed the bill

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420 Arthur Milnor. Bridgman, *A Souvenir of Massachusetts Legislators: 1892*, at 124 (1892). Bridgman also presented data on the number of smokers in each committee. For example, five of 9 members of the Public Health Committee smoked. *Id.* at 121. He also collected such bizarre data as the total weight of House and Senate members and how many did not like baseball. Unfortunately, 1893 was the last year in which Bridgman included data on smoking.


423 To be sure, some proportion of the nonsmokers may have chewed tobacco.
in the house.” More generally the Sentinel lamented that the election of big city Irish Democrats conferred on them “a standing in the community which no infusion of mugwump blood can offset” and which would expose both Irish and Democrats to “constant distrust until honest men...are sent to the legislature.”

The First Southern Legislative Chamber to Pass a Public Cigarette Smoking Ban: Mississippi House 1892

Whisky is not the only article this Legislature is determined to prohibit. It is also after cigarettes in a lively style.

At exactly the same time that the Massachusetts legislature was handing a telling rebuff to the anti-cigarette cause, the movement was achieving its first legislative success in terms of regulating adult behavior. On February 15, 1892, in the course of its morning deliberations on the chapter of the new state Annotated Code dealing with crimes and misdemeanors, the Mississippi Senate—which was composed, as it would be for the following eight decades, exclusively of Democrats—adopted a section making it a misdemeanor to sell any form of tobacco to persons under the age of 18. When the House, whose

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425 “War Against Cigarettes,” Call (San Francisco), Feb. 19, 1892 (1:3). The WCTU was a strong and militant organization in Mississippi that Frances Willard, the national leader, helped found in the later 1880s. As was the case elsewhere, alcohol was its prohibitory focus, but the state WCTU’s racist animus came to the fore in its reaction to the wet forces’ promotion of blacks’ voting in county-level campaigns. Stephen Cresswell, Rednecks, Redeemers, and Race: Mississippi After Reconstruction, 1877-1917, at 103-107 (2006). It remains a desideratum of research to determine the WCTU’s role in the Mississippi anti-cigarette movement of the early 1890s, on which William Graham Davis, “Attacking ‘The Matchless Evil’: Temperance and Prohibition in Mississippi, 1817-1908” (Ph.D. diss., Mississippi State U. 1975), shed no light in connection with his discussion of the Mississippi WCTU’s role in pursuing statewide alcohol prohibition.
427 “The Legislature,” Daily Clarion (Jackson), Feb. 16, 1892 (3:1). The section, which was adopted by a vote of 16 to 11, included two weakening amendments that imposed a knowledge requirement and lowered the maximum fine from $100 to $20; it also prohibited the sale of cigarette material and extended penalties to those procuring tobacco for persons under 18. None of these provisions was included in the final enactment, which permitted sales with written parental authorization and imposed a fine

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rules as early as 1870 prohibited smoking “in the Hall during the hours of session,”\(^{428}\) came to consider the same matter during the afternoon session, the speaker of the House of Representatives—in which Republicans held but three of 133 seats\(^ {429}\)—offered the following additional section:

If any person smoke a cigarette or tobacco or other substance wrapped in paper, shucks, leaves or other substance than tobacco, on any public street or highway, or in any church, schoolhouse, theater, public hall, hotel, dormitory, court house or other public buildings, or in or near any cotton yard, gin house, stable or barn, or near where any cotton, hay, fodder or other combustible material is kept or stored, or on any street car, railroad car, boat or other public conveyance, or in or near any manufacturing establishment, or in any store or warehouse, he shall on conviction be fined not less than five dollars nor more than twenty-five dollars or imprisoned not exceeding ten days or both.\(^ {430}\)

Speaker Hugh McQueen Street (1833-1920), Civil War veteran and Democrat, was no counter-cultural radical. He had been a “legislative factor in Mississippi for a quarter of a century”\(^ {431}\) and was “one of the ablest and most experienced legislators Mississippi ever had.”\(^ {432}\) Not only had he been House Speaker three times (1873-74, 1876-78, and 1892-94),\(^ {433}\) but also chairman of the ways and means committee.\(^ {434}\) His two great claims to political fame\(^ {435}\) were both


\(^{430}\) Journal of House of Representatives of the State of Mississippi, at a Regular Session Thereof: Convened in the City of Jackson, January 5th, 1892, at 378 (Feb. 15) (1892).

\(^{431}\) “Current Comment in Mississippi,” DP, Oct. 16, 1895 (6:1).

\(^{432}\) “Current Comment in Mississippi,” DP, Apr. 23, 1897 (13:2).

\(^{433}\) Dunbar Rowland, Official and Statistical Register of the State of Mississippi: 1908, at 44-45 (1908).

\(^{434}\) “Current Comment in Mississippi,” DP, Oct. 16, 1895 (6:1).

\(^{435}\) In 1896 Street reinvigorated his prominence by becoming the state head of the National or Gold Democrats, who were disgruntled over the party’s abandonment of President Cleveland and the gold standard. Stephen Cresswell, Multiparty Politics in Mississippi, 1877-1902, at 162-64 (1995).
First Successes Fail: 1889-1892

depthily rooted in the restoration of white supremacy to Mississippi. When, as an obituary lovingly reminded readers half a century later, he was elected as one of only eight Democrats to the state legislature in 1869, “the other members being carpet baggers and negroes,” the record he made “in wresting the state from the power of the carpet-baggers and negro dominance is indelibly stamped on the minds of those acquainted with the reconstruction days of the south.”  

The other “imprint of his genius” that he placed on the state constitution of 1890 by virtue of “having been one of the most practical members of the [constitutional] convention” brought about the disfranchisement of Mississippi’s black majority—or, as his family’s genealogy put it, “plac[ed] state government forever in the hands of the its most intelligent citizens.”

To the extent that Street’s anti-smoking proposal appeared to reflect a concern with conflagrations, it may not have been unrelated to his having been an “extremely conservative insurance executive” in the fire insurance business for the previous 17 years, in general charge of the interests of the Phenix Insurance Company of Brooklyn, New York, in Mississippi and Louisiana. After one representative had moved (apparently in jest) to amend Street’s amendment by adding “or any other place” (Laughter), another’s motion to

436“Col. H. D. [sic] Street Dies at Home in Meridan,” CA, June 1, 1920 (typewritten copy of article in “Hugh McQueen Street, 1833-1920,” a slim binder of similar typewritten copies of obituaries and memorials in Mitchell Memorial Library, Mississippi State University).

437“Current Comment in Mississippi,” DP, Apr. 23, 1897 (13:2). Scholarly commentary on the convention does not emphasize (or sometimes even mention) Street. E.g., Albert Kirwan, Revolt of the Rednecks: Mississippi Politics, 1876-1925, at 58-84 (1965 [1951]). Kirwan mentioned Street only twice, both times misspelling his name “Streit.” Id. at 191, 196.


439Henry Street and Mary Street, The Street Genealogy 331 (1895).

440Stephen Cresswell, Rednecks, Redeemers and Race: Mississippi After Reconstruction, 1877-1917, at 113 (2006). In Journal of the Proceedings of the Constitutional Convention of the State of Mississippi 708 (1890), he was listed as a fire insurance adjuster; Journal of House of Representatives of the State of Mississippi, at a Regular Session Thereof: Convened in the City of Jackson, January 5th, 1892, at 1028 (1892), listed him as an insurance adjuster.

441Biographical and Historical Memoirs of Mississippi 2:861 (1999 [1891]).

442“The House,” [Weekly] Clarion (Jackson), Feb. 18, 1892 (5:2-4 at 4). This motion did not appear in the House Journal. The movant, Mr. Peyton, voted for Street’s
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extend the prohibition to cigars and pipes lost. By a vote of 58 to 31 the House then adopted Street’s proposal making it a misdemeanor to engage in public cigarette smoking. With the chamber’s adoption of the whole chapter on crimes and misdemeanors, a conflict arose with the Senate.

In the meantime the House action became front-page news around the country: the full text of Street’s amendment was printed, for example, the next day in the New Orleans Picayune and several days later in the San Francisco Call. Mississippi’s leading newspaper, the Clarion, which provided extensive coverage of legislative proceedings and was not focused on fire prevention, editorially welcomed the action:

The alarming growth of the cigarette habit, with its appalling injury, and oftimes fatal consequences, to mind and body, has made necessary legislative action looking to its suppression. Public sentiment should give the law all possible moral support and contribute toward its rigid enforcement.

This kind of journalistic encouragement failed to persuade the Senate, which on February 18 refused to concur in Street’s amendment. A senator succeeded by the narrowest of votes (16 to 15) in securing reconsideration of that vote, but his motion to concur was then decisively defeated by a vote of 10 to 26. Exactly where the error in nationwide news dissemination occurred is unclear, but three days later the St. Paul Daily Globe, mistakenly believing that the House amendment was an “act,” compounded its misunderstanding by imagining enlarged coverage. Nevertheless, despite the error-fueled animus against the

amendment.

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\item Journal of House of Representatives of the State of Mississippi, at a Regular Session Thereof: Convened in the City of Jackson, January 5th, 1892, at 378 (Feb. 15) (1892). The movant, George McKie, a farmer and merchant, voted against Street’s amendment. Id. at 378, 1030.
\item Journal of House of Representatives of the State of Mississippi, at a Regular Session Thereof: Convened in the City of Jackson, January 5th, 1892, at 378, 379 (Feb. 15) (1892). Frank Burkitt, a very important Farmers’ Alliance and later Populist leader, voted for Street’s amendment.
\item “Mississippi Legislature,” DP, Feb. 16, 1892 (1:5).
\item “Penalty for Smoking,” Call (San Francisco), Feb. 20, 1892 (1:3).
\item Clarion (Jackson), Feb. 16, 1892 (2:1) (untitled edit.).
\item Journal of the Senate of the State of Mississippi, at a Regular Session Thereof, Convened in the City of Jackson, January 5th, 1892, at 328-29 (Feb. 15) (1892). Earlier that day the Senate had agreed to strike chewing tobacco from the ban on selling tobacco to persons under 18. “The Legislature,” Clarion (Jackson), Feb. 19, 1892 (3:1).
\end{enumerate}
Mississippi initiative, the newspaper’s editorial opinion reflected the proliferating national anti-cigarette sentiment, which, unbeknownst to the *Globe*, would reach the Minnesota House the following year:

Among the most recent acts passed [in Mississippi] is...the most advanced measure in regard to tobacco and cigarettes that has been observed in any quarter. ... That is, a “man can be imprisoned for smoking a cigarette, or tobacco or other substance rolled in paper” in any public place. If the prohibition had been confined to cigarettes, or the substances that pass for tobacco, which are nauseating to the general nose or prejudicial to health, the reason would be apparent. But it is a refinement of civilization hardly to be expected in that quarter that bars the popular habit in all places where people gather.  

On February 23, by a close vote of 59 to 47, the House adopted the motion to recede on its own Speaker’s amendment, thus ending the chamber’s week-long stance against public cigarette smoking in Mississippi. Despite this set-back, anti-cigarette forces targeting adult consumption did achieve one victory in the legislature that session—imposition of a $50 privilege tax on each dealer in cigarettes or cigarette paper, which applied “even though the party has paid a privilege tax as other dealers.”

The Mississippi House vote to prohibit adults from smoking cigarettes in indoor and outdoor public places was, despite contemporaneous complaints to the contrary, not “freak legislation”—or if it was, the freak replicated itself the following year in Alabama and Minnesota.

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449“A Rigid System,” *SPDG*, Feb. 21, 1892 (4:3) (edit.).

450Journal of House of Representatives of the State of Mississippi, at a Regular Session Thereof: Convened in the City of Jackson, January 5th, 1892, at 441 (Feb. 23) (1892). Street voted Nay, but there was considerable vote switching in addition to new votes by members who had been absent or had not voted eight days earlier. See also “The Legislature,” *Clarion* (Jackson), Feb. 24, 1892 (3:1-3 at 3).

4511892 Miss Laws ch. 75 § 1, at 243, 247; *The Annotated Code of the General Laws of the State of Mississippi* § 3334 at 753 (1892) (prepared by R. Thompson et al.).

452For example, “Senator Wilson protested strongly against the [general cigarette sales ban] bill’s being classed as ‘freak’ legislation, and announced that Ohio, Rhode Island, New Hampshire and other states had passed laws almost identical.” “Minnesota Legislature,” *Minneapolis Journal*, Mar. 26, 1901 (2:1). In fact, none of those three states had enacted such a ban, though others had.
1893: Annus Mirabilis

[Texas] Gov. Hogg delivered his message yesterday. To correct the evil of the issue of railway stocks of fictitious value, he recommended rigid laws requiring state inspection of contracts and work, limitation of stocks and bonds and a state registration and certification to make the issue legal, with forfeiture of charter for penalty. He advocated a stock quarantine and the taxation of insurance companies and foreign corporations, vendors of deadly weapons and cigarettes...¹

The prompt passage in the house of a bill prohibiting the sale of cigarettes in Georgia was a surprise. The bill will probably be killed in the senate. It should be. ... The cigarette habit is a bad habit. But so are the cocaine and opium habits. It is the abuse of these things which lead [sic] to trouble and harm. The anti-cigarette is only another phase of fanatical crusades against personal liberty. It is the entering wedge to other and more dangerous forms of prohibition. It is a needless and dangerous effort to prohibit certain forms of business and to abridge personal liberty.²

The past year [1893] has been a very hard one for the cigarette. It has been pounded and abused and legislated about and inveighed against in the newspapers almost as much as the deadly trolley. But the cigarette has continued in its progress into popular favor just as the trolley wires have appeared in nearly every city of the country, despite all protests and all opposition.³

... A result that was achieved by a vote of 326 to 17, indicating either a phenomenal degree of approval or a desire to pass the problem on to the Senate.⁴

The year 1893 ushered in deep economic depression⁵ and six years of double-digit unemployment⁶ along with labor and populist insurgency⁷ but it also

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³"Young Prince Nicotine,” Yenowine’s Illustrated News (Milwaukee), Feb. 17, 1894 (1:1-2).
⁶According to Stanley Lebergott, Manpower in Economic Growth: The American
1893: Annus Mirabilis

witnessed an unprecedented volume of anti-cigarette measures flooding state legislatures.\(^8\) Just as the state legislative activity between 1889 and 1892 discussed in the previous chapter had revealed that the enactment of the first statewide general cigarette sales ban in Washington State in 1893 was in no way some kind of unmediated, freakish event, the fact that that same year also witnessed one chamber in each of eight states (Alabama, Pennsylvania, Kentucky, Minnesota, Arkansas, California Nebraska, and Georgia) in several disparate regions pass similar bills impressively demonstrated that the anti-cigarette movement was nationally coalescing in the grips of a transformative strategy. Sheding the confines of the narrow targeting of children, members and leaders throughout the country, even if they, by and large, despite their claims that cigarettes were poisonous and, even in the absence of toxins, deleterious to grown-up men’s health, had not integrated the existing medical-scientific knowledge base and political-legal-moral discourses to demand prohibition vis-à-vis adult males, nevertheless began to grasp that they would be unable to make cigarettes inaccessible to children as long as these lethal commodities were freely and openly being sold to men. Newspaper transmission from one state to another of the facts of the initial partial successes of the new prohibitory approach—for example, on February 11 the Chicago Inter Ocean reported that passage in the Pennsylvania House of a bill prohibiting the sale and manufacture of cigarettes had made that state the fourth to “enter[ ] a protest against the cigarette”\(^9\)—and their propagation by the Woman’s Christian Temperance Union in its annual

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\(^8\)Records Since 1800, tab. A-15 at 522 (1964), the percent of the labor force unemployed quadrupled from 3.0 in 1892 to 11.7 in 1893, peaked at 18.4 in 1894, and still remained at 12.4 as late as 1898. Even according to a methodologically revised set of data, which produced a “much milder cycle,” the unemployment rate jumped to 8.09 percent in 1893 and remained in the 11-12 percent range during the next five years. Christina Romer, “Spurious Volatility in Historical Unemployment Data,” *Journal of Political Economy* 93(6):1-37, tab. 9 at 31 (Dec. 1985).


\(^8\)To be sure, the bills were largely filed even before the panic began with the collapse of the Philadelphia and Reading Railroad on February 20, and most of the state legislative proceedings had concluded by the time of the general collapse signaled by the failure of the National Cordage Company in May. “Collapse of the Reading,” *NYT*, Feb. 21, 1893 (3:1-3); “Cordage Trust Goes Under,” *NYT*, May 5, 1893 (1:5-6); Ida Tarbell, *The Nationalizing of Business: 1878-1898*, at 228-31 (1936).

\(^9\)DIO, Feb. 11, 1893 (4:3-4) (untitled). It is unclear how the newspaper defined such protests.
convention reports and weekly periodical\(^{10}\) helped sustain the momentum of the multi-state legislative snowball effect.

### Alabama’s Evanescent Public Smoking Ban: The House

Alabama is taking decisive action against the cigarette nuisance. A bill has passed one branch of the Legislature prohibiting the importation or sale of cigarettes or the smoking of the same in any public place in the State under severe penalties. This is sufficiently drastic and seems to be based on a proper conception of the cigarette and its insufferable stench in their relations to an innocent and suffering public.\(^{11}\)

The State of Alabama has passed a law forbidding the sale of cigarettes.... Alabama is no dude.\(^{12}\)

In 1885, just one year after it had been organized,\(^{13}\) the Alabama WCTU succeeded in securing enactment of one of the national organization’s anti-tobacco legislative priorities, which was gaining ground all over the country: it imposed so-called scientific temperance instruction on all public schools in hygiene and physiology with special reference to the effects on the human system of alcohol, stimulants, and narcotics.\(^{14}\) Eight years later the state group’s president still proudly recalled that Alabama had been only the eighth state and the first in the South to establish such an instructional regime.\(^{15}\) By the 1890-91 session, when the Alabama WCTU had only 260 members,\(^{16}\) the legislature passed the national WCTU’s other anti-tobacco legislative priority, making it unlawful to sell or give any minor under 18 years of age cigarettes, cigarette tobacco, or cigarette paper or any substitute, subject to a fine ranging between

\(\text{\textsuperscript{10}}\)E.g., “Since Our Last Issue,” *US* 19(6):1 (Feb. 9, 1893) (“The Alabama legislature [sic; should be House] has passed a bill to prohibit the sale or disposition of cigarettes, also the smoking of cigarettes in public places”).

\(\text{\textsuperscript{11}}\)CT, Feb. 1, 1893 (12) (untitled edit.).

\(\text{\textsuperscript{12}}\)DIO, Feb. 4, 1893 (4:4) (untitled).

\(\text{\textsuperscript{13}}\)Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting...1891, at 255 (1891).

\(\text{\textsuperscript{14}}\)1884-85 Alabama Acts 48, at 113.

\(\text{\textsuperscript{15}}\)Minutes of the Alabama Woman’s Christian Temperance Union, at the Tenth Annual Meeting, Selma, Alabama, December 1st to 3d, 1893, at 36 (copy furnished by Birmingham Public Library).

\(\text{\textsuperscript{16}}\)Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting...1891, at 255 (1891).
$10 and $50, or imprisonment in county jail, or hard labor for the county for up to 30 days.\textsuperscript{17}

Against the background of deep economic depression, dislocation, and political upheaval in Alabama during the first half of the 1890s,\textsuperscript{18} prospects for legislative intervention across a broad array of political-economic and social issues were transformed by the Populist rebellion against Bourbon Democratic control at the elections of 1892 and reflected during the 1892-93 session. This “Populist uprising” against “planter rule,”\textsuperscript{19} which was a challenge by large numbers of “native Southern whites” to the Democratic Party, has been characterized as “the most salient fact of Alabama political life in 1892....”\textsuperscript{20} (At the 1892 presidential election a greater proportion—36.6 percent—of Alabama voters cast ballots for Populist James Weaver than those of any other state east of Kansas.)\textsuperscript{21} In Alabama, as in several other southern states, the Farmers’ Alliance, a mass agricultural protest organization, soon morphed into or fused with Populism; by 1890 its (Democratic) members made up a clear majority of the Alabama House and one-third of the Senate.\textsuperscript{22} It supported Reuben Kolb, a former state agricultural commissioner and renowned watermelon plantation owner who was the state’s highest-profile agrarian figure, for governor in 1890, but failed to wrest his nomination from the Bourbon Democrats. In 1892, refusing to acquiesce in the Bourbons’ renewed effort to deny him the nomination, he and his supporters bolted the state Democratic convention on June 8 and held their own, at which they organized as Jeffersonian Democrats (though in reality hardly distinguishable from Populists) with Kolb as gubernatorial candidate.\textsuperscript{23} By this time Kolb represented and appealed to submarginal tenant
farmers, laborers, miners, factory workers, and Republicans with a platform featuring such state-level demands as a liberal public school system, equitable property taxation, opposition to trusts and placing convict laborers in competition with free laborers, and popular election of railroad commissioners as well as national Populist proposals for a graduated income tax, free and unlimited coinage of silver, and an expansion of the currency. Although the Bourbon Democratic platform also espoused a few of these planks, the most prominent divide between the parties related to blacks’ suffrage and other rights. Whereas the Bourbons—whose statewide political power rested on their fraudulently counting blacks’ votes for white-supremacist candidates in the Black Belt counties—openly favored election laws to “better secure the government of the State in the hands of the intelligent and the virtuous,” the Jeffersonian Democrats propagated the “protection of the colored race in their legal rights” and the “encouragement and aid in the attainment of a higher civilization and citizenship, so that through the means of kindness, fair treatment, and just regard for them, a better understanding and more satisfactory conditions may exist between the races.”

The bill to bring about a generalized prohibition of cigarette sales was introduced by a young first-term Black-Belt representative, William Henry Seymour of Sumter County, which was “[w]ithout a single white Republican,” the population of which was 80 percent black in 1890, and which in 1886, at the prodding of WCTU member Julia Tutwiler and her prohibition campaign, was statutorily made dry. Born in 1867, Seymour was the son of Robert Henry Seymour, a farmer and prominent county politician, through whose “‘pull’
his son attended the U.S. Naval Academy. After two years as principal of the Livingston Male Academy (which he himself had recently attended)—though he had studied law, he never applied for admission to the bar—he spent a further two years as chief clerk in the Alabama Department of Education before being elected to the 1892-93 session of the Alabama House of Representatives, in which he again served in 1898-99. During the intervening years he was U.S. consul in Palermo, Italy. At the beginning of the century he made a transition to a career as a “business man,” becoming in 1904 the first president of the newly organized Alabama Division of the Southern Cotton Association and of the Mississippi-Alabama Lumber Exchange, and then in 1907 director of the Alabama Bureau of Cotton Statistics.

Although in announcing his candidacy for one of the two House seats to represent Sumter County in February 1892 Seymour stated that he was seeking the nomination of the Democratic and Conservative Party, when he (and incumbent J. Reid Ramsay) won the primary on April 30, they were “Kolb men” at the same time that Kolb just eked out a victory in Sumter County over incumbent Bourbon Democratic Governor Thomas Jones. Kolb, according to the official count of the Sumter county returns in the state election on August 1, Kolb received fewer votes than Jones—just as he is generally recognized as having been swindled out of the governorship as a result of the Bourbon Democrats’ monumental election fraud in the Black Belt counties—but

30 The fact that following the 1892 presidential election R. H. Seymour was credited with being “the most instrumental man of the 6th congressional district in giving Cleveland...such a handsome majority” suggests that he was not acting in accordance with Jeffersonian-Democratic practice. SCS, Feb. 23, 1893 (2:1) (untitled).

31 The anti-Kolb and anti-Seymour LJ, Aug. 5, 1892 (4:2) (untitled edit.), attacked the unfairness of Seymour’s brother’s also having had bestowed on him a free education at the Naval Academy.


33 W. Henry Seymour, Letter to Editor, SCS, Feb. 18, 1892 (3:3).

34 “Victory!” SCS, May 5, 1892 (2:1); “The Result,” LJ, May 6, 1892 (4:1).

35 “Result of the Primary Election Held in Sumter Apr. 30th,” SCS, May 5, 1892 (3:4-7); “Sumter County Primary Election, April 30, 1892,” LJ, May 6, 1892 (5:2-4). The primary vote was linked to the selection of county delegates to the state party convention.

Seymour and Ramsay, who appeared on Kolb’s election tickets, were elected to the House.38

So, too, were about 36 other Jeffersonian Democrats/Populists and one or two Republicans in addition to seven of the former to the Senate.39 Distinguishing clearly between Jeffersonian Democrats and Populists or, for that matter, even between Jeffersonian Democrats and “straight” Democrats, was difficult in 1892, when Alabama politics were “extremely fluid” as Democrats experienced severe stress in breaking free from a party whose conservative leaders had, since Reconstruction, been insisting that white men who bolted were essentially committing race treason by voting for black Republicans.41 The figure for Populists thus included Jeffersonian Democrats, who were “only slightly disguised Populists,” some of whom were reluctant to call attention to their break with the Democratic Party, while others rebelled against the Bourbon Democratic leaders without adopting the more radical elements of the Populist platform.43 In reporting on the outcome of the August 1 elections, the Montgomery Advertiser initially noted that the state legislature was “safely straight Democratic by a large majority in both branches,” specifying that about two-thirds of the newly elected House members were “Jones men....”44 The next day it added (editorially) that 61 representatives were “certainly for Jones, with probability of some others.” Moreover, of those who had not favored Jones’s election, it was “highly probable that very few would go into any revolutionary

37“A Trick,” LJ, July 29, 1892 (4:2). A month earlier Seymour and Ramsay had not yet publicly announced their position regarding the two state tickets. LJ, June 24, 1892 (4:2) (untitled). Seymour’s father, R. H. Seymour, was also a Jeffersonian Democrat and member of Kolb’s executive committee. “R. H. Seymour,” LJ, Sept. 2, 1892 (4:3).


39The leading national almanacs reported that the 1892-93 Alabama House was composed of 61 Democrats, 38 Populists, and 1 Republican. Tribune Almanac and Political Register for 1893, at 261; The World Almanac and Encyclopaedia: 1894, at 377; The Daily News Almanac and Political Register for 1893, at 240 (1893).

40“Confirmed!” MA, Aug. 3, 1892 (1:1).

41Email from Wayne Flynt to Marc Linder (Aug. 7, 2010). Prof. Flynt is a leading historian of Alabama.


43Email from Wayne Flynt to Marc Linder (Aug. 2, 2010).

44“Confirmed!” MA, Aug. 3, 1892 (1:1).
schemes that Kolb and his advisers might originate."

The aforementioned ambivalence that still bedeviled would-be bolters and was ideologically reflected in the newspaper’s account took on a much more salient and practical profile at the opening of the legislative session in mid-November when the House Democratic caucus met. The 44 “Kolb men” who, the Advertiser, three and a half months after the election, now reported had been elected to the House, would be forcibly and binarily classified as Democrats or not depending on the qualifications that the caucus majority imposed for membership. Populist farmer George S. Youngblood sought to expand the scope of membership by offering as a substitute for a narrow definition a resolution “That all members of this House be admitted to membership in this caucus, without regard to how they voted as between Kolb and Jones in August, or between Weaver and Cleveland in November, if, prior to this year, they have habitually affiliated with the Democratic Party.” Youngblood then pushed the bounds into a zone unoverlookably anathema to the Bourbons and the extralegal bases of their power when he added as further qualifications that each member “shall favor, among the first acts of this body, the enactment of a law authorizing a contest of the election for Governor and other State officers at the August election, 1892” and “shall pledge himself to favor and vote for a fair election law, by which a free vote and fair counts of all lawful and constitutional votes, cast at any election in this State, shall be secured.” As soon as the caucus voted to table Youngblood’s amendment, “only...twenty-four Kolb members left the House.” Among those who remained and were enrolled as caucus members was Seymour, who just three days later himself sat with his caucus colleagues in judgment of others who sought admission despite their not having voted for various Democratic candidates.

Even if the possibly idiopathic reasons that caused Seymour to turn his back

47. Youngblood was returned as a farmer at the 1900 and 1910 Census of Population. As a Populist in 1896 he received 18 percent of the vote in his unsuccessful congressional campaign against the powerful John Bankhead. http://www.ourcampaigns.com/RaceDetail.html?RaceID=485815 (visited Nov. 8, 2010).
48. Two other proposed resolutions focused on the criteria of having supported (1) the Democratic Party’s presidential, vice-presidential, and congressional nominees and (2) Governor Jones at the August elections and being pledged to the party’s future support. “The General Assembly,” MA, Nov. 16, 1892 (1:5-6 at 2:1).
on the dissidents are unclear, in general the 20 Kolbites decided to return to the Democratic fold because:

They were never Populists to begin with. They were remnants of all sorts of anti-Bourbon factions left over from the 1870s and 80s.... They were National Grange, Farmers’ Alliance, Republicans, etc., without a common party, ideology, set of grievances, proposed solutions, or single champion. They were an anti-coalition, not a disciplined party. The whites were also racists and easily spooked when the Bourbons accused them of abandoning their own kind (whites) and forming a coalition with blacks. That was the most volatile charge of all, and resulted in many people of Populist ideology drawing back. Some were also opportunists, who went with which ever party and faction seemed most likely to win.51

On November 26, 10 days into the session, the House, which was operating under the rule that “No person shall be allowed to smoke within the house, lobby or gallery,”52 witnessed Seymour introduce H. 263, the title of which hid the bill’s radical light under a bushel by obscurely designating the measure as merely amending the aforementioned 1890 no-cigarette-sales-to-under-18-year-olds law. Appropriately, it was referred, as was often not the case in other states, to the Public Health Committee.53 Despite the modest title, the press immediately picked up on its explosive substance. The next day the Birmingham Age-Herald reported that Seymour’s bill would prohibit the sale of cigarettes by means of a $10 to $50 fine, half of which would go to the informant reporting the violation. Inserting its editorial comment into the detailed front-page article on the previous day’s session of the general assembly, the paper observed that the bill had “a good chance of enactment. It is another step in the world’s war against the ‘deadly cigarette.’ The state had a perfect right to pass such a law.”54 Seymour’s

51 Email from Wayne Flynt to Marc Linder (Sept. 3, 2010).
52 *Journal of the House of Representatives of the State of Alabama, Session of 1892-3*, at 81 (1893) (Rule 48).
53 *Journal of the House of Representatives of the State of Alabama: Session of 1892-3*, at 155 (Nov. 26, 1892) (1893). Because the Alabama Department of Archives and History unfortunately lacks a bill file for H. 263, the *Journal of the House* does not contain the text of the bill or substitute, and the bill did not become law, the legislative history has to be reconstructed from newspaper accounts. Telephone interview with Nancy Dupree, ADAH, Montgomery (Dec. 8, 2006) and letter to Nancy Dupree (Dec. 8, 2006).
54 “General Assembly,” *BA-H*, Nov. 27, 1892 (1:1-2 at 2). The amendment’s effect was to “strike out the words ‘to minors under 18 years of age,’ thereby prohibiting absolutely the sale of cigarettes....” “The Deadly Cigarette,” *Weekly Age Herald* (Birmingham), Jan. 11, 1893 (3:3).
hometown weekly reproduced the comments verbatim.55

On December 6, the committee reported the bill favorably.56 That same day the Associated Press sent out a brief report from the state capital of Montgomery, which ran the next day as a front-page filler in numerous newspapers throughout the country, including The New York Times, all of them bearing a headline with a connotation similar to the Times’s “The Cigarette Must Go”: “The Legislature of Alabama continues to pursue the paper cigarette. A committee has reported favorably a bill taxing all dealers in cigarettes $300 a year. To-day a bill was introduced to prohibit the sale of cigarettes altogether. The bill also prohibits smoking cigarettes in public places. The penalties are fines.”57 The next day the weekly Sumter County Sun also reported that the anti-cigarette bill introduced by “W. Henry Seymour,” who “will always be found on the side of the people,” imposed a state license of $200 and a $100 tax for the sale of cigarettes.58

One editorial in particular, in the Republican Morning Oregonian (which upped the ante by pegging the tax at $600), synthesized the frequently expressed disparate journalistic views on cigarettes that highlighted both extreme aversion to them and condescending world-weariness about government’s capacity to prevent their proliferation:

The lawmakers of Alabama are after the cigarette habit, with the determination to stamp it out if legislation can do it. ... While all legislation of this kind will in a great measure fail to effect its object, for the obvious reason that it is impossible to infuse manliness into mankind in this way, the Alabama lawmakers are to be commended for the thoroughness of the job they have undertaken. There is no half-way house on the line of this vitiating, disgusting, demoralizing habit, and if legislators attempt to control it they should recognize this fact and refuse to temporize with it. The chances that such endeavor will be “love’s

56Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 272 (Dec. 6, 1892) (1893); “Elyton Company,” BA-H, Dec. 7, 1892 (1:5-6 at 6). In the event, of the 11 committee members, only one voted against the bill on January 30, 1893, and none on January 31, 1893. For the committee membership, see Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 85 (1893).
58SCS, Dec. 8, 1892 (2:1) (untitled).
labor lost” will not be greater in this case than if they were to content themselves with a puny effort to “restrict” the vice of cigarette smoking, while it will stamp their wholesome detestation of the habit much more broadly. The Oregon method is to deal with boys in this line of compulsory reformation, but the Alabama method of dealing with men will be quite as efficacious—which is to say that will make little or no difference in the consumption of cigarettes.  

Though garbled, these accounts did make clear that early coverage of Seymour’s bill in one of the state’s leading Democratic newspapers, the Birmingham Age-Herald, had, astonishingly, omitted mention of its most radical provision, the ban on public smoking (with regard to which neighboring Mississippi had been a pioneer just as it had been regarding disfranchisement of blacks). In addition, the press had conflated H. 263 with a cigarette license bill, which Seymour did not introduce. In fact, a bill (H. 365) had been filed on November 30 to levy a state and county tax on dealers in cigarettes or cigarette wrappers. The following day another bill (H. 397) was introduced to require dealers in cigarettes or substitutes therefor to pay a license tax before engaging in the business. Both bills were referred to the Ways and Means Committee, which on December 5, reported H. 365 favorably and H. 397 adversely.

59 MO, Dec. 14, 1892 (4:2) (untitled edit.).
60 “Trying to Suppress Cigarette Smoking,” DNSJ, Dec. 31, 1892 (2:1), erroneously reported that only if Alabama’s (and Georgia’s) quasi-prohibitory “high license” failed to “make the industry so unprofitable that no one will engage in it,” might an effort be undertaken to make selling or possessing cigarettes a misdemeanor.

61 See above ch. 3.
62 Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 190 (Nov. 30, 1892) (H. 365 by Lewis J. Morris) (1893). About Morris, a Calhoun County Democrat, nothing is known: he did not appear in any Census of Population and the Alabama History librarian at the Anniston Calhoun County Public Library was unable to unearth any information about him. Email from Tom (Aug. 6, 2010). He was absent on account of sickness from the session’s opening Democratic caucus, but would have remained had he been present—in other words, he would not have left with the Kolbites/Populists. “The General Assembly,” MA, Nov. 16, 1892 (1:5-6 at 2:1-2).
63 Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 225-26 (Dec. 1) (H. 397 by Thomas Edmund Knight) (1893). A Democrat from Hale County in the Black Belt, Knight in 1931 became an Alabama Supreme Court judge, in which capacity he wrote an opinion upholding the conviction of the defendants in the infamous Scottsboro Boys case despite the fact that his like-named son was the prosecutor. State of Alabama Department of Archives and History, Alabama Official and Statistical Register 1935, at 98-99. Knight voted for Seymour’s bill (while Morris did not vote).

64 Journal of the House of Representatives of the State of Alabama: Session of 1892-3,
Following the latter’s death, H. 365 was recommitted to Ways and Means, which again reported it favorably, but the bill died before reaching the floor.\footnote{Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 526, 552, 567, 828 (Jan. 25, 26, 27, Feb. 9) (1893). In 1895, the legislature did pass a very modest cigarette license tax ranging from $5 in unincorporated areas to $25 in towns with more than 5,000 inhabitants. 1895 Alabama Acts No. 566, § 44, at 1192, 1215. Later this highest level was increased somewhat and a county tax equal to half the state tax was added; the imposition by the city of Birmingham of a tax of $40.50 still left the state’s highest cigarette privilege tax at only $93.  “Would Double Cigarette Tax in Alabama,” \textit{WTJ} 42(37):2:2-3 (Sept. 13, 1915);  “Cigarettes for Alabama,” \textit{WTJ} 42(44):3:1 (Nov. 1, 1915).}

Several days after the Public Health Committee had favorably reported Seymour’s bill, press reports all over the country began appearing that the (newly formed) Tobacco Trust was already engaged in efforts to defeat the bill. On December 10 a Texas paper noted that the anti-cigarette bill had “brought a representative of one of the largest cigarette manufacturers in the country” to Montgomery and that “a strong fight will be made.”\footnote{“Fighting for Cigarettes,” \textit{San Antonio Daily Light}, Dec. 10, 1892 (1:3).} The next day a Pittsburgh paper added that “New York City manufacturers will make a desperate fight to prevent” the bill’s passage.\footnote{“Late News in Brief,” \textit{Pittsburgh Dispatch}, Dec. 11, 1892 (11:4).} A week later another wave of identical fillers rolled through the midwestern press stating that cigarette manufacturers would appear before the Alabama legislature to “fight the bill prohibiting the smoking of cigarettes in public.”\footnote{The pieces all running in the “Condensed News” column appeared in \textit{Algona Upper Des Moines}, Dec. 21, 1892 (2:7); \textit{Marshfield Times} (WI), Dec. 23, 1892 (2:2); \textit{Postville Review} (IA), Dec. 24, 1892 (1:4).}

During the five-and-a-half-week House adjournment that lasted until January 19, the \textit{Birmingham Age-Herald} noted that although until the time of adjournment no lobby had put in an appearance, it was “practically certain” that a “strong lobby with plenty of boodle” would show up by the time the legislature reconvened. The reason was not far to seek: “All the big cigarette factories of the country are combined under one general head, forming a gigantic monopoly of some $10,000,000 to $20,000,000 capital. The annual sales of cigarettes in Alabama is estimated at $250,000, fully one half of which is said to represent clear profit to the manufacturers. They can afford to send down a strong lobby from New York to save such an enormous profit as that.” On the other hand, the
newspaper intuited that public sentiment against cigarettes was so strong that they would probably be driven out of Alabama—a process that was being expedited by businessmen, who had begun to “make war”; for example, Alabama’s strongest railroad corporation had begun denying employment in its general employment office in Montgomery to young men who smoked cigarettes.69

Seymour himself left his local newspaper with the sense that the chance of his bill’s “speedy enactment” when the legislature reconvened was “very good indeed.” To be sure:

The cigarette manufacturers will undoubtedly make a hard fight against it as the profits accruing from the sale in the State amounts to many thousand dollars. If money would defeat its passage, it would be used.

It is generally supposed that a strong lobby will appear in the interest of the manufacturers but Mr. Seymour feels very sanguine that it will be impossible for them to defeat it, as the bill has a unanimous favorable report from the committee and the House refused to allow the bill to be recommitted in order that a committee representing the manufacturers might appear before the House committee. Two of the ablest lawyers of Montgomery were representing the manufacturers. Literature was circulated by the cigarette committee with the hope of showing there was no great harm in the cigarette but it seemed rather to strengthen the opposition to it. Mr. Seymour says that one would be surprised to know the number of young men who are inveterate cigarette smokers are really anxious that the bill should pass.70

When the House took up H. 263 on January 28, 1893, Seymour offered a substitute changing the bill’s title to make clear that the bill was much more than an amendment of the existing no-sales-minors law. It now read: “To prohibit the sale, giving away or otherwise disposing of cigarettes, or cigarette paper or any substitute for either of them in this State.”71 Whereas the original bill made it “unlawful for any person, firm or corporation to sell, furnish, etc., any person, firm, etc., to or with cigarettes, cigarette tobacco, papers for same, or any substitute for either,” made violations misdemeanors punishable by fine, imprisonment, and hard labor, and gave the person reporting the violation half of the fine, the substitute provided that “no person shall sell, or otherwise dispose of cigarettes, or cigarette papers or any substitute for either within the state,” but

69“The Deadly Cigarette,” Weekly Age-Herald (Birmingham), Jan. 11, 1893 (3:3). The identical text was reprinted from the daily Birmingham Age-Herald as “Cigarettes Smoking,” MA, Jan. 10, 1893 (3:1).
70“Cigarette Bill,” SCS, Jan. 12, 1893 (2:2).
struck out the provision giving the reporter half the fine.\textsuperscript{72} Conservative Democrat Thomas Lamar Sowell, who would soon vote twice against Seymour’s bill, then offered a killer amendment that would have extended the scope of the measure by banning the sale of all tobacco (“nor shall any person be allowed to sell, give away or otherwise dispose of tobacco in any shape, for or manner”), but on Seymour’s motion it was tabled and his substitute adopted.\textsuperscript{73} The press concluded, based on floor debate and the voting down of the bill-killing amendment,\textsuperscript{74} that the bill’s passage was “almost certain, though some little opposition to it was manifested....”\textsuperscript{75} The principal objection was forwarded by the chamber’s highest authority, House Speaker Francis Pettus (1858-1901) of Dallas County in the Black Belt, the son of U.S. Senator Edmund Pettus and a “central figure” in the Alabama legislature from 1886 to his death.\textsuperscript{76} During the 1892-93 session he was (unsuccessfully) leading a push for an (even among Bourbon Democrats) controversial bill to call a constitutional convention to restrict suffrage, by means of property, literacy, and military service requirements, in order to perpetuate Democratic rule \textsuperscript{77} and “white supremacy in Alabama forever.”\textsuperscript{78} Pettus’s non-substantive argument was that because the title of Seymour’s original bill failed to comply with the state constitutional requirement that “no law shall be passed except by bill and no bill shall be so altered or amended on its passage through either house as to change its original purpose” it had been improperly considered, while “the substitute altered the purpose of the bill introduced so that it proposed to place an entirely new law

\begin{footnotesize}
\textsuperscript{72} “The General Assembly,” \textit{MA}, Jan. 29, 1893 (7:1-5 at 4). Neither this nor other press accounts mentioned the presence of a ban on public cigarette smoking. Since the sale of cigarette papers was prohibited, it is unclear why the \textit{Birmingham Age-Herald} opined that if Seymour’s bill became law, “many a fellow will have to learn to roll his own little dose of poison.” \textit{BA-H}, Jan. 31, 1893 (4:2) (untitled edit.).


\textsuperscript{74} “A Veto Overridden,” \textit{Daily Register} (Mobile), Jan. 29, 1893 (2:1-3 at 2).


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1893: Annus Mirabilis

When the House on January 30 again took up the bill as unfinished business—"A Veto Overridden," "A Veto Overridden," Daily Register (Mobile), Jan. 29, 1893 (2:1-3 at 2) —the previous day the Montgomery Advertiser had predicted that it "will probably pass the House" but reported that the "clause prohibiting smoking in a public place will be stricken out" —Seymour, with the purpose of amending it, moved to reconsider the vote by which the bill two days earlier had been ordered to a third reading. After the House speaker had sustained a senator's point of order that Seymour was out of order because the previous question had been called two days earlier, Pettus and others pressed the aforementioned point concerning the substitute's constitutionally nonconforming phraseology. Then on third reading the House, without amendment, passed the bill by a more than two-thirds majority—59 to 26. Remarkably, of these 26 Nays only one was cast by the 39 (or 44) members of the anti-Bourbon Populist, Jeffersonian Democratic, and Republican parties elected to the House or the aforementioned

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1893: Annus Mirabilis

24 members who walked out of the Democratic House caucus in November. As passed, the bill absolutely prohibited the sale of cigarettes, cigarette tobacco, or papers, or any substitute therefor; for violations it imposed a fine ranging between $10 and $50 or imprisonment in county jail or hard labor of up to 30 days. Although the bill also made it unlawful for anyone to smoke a cigarette in a public place, the state’s leading newspaper and the “self-constituted guardian of the orthodox Democratic party,” the Montgomery Advertiser, (again) predicted both that this provision would probably be eliminated before H. 263 became law and that “[w]hen the bill returns to he [sic] House [from the Senate] the prohibition as to smoking in a public place will be eliminated by amendment.”

As for the aforementioned constitutional issue, the Advertiser explained that the bill was “in a shape...which it is said invalidates its operation. However, it will be properly fixed up before it passes the Senate. The trouble with it now is that the substitute and the title of the bill do not correspond. In other words, the provisions of the bill as substituted are not properly set forth in its title.” The Birmingham Age-Herald was presumably alluding to the same circumstance in opining that the cigarette bill was “in bad shape,” but that it would be “shaped up and ought to become a law.”

Seymour apparently sought to expedite that process by recalling his bill from the Senate. In compliance with the House request, on January 31 the Senate returned H. 263, and Seymour’s motions to reconsider the votes by which the bill was passed and the substitute was adopted carried, his purpose being to

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four different designations that he used for Democrats were, by 2010, no longer comprehensible to him, let alone to anyone else. Moreover, he identified 13 (later reduced to 10) Democrats as “Independent” who had been “classed as Democrats at the beginning of the session”—again, without indicating a source—who voted with Kolbites in a contest over seating a Kolbite candidate. These notes formed the basis of the aggregate data in J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910, tab. 5.7 at 136 and n. 47 (1975 [1974]).

87 Only three of the 24 did not vote for Seymour’s bill (Mastin voting against and two not voting at all).
89 John Clark, Populism in Alabama 90 (New York University Ph.D. diss. 1927).
conform the bill to the aforementioned constitutional requirements. He then had the substitute tabled and the original amended “so as to embody the substitute and to make the title and provisions correspond.” Although the Montgomery Advertiser noted that Seymour had “fix[ed] it up so as to avoid any internal trouble,” the press failed to explain that before passing the bill on its third reading by an even larger majority of 63 to 18—the same Populist casting the sole anti-Bourbon Nay—the House adopted the two amendments that Seymour offered to strike out sections 4 and 3. Because the House Journal also failed to specify the content of these sections (and the bill file is not preserved in the Alabama Archives), their wording is not certain, but one of them presumably contained the ban on public smoking. In the wake of House passage the Advertiser editorially wondered both whether the attempt to prevent the use of cigarettes might prove to be an advertisement for them and the proposed measure was too severe.

The day after House passage of his bill the Sumter County Sun published a fulsome encomium to Seymour to boost his prospects for Register of the Land Office in the state capital. Declaring that no more “deserving fellow” could be found in Alabama, the paper praised him as a “noble, upright, honorable and cultured” man, who had pursued a “manly course” in the House of Representatives, although he was “no politician...but a man who wins the respect of men by his manliness.”

The Alabama House action was widely reported throughout the United States, though many newspapers, neglecting to distinguish between the bills passed on January 30 and 31, erroneously stated that the measure banned public cigarette smoking. (The brief piece in the Sumter County Sun did not make that mistake.) The last sentence of the Associated Press squib that ran, for example, in the Chicago Tribune under the headline, “Alabama Prohibits Cigarette Smoking,” stated that the bill also prohibited smoking cigarettes in any public

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97. Although the Journal stated twice that 62 Yeas and 26 Nays were cast, in fact it listed 63 and 18 members as voting Yea and Nay, respectively. Journal of the House of Representatives of the State of Alabama: Session of 1892-3, at 608-609 (Jan. 30) (1893). Of the 26 members who voted Nay on January 30, 15 voted Nay, 6 voted Yea, and 5 did not vote on January 31. Of the three new Yeas cast on January 31, two had voted Yea and one had not voted on January 30.
98. MA, Feb. 1, 1893 (4:2) (untitled edit.).
100. SCS, Feb. 2, 1893 (2:1) (untitled).
The news prompted the Tribune editorialist (who embroidered the story by asserting that the bill would also prohibit the importation of cigarettes) to salute Alabama for proposing an approach that “is sufficiently drastic and seems to be based on a proper conception of the cigarette and its insufferable stench in their relations to an innocent and suffering public.” Some out-of-state papers that did not mention the public smoking provision still accorded “All honor to Alabama” and opined that the “law should become general.” The Republican Fort Wayne Daily Gazette tilted toward the purely aesthetic-moralistic realm in declaring that: “A more disgusting and revolting sight is seldom seen than a lot of half-baked, sickly, sentimental dudes puffing villainous cigarettes, whose vile stench is enough to sicken any person. A cigar or even a pipe may be tolerated, but neither the cigarette nor the cigarette smoker is entitled to consideration by self-respecting men.” Reacting to such praise the Birmingham Age-Herald informed its readers that: “The Northern papers say that the passage by the Legislature [sic] of the bill prohibiting the sale of cigarettes will place Alabama in the front rank of her sister States.”

That view was, to be sure, hardly universal. Unsurprisingly, the Times of Richmond, the epicenter of the Virginia cigarette tobacco industry, thought it “hardly possible” that the House bill’s public smoking ban would become law “because it smacks too much of interfering with the personal rights of citizens.” While it might be appropriate for minors, “grown men ought to be left to decide for themselves whether they shall smoke cigarettes or not. These sort [sic] of sumptuary laws are decidedly unrepublican.” The issue as to why (collectively speaking) fathers’ consumer freedom had to be curtailed on behalf of their boys’ health—which was rarely articulated in any state—was joined when the Mobile Register charged that: “Unfortunately grown men can’t take care of themselves any more than boys. The state must step in and take them by the back of the neck, and say: ‘Stop your beastial [sic] nonsense!’” In juxtaposing these attitudes the New Orleans Daily Picayune isolated the problem as a moral failure at the level

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102CT, Feb. 1, 1893 (12:1) (untitled edit.).

103Fort Wayne Daily Gazette, Feb. 2, 1893 (4:2) (untitled edit.).


105Times (Richmond), Feb. 3, 1893 (4:1) (untitled edit.).
of the individual family, which sought to transfer its responsibilities to society at large: “The small boy can ruin his health by smoking cigarettes, and the guardians who cannot control their boys, or are too tender-hearted to whale them, conceive the idea of prohibiting the manufacture of cigarettes, regardless of the pleasure and comfort of able-bodied men who know whether or not smoking is good for them....” What the newspaper’s animus against public “moral regulators”\(^{106}\) blinded it to was the fact that a smoking paterfamilias had no effective standing to buttress his preaching with corporal punishment while practicing the very behavior that he forbade his son, thereby making it all the more enticing to emulate.

In the event, Alabama’s elevation into that aforementioned vanguard would have to wait. Ominously, on February 16 the *Sumter County Sun* reported that Seymour “thinks his cigarette bill has been monkeyed with or there has been gross carelessness somewhere” after House passage. Seymour apparently suspected that rather than mere neglect the American Tobacco Company’s strategic action was derailing H. 263: “He had it sent to the Senate without its being engrossed, he did this to save time and in order to get it on its passage there as quickly as possible. It was only the other day that it turned up in the committee. Some of our leading journals have been publishing the last few days articles in which it is argued there is no harm in cigarettes. Of course this is not done for nothing. The hand of the cigarette trust is plain and those whose duty it is to look after such matters in the senate cannot be too careful.”\(^{107}\)

That article, which appears not to have been published outside of Alabama,\(^{108}\) was placed the same day in the *Birmingham Age-Herald* and *Montgomery Advertiser*, both of which found it opportune to dedicate more than an entire column to a chemist’s analysis presented at a hearing before the Massachusetts legislature a year earlier,\(^{109}\) but which the article erroneously claimed had been held before the (non-existent) “congressional joint standing committee on public health....” This “Special Correspondence” bore various tell-tale rhetorical propagandistic hallmarks of an advocate such as the Tobacco Trust (“The war on the cigarette smoker which has been raging for years in congress, in state legislatures and elsewhere”; “The tobacco companies, it must be confessed, have shown a willingness to be investigated”). Although the finding that manufactured...
cigarettes were not prepared with opium may have been unexceptionable, the article’s key assertion directly contradicted the chemist’s testimony (which the Trust suppressed): “Whatever may be the harmful effects of the cigarette it [sic] lies purely in those natural to tobacco, the same that are in the cigar and the chewing article.” In fact, the chemist had unambiguously emphasized that cigarette tobacco smoke was more easily inhalable and to that extent was more injurious than that of cigars. In its accompanying editorial the Advertiser speculated that the “very common impression that cigarettes are medicated with opium or some other drug that increases the appetite for them and fastens the taste for them...probably accounts in a large measure for the widespread prejudice against them, and the many legislative restrictions being thrown around their sale.” The newspaper suggested that the chemist’s failure to find any adulteration might possibly “assist in removing the popular prejudice to a considerable extent.”

Whether the Tobacco Trust relied on such journalistic distortion to sway senators’ votes or used more direct material incentives, Seymour’s efforts did in fact come to naught two days later, when, on February 18, three days before adjournment, the Senate Judiciary Committee, to which his bill had been referred, reported it adversely, thus making it clear to at least part of the press that the chamber (composed of 26 Democrats and 7 Populists) had “killed” it. To be

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111Testimony of Professor James F. Babcock, in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 20, 21 (n.d. [1892]), Bates No. 950297842. A version of Babcock’s testimony was a kind of vade mecum for the Tobacco Trust’s lobbyists: for example, “armed with” such a pamphlet, S. B. Linthicum appeared before a social license committee of the Portland city council, which was considering an ordinance that would require cigarette sellers to pay $100 a year. “The License Ordinance,” MO, Dec. 6, 1892 (1):2).

112MA, Feb. 7, 1893 (4:3) (untitled edit.).

113Journal of the Senate [of the State of Alabama, Session of] 1892-3, at 436, 761 (Feb. 1, 18). The chairman of the Judiciary Committee was Martin Luther Stansel, a former head of the Alabama State Bar Association, who represented two Black Belt counties, including Sumter. On Stansel, see Thomas Owen, History of Alabama and Dictionary of Alabama Biography 4:1613 (1921). The committee vote is unknown; for the committee membership, see Journal of the Senate [of the State of Alabama, Session of] 1892-3, at 75.

sure, that it “died on the calendar”\textsuperscript{115} did not faze other, in- and out-of-state, newspapers that welcomed the (nonexistent) new law\textsuperscript{116} because, “if properly enforced [it] will greatly reduce the number of those addicted to the use of tobacco”\textsuperscript{117} or prohibit “the use of the disgusting things in public...a move that should be general in this country.”\textsuperscript{118}

Evidence of the Alabama WCTU’s puzzling detachment from the struggle for enactment of the Seymour bill can be found in its corresponding secretary’s failure even to mention the measure in her report to the national organization’s annual meeting.\textsuperscript{119} Nor did the group’s superintendent of narcotics allude to the battle over the Seymour bill in her report to the state organization’s own annual meeting in December. Instead, while warning that “[v]ice in all its hideousness walks among our children, and, ignorant of its nature, they clasp it to their bosoms,” and opining that “the tobacco habit is the beginning of all other bad habits,” Mrs. E. F. Troy merely expressed great disappointment and regret that during the year she had not accomplished more than writing 17 letters and circulating some literature.\textsuperscript{120} Four years later, however, the legislature would mount another effort to ban all cigarette sales.\textsuperscript{121}

**Pennsylvania:**

**The House Again Passes a Sales Ban and the Senate Again Does Not**

There is no longer any doubt as to the attitude of the Pennsylvania legislature in relation to cigarettes. The lower house has just passed a bill, by a vote of 150 to 28 [sic; should be 18], prohibiting the manufacture and sale.... If the measure becomes a law it will create a sensation.\textsuperscript{122}

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\textsuperscript{116}The \textit{Davenport Daily Democrat}, Feb. 6, 1893 (1:1) (untitled), misreported that the legislature had passed the no-sales bill without mentioning the public smoking provision.

\textsuperscript{117}“The Cigarette,” \textit{BA-H}, Feb. 21, 1893 (4:3) (reprinted from \textit{Prattville Progress})

\textsuperscript{118}\textit{Davenport Tribune}, Mar. 9, 1893 (1:1) (untitled) (also mistakenly stating that Michigan had passed such a law).

\textsuperscript{119}\textit{Minutes National Woman’s Christian Temperance Union at the Twentieth Annual Meeting...October 18-21, 1893}, at 149-50 (1893).

\textsuperscript{120}\textit{Minutes of the Alabama Woman’s Christian Temperance Union, at the Tenth Annual Meeting, Selma, Alabama, December 1st to 3d, 1893}, at 55 (copy furnished by Birmingham Public Library).

\textsuperscript{121}See below ch. 6.

\textsuperscript{122}\textit{Omaha Daily Bee}, Feb. 9, 1893 (4:1) (untitled edit.).
The lower house of the Pennsylvania legislature has passed a bill to prohibit the manufacture and sale of cigarettes.... There is no more chance to destroy the cigarette evil by law than there was the “treat” nuisance, which was made the subject of solemn enactment in Wisconsin a few years ago.\(^{123}\)

The elections of 1892 effected a further decline in Democratic representation in the Pennsylvania legislature (only 17 Democrats opposed 33 Republicans in the Senate, while in the House 69 Democrats faced 135 Republicans),\(^ {124}\) but in the wake of the panic and depression that began in the opening months of the second Cleveland administration in 1893, the 1894 elections ushered in the “thoroughly one-party state”\(^ {125}\) that Pennsylvania would remain until the New Deal 40 years later: by the 1895 session Democrats’ strength was reduced to but 12 percent of Senate and 14 percent of House seats.\(^ {126}\)

Philadelphia Democrat John H. Fow—one of only three Democrats remaining in that city’s 39-member-strong House delegation—nevertheless persevered, introducing at the 1893 session, once again, virtually unchanged, his cigarette

\(^{123}\) *Milwaukee Journal*, Feb. 9, 1893 (4:1) (untitled). The allusion was presumably to a law designed to penalize ‘treat’ intoxicating liquors “spendthrifts” who were spending their families into indigence and to whom Wisconsin law made it unlawful to sell liquor. 1874 Wisconsin Laws ch. 179, § 12, at 297, 301; Wisconsin Statutes § 1556 at 1147 (1898).


\(^{125}\)Walter Burnham, *Critical Elections and the Mainsprings of American Politics* 50 (1970). Burnham analyzed Pennsylvania as an example of “the disappearance of the local Democratic Party as a visible general election alternative” in the wake of national parties’ reorganization during and after the 1890s: “Essentially, the reorganization of the Democratic Party during the Bryan era made it to a very large degree the vehicle of colonial, periphery-oriented dissent against the industrial-metropole center. It was also the vehicle by which the myriad island communities surviving from the nineteenth century sought on occasion to ward off absorption into the larger society being brought into existence under the auspices of industrial capitalism. ... The nostalgic agrarian-individualist colonial appeals of the national Democratic leadership tended to present the voters of metropole states with the choice between an essentially backward-looking provincial party articulating an interest opposition to the industrial metropole as a whole and a ‘modernizing’ party based upon enthusiastic acceptance of and cooperation with the dominant economic interests of that region and of the country as a whole. This partitioning of the political universe...helped to insure crushing Republican majorities in an economically advanced state like Pennsylvania.” Id. at 53-54.

sales ban bill (but not the public smoking ban), which, once again, was referred to the Vice and Immorality Committee, which promptly reported it without amendment. If the Pennsylvania House needed any precedential encouragement, on the same day that it took up Fow’s H.B. No. 13 on second reading, the Pennsylvania press reported that the Alabama House had just passed a bill selling cigarettes or smoking them in public places. During that discussion on February 2, the House agreed to the amendment moved by Fow himself to strike out his own proviso excluding “medicinal” cigarettes that he had included in the bill. When Fow explained that the exemption was designed to exempt cigarettes sold in drug stores on a prescription basis, Democrat George Skinner, a lawyer-tanner who in 1891 had voted against Fow’s no-sales bill but for his no-smoking bill, opined that such a step would confer a cigarette monopoly on drug stores, “but his objection was met by the assertion they could not sell tobacco cigarettes.” Henry Fishel, who had been a public school teacher and principal before attending medical school, practiced medicine but briefly, “preferring to follow mercantile lines,” and was now engaged in the drug business, vigorously attacked cigarettes because they “caused heart failure and certain death.” After defeating a proposed (killer) amendment to extend the

127Legislature of Pennsylvania, File of the House of Representatives, No. 13, Session of 1893, Mr. Fow, in Place, Jan. 23, 1893 (copy provided by the State Library of Pennsylvania). The bill: expanded coverage to include cigarettes “made of tobacco or any other substance and wrapped in paper”; capped the fine at $1,000; and excluded “cigarettes used for medicinal purposes.” On Fow’s bills in 1891, see above ch. 3.
129Legislative Record 253 (Jan. 25, 1893).
130E.g., “Severe on Alabama Dudes,” Indiana Democrat (Indiana, PA), Feb. 2, 1893 (2:3). See also “Flashes by Wire,” Titusville Morning Herald, Feb. 1, 1893 (1:3).
133See above ch. 3.
sales ban to cigars, the House agreed to forward the bill to its third reading.137

On final passage no amendments were offered and the vote was an overwhelming 150 to 18.138 Ten Yeas were cast by members who had voted against Fow’s anti-sales bill in 1891. The Nays were cast by 11 Democrats and seven Republicans, of whom four had voted against both Fow bills in 1891, two had voted for both, and one had split his votes.139

The Pennsylvania press largely accorded House passage perfunctory coverage, the Philadelphia Inquirer, for example, merely noting the vote while devoting considerably more space—and the headline—in the article on the previous day’s state legislative session to committee action on Fow’s rapid transit bill.140 A major exception was the Republican Lebanon Daily News, which explosively claimed that the reasons for the opposition that Fow’s bill would be likely to meet in the Senate would “be a surprise to many. The ground of opposition will be that it is a measure in furtherance of the interests of the Cigarette trust. Suspicion that it is a measure...secretly formed by the cigarette manufacturers has been aroused by the fact that at former sessions of the Legislature, when similar bills have been before it, there have been no lobbies present.”141 The salient point here was that Fow’s bill prohibited both the manufacture and sale of cigarettes:

When the bill comes before the Senate, attention will be called to the fact that the manufacture of cigarettes is in the control of three large firms, all of which are members of the Tobacco trust, and that they are arranging for the removal of all cigarette plants to Richmond. Virginia being a tobacco growing State, will never pass a law prohibiting the manufacture of tobacco in any form which the ingenuity of man may suggest. The greater number of States which will then pass laws prohibiting the manufacture of cigarettes the less opportunity there will be for the establishment of plants to compete with the present

137Journal of the House of Representatives of the Commonwealth of Pennsylvania 331-33 (Feb. 2) (1893). For the text of the bill at this juncture, see Legislature of Pennsylvania, File of the House of Representatives, No. 13, Session of 1893, as Amended on Second Reading, in H.R., Feb. 2, 1893 (copy provided by the State Library of Pennsylvania); “Here Is Trouble over Fair Money,” PI, Feb. 3, 1893 (2:1). Charles Fletcher, the Philadelphia Republican who moved to include cigars, had voted for both Fow bills in 1891.


139See above ch. 3.

140“Fow’s Transit Bill Reported,” PI, Feb. 8, 1893 (2:5-6). Fow asserted during the proceedings that he was president of the Cheltenham Railroad.

1893: *Annus Mirabilis*

The Trust, according to this account, in exchange for benefiting from the statutory manufacturing ban, which would prevent potential competitors from building factories in other states, was willing to acquiesce in state sales bans “as a very small matter comparatively,” for two reasons: “The laxity in the execution of the law which is expected and operation of the inter-state commerce law. Under that law the State is powerless to prevent the importation into its borders of goods in original packages. In the case of cigarettes, a single pack or box, however, small, would be an ‘original package’ and cigarette fiends would be put to but little inconvenience in securing, even in the most remote parts of the State, all of the prohibited cigarettes which they might want.”

This allegation that the Tobacco Trust stood behind Fow’s bill cannot be denied a certain degree of superficial plausibility, but ultimately remains unpersuasive for several reasons. First, if the American Tobacco Company ever had any plan to centralize its factories in Virginia, it must have abandoned it since the non-tobacco-growing state of New York continued for many years to manufacture more cigarettes than any other state. Second, the newspaper’s allegation was irreconcilable with the brute fact that ATC systematically attacked all such statutes in the courts; and although the Tobacco Trust did ultimately (but unsuccessfully) base its challenges to the constitutionality of state anti-cigarette laws on the interstate commerce clause and the judicially created original package doctrine, it did so not with a view to sparing the ban on manufacturing (which the attacked Washington and Iowa statutes included), but in order to invalidate them entirely. And finally, the editorial’s account could make no sense of the Senate’s silently killing the bill procedurally instead of publicly assailing ATC’s machinations in hijacking a do-gooders’ bill in order to preserve its nationwide monopoly.

The likelihood that the editorialist’s disclosure was subjectively offered in good faith was heightened by another editorial published by the *Lebanon Daily News* the same day militantly advocating cigarettes’ abolition. Alluding to the Alabama legislature’s aforementioned dual initiative to ban cigarette sales and

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144E.g., *Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1893*, at 30 (1893); *Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1911*, at tab. 2 at 120 (1911).
145See below ch. and ch. 10-11 below (which also include discussions of the burdens borne by consumers who personally had to mail-order cigarettes from other states.)
public smoking, the Lebanon Daily News opined that the importance of such a regulatory structure had to be “apparent to everyone who sees the great number of small boys on our streets with this disease producing and health destroying weed in their mouths.” Because the cigarette was “much more damaging” than a pipe or cigar, “it should be abolished. Too stringent laws cannot well be passed on the subject. It is a source of great mischief and the habit is taking a firm hold on the young unless the cigarette is driven from the market.” Pleased that the Pennsylvania legislature had taken up the question and predicting that the bill would pass, the newspaper insisted that the “cigarette must be exterminated.”

The out-of-state press, which wire services kept apprised of the bill’s progress, did not fail to note the nationally emulative impact of such state enactments. Indeed, the Omaha Daily Bee, which was about to attack a Nebraska anti-cigarette sales bill, exaggerated by erroneously claiming that Fow’s bill had already passed the Senate as well: “In passing a law prohibiting the manufacture or sale of cigarettes the legislature of Pennsylvania set an example that bids fair to knock the cigarette out of the market. The lower house of the Minnesota legislature has passed a similar bill and it would not be surprising if the example were followed in other states.”

Despite the huge House majority, the Senate noiselessly euthanized H.B. No. 13 by taking absolutely no action on it at all after its referral to the Committee on Corporations.

Kentucky: The House in the Leading Tobacco State Passes a Sales and Possession Ban

One of the most absurd pieces of legislation enacted by the unlamented Legislature was what is known as the “anti-cigarette bill.” While the object for which the bill was designed was such as to be commendable in the highest degree, the bill itself was so recklessly drawn that it defeats itself. Some of the provisions of the measure are so drastic

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146 Lebanon Daily News, Feb. 8, 1893 (2:1) (untitled edit.).
148 See below this ch.
1893: Annus Mirabilis

that, if attempted to be enforced, would “cause trouble in de land” sure, as they interfere with rights guaranteed to the citizen by all laws and Constitutions.

We were sincerely in hopes that some bill would be passed to suppress this abominable and dangerous nuisance to health and morals, but our hopes are vain so far as this law is concerned.\footnote{Absurd Legislation,” FR, Mar. 19, 1898 (4:3) (editorial).}

The cigarette sales ban ordinance in the state capital: Frankfort 1889-90

Kentucky’s first major foray into cigarette control took place in Frankfort. Even in the capital of the country’s biggest tobacco-producing state, the city council in 1889 did not include tobacco among “the necessaries of life, such as green groceries, milk, meat etc.,” which stores were permitted to sell on Sundays until 10 a.m., whereas the police were instructed to prosecute all violators of the Sunday law and, in particular, drug stores for selling liquor, cigars, and tobacco.\footnote{The council passed this motion by a vote of 7 to 1 on Sept. 10, 1889. “Council Meeting,” FR, Sept. 14, 1889 (5:1).} The latter part of that year, Frankfort experienced a months-long “lively discussion of the effects of cigarette smoking upon boys in the schools. Parents and teachers combined to suppress the evil, but it was found impossible to keep the boys from their favorite indulgence. It was then decided to put temptation beyond their reach.”\footnote{“Cigarette Smokers Suffering,” SPDN, Jan. 4, 1890 (1:6).} In early December, the council’s license committee decided to recommend fixing a $1,000 tax on sales of cigarettes: being of the opinion that “the trade should be crushed out,” the committee believed that “a heavy license fee will go a great ways towards the desired end.”\footnote{“Cigarettes Must Go,” FR, Dec. 7, 1889 (4:2). At least one city in Kentucky, Maysville, (later) imposed a $20 annual license fee on the sale of cigarettes; the highest of many license fees was $300 for barrooms and $150 for retail merchants. “Last Call!” Daily Public Ledger (Maysville), Jan. 26, 1898 (4:2).} The city attorney, however, advised against passage of such an ordinance because he “felt sure” that the state Supreme Court “would hold that such a fee was excessive.”\footnote{“The Cigarette Must Go,” CN (Evening), Jan. 6, 1890 (2:3). The highest court in Kentucky was (and is) called the Court of Appeals. An out-of-state newspaper had reported erroneously that a $1,000 license ordinance had in fact been passed in late December 1889 and when it went into effect on January 3, 1890, “no tobacco dealer could see his way clear to paying so steep a price even for a monopoly.” “Cigarette Smokers
1893: Annus Mirabilis

1889, the Board of Councilmen of Frankfort, consisting of nine “prominent businessmen,” passed the following ordinance by a vote of 6 to 1:

Be it ordained by the Board of Councilmen of the City of Frankfort

Section 1. That it shall be unlawful for any person or persons doing business in the City of Frankfort to sell or offer for sale Cigarettes or any other similar preparation of tobacco except cigars.

Section 2. Any person or persons, having a license from the City of Frankfort to carry on any business, violating the provision of the foregoing section, shall subject himself or themselves to a suspension or forfeiture of such license as the Council may in its judgment determine.

Section 3. Any person or persons not having a license to do business in the City of Frankfort who shall sell or offer for sale cigarettes or any other similar preparation of tobacco shall be subject to the same penalties as are now provided for by ordinance against persons doing without license.

Section 4. It shall be the duty of the City Marshal, and other police officers of the City of Frankfort to report all infractions of this ordinance to the proper authorities.

Section 5. This ordinance shall take effect and be in force from and after January 1, 1890.

The occupations of the nine city councillors at the time included: superintendent of the Carlisle and O.F.C. distillery; clerk in the Old Crow distillery; steward of the Feeble-Minded Institute; contractor and builder; miller; livery stable owner; maker of the famous Frankfort reel (and “regarded as patron saint by all scientific anglers”); lumber businessman; hardware merchant. A five-member majority of this “reform council” had been elected, according to a lengthy article in the Chicago News, “as the result of a citizens’ movement to oust

Suffering,” SPDN, Jan. 4, 1890 (1:6).

“Killing the Children,” CT, Jan. 6, 1890 (2:4).

Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 634 (Dec. 17, 1889) (copy furnished by the Kentucky Department for Libraries and Archives).

Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 633-34 (Dec. 17, 1889) (copy furnished by the Kentucky Department for Libraries and Archives). See also “Suppressing Cigarettes,” SPDN, Jan. 3, 1890 (1:7); “Killing the Children,” CT, Jan. 6, 1890 (2:4). At the same council meeting, the License Committee made a report recommending fixing a “merchants’ liquor dealers’ license” of $150 and a bar-room license of $200. “City Council,” FR, Dec. 21, 1889 (4:1). The current Frankfort city clerk speculated that the press’s statement that the council had passed the ordinance on January 2, 1890, might be explained on the basis that the effective date is the date of publication, which may have been Jan. 2, 1890. Email from Ramona Newman (Nov. 27, 2006).
what in Chicago might be called the ‘gang,’ but is here called the old council,” which included four members and the mayor. “The reformers have had a hard fight, as the mayor...and four councilmen were opposed to them. They have succeeded in carrying out many reforms, however, in spite of vetoes, injunctions, and other obstructive measures, and now point with pride to the fact that they have paid off all current debts and begin the new year with more money in the treasury than any previous council could boast. Not the least important of their reforms is the suppression of the deadly cigarette, although in this case the originator of the measure was a member of the old council,” Lewis Mangan, the 63-year-old proprietor of a livery stable.159

The basis for Mangan’s “wishing to suppress the cigarette” was public health. In the traditional manner, he was especially concerned about children, claiming that “every boy in town who was able to walk was smoking cigarettes.” The ones who could not buy them, got them some other way: “A man could not throw away a half-smoked cigarette without some child picking it up and smoking it.” Mangan’s passion was intensified by “a selfish motive”: his own son smoked cigarettes. Admitting that he was “not a scientific man,” Mangan based his opposition on “personal observation and experience”: he smoked five or six cigars a day, but could not smoke two cigarettes “without feeling an effect which I am loath to believe is caused by pure tobacco.” He wondered whether they contained opium, but was “sure they must have some narcotic quality” absent from cigars.160

Mangan saw the council’s step as propagating the anti-cigarette cause, perhaps prompting Louisville and—based on his erroneous belief that the Alabama and Georgia legislatures had already prohibited the sale of cigarettes161—even that session of the Kentucky legislature to follow suit. Nor was Mangan the only councilman who agreed with the underlying strategy,

159“The Cigarette Must Go,” CN (Evening), Jan. 6, 1890 (2:3). This article was reprinted verbatim with attribution as “The Deadly Cigarette,” DC, Jan. 15, 1890 (2:2-4), and with omissions and changes and without attribution as “Killing the Children,” CT, Jan. 6, 1890 (2:4). At the 1870 and 1880 population of census Mangan was returned as a potter and contractor, respectively. Though a co-partner in the largest livery stable in the state’s interior, Mangan devoted his time to managing a brick manufacturing business. “Mangan & Darnell,” FR, Feb. 15, 1890 (10:3).

160“The Cigarette Must Go,” CN (Evening), Jan. 6, 1890 (2:3).

161On the actions of the Alabama and Georgia legislatures, see this ch. During the 1893 Kentucky legislative session the press did report on passage of such a bill in Alabama. “No More Cigarettes in Alabama,” Daily Public Ledger (Maysville, KY), Feb. 2, 1893 (3).
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though the others had “not thought as much or as deeply” about it. As Benjamin Milam, the reel maker, observed: “‘We believed the best way to stop children from smoking was to stop the sale of cigarettes.’” The council president, S. R. Smith, who had never used tobacco, was sure that the ordinance was “a good thing,” especially after it had received such general approval—an impression that the Frankfort correspondent of the Chicago News also formed after interviewing a dozen residents of Frankfort who were “almost unanimously opposed to the cigarette....”

The Frankfort Roundabout observed on January 4, 1890, that the cigarette and the street hog had both gone into retirement on New Year’s Day, when the law prohibiting the sale of the one and the running at large of the other went into effect. Even before the ordinance went into effect tobacco dealers in Frankfort had discontinued their sale because they did “not care to handle them”; if the mayor vetoed the ordinance, they would “have to resume the business, but they hope[d] he [would] let it become a law.” Consequently, once it did become law, cigarettes immediately became unobtainable.

The state legislature convened in Frankfort just as the ordinance went into effect. On January 4, the Louisville Courier-Journal reported that: “The cigarette has been banished from Frankfort; but young statesmen outside of the Capital [sic] keep on smoking.” Inside the capitol, however, a entirely different atmosphere prevailed. The very next day, according to the same paper: “The minds of several members seemed to be fixed upon public morals and upon waging a war in the House and in the State against the smoking of the harmless and enervating cigarette.” On the House floor, as “big logs in the open grates cracked and blazed away cheerily in contrast” to the torrential rain outside: “A young member was imprudent enough to light a cigarette. The action escaped everyone but the lynx-eyed member from Jefferson, Mr. Briscoe, who was on his feet with a protestation immediately. This was to prevent members from smoking in the House, on the floor or in the lobbies.”

Attention and favorable comment rapidly spread in the out-of-state press. A Chicago paper remarked that “decent society owes the common council...a vote of thanks. The chief function of the cigarette is to undermine health and render

162“The Cigarette Must Go,” CN (Evening), Jan. 6, 1890 (2:3).
163“They Had to Go,” FR, Jan. 4, 1890 (5:1).
164“The Cigarette Must Go,” CN (Evening), Jan. 6, 1890 (2:3).
165“The Southern States,” DP, Jan. 3, 1890 (2:1); “Cigarette Smokers Suffering,” SPDN, Jan. 4, 1890 (1:6); Atchison Champion (Kansas), Jan. 22, 1890 (6:5) (untitled).
166C-J, Jan. 4, 1890 (4:3) (untitled).
its smokers obtuse to their own offensiveness.” For an Iowa newspaper the ordinance was “a radical step, but there is no doubt regarding its wisdom.” In going beyond state no-sales-to-boys statutes, “the Frankfort plan is far in advance of any other law. There is little good in a law that will allow one person to smoke a cigarette and prohibit another from doing the same thing. Frankfort serves all alike, and now if other cities will follow her example, our country will be all the better for it.”

Although Mangan incorrectly predicted that it was “almost out of the question” that the mayor would veto the ordinance, he was right in asserting that the council, backed by “[t]he whole city,” would override the veto. Mayor Edmund Haynes Taylor, Jr. did veto the ordinance on January 14, 1890. Taylor (1830-1923), “the father of the modern bourbon industry”—whose firm, E. H. Taylor, Jr. & Sons, was known “from ocean to ocean” as the manufacturer of Old Taylor whisky—was mayor of Frankfort from 1871 to 1877 and then again from 1881 to 1890. For his veto he offered several supporting reasons, beginning with the unconvincing claim that in form the ordinance was “vague and indefinite—so lacking in the certainty of its provisions as to make it imperative as a law, even were it otherwise unobjectionable.” Next, Taylor alleged that, being “purely legislative” in character, the board had “no judicial functions.” Consequently, when the board undertook to “punish an offender by [sic; should be “or”] forfeiture of license, as the Council may, in its judgment determine,” it assumed “all the powers of a criminal court” inasmuch as it had to determine guilt or innocence and determine the nature and amount of punishment. But, the mayor argued, the legislature did not confer any such authority in the city charter.

But even if these form defects could be eliminated, Taylor found the spirit of the ordinance “even more objectionable” and “its meaning and intent...wrong past

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168 BDT, Jan. 10, 1890 (2:1) (untitled) (quoting CN).
169 New Era (Humeston, IA), Jan. 15, 1890 (1:1) (untitled). To be sure, the article ended with an admonition to smoke a “good cigar or a comfortable pipe....”
170 “Killing the Children,” CT, Jan. 6, 1890 (2:4).
171 “Obituary Notes,” NYT Jan. 20, 1923 (13). According to the 1900 population census, Taylor, returned as a distiller, was 68 that year.
175 Frankfort, Kentucky Board of Councilmen, Minutes, Jan. 14, 1890 (copy furnished by City Clerk Ramona Newman). The text in a slightly different form was published as “The Cigarette Ordinance,” DC, Jan. 16, 1890 (2:2).
all remedy.” Moreover, even if the ordinance could be enforced, in practice “it would build up a cigarette emporium outside the City limits, from which no City tax could be derived, and at which every cigarette smoker in Frankfort could supply himself with as many as he wanted as often as he pleased.”

Waxing philosophical, while revealing his concern to block the slippery slope to his own bourbon business, Taylor asserted that:

The theory of our government is not what is called “paternal.” ...
An attack upon the liberty of one man, or class of men, is an attack upon the whole body politic. If your honorable body has the right to prohibit cigarettes...have you not the right to prohibit cigars or plug tobacco or pipes or even leaf tobacco of the farmer from being sold or offered for sale in the City? Have you not the same right to prohibit the sale of liquors without consent of the people expressed through the polls, or to regulate the kind of jewelry, or quality and price of female apparel to be worn in this City?

Unwilling to forget potential future interference with the sale of bourbon, Mayor Taylor turned anthropological:

Stimulants and narcotics have been used by mankind from the earliest times known to history. The tendency to their use is innate and inherent. A wise public body demands that the traffic in these articles, as well as their use, should be regulated by law, and also tempered by public opinion. Any attempt to prohibit this use entirely has always been a failure....

Worse still, such laws, by virtue of “spring[ing] from a disregard for the rights and wishes of others,” engendered in those who perceived injustice disrespect for and habitual violation of the law “with the knowledge and connivance of their neighbors and friends.”

Overriding Mayor Taylor’s veto, the council voted 8 to 1 to adopt the ordinance. As late as October 1890, the out-of-state press was reporting that

\[\text{176 Frankfort, Kentucky Board of Councilmen, Minutes, Jan. 14, 1890.}\]
\[\text{177 Frankfort, Kentucky Board of Councilmen, Minutes, Jan. 14, 1890. The out-of-state press did not quite capture Taylor’s position in reporting the basis of his veto: “[A]ny other Colonel of Kentucky has as much right to smoke cigarettes as the Mayor has to smoke a pipe.” “Personal Liberty in Kentucky,” Weekly Gazette Stockman (Reno), Feb. 13, 1890 (1:3); “Latest News Items,” Evening Bulletin (San Francisco), Feb. 4, 1890 (1:4).}\]
\[\text{178 Frankfort, Kentucky Board of Councilmen, Minutes, Jan. 14, 1890.}\]
\[\text{179 Frankfort, Kentucky Board of Councilmen, Minutes, Jan. 14, 1890.}\]
\[\text{180 Frankfort, Kentucky Board of Councilmen, Minutes, Jan. 14, 1890; “Council Proceedings,” FR, Jan. 18, 1890 (5:3).}\]
the ban was still in effect. Then, on December 9—three days after the election at which the Democratic party won all nine seats on the council, defeating the Citizen’s ticket, consisting of Republicans, Mugwumps, Democrats, and Prohibitionists, and thus, in the words of the Democratic Louisville Courier-Journal, “redeeming the city from its past bondage to the Republican party”—the city council, by a vote of 6 to 1, passed a second cigarette ordinance, which the local newspaper stated had been presented by the city attorney, but which according to the minutes was, once again, presented by Councilman Mangan:

Section 1. That it shall be unlawful for any person or persons within the corporate limits of the City of Frankfort to give, sell or barter, either directly or indirectly, a cigarette or cigarettes, or cigarette material to any person whomsoever, and any person violating the provisions of this section shall be fined five dollars for each offence recoverable by warrant before the Police Judge of the City of Frankfort.

Section 2. This ordinance to take effect and be in force from and after Jany 1st 1891.

The most noticeable change was the elimination, presumably in response to Mayor Taylor’s objections, of the council’s judicial powers.

At the next council meeting a week later, Councilman Mangan, who had organized the anti-cigarette campaign, offered an ordinance to repeal with immediate effect the ordinance of January 14 prohibiting the sale of cigarettes, which the Board of Councilmen unanimously adopted by a vote of 8 to 0. Finally, on December 23, Mayor Taylor announced his approval of the repeal as

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182“Saturday’s Election,” DC, Dec. 9, 1890 (2:4).
183“Strength in Union,” C-J, Dec. 7, 1890 (4:3).
185Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 87 (Dec. 9, 1890) (copy furnished by the Kentucky Department for Libraries and Archives). The vote was almost identical to that on the first ordinance: 5 Yea’s and the Nay were the same.
186“Council Proceedings,” FR, Dec. 13, 1890 (1:1-2). The newspaper failed to publish the ordinance as it did some ordinances that the city paid it to publish.
187Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 87 (Dec. 9, 1890).
188Frankfort, Kentucky Board of Councilmen, Minutes, Dec. 16, 1890 (copy furnished by City Clerk Ramona Newman). See also “Council Proceedings,” FR, Dec. 20, 1890 (1:1-2). The text of the repealing ordinance also appeared in FR, Jan. 3, 1891 (5:3).
well as his veto of the new cigarette ordinance, which the council sustained by a vote of 5 to 3 to adopt the ordinance.\(^{189}\)

Taylor’s extended veto message, which harped on several themes of his first repeal message, was even more instructional. Beginning with a lesson in statutory interpretation, he taunted the council with the construction that “a commercial traveler, legislator, casual visitor, or even a chance passenger going through the city on a train” would be punishable for giving a cigarette or cigarette material to anyone. Consequently, “justice to the traveling public would demand that prominent bill boards should be erected on all roads leading into the city, warning all visitors against the consequences of any...gift...of any form of tobacco or paper while within the sacred boundaries of Frankfort.” And since corn shucks were used as cigarette wrappers, “the farmers should be warned against...giving away corn which has not been scrupulously denuded of its outer covering.” After further sarcastic dilation on the ordinance’s “Chinese principle of exclusion,” the mayor argued to the council that it had “taken but a brief experiment to prove your previous ordinance a dead letter,” while nothing in the second ordinance, which differed only in form from the first, retaining “[t]he same mistaken spirit,” suggested that it would prove less impracticable: “Its effect would be to transfer the entire traffic in tobacco to places situated just beyond the city limits, thus depriving the town of citizens who contribute liberally at present to our revenue.”\(^{190}\)

Taylor conceded that “excessive use” of tobacco was recognized as “harmful to the human race,” though to a lesser extent than that of intoxicating liquor, and that therefore government, by means of license and revenue laws, supervised the traffic in both, even granting home rule to local communities to prohibit the sale of liquor. In contrast, he could find no legislative grant of “this extraordinary power over the sale of tobacco” to the city council.\(^{191}\) Taylor then paternalistically defended his own economic interests by chiding several councilmen for lacking the foresight and self-interest to detect the slippery slope

\(^{189}\)Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 92 (Dec. 23 1890) (copy furnished by the Kentucky Department for Libraries and Archives); “Council Proceedings,” \textit{FR}, Dec. 27, 1890 (1:3); “Cigarette Ordinance,” \textit{DC}, Dec. 30, 1890 (3:3-4).

\(^{190}\)Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 92 (Dec. 23 1890) (copy furnished by the Kentucky Department for Libraries and Archives). The mayor’s message was also published as “Cigarette Ordinance,” \textit{DC}, Dec. 30, 1890 (3:3-4).

\(^{191}\)Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 92 (Dec. 23 1890).
that their ordinance had made possible:

Three members of your honorable body are connected with the whisky interests, which form so large a part of our material wealth. One is an officer of the company which controls the “Hermitage” and “Old Crow” Distilleries; another is, probably, the most prominent saloon keeper in the city of Frankfort; the third is Secretary and Manager of the “O.F.C.” and “Carlisle” Distilleries. These gentlemen, it is true, advocated and voted for this ordinance. But I am sure that they did not consider the matter carefully. Had they done so, they would have seen that the absolute authority which your present action implies would also enable you to prohibit the sale, gift or barter or manufacture of ardent spirits in the city limits. 192

In closing, Taylor referred to the “real people, the voters, the tax-payers of the land,” who had “recently spoken at the polls. They have spoken against sumptuary legislation; they have pronounced against discrimination between citizens engaged in lawful occupations. Even in our city elections a short time since, the ballot box has declared for a party whose national and State platforms have clearly expressed the views I have but feebly indicated. To that party I belong, and its principles seem to me the true basis of free government. [W]hen you...discriminate against a worthy class of citizens and business men, I can not co-operate with you...” 193 On January 6, 1891, Taylor tendered his resignation to the newly installed Democratic city council, which elected ex-council member Mangan to fill out his term. 194

The House Ban on Sales and Possession

WHEREAS, The chewing of tobacco is a barbarous and disgusting practice, nauseating and repulsive to those who do not indulge in it, tainting the air and befouling the carpets and furniture of any room or inclosed place; therefore,

Be it resolved, That from and after the passing of this resolution the Sergeant-at-Arms is hereby directed to prevent the chewing of tobacco in the Senate Chamber, between the hours of 9:30 A.M. and 10’clock P.M. on each day. 195

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192 Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 92 (Dec. 23 1890).
193 Minutes of the Meetings of the Board of Councilmen of the City of Frankfort at 92 (Dec. 23 1890).
195 Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 765
In January 1890, in the immediate wake of the passage of the first Frankfort ordinance, the state legislature, in step with the wave of such enactments that had been advancing across the United States since 1883, began considering a bill prohibiting the sale of cigarettes to anyone under 18 years old. In the House it immediately encountered filibustering, which prompted the Frankfort Capital (which covered the legislative proceedings exhaustively) to editorialize that, whether the bill was a sumptuary measure or not, “there can be but one opinion about the cigarette—it is nauseous, deadly, and the sooner it is banished from use the better it will be for its unfortunate victims.” To be sure, the Capital’s insistence that the “cigarette must go” and “will go sooner or later” was based on the sentiment—not confined to, but presumably widespread in, Kentucky—that “[t]hat blessed solace, tobacco, was never intended to be used in such a manner...” But already on January 11 the House passed the bill. A week later the Senate passed its own bill by a three to one majority after having rejected one amendment to lower the age of coverage from 18 to 15 and another to relieve persons of liability who did not have “‘reasonable grounds to believe’” that the person to whom they sold or gave cigarettes was over 18 “in order to cover mistakes where a boy may seem to be over 18....” Although as sumptuary legislation the anti-cigarette measure “was opposed to the principles of the Democratic party,” the Capital nevertheless welcomed Senate passage because: “It is in the interest of the small boy, an institution of our country that may become very useful, and as that interesting personage does not seem equal to taking care of himself in the matter of smoke, it may be necessary for the State to take him in charge and protect him.” The newspaper realized that men, too,
smoked cigarettes, but considered any man who “did not know enough to shun the deadly little thing...a hopeless case, who had as well be left alone.”

The House rejected amendments to the Senate bill raising the age to 21 and lowering it to 15, but, in an unusual breach of inter-chamber courtesy, a “shrewd parliamentarian” managed to get the bill tabled. The only remedy was passage of another Senate bill that might avoid such a fate the next time. But a few days later the Senate did pass another bill, which, overcoming renewed parliamentary breakers, the House also passed. The law that was enacted by mid-February was almost identical to the original House bill.

§ 1. That it shall be unlawful for any person or persons in this Commonwealth to give, sell or barter, either directly or indirectly, a cigarette or cigarettes, or cigarette material to any child under eighteen years of age, or to give, sell or barter the same to any person whomsoever, with the knowledge that the same is to be given or sold or bartered to any such child or children, or to persuade, advise, counsel or compel any child under said age to smoke the same.

§ 2. Any person who violates the provisions of the aforesaid section shall be guilty of a misdemeanor, and, upon conviction therefor, shall be fined not less than five nor more than twenty-five dollars, or imprisoned in the county jail not exceeding thirty days, or both so fined and imprisoned.

This relatively weak law with its escape clause requiring knowledge-based liability was further relaxed as part of a comprehensive revision of the criminal code two years later, when the phrase “either directly or indirectly” was deleted. Enforcement of this ban on underage cigarette smoking was apparently sufficiently meager to prompt consideration of more efficacious measures.

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201 DC, Jan. 20, 1890 (2:2) (untitled edit.).
202 “Kentucky Legislature,” DC, Jan. 27, 1890 (1:3-6 at 6).
203 DC, Jan. 27, 1890 (2:2) (untitled edit.).
204 “Kentucky Legislature,” DC, Feb. 3, 1890 (1:3).
205 “Kentucky Legislature,” DC, Feb. 13, 1890 (1:2-4 at 4).
206 The bill as it passed the House in January defined a “cigarette” to include “any thing made to smoke in which tobacco mixed with any other substance, or liquid or fluid, is the chief ingredient.” “The Cigarette Bill,” DC, Jan. 14, 1890 (2:2); “Cigarette Bill,” FR, Jan. 25, 1890 (5:3).
208 The Frankfort Roundabout welcomed the law as “a step in the right direction,” but urged as the next step “crush[ing] out the demon alcohol....” “Forks of Elkhorn,” FR, Feb. 15, 1890 (5:3).
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intervention. A good omen for action could be discerned in the self-protection that members of both chambers bestowed on their own space in 1892. On January 7, the House adopted this resolution moved by Louisville Democrat Albert H. Charlton, a printer and member of the Typographical Union (who the following year introduced a bill to protect unionized employees from discharge):

\begin{quote}
WHEREAS, Tobacco smoke is offensive to many persons; therefore, be it Resolved by the House of Representatives of Kentucky, That the Sergeant-at-Arms is hereby instructed to prohibit smoking in the hall at all times during this session of the Legislature. Three months later the Senate adopted a prohibition of smoking in its chamber between 9:30 a.m. and adjournment to be enforced by the sergeant-at-arms.
\end{quote}

The same long legislature (1891-93) considered a total ban on sales. The driving force behind this proposed legislation was representative James Knox Polk Cansler of Christian County, who had been constable and sheriff in Hopkinsville and then became a businessman, owning, inter alia, a livery business. The fact that Cansler—who had earlier presented a petition by “colored” citizens against the segregation of railway coaches—presented to the House a petition from the WCTU in Hopkinsville on the subject of alcohol suggests the possibility that his anti-cigarette measure initiative owed its impetus to that organization too. In 1892 he introduced two bills to prohibit the sale of

\begin{itemize}
\item \textit{To Protect One Side Only,"} Hopkinsonville Kentuckian, July 4, 1893 (2:1).
\item \textit{Charlton for Senate,"} Kentucky Irish American (Louisville), Mar. 18, 1905 (3:4).
\item \textit{Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky} 76 (Jan. 7, 1892) (1891 [sic]).
\item \textit{Journal of the Regular Session of the Senate of the Commonwealth of Kentucky} 711 (Apr. 14, 1892) (1891 [sic]). The ban was proposed by Henry George, who a week later was one of five senators to vote against the tobacco chewing resolution.
\item \textit{Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky} 1:195 (Jan. 29, 1892) (1892).
\item \textit{Journal of the House of Representatives of the Commonwealth of Kentucky: Regular Session, 1891-92, Called Session, 1892, Adjourned Session, 1892, 3:3662 (Apr. 19, 1893) (1892 [sic]).
\end{itemize}
cigarettes in Kentucky. One died immediately, while the other was reported out to be read a second time later, but was instead recommitted to the Committee on Public Health and died. In the next session, in January 1893, Cansler introduced H.B. 419, which, again, prohibited the sale of cigarettes, and was referred to the Committee on Public Morals. Cansler himself, for reasons unknown, soon moved to recommit the bill, and the House adopted the motion. The committee reported it with a substitute, which the House adopted but then rejected on its third reading by a vote of 38 to 23 (which, though a majority, did not constitute a constitutional majority of all members). The bill would have made it unlawful to “sell, barter, loan, or give, or in anywise dispose of, or to have in possession for the purpose of selling, bartering, loaning or giving, or in anywise disposing of, any cigarette or any material such as is manufactured or prepared especially for and commonly used in cigarettes.” But the next day the House voted to reconsider that vote and then passed the anti-cigarette bill by a 47 to 17 constitutional majority. The Senate, after numerous procedural skirmishes in a “red-hot filibustering fight,” at the end of April finally rejected

216Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 1:765, 1044 (H.B. 220 and H.B. 269) (Apr. 22 and May 20) (1892). The wording of the bills, whose texts were not printed in the Journal, is unknown because the Kentucky state archives has never collected legislative bills. Telephone interview with Tim Tingle, archivist, Public Records Division, Kentucky Department for Libraries and Archives (June 13, 2006).


221Journal of the House of Representatives of the Commonwealth of Kentucky: Regular Session, 1891-'92, Called Session, 1892, Adjourned Session, 1892, 2:2911, 2913-15 (Feb. 9, 1893) (1892). The same day that Cansler’s bill was rejected Representative John Bashaw introduced H.B. 455 to regulate the sale of cigarettes; the next day Bashaw voted against H.B. 419 and withdrew his own after the former had been passed. Id. at 2908, 2915 (Feb. 8-9).

the bill 18 to 13, thus ending the initiative for that session.\textsuperscript{223}

\textbf{The First Midwestern Legislative Chamber to Pass a Public Cigarette Smoking Ban: Minnesota House}

The legislature [sic] of Minnesota has passed a bill which makes the smoking and use... of cigarettes a misdemeanor... The Minnesota legislature is liable to do almost anything. A few years ago it passed a law forbidding the appearance at theatres and playhouses of “ladies” in tights but the law met with such opposition from citizens of Wabasha that it was repealed at the next session. At the present session it has under consideration a bill to prevent the wearing of crinoline by either sex. Great Commonwealth that gopher state.\textsuperscript{224}

Smoking cigarettes...does not imperil public order, like unregulated drinking.... Their undermining effect upon health and virility is insidious and gradual, even in the young, who realize their gravest loss only after arrival at maturity.

They can hardly be penalized without invasion of personal liberty. We doubt if they could be reached as a menace to public health, since they menace only the users. Sanitary law generally proceeds upon the theory that persons who infect air, food or water injure others. Probably they could consume their own sewage, infected milk or rotten meat, fruit or vegetables without incurring penalty. Cigarettes are a greater public offense than choked cesspools, open sewers or filthy stables, but their actual indirect injury is slight.

The most practical direct attack upon them would be as a public nuisance. Their stench is more sickening to clean nostrils than a pound full of enraged polecats, but smell is a matter of taste and you cannot penalize a nuisance without support of public opinion. There are peoples in the world who revel in the fragrance of decayed fish, musk or elvet, and the thick odors of an Esquimaux hut. The cigaret vote would end the career of any statesman who should propose a nuisance law. ... So long as fathers and even mothers assert the right to stink in public and stew in private, you can hardly expect children to abstain.\textsuperscript{225}

In 1859, just a year after Minnesota had achieved statehood, its House of


\textsuperscript{224}“No Cigarettes for Gophers,” \textit{Marshfield Times} (Wisc.), Feb. 17, 1893 (4:2) (edit.).

\textsuperscript{225}“Beyond the Reach of Law,” \textit{MT}, Mar. 16, 1909 (4:1) (edit).
Representatives adopted a resolution “That no smoking be allowed in the Hall of this House previous to adjournment on each day.” In 1889, two years after having passed a Scientific Temperance Instruction law, Minnesota enacted a statute prohibiting selling or giving cigarettes or any kind of tobacco to anyone under the age of 16. The WCTU took credit for having “championed” this law.

After having lost its decades-long significant House and Senate majorities in the 1890 election to Democrats and an insurgent Farmers’ Alliance (buoyed by agricultural discontent), which formed a post-election legislative combine but failed to pass the expected economic reform legislation, Republicans regained control of the House in 1892 in large part as a result of the disappointing electoral performance of the People’s Party, into which the Farmers’ Alliance had been absorbed. In 1893, the House (under whose rules smoking was still prohibited in the hall of the House while in session) unanimously passed H.F. No. 446, which, to judge by its title in the Journal of the House, was, remarkably enough, “A bill to prohibit the use of cigarettes in the State of Minnesota.” The bill,
according to the same day’s report in the Independent Republican *St. Paul Daily News*—whose headline and subheads read: “Cigarettes: So Far as the House is Concerned People Must Hereafter Forgo [sic] The Habit: The Bill Prohibits the Smoking or Use of the Little Rice Paper Evil”—included no exceptions and imposed a penalty of a $25 fine or 30 days’ imprisonment.\(^{233}\) The out-of-state press, which widely took note of and commented on the bill’s passage in the House, followed this absolutist version.\(^{234}\) Unfortunately, since the *House Journal* did not print the text and the bill is missing from the state archives, its exact wording may not have been preserved and appears to be unknown.\(^{235}\) However, according to the more plausible (but deviant) account in the Republican *St. Paul Daily Pioneer Press* (which praised the bill), H.F. No. 446, while still radical, prohibited smoking a cigarette “in any public place”\(^{236}\)—precisely the restriction that the Mississippi House had passed in 1892 as part of its revision of the section of the state code devoted to crimes and misdemeanors and that the Alabama House had passed as part of a bill prohibiting the sale of cigarettes eleven days before H.F. 446 was introduced and about which (together with passage of universal cigarette sales bans bills in the House in Pennsylvania and Washington State) the Twin Cities press had kept citizens and legislators informed.\(^{237}\)

The bill was introduced, and, under suspension of the rules, read a second and third time on the same day (February 10), passing by an unanimous 78 to 0 vote\(^{238}\)
“with the greatest enthusiasm.” It had been introduced by Patrick H. Kelly, a wealthy wholesale grocery merchant who had immigrated to the United States from Ireland in 1847. As Minnesota Democratic Party boss in the 1880s and 1890s and a national party committee member from 1880 to 1888, this conservative businessman effectively carried out his assignment of insulating the Democratic party nationally from midwestern radicalism. His “overlordship of the St. Paul, and hence the state, Democracy” in cahoots with railroad magnate James J. Hill came to an end with William Jennings Bryan’s ascendency in 1896. During his campaign for the House in the fall of 1892, the press noted that he represented business interests, while as owner of P. H. Kelly Mercantile Company he “is a considerable employer of labor and contributes large sums of money each year in wages paid for the support of families, and by profit-sharing affords his employes opportunities that are highly prized by them.” Kelly, whose legislative service representing Ramsey County (St. Paul) was confined to 1893-95, “became most prominent, commercially and politically, during those recent ‘boom’ years, 1888 to 1893.”

As an Irish Catholic Democratic boss, Kelly would seem to have been an implausible advocate of a radical sumptuary law. Yet the day before he introduced his anti-cigarette bill, he had vociferously advocated on behalf of a bill to criminalize pool rooms (i.e., betting parlors) on the grounds that they were “the curse and ruin of our young men,” none of whom could be hired at a commercial house in St. Paul if known to frequent them. And two weeks later the newspaper insisted that their suppression was not “puritanic.” To be sure, two days later, the paper editorialized: “What are we coming to during this session? With neither hoop-skirts, pool rooms or [sic] cigarettes there will be nothing exciting or amusing save the synonyms of the dramatic

243 “Second Ward District,” SPDN, Oct. 28, 1892 (4:2) (edit.).
244 “Sudden Call,” MT, Oct. 24, 1900 (1:4).
245 “Pool Rooms,” SPDN, Feb. 9, 1893 (4:2). The newspaper insisted that their suppression was not “puritanic.” To be sure, two days later, the paper editorialized: “What are we coming to during this session? With neither hoop-skirts, pool rooms or [sic] cigarettes there will be nothing exciting or amusing save the synonyms of the dramatic

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he vehemently opposed any exceptions to a bill absolutely prohibiting selling or giving liquor to minors, insisting that “if it was a Democratic principle to favor the sending of children with the ‘growler,’ he was not a Democrat. The custom of sending little girls to the saloon brought them in contact not only with the temptations of the saloon, but also with that of the seducer. ‘The passage of this bill will save them...not only from the curse of drunkenness, but also from that of prostitution.’”

More specifically, Kelly’s animus against cigarettes was widely known. In fact, as the independent Democratic St. Paul Daily Globe reported, there was “no more inveterate hater of the much liked and disliked paper-wrapped smokes.... He will not allow them to be smoked in his establishment by any one. Collectors and others who have gone there with a cigarette in the mouth have been made to realize that they were objectionable and have not repeated the offense.”

The Globe certified that Kelly had achieved the session’s “quickest and most complete victory recorded in the legislation of the house.... Without warning he sprung” on the members the bill, whose “merit...at once commended it to all present.” In all the House needed only five minutes to discuss, pass, and send the bill on to the Senate.

The socially most revelatory description of the legislative proceedings, which shed considerable light on the widespread antipathy toward exposure to environmental cigarette smoke (for olfactory and aesthetic reasons), appeared in the St. Paul Daily Pioneer Press and merits quotation in full:

The house of representatives placed itself on record yesterday as being unalterably opposed to the seductive but soul-destroying cigarette, and if the senators exhibit as great an antipathy to the “coffin nail” as did the representatives it will cost a person $25 to smoke a cigarette in any public place, and if the smoker is not able to pay that sum he will be sent to reside for thirty days in a place where cigarettes do not form part of the menu.

It was Mr. P. H. Kelly who came to the rescue of the people who despise a cigarette as much as they pity the smoker, those superior people who smoke pipes and cigars and people who don’t smoke at all. He introduced a bill, H. F. 446, which is to prohibit the use and smoking of cigarettes, and to the surprise of Mr. Kelly the bill was passed under


Bomb Thrown by Bob,” SPDG, Feb. 26, 1893 (5:1-4 at 3). A “growler” was the receptacle in which customers transported alcohol from saloons to their residences.


suspension of the rules without a dissenting vote. This was remarkable in view of the fact that among the members of the house are several who use cigarettes, notably four members of the committee on labor and labor legislation, and two members of the house who are not on that committee derive most of their sustenance from cigarettes, judging by the number they smoke in a day. The vote indicates a beautiful change of heart on the part of the cigarette smokers, and that they really desire to be debarred by the strong arm of the law from indulging in their deplorable habit, while the roll call offered the man who has sat behind a cigarette on board a street car and been deprived of his sense of taste and smell for a week in consequence of inhaling the fumes, a chance to get even.249

Thus—allowing for a hefty dose of irony—resistance to the physical impact of adults’ second-hand smoke rather than class and/or ethnically based moral condemnation of public smoking by “[b]ootblacks, newsboys and other street urchins of tender age”254 appears to have been the guiding animus of Kelly’s ban. Nor was the Pioneer Press alone in this judgment. One provincial paper agreed that: “The law would be as much a godsend to those who have to inhale the deadly cigarette smoke as those who smoke the vile things.”251 But other newspapers joined in the anti-paternalist denunciation, predicting that Kelly’s “next onslaught is expected to be on brasswood toothpicks and parting hair in the middle,” or in hoping that before adjourning the legislature “will give us a list of what we may wear and use.”252

The bill’s presentation, according to the account in the St. Paul Daily News, had come as “a complete surprise to the members, and struck a popular chord.”253 But the Democratic Minneapolis Times, under the subhead, “Awfully Funny,” reported that Kelly’s introduction of the bill “was regarded as a good joke and many a farmer legislator took a fresh chew of plug tobacco in felicitation over the idea of prohibiting the use of tobacco in the form of the deadly cigarette.” Continuing in this vein, the paper observed that the “affair grew still more hilariously funny”254 when, according to the Independent Republican Minneapolis Journal, “Kelly explained that the bill was introduced for the especial benefit of his friend [Republican] Hiler Horton, whose only vice was the smoking of these little pests. Mr. [Dennis] Sullivan [Republican of Ramsey County] at first voted

249“Boon to Humanity,” SPDPP, Feb. 11, 1893 (2:1).
251“Hoop Skirts, Cigarettes, Etc.,” MT, Feb. 26, 1893 (4:7) (excerpt from editorial comment in the Superior Call).
no, as he said it would work a hardship on Mr. Horton, who had told him only a day or two before that he smoked cigarettes because he could not afford to smoke cigars. Mr. Horton asked Mr. Sullivan to change his vote as he had reformed only this morning and needed some such law as this to aid him in keeping the resolution. Mr. Sullivan promptly complied with the request. This banter continued when St. Paul Democrat John Ives, who had voted strongly for the bill, expressed a desire to “put hoop skirts on the bill, but it was declared to be too late.” (In fact, a separate bill was pending in the House to prohibit the manufacture or sale or permitting the use of hoop skirts “or anything like thereunto” in Minnesota, and one paper opined that Kelly had gone that bill’s introducer “one better”).

The *Trenton Times* went beyond the usual wire service report: “Minnesota’s Legislature is following up its anti-crinoline crusade by a law to prevent cigarette smoking. A bill to this effect was introduced the other day, and, so virtuous had the legislators become, that the measure was promptly passed under a suspension of the rules by a vote of 78 ayes to no nays. ... It would be an everlastinglly good thing to stop smoking cigarettes everywhere and the effects of the Minnesota bill, if it becomes a law, will be watched with great interest.” One Illinois company hawking a worthless patent medicine (presumably to combat the onset of bronchitis caused by cigarette smoking) even tried to capitalize on the bill’s notoriety by referring to it in newspaper advertising titled, “The Cigarette Fiend”: “A member of the Minnesota House of Representatives has introduced a bill making the smoking of cigarettes a nuisance and a misdemeanor. A great many young men begin to smoke cigarettes because they think it helps them with their catarrh. If they will get a bottle of Reid’s German Cough and Kidney Cure and take it according to directions, they can be cured of their catarrh without fail.”

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260*New Era* (Humeston, IA), Mar. 1, 1893 (3:5). Why the company was unaware that the bill had actually been passed immediately is unclear.
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But as the *Globe* observed two weeks later: “Any one who imagines that Hon. P. H. Kelly’s anti-cigarette bill was introduced purely as a joke is badly mistaken.” The *Globe*’s editorial position was especially illuminating because it supported the ban in spite of its principled opposition to collectivism. Perhaps concerned about its own stance as well, the paper declared:

P. H. Kelly’s Democracy will hardly survive a session’s contact with the socialistic crowd in the house. It has become so far obscured as to permit him to introduce a bill regulating one habit, that of smoking cigarettes. It may get him in a state of mind to regulate the appetite for drink, and bar out beer or Pom. See before the session end if he does not beware. Some other Democrats are becoming infected with the paternalism of their associates on the Republican and Populist side of the legislature.

In an editorial titled, “The Cigarette Doomed,” the *Globe*, straining to find an explanation for this specific and unexpected nationwide outburst of paternalism, harshly vented its spleen on the new (decade-old) phenomenon of the dude:

The unpopularity of the cigarette is one of the most surprising things on record. Arkansas opened the way by passing a bill prohibiting the manufacture and sale of the article. Georgia came next, passing a similar bill. Pennsylvania bobbed up third.... And now comes Minnesota with a bill...prohibiting the smoking of the article. The legislatures of several other states are reported to be considering laws against this pride of the dude. The bill of Hon. P. H. Kelly passed the house...with a whirl and a whoop which must take the dude’s breath away. ... Physicians unite in the opinion that the cigarette is one of the most destructive articles in use. ... To enjoy a cigarette, the smoke must be inhaled into the lungs....

But there are several other indulgences just as hurtful as the cigarette, which have been in equally as general use since long before the cigarette was invented. But few legislatures have ever attacked them, and those which have did so with reluctance and generally with little success. Why, then, has the cigarette fallen so easily? The only answers seems to be that the dude has killed it. If the dude were a man, or a mortal possessed of sensibilities, he would move off the earth after this unmistakable evidence of universal contempt for him. Of course, not every one who indulges in the vile article is a dude. Some very respectable men have, it is unpleasant to remark, become addicted to the habit. If Mr. Kelly’s bill becomes law, and it is enforced, it may work a good reformation among the latter class. So far as the dude is concerned, the sooner he smokes himself to death with cigarettes the better.

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262*SPDG*, Feb. 11, 1893 (4:3) (untitled edit.).
263“The Cigarette Doomed,” *SPDG*, Feb. 11, 1893 (4:2) (edit.). The newspaper incorrectly stated the sequence in which (only one house of) the state legislatures had
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The Senate considered H.F. No. 446 the very next day after House passage. Debate appears to have begun to be conducted in the same jocular tone as in the House (“The Senate Starts Out to Have Fun With It and Quits,” read a subhead in the Republican Minneapolis Tribune).264 Contrary to the Globe’s prediction that Senator Ignatius Donnelly, who would be in charge of the bill, would “no doubt give it eloquent advocacy,”265 Donnelly—who “had broken a lance for every considerable reform cause that the United States had known, beginning with pre-Civil War Republicanism,”266 as a Minnesota Republican lieutenant governor, and then congressman, state representative and senator,267 before becoming a national leader of the People’s party and its unsuccessful gubernatorial candidate in 1892268—moved that the bill be referred to the Committee on Drainage.269 (Donnelly’s belittling proposal was ironic since his like-named son, a physician who had made a special study of throat diseases in Vienna,270 during a lecture in St. Paul had “touched upon the cigarette as the great enemy of the throat organs. He asserted that nine out of ten users had diseased throats and afforded attractive fields for all floating bacilli, and were apt to die quite young.”)271 But then Democratic Senator William W. Mayo, the founder of the Mayo Clinic and former mayor of Rochester and president of the State

passsed the bills.

Medical Society,272 offered a motion proposing the inclusion of cigars.273 Following a motion to accord the bill the same expedited passage that it had received in the House, Republican Senator Hiram Stevens274 of Ramsey County, who denied any personal interest in the bill in that neither he nor any of his relatives used cigarettes,275 declared that this sumptuary legislation “is too much like an invasion of personal liberty—so much so as to seem unconstitutional on its face. Already enough has been done this winter to make Minnesota a laughing stock. We are above par in that respect....” His motion to send the bill to the Judiciary Committee for serious consideration received a dozen seconds;276 the Senate did refer it to that committee,277 which, the Minneapolis Journal predicted, would “probably kill the bill as unconstitutional,”278 and which on April 10 ended its life by reporting it back with the recommendation that it be indefinitely

274 The Legislative Manual of the State of Minnesota: Certified for the Legislature of 1893, at 572. Stevens, a lawyer, advocated pro-worker legislation as a member of the state House and Senate including factory inspections, requiring employers to provide seats for female employees in stores, and mechanics’ liens. Progressive Men of Minnesota: Biographical Sketches and Portraits of the Leaders in Business, Politics and the Professions 172 (Marion Shutter and J. McLain eds., 1897).
277 Journal of the Senate of the Twenty-Eighth Session of the Legislature of the State of Minnesota 211 (1893) (Feb. 11). Without elaboration, the St. Paul Daily News observed that: “The attention of the Hon. P. H. Kelly is called to the fact that his cigarette bill is in the hands of the equally Hon. John Day Smith, who considers that he has the power to act.” SPDN, Mar. 1, 1893 (4:1) (untitled). Smith, a lawyer and leading Senate Republican, was chairman of the Judiciary Committee, of which Stevens and Donnelly were also members. Journal of the Senate of the Twenty-Eighth Session of the Legislature of the State of Minnesota 60 (1893). He had also taught law at Howard University and Columbia University. Progressive Men of Minnesota: Biographical Sketches and Portraits of the Leaders in Business, Politics and the Professions 376 (Marion Shutter and J. McLain eds., 1897); The Legislative Manual of the State of Minnesota: Certified for the Legislature of 1893, at 573. Later in March, after Washington State had enacted the first general anti-cigarette statute, the Daily News injected another warning: “The State of Washington has an anti-cigarette law. But then, perhaps the senate of Washington had no judiciary committee.” SPDN, Mar. 22, 1893 (4:1) (untitled).
By Valentine’s day Kelly had been expressing the hope that the Judiciary Committee would “not electrocute his bill without summoning witnesses.” Whatever optimism he retained may have been energized by the “multitudes of friends” the bill had won him who were showering him with letters and valentines. Among the latter was a representation of a “convention of bootblacks, with perplexed faces, deliberating on the possible effects of the bill”; among the former were requests from Ohio for copies of the bill. A few days later the *Globe*, under the subhead, “Hon. P. H. Kelly’s Cigarette Bill Endorsed All Over the Land,” reported that he was receiving letters from school superintendents and legislators requesting copies of the bill and “wishing him success in pushing it through.” Such sentiments, the paper opined, demonstrated “that aversion to the cigarette fiend is deep rooted everywhere,” adding, no doubt tongue in cheek, that “the fame of the Minnesota sage has been spread to the furthest extreme of the country by his bill to abolish a general nuisance.”

Passing on to the more mundane matter of getting the bill through the Senate, the *Globe* conceded, without explanation, that H.F. No. 446, as it had passed the House, “was lacking in many points.” Remaining vague, it alluded to the expectation that the Judiciary Committee would amend the bill “in some vital particulars” or report a substitute: “If this is done there seems little question as to the passage of the bill. Cigarette smokers have few friends, and no open champions in the house.”

Two days later the *Globe* published a prophetic letter to the editor in response to the newspaper’s assessment of the bill’s chances of enactment if “properly amended.” “Democrat,” falsely portraying state legislatures’ police powers to suppress commerce in and consumption of dangerous commodities for important public health reasons, opined that:

> We have always claimed that the Democracy was the fountain of reform, and this exhibition of zeal on the part of the old war horse Kelly confirms our preconceived notions; but even a good thing may be so overdone as to defeat its own purpose. The bill introduced by Mr. Kelly is of this character. It absolutely prohibits the use or smoking of

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279 Journal of the Senate of the Twenty-Eighth Session of the Legislature of the State of Minnesota 739 (1893).


281 “Chiseling a Charter,” *SPDG*, Feb. 20, 1893 (4:6-7). The *Globe*’s further assertion that “[s]ince the bill was introduced here several legislatures have considered or adopted such an act” pointed to the national snowballing effect.

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a cigarette within the state of Minnesota, without any qualifications. This is going too far. Blackstone once said the parliament of Great Britain was omnipotent in everything but one—“It could not change a man into a woman”—but this unlimited power does not pertain to American legislatures. There are certain liberties of the citizen that cannot be curtailed by legislation. An act that should prohibit a man from chewing tobacco, a woman from chewing gum, or a citizen of liberty-loving Boston from eating beans, would be without validity, as infringing on the chartered right of the American; the bill of Mr. Kelly runs against this constitutional bulwark. What Mr. Kelly wants is this: A bill that will prohibit the manufacture, sale or use of cigarettes that are not made of pure tobacco. It falls within legislative jurisdiction to prohibit the manufacture, sale or use of adulterated products of any kind...but they cannot trench upon the use of the pure article. It might be as well to include in the bill a prohibition of furnishing cigarettes or tobacco of any kind to minors; but if our reformers will take a look at the General Laws of 1889, chapter 14, page 57, they will find a law covering the whole question so far as it relates to minors.283

Remarkably, despite the fact that such a trivial measure—which appears to have been formulated for, if not by, the Tobacco Trust—was precisely not what Kelly or those expressing the nationwide aversion to exposure to cigarette smoking wanted, the bill that Kelly introduced two days later embodied only the two pseudo-protections limned by “Democrat.” Although Kelly did not intend to “abandon the prohibition of the use of the cigarette,” when it became clear that the Senate Judiciary Committee had decided that S.F. No. 446 was unconstitutional,284 on February 24 he “took another shot at the baneful cigarette by introducing”285 another bill (H. F. No. 652), which merely prohibited the manufacture, sale, giving away, or use of “any cigarette containing any substance foreign to tobacco and deleterious to health,” in addition to prohibiting the sale or giving away of cigarettes or any kind of tobacco to anyone under the age of 16.286 Both provisions were superfluous: the former because cigarettes did not

286Journal of the House of the Twenty-Eighth Session of the Legislature of the State of Minnesota 335 (1893) (Feb. 24). The language of the bill is taken from the enactment, which was not amended in this regard. It is unclear why this no-sales-to-minors provision was reenacted four years after the aforementioned enactment in 1889; the only difference was the addition of the phrase “in any way furnishes.” 1893 Minn. Laws ch. 22 at 125. The extent of the Minnesota WCTU’s involvement in securing passage of Kelly’s use ban bill in the House is called into question by an article by one of its officials confusing that bill and the no-sales-to-minors bill. Amy Green, “Minnesota,” US 19(7):11-12 (Apr. 20, 1893). During the 1893 session the WCTU was occupied with advocating on behalf of a bill to give women equal active and passive voting rights in municipal elections. “For
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contain opium or other constituents imagined by some anti-cigarette activists, and the latter because it failed to go beyond the law of 1889. Having been worded to avoid constitutional objection, it passed the House on April 4 by a vote of 72 to 1, followed the next day by a unanimous 42 to 0 vote in the Senate, though initially some senators, especially those of German background, had been inclined to oppose it as sumptuary legislation. In retrospect, the *St. Paul Daily News* called first-term Democrat Kelly in a Republican House its “most powerful member,” whose secret was his “bonhomie,” “personal magnetism,” and his position as a “successful business man....” In the event, Minnesota would not enact a universal sales ban until 1909.

Arkansas: Both Chambers Pass an Anti-Sales Ban, But the Senate Reconsiders, Has the Bill Returned from the House, and Kills It with Exemptions

My next stop was at Little Rock, Arkansas, where the faithful ones were earnestly working for the passage of three bills in the legislature, one to raise the age of consent, another for Scientific Temperance Instruction, and the other to prohibit the manufacture and sale of cigarettes. To defeat the last, the cigarette dealers had put thousands of dollars in the hands of the members of the legislature.

Democratic lawyers, many of whom were Methodists—the pietistic Christian denomination that nationally advocated most strenuously for alcohol prohibition—provided key support for and opposition to the general cigarette

Female Suffrage;” *MT*, Feb. 12, 1893 (13:2).

287 See above ch. 3.


290 *Journal of the Senate of the Twenty-Eighth Session of the Legislature of the State of Minnesota* 701-702 (1893) (Apr. 5). The Senate amended the bill’s penalty provision slightly.


293 See vol. 2.

294 *Minutes National Woman’s Christian Temperance Union at the Twentieth Annual Meeting...1893*, at 236 (1893) (Helen Bullock, Nat. Organizer).

295 Richard Jensen, *The Winning of the Midwest: Social and Political Conflict, 1888-
sales ban bill passed by both chambers in Arkansas in 1893. Altogether, 45 of 100 House members and 9 of 32 senators were Methodists (compared to only 18 and 14, respectively in 1891). Importantly, Methodists also staked out the highest-profile anti-tobacco position among Christian churches. On the national level: “Among the leading denominations of America Methodists stand alone as the only one which holds the use or disuse of tobacco as a test of a candidate’s fitness for the ministry... ‘The use of tobacco is filthiness to the body and soul,’ said Rev. J. B. McCullough, editor of the ‘Methodist.’” In Arkansas, a state conference as far back as 1867 had adopted the following resolution:

> “Seeing the tendency of the Church to needless self-indulgence and softness, we say to clergy and laity that at this time there is a great evil in the church, in the use of snuff and tobacco, and that there is now more money spent in that needless self-indulgence than is raised for all the benevolent charities of the Church; therefore, be it

> “Resolved, That we will use all means in our power to dissuade our members from the use of the same, and that the moral influence of the Church be against it.”

By 1893 Democrats enjoyed a crushing majority in the Senate (in which they occupied 29 seats, leaving only three for Republicans and Populists) and the House (85 percent of whose members were Democrats). The opposition’s post-

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1896, at 66, 72-73, 93, 106 (1971).

296 Calculated according to Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1892, at 68-71 (1893). During this period, almost 80 percent of churches in Arkansas were Baptist or Methodist; however, whereas 78 percent of rural churchgoers were Baptists or Methodists, in Little Rock they accounted for only 35 percent. Carl Moneyhon, Arkansas and the New South, 1874-1929, at 15, 50 (1997). According to Jeannie Whayne, “Prosperity Eluded: Era of Transition, 1880-1900,” in Arkansas: A Narrative History 240-71 at 261 (Jeannie Whayne et al. eds. 2002), at the end of the century, politicians were almost always Baptists or Methodists. In 1893, Baptists held five seats in the Senate and 16 in the House. According to the 1890 Census, communicants or members of (white) Regular Baptist (South) churches in Arkansas numbered 58,364 compared to 71,565 in Methodist Episcopal (South) churches. [U.S.] Department of the Interior, Census Office, Report on Statistics of Churches in the United States at the Eleventh Census: 1890, tab. 7 at 38, 41 (1894).

297 Calculated according to Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1890, at 76-78 (1891). Although information on religion was lacking for more House members in 1891 than in 1893, that difference cannot account for the whole gap.


299 Horace Jewell, Methodism in Arkansas 196 (1892).
Reconstruction share fell somewhat below the high point of 26 percent secured by the fused Republican-Union Labor parties in the House in 1888, but their proportions of gerrymandered legislative seats significantly understated their shares of the vote, which the Democrats succeeded in further depressing by means of an election law (which disenfranchised numerous illiterates) and a poll tax, both of which especially reduced the black participation rate. Coordiately, the number of black House members was cut drastically from 11 in 1891 to four in 1893. Unsurprisingly, one of the “principal Acts” of the 1893 session was “an Act compelling railroad companies to furnish separate coaches for white and colored passengers,” although it merely amended the aforementioned act of 1891.

John E. Bradley, a 38-year-old Democrat, Methodist, and lawyer from Arkadelphia, where he had also edited Democratic newspapers, introduced House Bill No. 98, “An act to prohibit the sale, exhibition and giving away of

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303 Dallas Herndon, *Outline of Executive and Legislative History of Arkansas* 135 (1922). In fact, that year’s enactment was, in some respects, less aggressive than the “equal but separate...accommodations” for the “white and African races” bill passed in the previous session. 1891 Arkansas Acts ch. 17, at 15; 1893 Arkansas Acts ch. 114, at 200.

304 1893 Arkansas Act ch. 114, at 200; see above ch. 3.


cigarettes in this state,” on January 23.  His bill made it a misdemeanor to sell, exhibit for sale, or give away cigarettes, cigarette paper or other device,” punishable by a fine of $50 to $100, half of which the informant was to receive.  The next day, Democratic Representative J. Monroe Smith, a farmer, offered an amendment radically (or bill-killingly) expanding coverage to include cigars, pipes, and manufactured tobacco, which, together with the bill, was referred to the Practice of Medicine Committee.  Two days later committee chairman Maximillian Haynie Buchanan, a Methodist physician, reported the bill back with the recommendation that it not pass.  Nevertheless, four weeks later, the full House, after rejecting Smith’s amendment, passed the bill by the very large majority of 60 to 19. All but one of the Nays were cast by Democrats; five Republicans (including all five blacks) voted Yea, none voted Nay, while seven Populists voted Yea and only one Nay. Of the eight physicians in the House, three each voted Yea and No.  During floor debate, Bradley in support of the bill was joined by five Democrats, including four lawyers (two of whom were also Methodists), and a Presbyterian minister. The bill’s three floor opponents were also all Democrats, two of whom, interestingly, were physicians, of whom German-born Carl Flucks, a Catholic, also owned a drug store and “engaged in the gin business and had other interests which were profitable.”  The press

308 “State Legislature,” AG, Feb. 21, 1893 (5:1-6 at 6). The bill text has had to be reconstructed from press accounts (and fragmentary mentions in the House and Senate Journal) because the Arkansas Historical Commission/State Archives has not retained bills from this period. Telephone interview with Jeff Lewellen, archivist, Little Rock (Dec. 7, 2006).
311 At the Census of Population he was returned as a physician, while Biennial Report of the Secretary of State of the State of Arkansas: 1892, at 70 (1893), listed him as a farmer and an M.D.
314 History of Posey County Indiana 344 (John Leffel ed. 1913).
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across the country reported the House action widely,315 *The New York Times*, for example, erroneously claiming that the bill abolished cigarette smoking and predicting that the Senate would follow suit.316

And indeed prospects did appear excellent in that chamber when the chairman of the Public Health Committee, physician A. J. Redwine, reported the bill with the recommendation that it pass.317 Then on March 3, the day after both houses of the Washington State legislature had passed a general no-cigarette-sales bill, Arkansas became the second state to do so when H.B. No. 98 passed the Senate by a vote of 22 to 6, all six Nays being cast by Democrats, 20 of whom together with one Republican (George W. Bell, a teacher and the only black senator)318 and one Populist voted Yes.319 However, three days later, after the bill had already been forwarded to the House, everything began to unravel when Senate President Edgar Burton Kinsworthy, moved both to reconsider the vote and that the House be requested to return the bill to the Senate.320 Kinsworthy—a Little Rock corporation lawyer, who would serve as attorney general from 1895

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315 E.g., “Anti-Cigarette Bill in Arkansas,” *World* (New York), Feb. 21, 1893 (2:5); “No Place For Dudes,” *BDT*, Feb. 21, 1893 (1:5); *New Era* (Humeston, IA), Mar. 1, 1893 (1:1) (untitled).


317 *Journal of the Senate of Arkansas, Twenty-Ninth Session* 409 (Feb. 25) (1893).

318 Carl Moneyhon, *Arkansas and the New South* 91 (1997), erroneously stated that all 12 blacks who had been members of the legislature in 1891 had “disappeared” by 1893.

319 *Journal of the Senate of Arkansas, Twenty-Ninth Session* 464-65 (Mar. 3) (1893).

320 The six Democrats who voted No, three (Robert J. Wilson, Walter S. Amis, and Tom Miller Mehaffy) were lawyers, two (Wesley E. Davidson and Clay Sloan) were farmers, and one (John Franklin Weaver) was a newspaper editor; two (Mehaffy and Davidson) were Methodists. *Biennial Report of the Secretary of State of the State of Arkansas: September 30, 1892*, at 68 (1893). Sloan, though listed as a farmer, was in fact a banker and planter, who was an “ardent prohibitionist.” The Governors of Arkansas: Essays in Political Biography 297 (Timothy Donovan et al. ed. 2d ed. 1995 [1981]) (as Senate president pro tempore he was acting governor for a month in 1894 while the governor was out of state). Mehaffy was an Arkansas Supreme Court justice from 1927 to 1942. http://courts.state.ar.us/historical%20society/history3.html (visited Apr. 9, 2010).

to 1899—had voted for H.B. No. 98 and purported to be in favor of it, “but he had learned that a long fight would be made to keep the governor from signing the bill, and if signed it would be fought before the courts on the grounds of its being unconstitutional.” Consequently, he wanted the vote reconsidered and the bill referred to the Judiciary Committee so that its constitutionality could be examined. The press account failed, unfortunately, to reveal whether these gubernatorial and judicial fights would be fought by the Tobacco Trust, but the explanation offered by Kinsworthy—who had, after all, taken a prominent anti-tobacco position on measures concerning children in 1891—apparently persuaded his colleagues, who voted 19 to 5 to reconsider, referring H.B. No. 98 to the Judiciary Committee. Whereas 14 of the 22 senators who four days earlier had voted for passage now voted to undo those votes, only two (Democrats) opposed reconsideration.

Despite Kinsworthy’s purported trepidations, after a week’s consideration the Judiciary Committee, chaired by Democratic Methodist lawyer C. C. Hamby (one of only two senators who had voted for the bill and against reconsideration), did not recommend against passage on the grounds of unconstitutionality. The only amendment on which it conditioned its do-pass recommendation was striking the relatively unimportant section that gave informers half the fine. To be sure, a three-member minority (two of whom had voted against the bill on March 3) did recommend that H.B. No. 98 not pass. Once the Judiciary Committee, the chamber’s constitutional watchdog, had dispelled Kinsworthy’s second- or thirdhand doubts—the only reason for reconsideration—the Senate should have re-sent the bill back to the House, at the very least after the full Senate had taken up the bill on March 17 and adopted the committee amendment striking the provision concerning informers. Instead, the deliberations unleashed a torrent of absurd amendments the total impact of which would have been to render the ban a virtual nullity. Since some of these radical killer amendments were offered by senators who had voted for the bill, what suddenly prompted them to change their
minds is a mystery.

First, Senator Tom Miller Mehaffy, a Methodist, lawyer, and future Arkansas Supreme Court justice, who in 1891 had led the House to pass a bill to repeal the no-sales-to-under-15-year-olds bill\(^{326}\) and headed the aforementioned Judiciary Committee minority, proposed extending the sales ban to “any alcohol, or any spirituous, ardent, vinous, malt or fermented liquors or compound or preparation thereof, commonly called tonics or bitters or medicated liquors or intoxicating spirits of any character whatever.”\(^{327}\) Though the bill was “wrong in spirit” and “undemocratic” because it would regulate people’s habits and morals, Mehaffy argued that if the legislature was going in this direction, it should act consistently and strike a blow at the whisky traffic, which was “far more destructive to health, home, society, morals and finance than cigarettes.” Picking up where Mehaffy had left off, Senator Bell added the observation that cigarettes did “not enter a man’s brain and set it wild with madness and frenzy, but whisky does.”\(^{328}\) After the Senate had rejected this great equalizer of evils, Gibson Witt, another Democratic lawyer, who, like Mehaffy, had been in the Judiciary Committee minority, proposed striking the prohibition of giving away cigarettes. Witt argued that it would be an “outrage” to fine a man or boy $50 for such an act because: “Thousands of visitors go to Hot Springs annually, and hundreds of others visit all the cities of this State, and they bring with them cigarettes. They will know nothing of this little sumptuary law, and will give away a cigarette, then they are in the clutches of the law.” Another Democratic lawyer, W. R. Quinney, protested that the amendment would defeat the bill’s purposes because it would facilitate dealers’ evasions such as selling “some little valueless article” such as a stick of candy while giving away a package of cigarettes. While proffering no empirical support for his empirical denial that such practices could be or had been used, Witt self-contradictorily claimed that the courts had held such sales to be subterfuges. Once again, this attempted dilution was defeated by a vote of 12 to 17, though the fact that some who had voted for the bill now supported its amputation augured poorly for the ban bill’s ultimate survival. The Senate finally adopted an amendment when it agreed to insert a requirement that selling or giving away cigarettes had to take place “willfully and knowingly” to qualify as a violation, thus creating possibly numerous loopholes. Senator Russ, a Populist and Methodist, offered an amendment (which had already been defeated and was

\(^{326}\) See above ch. 3.

\(^{327}\) *Journal of the Senate of Arkansas, Twenty-Ninth Session* 608 (Mar. 17) (1893).

\(^{328}\) “State Legislature,” *AG*, Mar. 18, 1893 (3:1-2 at 3). Unfortunately, the paper did not clarify whether it was citing G.W. Bell or J. H. Bell, the former being the Senate’s only black or Republican.
probably designed to kill the bill) to ban the sale of cigars as well, but it was
tabled. Mehaffy then sought to subvert the bill entirely by limiting coverage to
the under-15-year-olds to whom it was already illegal to sell cigarettes, but it lost.
Witt then tried to accomplish directly what his previous amendment had failed to
do indirectly—namely, to exempt “persons temporarily residing or visiting” in
Arkansas who gave away cigarettes. That it lost only by the narrow margin of 14
to 15 suggested, again, that the anti-cigarette forces were buckling. At this point
Mehaffy had recourse to a new tactic to perforate coverage and render the ban
illusory—the exemption of 11 counties, including two of his own but also Pulaski
(Little Rock). Debate then focused on an issue that would continue to resonate
in pro-tobacco circles in many states (including Iowa) into the twenty-first
century: “[J]ust over the line at Fort Smith, Texarkana, and all around the State
parties will sell cigarettes and cigarette papers to parties in this State, while the
business men of this State, just inside the line, will be prohibited from selling.”
Once the amendment had secured a 13 to 11 majority, “Senators began to offer
amendments exempting certain counties in their districts, until more than one-half
the counties of the State were exempted. While this wholesale business of
exempting was in progress,” which even Dr. Redwine, who had earlier been the
bill’s reliable supporter, joined, a halt was called to this rout and further
consideration of the bill and pending amendments was postponed until the
following week.\footnote{State Legislature,” \textit{AG}, Mar. 18, 1893 (3:1-3 at 2) (quotes); \textit{Journal of the Senate of Arkansas, Twenty-Ninth Session} 608-10 (Mar. 17) (1893).Where the account in the \textit{Gazette} deviated from that in \textit{Journal} concerning votes or names of movants, the latter has been assumed to be more reliable.}

On taking the bill up again on March 24, the Senate adopted three more
amendments exempting eight more counties and bringing the total to 19. The bill
was then ordered to its third reading,\footnote{\textit{Journal of the Senate of Arkansas, Twenty-Ninth Session} 667 (Mar. 24) (1893); “State Legislature,” \textit{AG}, Mar. 25, 1893 (5:1).} but the anti-anti-cigarette legislators
having arguably made their point that they had the votes to squeeze coverage to
the vanishing point, further debate apparently became senseless, and the bill died.
Yet another attempt would take place at the 1895 session.\footnote{See below ch. 6.}
The First State to Enact a Sales Ban: Washington 1893

Cigarettes Abolished.\footnote{Cigarettes Abolished,} 332 

The legislature of the young state of Washington has passed a bill making it unlawful for anyone to manufacture, buy, sell, give away, or have in his possession cigarettes or cigarette papers. This is sumptuary legislation with a vengeance. It’s quite evident that Washington intends to conserve the mental and physical powers of her people even if she has to go Spartan methods several points better.\footnote{San Saba News (Texas), Mar. 31, 1893 (2:1) (untitled edit.).} 333

Washington, whose territorial legislative assembly in 1883 had outlawed the sale of toy pistols, cigarettes, cigars, or tobacco to anyone under 16 (without written parental consent),\footnote{1883 Wash. Laws at 67-68. Parental consent did not apply to toy pistols.} in 1893, barely three years after having attained statehood, became the first state to make it unlawful, regardless of age, to “manufacture, buy, sell, or furnish to any one cigarettes, cigarette paper or cigarette wrapper,” subjecting violators to a maximum fine of $500 and/or imprisonment of not more than six months. The expansive structure, which extended liability also to buyers, was reinforced by a provision requiring that the act “shall be liberally interpreted to the end that its object shall be enforced.”\footnote{1893 Wash. Laws ch. 51, §§ 1-3, at 82.  Members of the Washington State Legislature 1889-2009, at 5 (2009), on http://www.leg.wa.gov/History/Legislative/Documents/Members_of_Leg_2009.pdf (visited Dec. 26, 2009); http://www.leg.wa.gov/History/Senate/Documents/SenatePrior1979.pdf and http://www.leg.wa.gov/History/House/Documents/HousePolDiv1889-2009.pdf (visited Dec. 25, 2009); “The Washington Legislature,” MO, Nov. 30, 1892 (3:2). Nine Democrats and no Populist sat in the Senate in 1893. Will Steel and Albert Searl, \textit{Steel & Searl’s Legislative Souvenir Manual for 1895-1896}, at 19-21 (1895) stated that the legislature that passed House Bill No. 236, while not quite so lopsidedly Republican as Washington’s first two of 1889 (when the Senate was composed of 34 Republicans and one Democrat and the House of 61 Republicans, eight Democrats, and one Independent) and 1891 (when 30 Republicans stood against four Democrats in the Senate and 60 Republicans confronted 17 House Democrats and one Populist), was nevertheless distinctly under the control of the Republican party, which in 1893 accounted for 25 of 34 Senate and 50 of 78 House seats (19 Democrats and 9 Populists holding the remainder).\footnote{The First State to Enact a Sales Ban: Washington 1893}
The sponsor of the bill, 24-year-old Republican Chris Roscoe, who had not come to Washington until 1888 and was admitted to the bar in 1891, pledged for passage at the conclusion of House debate on “moral grounds” by appealing for protection of “the rising generation” and suppression of “a habit that even women and girls were becoming the victims of....” The motivation for the giant leap to a universal ban depriving adult men of the right accorded them elsewhere in the United States to buy cigarettes was, unfortunately, barely illuminated in public debate, which focused on youth. This orientation was suggestive of the involvement of the state Woman’s Christian Temperance Union, about whose participation, let alone leadership, little is known. For example, the “W.C.T.U. Column” in the weekly Vancouver Columbian never even mentioned the Roscoe bill or law during 1893. And even when, a week before the law went into effect, the fourth annual convention of the Whitman County WCTU passed a resolution on the law, the group seemed to be unaware that the ban even applied to adults: “That as we now have a law prohibiting the sale of cigarettes to boys, let us see that this law be enforced. We also call on all pure and virtuous men, to prohibit by law the custom of sending out in cigarette packages the seminude pictures of women...which is such a mighty factor in the defilement of our boys.” At the same time the president of the Tacoma WCTU, in explaining her group’s work at a Baptist church, did not allude to any role in passage of the general sales ban bill, but merely mentioned that: “Our department of narcotics has put thousands of pages of leaflets into the homes of our city, warning the young against the tobacco habit, and dealers in cigarettes and tobacco have been

in 1889 there was one fewer Republican senator and one more Republican representative.


340 In 1897 the Washington WCTU’s membership was only 842 or about 0.24 percent of the state’s population (in 1890). Though approximately the same as the national average (0.22 percent), this proportion was considerably lower than in some states that never enacted a universal sales ban law such as Maine and New Hampshire. Calculated according to Report National Woman’s Christian Temperance Union Twenty-Fourth Annual Meeting...1897, at 182-83 (1897).


labored with, and with some success, to prevent the sale of the pernicious articles [to minors].”343 Moreover, when, just as the law went into effect, the state reporter submitted to the national WCTU organ a report on the King County (Seattle) annual convention, the only concern she voiced based on ATC’s claim that the law did not prevent the sale of original packages and that tobacco dealers therefore did not intend to obey the law was that: “They are just as lawless as saloon-keepers and just as conscienceless in regard to the ruin of the boys.”344

Two days before Roscoe introduced his bill, a Tacoma editorialist, reacting to the previous day’s passage by the Alabama House of the aforementioned ban on cigarette sales and public cigarette smoking (which it reconsidered and dropped the very day the editorial appeared), called it “the only effective way to deal with this great evil, which has few if any redeeming features.” Because no-sales-to minors laws were “practically dead letters” and even cigarettes not adulterated with opium or other poisons “would be very detrimental” to young people’s health—as witnessed by more than one case of insanity or imbecility and ensuing institutionalization—“the legislature of this state might well try the effect of more drastic measures.”345

Although the Morning Oregonian viewed House passage of the bill as the legislature’s taking “a long step in the direction of depriving its members of cigarettes,”346 the overwhelming majority of 57 to 7147 that H.B. 236 garnered did not signify that all of its supporters backed it for the same reason. Thus, for example, Republican farmer J. E. Tucker declared during floor debate that he “was opposed to the cigarette trade because it promoted traffic with the Chinese. ‘Take a cigar and be an American,’ he announced as his motto.” Conversely, the small opposition was not above turning the deliberations into what the press

343“It Was Temperance Night,” TDL, June 5, 1893 (4:4).
346“Against Cigarettes,” MO, Feb. 17, 1893 (3:3).
called “a burlesque proceeding....” The chief instigator was the “irrepressible” Ferdinand Mays, a Democrat and Virginian who had “entered the confederate service,” later became a minister in the Methodist Episcopal Church, South, and founded a newspaper in Washington State. Failing to secure any support for his proposed extension of the prohibition to “‘narcotics and stimulants,’” with the assistance of a “‘joshier’” and the humorist House speaker, he mobilized another member’s questioning of the bill’s constitutionality on the grounds that it banned the sale of cigarette paper in order to have the question referred to him, enabling him to declare “judicially...that ‘By virtue of the legal authority vested in me by the house of representatives of the state of Washington, I decide this bill to be unconstitutional.’”

Importantly, passage of the bill in the House was facilitated by the strong support provided by Republican Representative Constantine Webb, who, as head of “the largest grocery house in Seattle,” also “probably handle[d] as many cigarettes as any firm in the state....” As a wholesale tobacco dealer, Webb described during floor debate “the methods adopted by the American Tobacco Company, a monster trust, to control the cigarette trade, and expressed the opinion that the bill would prove a double blessing, in keeping the company from operating in the state, as well as in correcting the noxious cigarette habit.” Indeed, one newspaper went so far as to charge that “[t]he most vigorous lobbyists for the bill were the wholesale tobacco-dealers, not in the interest of

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349Clarence Barton, Barton’s Legislative Hand-Book and Manual: 1893-1894, at 236 (1893). At the 1910 Population Census Mays was returned as a prisoner in a county jail without an occupation.

350“Turner Goes Home,” SP-I, Feb. 17, 1893 (1:6-7, at 2:1). Populist Rep. John B. Smith, who had questioned the ban on cigarette paper, cast one of the seven Nays, as did Republican Frank Nash, a lawyer, who argued that the bill was unconstitutional because it failed to deal with the cigarette stocks that dealers had on hand. Id. In 1909, Nash succeeded in persuading a state superior court judge in Tacoma to invalidate a recently enacted provision of the penal code prohibiting cigarette smoking. “Cigarette Law Will Be Tested,” Centralia Daily Chronicle, July 3, 1909 (1:4); “Cigarette Law Knocked Out in Court,” Centralia Daily Chronicle, July 10, 1909 (1:3).

351Clarence Barton, Barton’s Legislative Hand-Book and Manual: 1893-1894, at 252 (1893). Together with his father, Webb had owned the largest wholesale grocery business in Iowa in the 1870s. Id.


morality or hygiene, but of their business. A cessation of cigarette smoking means the sale of more cigars, and there is more profit in cigars. Without these powerful allies, the reformers would not have been able to pass their bill.\textsuperscript{354} (About the same time, cigar and tobacco retail dealers in New York, complaining that “cigarette manufacturers compel them to buy their stock of cigarettes through jobbers,” who left them a “very narrow profit margin,” which they felt very keenly because cigar consumption was steadily declining while that of cigarettes was increasing, “organized a mutually protective and anti-cigarette trust association.”)\textsuperscript{355} The bill’s passage was said to have prompted rejoicing among tobacco wholesalers and jobbers in Tacoma, which accounted for one-fourth of the state’s total annual sales of 40,000,000 cigarettes: “All the Tacoma and Seattle wholesale houses were represented at the capital in the interests of the bill.”\textsuperscript{356} Going even further, the Western Washington Wholesale Grocers’ Association not only decided to conform to the new law when it went into effect three months later, but agreed to “countermand their orders placed with the American Tobacco Company for regular monthly supplies, and resolved to aid in stamping out the sale of cigarettes” in Washington State.\textsuperscript{357} Public support for even more radical prohibition was visibly on display in the Senate, which (following the recommendation of its Committee on Public Morals)\textsuperscript{358} voted 25 to 2 to amend the House bill\textsuperscript{359} by making possession of cigarettes (or paper or wrapper) a misdemeanor as well. The press noted that “[i]t was seen that the bill had a great many friends, but the amendment caused considerable discussion....”\textsuperscript{360} Unfortunately, the press failed to reveal any of the
substance of debate on this extraordinarily radical proposed statewide intervention in the history of tobacco control. After the House had refused to concur in the Senate amendment, the Senate refused to recede from its amendment but finally did so pursuant to a conference committee recommendation.

Local press support for the initiative was signaled by the Seattle Post-Intelligencer, which editorialized that the Senate version outlawing possession was “extremely stringent” and would, if enacted, “certainly have the intended effect. It will, at least, prevent the open sale of cigarettes and remove all temptation to become addicted to the pernicious habit of cigarette smoking. While legislation of this kind may in some cases be objectionable, in this particular instance few will be found who will object to it.” Indeed, even after the ban on possession was struck, the newspaper opined that the legislature “cannot do a more popular thing than to pass” the bill. Exactly why the law would be so popular when it deprived adult males of a segment of their consumer sovereignty the Post-Intelligencer no more explained than why their addiction had to be sacrificed on the altar of the next generation’s welfare when a strictly enforced ban on sales to and smoking by minors would also have targeted the latter issue:

If the only persons who were addicted to the habit of cigarette smoking were men of mature years, who may be said to be responsible only to themselves for their actions, the case would be different. It is well-known, however, that the great evil in connection with the cigarette habit is the constant menace and temptation to the youth of the state. If the Roscoe bill becomes a law the rising generation will become better men physically,
mentally and morally.\textsuperscript{366}

As far away as Minnesota, the press was jubilant: “Think, says the Minneapolis Journal, of riding downtown on a street car without that familiar odor like an old overshoe burning. Washington is a pretty good state [even] if it is locked away in one damp corner.”\textsuperscript{367} In contrast, The New York Times sarcastically asserted that, despite the “great wave of moral reform” that had “struck” Washington and prompted the legislature and governor to ban cigarette sales:

Nine-tenths of the members who voted for the bill did not care a nickel about the reform of the cigarette fiend, but they were anxious to knock out the Tobacco Trust. This powerful combine, which has secured control of the manufacture of all the leading brands of smoking tobacco and of nearly all the cigarettes in the United States, has been grinding the merchants and retailers to such an extent that they are glad to see it get a dose of its own medicine.

The American Tobacco Company is making more money out of cigarettes than from all other branches of its business put together, its profits last year being reported at $4,000,000 from cigarettes alone. The profits of the jobber and the retailer are now represented by a fraction of a cent on a package.

... The retailer objects to cigarettes because his percentage of profit must be large to make a living, and one dealer expressed his feelings by saying:

“I am glad the bill has passed. I am tired of getting off my stool 250 times a day to sell a five-cent package of cigarettes and then making only 10 cents on the whole lot.”\textsuperscript{368}

The reason, according to the Times, that the Washington legislature had been able to pass the bill “without difficulty” was that:

The American Tobacco Company did not awake to the situation until the bill was well on

\textsuperscript{366}“The Roscoe Cigarette Bill,” SP-I, Mar. 2, 1893 (4:1) (edit.).
\textsuperscript{367}Freeborn County Standard (Albert Lea, MN), Apr. 3, 1893 (4:1) (untitled edit.).
\textsuperscript{368}“Fighting the Tobacco Trust,” NYT, Mar. 17, 1893 (10). Intriguingly, almost three decades later, when the WCTU succeeded in securing the introduction of a bill in the Washington House prohibiting the sale or manufacture of cigarettes, the United States Tobacco Journal expected jobbers to oppose it strenuously: “But they are not doing anything of the sort. ... They complain that there is no profit in cigarettes for them and so consequently why worry. If the bill passes, they reason, and cigarettes are taboo, why then they can sell more cigars. This may or may not be their state of mind—but that is the way things look.” “Anti-Cigarette Bill Fails to Disturb Jobbers in Spokane,” USTJ, vol. 104, Dec. 26, 1925 (48:1-2).
its way to become a law. Then it started an expert lobbyist to Olympia with $20,000 to compass the defeat of the measure, but before he arrived it was in the hands of the Governor and the game was lost.\footnote{369}

To be sure, this account contradicted that published a month earlier by the Post-Intelligencer, which, on the day that the bill passed the House, wrote that “a strong effort is to be made by the tobacco interests to beat it in the senate. Lobbyists are here to secure its defeat in that branch.”\footnote{370} And on the day the legislature passed the bill, wholesalers (who supported it) reported that the “American Tobacco Company..., which controls the cigarette trade, sent three lawyers to Olympia to work against the bill.”\footnote{371} In fact, the ATC, as Progressive Senator Albert Beveridge told his colleagues on the Senate floor in 1909 during a tariff debate on tobacco, became widely known for “resort[ing] to bribery in legislation. It has had its general lobbyist in New York, a man of great standing there, up to the time he died four years ago. It has had its local lobbyists with salaries and an expense fund at their command in every State where legislation affecting its interest was before the State legislature.”\footnote{372} By mid-April, at least one newspaper served up the scoop that “[a]t last the American Tobacco company, which is another name for the cigarette trust, has disclosed how they will attack the anti-cigarette bill....” One of ATC’s agents was in Seattle “giving confidence to the local retailers not to worry about the law, but to continue selling and buying, as the law cannot be enforced, and that [sic] the law can be subtravented [sic] without legal assistance.” The panacea was the original package doctrine, which had served to undo state liquor prohibition laws: ATC claimed that “each package of cigarettes is an original package, and that its sale cannot be stopped by any state law,” although its agent tantalizingly “admit[ted] the sale of them may be regulated within certain limits” without revealing how. What he did explain was that the Roscoe law had been “passed by the wholesale dealers because there was no longer any profit in the business, and that they had the bill passed so that the American Tobacco company would give them better terms” than the 15 cents per 1,000 cigarettes that they had been

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\footnote{369}{"Fighting the Tobacco Trust," NYT, Mar. 17, 1893 (10).}
\footnote{370}{“Turner Goes Home,” SP-I, Feb. 17, 1893 (1:6-7, at 2:1).}
\footnote{371}{“Rejoicing in Tacoma,” MO, Mar. 3, 1893 (3:4).}
\footnote{372}{CR 44:3734-35 (June 24, 1909). Although Beveridge was referring to Frederick Gibbs, who had in fact died six years earlier, and mentioned that the relevant materials had been published in Collier’s, he refused, even when a colleague requested him, to name names. On Gibbs, see below ch. 5.}
In the interim between the passage of the Roscoe bill and its effective date the press—seemingly inspired by the same ATC agent—charged that the law was a labor of Sisyphus because it was “simply calculated to take all the money heretofore paid for them by residents out of the state. Smokers can send to Portland and other places and purchase as many or as few cigarettes as they desire. They can get them through the mails or by express. There is nothing to prevent a man from buying cigarettes elsewhere and having them sent to him....” Although this possibility of consumer-activated imports was entailed constitutionally by the original-package doctrine, its limited practical scope, as the Iowa attorney general would point out three years later, would, especially on account of the considerably less than spontaneous or instantaneous nature of the economically burdensome individualized commercial transactions it involved, scarcely render the ban nugatory.

California: The Senate Takes the Initiative, But Time Runs Out in the Assembly

Alameda, Cal., is evidently misplaced. It ought to be in Kansas or Iowa. It has just passed a very stringent law regulating the sale and smoking of cigarettes, and curiously enough was moved to do it by a petition gotten up and signed by the tobacconists, who evidently are afraid of the cheap smokes destroying their business. ... Alameda is a very nice place to stay away from.

The Californians have sat down hard on the deadly cigarette. A bill has gone to the governor absolutely prohibiting the manufacture, sale or use of cigarettes in that state.

The same day that the Minnesota House passed Kelly’s public cigarette smoking ban bill and the day after the Kentucky House had passed its sales ban bill, Republican Senator Guy C. Earl of Oakland introduced Senate Bill No. 646

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373“To Dodge the New Law,” TDL, Apr. 14, 1893 (2:1).
375See below chs. 10-11.
376For ATC’s judicial attack on the statute and its repeal in 1895, see below ch. 11.
377“Cigarettes Tabooed,” DP, Mar. 29, 1894 (4:5).
1893: Annus Mirabilis

to prohibit the manufacture and sale of cigarettes on February 10. The editorial attack on the Minnesota bill that the San Francisco Chronicle published two days later could easily have been construed as a critique tailored to local California consumers:

The Minnesota legislature must be run in the interest of the cigar-makers. The bill making the smoking of cigarettes a criminal offense would not commend itself to the Spanish-Americans who are so numerous on this coast and in the Southwest. The cigarette to the man of Spanish blood is as much a part of daily life as is claret to the Frenchman or maccaroni [sic] to the Italian. ... If a legislature has the right to rule out the cigarette it may also specify the brand of whisky that its members and the community must drink or the quantity of clothing that they must wear.

The newly elected Earl, a lawyer in San Francisco—who would later become a wealthy electrical industry capitalist and University of California regent, but gain his most enduring fame as an eponymous party in the U.S. Supreme Court case holding that a lawful contract between him and his wife to hold his salary and attorney’s fees as joint tenants did not trump the federal internal revenue code’s requirement that the earning spouse report and pay income tax on the whole amount—seemed an unlikely California representative of a nationwide movement, but the bill quickly secured a “do pass” recommendation from the Judiciary Committee, and on the night of March 10, four days before adjournment, the Senate, in which Republicans outnumbered Democrats 22 to

379 Journal of the Senate During the Thirtieth Session of the Legislature of the State of California, 1893, at 403 (Feb. 10) (1893). A local Sacramento paper made “A Bill Against the Making and Sale of Cigarettes” the subhead of the article on the previous day’s Senate proceedings, but other than listing the bill, did not discuss it. “The Proceedings,” R-U, Feb. 11, 1893 (5:1-2).
380 SFC, Feb. 12, 1893 (6:1) (untitled edit.).
383 Extensive and intensive questioning of surviving members of Earl’s family turned up no information that might shed light on his advocacy of the anti-cigarette bill.
1893: Annus Mirabilis

18,385 considered S.B. No. 646. Debate appears to have been somewhat less one-sided than the 31 to 3 vote in favor of passage386 inasmuch as two senators who spoke against the bill nevertheless voted for it. Republican William Simpson, a physician, “surprised the Senate by saying that the bill was too severe. He did not think that the manufacture of the deadly things should be stopped.” After Democrat Henry Wilson, a farmer, had “paralyzed his friends by saying that cigarette smoking was all right provided the tobacco was wrapped in brown paper,” Democrat George G. Goucher, a lawyer from Fresno, “amazed” by their statements, gave both of them a “‘roasting’” and expressed the hope that, instead of being “led astray,” his colleagues would vote “to preserve the future generation. He considered the cigarette habit the next-door neighbor to the opium habit. It made the youth vicious and criminal.”387 In spite of the Republican majority, Democrats cast more Ayes (17) than did Republicans (14), who accounted for all three Nays.388 By the time the Senate acted, only three legislative days remained in the session, during which the Democratic-controlled Assembly never took up the bill.389 In 1895 both chambers would pass a bill, but the governor would not sign it.390

Nebraska: A Virtually Unanimous House Makes No Impression on the Senate

The bill which had just passed the house prohibiting the sale or manufacture of cigarettes...will probably become a law. Nebraska will then be the second state to shut off

385California, Blue Book, or State Roster: 1893, at 218-19, 222 (1893).
386Journal of the Senate During the Thirtieth Session of the Legislature of the State of California, 1893, at 1060 (Mar. 10) (1893).
387“Legislative Notes,” R-U, Mar. 11, 1893 (8:3). The occupational data are taken from California, Blue Book, or State Roster: 1893, at 218-19 (1893), except for Simpson’s, which is stated according to the newspaper, though the Blue Book listed him as a druggist. The accounts of the debate in the state’s leading newspapers were perfunctory: “State Solons,” LAT, Mar. 11, 1893 (2:2) and “Work at the Capitol,” SFC, Mar. 11, 1893 (4:1-2 at 2); “How the State Is Fleeced,” Examiner (San Francisco), Mar. 11, 1893 (2:4-5).
388The three Nays were cast by Senators Broderick (butcher), Carpenter (attorney), and Williams (clerk), all Republicans. California, Blue Book, or State Roster: 1893, at 218-19 (1893).
389According to the Journal of the Assembly during the Thirtieth Session of the Legislature of the State of California, 1893 (1893), the Senate appears not even to have transmitted the bill to the Assembly.
390See below ch. 6.
this business, Washington having taken the lead. Other states will follow and in a few years neither a shot gun nor a search warrant can find one of these “coffin nails” in the country. Self execution in this line will then be stopped. Crazy houses will lose a prolific source of supply and graveyards will yearn for lack of dead men.\textsuperscript{391}

For more than two decades, from statehood until the end of the 1880s, Republicans had controlled both houses of the Nebraska legislature by very large majorities. During that decade minority Democrats focused largely on alcohol prohibition, mounting vociferous opposition to sumptuary legislation in general, reflecting ethno-cultural constituencies of German, Czech, Irish, and Polish Catholics, whose liturgical-ritualist orientations set them in opposition to pietist Methodists and “old-stock” Protestants, who formed the core of the Republican Party and prohibitionist movement.\textsuperscript{392} Republicans lost their electoral and legislative majorities in 1890 to the upsurge triggered by adverse agricultural conditions, which in turn pushed the Farmer’s Alliance to seek independent political action. The resulting People’s Independent party advocated on behalf of reduced railroad freight rates, the secret ballot, and the eight-hour day (except for agricultural labor) in addition to free silver coinage, increased monetary circulation, and abolition of the monopoly in land.\textsuperscript{393} In order to ward off this threat, the Republican and Democratic parties offered (verbal) concessions, both in particular denouncing the trusts. One issue that increasingly loomed over all parties was liquor prohibition, from which otherwise prohibitionist-leaning Republicans shied away lest they lose the votes of the strongly anti-prohibitionist German and Bohemian immigrants. Dry Populists, too, found the issue too divisive to deal with. Only the Democratic party took a clear stance, opposing prohibition, but supporting a saloon-licensing system. Once a prohibitionist constitutional amendment made it onto the general election ballot in 1890, it became the overtowering issue in Douglas County (Omaha), whose literally incredible 23,918 to 1,555 vote in opposition facilitated temporary resolution of the controversy in a statewide rejection by a vote of 111,728 to 88,292. More significantly, the 1890 elections also propelled the Populists into outright majorities in both houses of the legislature in 1891.\textsuperscript{394} During the 1891 session

\textsuperscript{391} \textit{Evening News} (Lincoln), Mar. 20, 1893 (4:2) (untitled edit.).


\textsuperscript{394} James Olson and Ronald Naugle, \textit{History of Nebraska} 228-31 (3d ed. 1997 [1955]).
the Populists were, by large majorities, able to pass the so-called Newberry bill cutting railroad freight rates, but the Senate’s failure to mobilize the requisite supermajority to override the Democratic governor’s veto demonstrated the Democrats’ and Republicans’ lack of anti-monopoly commitment. Nevertheless, Populists did pass bills to secure the secret ballot, free textbooks, the eight-hour day, and state regulation of elevators and warehouses.395 When, however, the Populists—whose convention advocated, inter alia, equal pay for men and women, arbitration for settling labor disputes, direct elections for president, vice president, and senators, and opposed convict labor—who began seeking support from middle-class business and professional groups, lost their momentum at the 1892 elections, no party gained a majority, leaving the 1893 legislature “in chaos” and jeopardizing achievement of the Populist legislative program. While Democrats and Populists entered into a full-scale coalition in the House, the Senate witnessed Democrats allying with Republicans and Populists.396


396Albert Watkins, History of Nebraska 3:242-43 (1913); John Hicks, The Populist Revolt: A History of the Farmers’ Alliance and the People’s Party 262 (1961 [1931]) (quote); James Olson and Ronald Naugle, History of Nebraska 233-34 (3d ed. 1997 [1955]); Robert Cherny, Populism, Progressivism, and the Transformation of Nebraska Politics, 1885-1915, at 43 (1981). The 47 House Republicans outnumbered but did not majoritize the 40 Populists and 13 Democrats; in the Senate Populists and Republicans each occupied 14 seats, while Democrats controlled only 5. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 115 (2007). According to Lawrence Goodwyn’s incisive, influential, and controversial interpretation, Nebraska’s Populist organization, which reached all the growth that it would ever achieve between November 1889 and July 1890, was a “shadow movement,” which “dutifully trailed” after the Kansas movement, but without any understanding of the Farmers’ Alliance cooperative crusade, the absence of which helped it attract vaguely anti-monopoly adherents unrelated to an institutional base, a collective identity, self-education, or culture required to “counter the constant intimidation of the prevailing corporate culture.” As a result, the “Nebraska People’s Party languished in complete ideological homage to the Democratic Party,” with which it fused by 1894. Lawrence Goodwyn, The Populist Movement: A Short History of the Agrarian Revolt in America 128-29, 142-43, 222
1893: Annus Mirabilis

The Nebraska anti-cigarette bill of 1893, House Roll No. 425, which was introduced on February 23, prohibited the manufacture, sale, keeping for sale, giving, or furnishing to anyone cigarettes or the material for their composition. The misdemeanor fine for conviction of each violation was $100. The introducer was 44-year-old Republican Representative Edgar M. Jenkins, who in 1879 had moved from Illinois, where he engaged in the grain and lumber business, to Alexandria (1890 pop. 1,111) in southeastern Nebraska, where he opened a drug store in addition to raising hogs. "That the small town in which Jenkins decided to settle was a “moral community” was signaled by its not granting liquor licenses. As a newly elected legislator in 1893 he also self-designated occupationally as a druggist, one of only two in the House, two-thirds of whose members were farmers. Jenkins’ position as a typical Nebraska Republican of the session was underscored by his opposition to the Populists’ most important piece of legislation, the Newberry bill to reduce railroad freight rates, which was finally enacted in 1893.

After the Miscellaneous Subjects Committee to which the bill had been

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397 House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session 489 (1893). What role (if any) the WCTU played regarding the bill is unclear. Several days earlier the WCTU did submit petitions to numerous House members (but not Jenkins), but the Journal failed to specify their subject matters; they were referred to the same committee as Jenkin’s bill. Id. at 409-11 (Feb. 16). In 1885, the Nebraska had passed a no-sales-to-under-15-year-olds law “through the influence of the W.C.T.U.” Minutes of the National Woman’s Christian Temperance Union at the Twelfth Annual Meeting...October 30th and 31st and November 2d and 3d, 1885, at 128 (1885).

398 House Roll No. 425, RG 046, Legislature (Neb.), Box 76 (NSHS).

399 Biographical Sketches of the Nebraska Legislature and National and State Officers of Nebraska 143 (W. Howard comp. 1895), on http://www.archive.org/stream/biographicalsket00howa#page/n9/mode/2up (visited Apr. 3, 2010).


401 House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session n.p. (1893). At the 1880 Census of Population he was returned as a druggist and so self-designated during the 1895 session. House Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 10 (1895). At the time of the 1900 Census of Population he was residing in the state capital, Lincoln, where he was a revenue clerk.

402 Jenkins explained that he favored a substitute reducing rates by only 20 percent as opposed to the 20-35 percent range embodied in the bill. House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session 707 (vote), 709 (explanation) (Mar. 10) (1893).
referred\textsuperscript{403} reported it back with a recommendation that it pass,\textsuperscript{404} the full House on March 17 passed it by the overwhelming vote of 76 to 1.\textsuperscript{405} The near-unanimity by which the House passed the anti-cigarette bill may have been linked to the fact (or at least the perception propagated by the anti-Prohibitionist Republican \textit{Omaha Daily Bee}) that “[t]here are few cities where cigarettes are so little used as in Omaha and their consumption is not extensive elsewhere” in Nebraska.\textsuperscript{406} House Roll No. 425 died, however, in the Senate, without reaching the floor for debate.\textsuperscript{407} The same battle would be resumed at the 1895 session.\textsuperscript{408}

\section*{Georgia: The House Learns from the Defeat in 1891, But the Senate Does Not}

At the 1893 session of the legislature the anti-cigarette forces finally secured their first breakthrough in Georgia in the form of House passage of a general cigarette sales ban. Although William Sinquefield, who had championed the unsuccessful prohibitory measure in 1891,\textsuperscript{409} was still a member in 1893 and voted for the new measure, House Bill No. 374 was introduced by merchant George Stapleton of Sumter County,\textsuperscript{410} “the lady’s man of the house,”\textsuperscript{411} and

\textsuperscript{403}\textit{House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session} 518 (Feb. 24) (1893).

\textsuperscript{404}\textit{House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session} 681 (Mar. 9) (1893).

\textsuperscript{405}\textit{House Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session} 840 (1893). Because 14 of the 22 non-voters/absentees were Republicans (and the one Nay was cast by a Republican), only 32 of 47 Republicans voted for the bill in contrast to 35 of 40 Independents/Populists and 9 of 13 Democrats. Press coverage was perfunctory; e.g., “Grief of Sheridan,” \textit{Nebraska State Journal}, Mar. 18, 1893 (3:1-4 at 4).

\textsuperscript{406}\textit{Omaha Daily Bee}, Feb. 18, 1893 (4:3) (untitled edit.). The paper’s sarcastic substitute bill entailed 30 days’ bread and water “for any dude convicted of smoking cigarettes....”

\textsuperscript{407}\textit{Senate Journal of the Legislature of the State of Nebraska, Twenty-Third Regular Session} 705, 905 (Mar. 21 and Apr. 1) (1893). The last action was the Education Committee’s recommendation that the bill be placed on general file. House Roll No. 425, RG 056, Legislature (Neb.), Box 76 (NSHS).

\textsuperscript{408}See below ch. 6.

\textsuperscript{409}See above ch. 3.

\textsuperscript{410}Many New Bills,” \textit{AC}, Oct. 27, 1893 (7:1-3 at 3). That Stapleton was no morally antediluvian politician, but thoroughly capital and market oriented he made clear by introducing a bill to “authorize foreign corporations to bid in real estate upon which they
advocated for most strenuously by William M. Sears, another farmer and prominent Allianceman, who, to be sure, admitted on the House floor that he had engaged in the discussion “with very little investigation of the subject....” (At the 1892 session Stapleton had also introduced a “bill to prohibit the sale of cigarettes, and for other purposes,” but the House took no action on it.) Nevertheless, even on the bill’s second reading the Atlanta Journal opined that indications were that cigarettes would “soon be banished from the state.” The bill that was debated the next day, October 27, had been strengthened by the Committee on Hygiene and Sanitation, which “went Mr. Stapleton one better” by including cigarette tobacco and paper, a step that the out-of-state press ironically characterized as having “emphasized the rigid moral sense of the house” inasmuch as “this same body has been using every effort to encourage the cultivation of tobacco in the state.” The debate—the outcome of which the Atlanta Journal headlined on the front page above the fold as “Bye Bye to Cigarettes”—occupied the House for several hours on its third reading, although oddly the bill did not immediately attract attention so that before any floor discussion a rising vote of 92 to 14 was taken. At this point Representative William Harrison, a lawyer, opposed the measure on the grounds that the legislature lacked the power to curtail the use of cigarettes totally; moreover, he

have loaned money and secured themselves by lien or mortgage.” Stapleton’s motivation was to eliminate large foreign corporations’ reluctance to do business in Georgia. Instancing a Scottish loan company anxious to invest millions of dollars in Georgia which it would have been enormously advantageous to have in the state, Stapleton regarded it as “really an injustice not to allow these people to protect themselves by buying in land....” “On Education,” AC, Nov. 1, 1893 (7:1-4 at 3).

“‘What They Didn’t Do,” AC, Dec. 18, 1893 (6:1).


Journal of the House of Representatives of the State of Georgia, at the Session of the General Assembly: Commenced at Atlanta, Wednesday October 26, 1892, at 454 (Dec. 7) (1892).


“The Immoral Cigarette,” Milwaukee Sentinel, Nov. 25, 1893 (4:6). House passage had taken place a month, not, as the article claimed, a few days earlier. By the time this article appeared, the senate had killed the bill.


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1893: Annus Mirabilis
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questioned the use of encouraging their manufacture in Georgia when the sale of the manufactured product was “crippled or suppressed.” Representative Hendon of Troup County took a different tack in opposition, both insisting that H.B. 374 was “foolish, practical and foredoomed to be a dead letter” and “emphatically den[y]ing that the cigarette was as injurious as generally assumed.” Moreover, evasion of the law would insure that instead of saving boys’ health, the measure would “result in their smoking any kind of tobacco in any kind of paper.” Sears’s “long and impassioned speech,” which assured the House that Georgia’s women and mothers has inspired the bill, appealed to the need to “protect the rising generation and surround it with every possible safe ground.”419 By an almost 70 percent majority, the bill passed 101 to 45,420 with the Fulton County (Atlanta) delegation voting solidly against it and “the two negroes” in the House in favor.421

Atlanta’s leading newspapers condemned the bill for its paternalism and the House for passing it, and appealed to the Senate and/or the governor to “send it to the graveyard where they bury legislative freaks.”422 While admitting that “the average cigarette is a combination of nasty tobacco and bad paper and that the habitual cigarette smoker often makes others unhappy,” the Journal contended

420Journal of the House of Representatives of the State of Georgia at the Regular Session of the General Assembly 52-53 (Oct. 27) (1893). Apparently, in order to secure passage in the House the bill exempted from the ban so-called cubeb and medicated cigarettes. “Cigarette Bill Killed,” SPDG, Nov. 4, 1893 (1). (Cubeb is a type of pepper that, when smoked, allegedly aids in treating, inter alia, asthma. For example, the Constitution published advertisements by a pharmacy for cigarettes “For Asthma and Catarrh Trouble.” AC, Nov. 12, 1893 (8).) The same newspaper editorialized that the exemption amounted to “legislative nullification.... The line between the medicated and the non-medicated article would be drawn entirely by the dealer and the smoker, and it would not be long before the market would be glutted with the medicated article, which, however, would probably not be sufficiently ‘medicated’ to injure its sale.” “A Nonsensical Bill,” AC, Oct. 29, 1893 (18:2) (edit.). The dysfunctionality of exempting these cigarettes was highlighted in doggerel about “the worst of earthly stenches” created by a legislator who smoked one on the House floor: “While Stapleton of Sumter, turned pale around the gill,/And took no further interest in the reading of the bill./And Sears of Webster, whispered in a tragic undertone,/That he wished to gracious heaven he’d let cigarettes alone.” “Legislative Loot,” AC, Nov. 6, 1893 (5:3-4 at 4). A somewhat similar provision in an earlier anti-liquor law, which did not prevent licensed druggists from selling pure alcohol for medicinal purposes, supposedly undermined it. Georgia Acts and Resolves 1884-85, No. 182, § VIII, at 121, 123.
that the legislature had “properly” no more “business” with such an “extreme
sumptuary” law, which was “repugnant to the spirit of our people and to the
genius of our institutions,” than it did making it a “misdemeanor to wear dyed
socks, which are liable to stain the feet, and in some cases to produce blood
poisoning....” The Constitution called it “the most nonsensical bill that has
been sent to the senate from the house in a long time.” Favoring literal over
surrogate paternalism, the editorialist opined that “if a man has no more sense
than to neglect to address his attention to the welfare of his own family, it is not
part of the state to step in and exercise paternal functions for him.” Indeed, doing
so was a “much greater nuisance” than cigarette smoking.

The day following passage, Representative Charleton Battle of Muscogee
County, yet another lawyer, moved to reconsider the vote. Including himself
among the numerous House members who smoked and had not been killed by
cigarettes, he ridiculed the “prevailing impression” that the “coffin tack...was
deadly to the health of the user.” Since, the Constitution chimed in, “Mr. Battle
is built on the roly-poly plan and is the picture of health and good nature, the
force of his illustration was exceedingly obvious.” However, Battle charged, a
real “coffin tack” might emerge if as a result of the law boys began smoking “the
vilest sorts of substitutes” they could get their hands on such as plug tobacco. He
also opposed the bill because it struck a blow at what was largely a southern
industry. Having learned or remembered nothing from Payne’s or
McCandless’s analysis, Battle, who was “‘disgusted with this cigarette bill,”
mounted a multi-pronged assault on it:

“The hue and cry against cigarettes is unfounded fact and was started by the cigar
manufacturers whose business was cut into by the sale of them. The majority of those who
voted for the bill were influenced by blind, ignorant and unreasoning prejudice, and they
have simply taken a quarter of a million dollars’ worth of business annually out of the state
without accomplishing an iota of real good. Chemical analysis has proven that the
cigarettes on the market at present are absolutely free from all drugs or adulteration. ... But
there are some blamed fools that can’t see it that way, and it is no use arguing with

425The previous day Battle had originally voted against the bill, but when he realized
that it would pass, he requested and received permission to change his vote to Yes so that
he would be eligible to move for reconsideration. “It Must Go,” AC, Oct. 29, 1891 (21:1).
426Battle’s assertion that an able chemist’s analysis had shown that cigarettes contained
no poison other than that in the tobacco overlooked McCandless’s recitation of the toxins
Finally, Battle raised the question—to which there was a straightforward answer, but one that prohibitionists evaded—as to the sense of the state’s protecting its adult citizens when there was already a law prohibiting sales to children. Sears sought to deflect the anti-paternalist criticism of the bill by arguing that parents “needed the legislature to assist them in keeping their children straight.” The extent to which his claim that Georgia’s businessmen advocated the bill was empirically well grounded was just as unclear as that by Representative William Neel that dealers themselves preferred this bill to the current no-sales-to-minors law. W.C. Bryan, a Primitive Baptist or “hardshell” preacher, whom no one could accuse of “being a representative of the dudes,” urged defeat of the ban bill on the grounds that it shifted parents’ responsibility to the state: “It was not the business of the state to look after the health of cigarette-smoking boys,” and the very mothers who were proclaimed as the bill’s sponsors could render it superfluous by simply “giving proper attention to their boys in their own households.” Neel, yet another lawyer-legislator, accused Bryan of having failed to grasp the specific division of punitive labor between state and parents with regard to this dimension of youth behavior: “While the parent was ready to punish the boy, the state must be ready to punish the man who would corrupt him by setting traps and snares for his feet...after he gets from under home influences.” The defeat of the motion to reconsider by a vote of 41 to 84, that is, by more than a two-thirds majority, indicated that second thoughts in no way were plaguing House abolitionists.

During the interim of several days before the Senate took up the House bill, the press in Atlanta and the elsewhere in Georgia and the public debated it with increasing urgency. An anonymous columnist in the Journal insisted that, if enacted, the bill would exacerbate the already existing phenomenon of “picking

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up along the gutters the remains of cigarettes cast away by those allowed to
smoke by the benign laws of this glorious commonwealth. It is not the elite of the
coffin-tack fraternity that engage in the profitable past-time... The riff-raff are
the ones. [A]lready, in the early morning hours, boys from 10 to 18 years of age
are seen moving swiftly along the uptown gutters, closely scanning every crack
and crevice in the pavement for their morning smoke.” If the bill became law,
The Polygraph predicted, it would “driv[e], literally, the majority of the juvenile
population to the gutters....”\textsuperscript{432} Dissatisfied with Polygraph’s “sarcasric
deliverances” and the \textit{Journal’s} rebuke of the House, one reader, while calling for
an outright ban on a thing as poisonous as cigarettes, submitted the proleptic
proposal that “[i]f allowed to be sold, they ought to have the skull and bones, and
the label ‘poisonous’ as a trademark.”\textsuperscript{433} A reader of the \textit{Constitution} dismissed
the bill as “useless” because a “2-cent postage stamp and a letter to Chattanooga
or any town out of Georgia will get enough cigarettes by return mail to last a boy
or man one month, postage paid”\textsuperscript{434}—an argument that the \textit{Journal} echoed the
next day in an editorial attacking the bill as “vicious” as well as condemned to
become a “dead letter in effect.”\textsuperscript{435}

The Senate General Judiciary Committee recommended that Stapleton’s bill
do pass with (weakening and strengthening) amendments to strike the exception
for so-called medicated cigarettes and to exclude cigarette tobacco from the sales
ban. When the full Senate took it up on November 1, supporters attempted to
force an immediate vote and defeated a motion to delay debate for two weeks by
a vote of 16 to 19. Then, however, supporters (inexplicably) successfully moved
(by a vote of 21 to 16) to recommit the bill to the committee, a majority of which,
despite the recommendation, was said not to favor the bill. These procedural
maneuverings in no way shook the “general belief...that the senate will kill the
bill.”\textsuperscript{436} That killing did in fact take place the next day—just as a cigarette dealer
was attracting crowds to his display window to discuss the bill and look at empty
cigarette boxes above a crepe bow with the inscription: “We are mourning our

\textsuperscript{433}W. O. Butler, “The Cigarette Bill,” \textit{AJ}, Oct. 31, 1893 (5:2) (ltr to edit.). Butler
went on to warn that: “Out of a couple of generations of poisonous cigarette smokers [w]e
will have mental and physical imbeciles...driving idiocy and impotency....”
\textsuperscript{434}Democrat, “Don’t Like It,” \textit{AC}, Oct. 31, 1893 (4:5) (ltr to editor).
\textsuperscript{435}“The Cigarette Bill,” \textit{AJ}, Nov. 1, 1893 (4:1) (edit.).
\textsuperscript{436}“Purer Elections,” \textit{AC}, Nov. 2, 1893 (7:1–4 at 3-4) (quote); \textit{Journal of the Senate
of the State of Georgia, at the Regular Session of the General Assembly, at Atlanta,
Wednesday, October 25, 1893, at 66-67 (Nov. 1) (1893).
impending doom.” The bill’s death was not accompanied by substantive debate; instead, wrangling, spread across 10 pages in the Senate Journal, over procedural motions to delay the vote, all of which were lost, was driven by supporters’ knowledge that the bill itself was lost unless they could gain additional time to reassemble other friends of the bill who had gone home “under the impression, if not absolute guarantee, that the bill would not come up” that day. Having exhausted their own patience filibustering and yielding to the inevitable vote on final passage, supporters—whose canvass revealed that even under the best of circumstances the 19 votes they could mobilize fell four short of a constitutional majority—were able to muster only 12 Ayes against 19 Nays.

The Senate’s action appealed to the Constitution’s anti-paternalism because “to say to a man who is old enough to be his own master, that he shall or shall not do this or that, so long as his doing so does not offend society or endanger public morals, is a resort which should be attempted only in very extreme cases.” The anti-cigarette movement’s failure to engage this argument, at least to the extent of explaining either why children would want and gain access to cigarettes so long as their fathers (and other adult males) possessed and smoked them or that inhalation of cigarette smoke was as likely to injure the health of grown men as that of growing boys, in large part undermined its ability to thwart the cigarette industry’s reliance on adult consumer sovereignty for survival and expansion. However primitive medical-scientific understanding of cigarettes’ health impacts was at the time, it would have been robust enough to carry the argument that they endangered public health. It would have had to have been yoked, however, with an empirical refutation of the editorialist’s other argument—namely, that the statewide sales ban “would have amounted to nothing so long as surrounding cities and states licensed the sale to dealers who would have profited at the expense of this state....” Had such cross-border sales to individual consumers, thanks to the original package doctrine, been significant enough to sustain and develop the burgeoning addiction in Georgia, then the anti’s would have been

438Journal of the Senate of the State of Georgia, at the Regular Session of the General Assembly, at Atlanta, Wednesday, October 25, 1893, at 82-91 (Nov. 3) (1893).
440“Satisfactorily Disposed Of,” AC, Nov. 4, 1893 (4:3-4) (edit.).
441“Satisfactorily Disposed Of,” AC, Nov. 4, 1893 (4:3-4) (edit.).
compelled either to adopt the initiative that the House in Mississippi and Alabama had seized in banning public cigarette smoking or, as one newspaper observed, to advocate national legislation.  

Legislative Chambers That Debated But Rejected Radical Bills

It is one thing to make sumptuary laws and another thing to get juries to enforce them. A charge of smoking cigarettes against a man or boy would be laughed out of court. The logical consequence of such kindergarten legislation is the spanking post. When the legislature creates a new crime it should devise a punishment to fit it.

Iowa, whose legislature did not meet in 1893, was virtually surrounded by states dealing with advanced anti-cigarette bills. In addition to Minnesota and Nebraska, whose Houses did pass bills, the lower chambers in Illinois, Missouri, and Wisconsin also considered controversial radical measures, thus sustaining interest in the cause and helping build momentum, especially in Wisconsin and Illinois, which did ultimately enact ban bills in 1905 and 1907, respectively. Although Iowa’s southern neighbor never enacted such legislation—in 1913 its House did pass a general sales ban—the Missouri House Criminal Jurisprudence Committee in 1893 did recommend that a bill prohibiting the manufacture, sale, or giving away of cigarettes pass, but the measure did not

444See vol. 2.
445House Bill No. 548 as introduced G. B. Fluty, a farmer and Democrat, also prohibited “having in one’s possession any cigarette, cigarette papers or material for the manufacture of cigarettes or cigarette papers,” but that provision failed to survive floor consideration. Journal of the House of Representatives of the 47th General Assembly of the State of Missouri: 1913, at 244 (Jan. 31), 457 (Feb. 13), 695-97 (Feb. 27), 759 (Mar. 1), 1023-24 (Mar. 10), 1406-1407 (Mar. 18). The Senate Criminal Jurisprudence Committee killed the bill by recommending that it not pass. Journal of the Senate of the 47th General Assembly of the State of Missouri: 1913, at 1302 (Mar. 24).
446John W. Coots, who had been returned at the 1880 Census of Population as a teacher and in 1900 as a lawyer, introduced H.B. No. 655. Journal of the House of Representatives of the 37th General Assembly (Regular Session) of the State of Missouri: 1893, at 430 (Feb. 14) (1893).
come to a floor vote. As preliminary as it was, the committee’s action prompted one out-of-state newspaper to observe (ironically) that it had “jeopardized the interests of a thriving industry and invited the wrath of the dude and the small boy....” That this defeat did not eliminate a critical mass of support for anti-tobacco regulation was on display during the 1895 session, when the following substitute for an amendment to a bill designed to apply only to minors received 28 percent of the votes cast—22 Ayes as against 56 Noes—despite its unprecedented prohibitory scope: “It shall be unlawful for any person to smoke or in any way use any cigar, cigarette or tobacco in any form whatsoever in any public street, place or resort.” Legislative support for suppressing cigarettes was even more clearly signaled by the Senate’s passage, on a vote of 22 to 9, of a bill fixing a prohibitory $1,000 license for handling cigarettes and cigarette papers. When the House “broke forth in applause” upon being informed of the Senate’s action, the press reported that House passage was a “foregone conclusion,” and the House Ways and Means Committee did recommend that it pass at the very end of the session, but time ran out on the bill. Finally, the Massachusetts legislature, which held hearings on cigarettes in 1892 and whose full House debated and rejected a general sales ban, held yet another hearing on an identical bill in 1893 before the Senate rejected it.

447Journal of the House of Representatives of the 37th General Assembly (Regular Session) of the State of Missouri: 1893, at 636 (Feb. 28) (1893). The bill was ordered engrossed and the Engrossed Bills Committee found that it had been truly engrossed. Id. at 723 (Mar. 3), 881 (Mar. 11).

448“Missouri Solons,” Emporia Gazette (KS), Mar. 2, 1893 (1:2).

449Journal of the House of Representatives of the 38th General Assembly (Regular Session) of the State of Missouri: 1895, at 297 (Feb. 1) (1895). The bill went on to provide that: “Any person violating any provision of this section shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished by a fine not exceeding ten dollars nor less than two dollars for each offense.” Representative Joseph T. Davison of Poplar Bluffs, who was returned as hotel keeper in 1880 and a lawyer in 1900, offered the substitute for the amendment.

450Journal of the Senate of the 38th General Assembly (Regular Session) of the State of Missouri: 1895, at 57 (Jan. 16), 138-39 (Jan. 29), 221 (Feb. 8) (S.B. No. 95, by Senator Richard A. Love) (1895).


452Journal of the House of Representatives of the 38th General Assembly (Regular Session) of the State of Missouri: 1895, at 1252 (Mar. 23) (1895).
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Illinois: “a crime against humanity”

The young man who is dying from excessive cigarette smoking is entitled to some sympathy, perhaps, but the victims whose olfactory nerves he tortures with the disgusting stench of the thing he smokes are entitled to much more. Let the lawmakers stamp out the vile nuisance.453

The process of interstate emulation was illustrated by Illinois, where, inter alia, the Chicago Tribune reported frequently on anti-cigarette measures in other state legislatures.454 In 1893 the House—which Democrats controlled 78 to 75455—appeared to offer a propitious environment when its Rules Committee at the outset of the session, included, among the rules modifications on which it agreed, prohibition of smoking in the House (with the provision of smoking-rooms).456 In Illinois, as elsewhere, the state WCTU requested legislation banning the sale and manufacture of cigarettes (in addition to a measure for county-level female suffrage).457

The main legislative vehicle in 1893 was House Bill No. 185, introduced on January 23 by Democrat Freeman (“Free”) P. Morris458 (who was on the seven-member Rules Committee). It imposed a fine of $20 to $100 or imprisonment of 10 to 30 days for anyone who made, kept or handled for sale or gave away cigarettes in addition to fining anyone who tried to evade the law by using another name instead of “cigarette.” What made the bill remarkable, however, was its provision that “the description ‘cigarette’ shall be deemed to include all preparations of tobacco soaked in nicotine, or impregnated with opium, or

453CT, Feb. 22, 1893 (4) (untitled edit.).
454E.g., “Alabama Prohibits Cigarette Smoking,” CT, Feb. 1, 1893 (4); “Pennsylvania to Prohibit Cigarettes,” CT, Feb. 8, 1893 (2).
456“Agree on Committee Chairmen,” CT, Jan. 5, 1893 (2).
457“On Woman Suffrage,” DIO, Feb. 3, 1893 (6:3). Since 1887 the WCTU had been the chief enforcer/prosecutor of the no-sales-to-minors law. “No Tobacco for Minors,” NYT, July 4, 1887 (1). Illinois WCTU membership peaked in 1891 at about 17,000, dropping to about 15,000 in 1893 and 14,000 by 1900. Ann-Marie Szymanski, Pathways to Prohibition: Radicals, Moderates, and Social Movement Outcomes fig. 8 at 165 (2003).
stramonium, or belladonna, or alcoholic liquor, or valerian; or tonca bean, or mellolotis, or any other deleterious or poisonous substance.”459 Since this sub-focus on toxic supplements, which reflected a major strand of criticism in the anti-cigarette camp460 distracting attention from the real health impacts of cigarette smoking461 (even as understood by physicians and scientists of the period), did not exclude non-adulterated cigarettes from the ban, the bill’s comprehensive scope remained unimpaired.

A week into February, the Daily Inter Ocean, confirming the aforementioned press-mediated, nationally rolling wave of state-legislative filings, observed that the (unsuccessful) “attempt of the Alabama Legislature to suppress the cigarette nuisance, which is attracting attention from the press all over the country, is likely to find a repetition in the Illinois General Assembly.” The newspaper meant the bill filed by Morris, who cleverly “caused it to be referred to” the Judiciary Committee, by which, since he happened to be its chairman, there was a “probability” that it would be “promptly reported.”462 Talking tough, but within the framework of the assault on (make-believe) adulterated cigarettes and the insanity and broken-down youth they left in their wake, Morris, who had first been elected to the legislature in 1884,463 self-confidently predicted that:

“I do not think my bill will have any opposing vote in the Assembly.... I have collected a great deal of data on the cigarette nuisance and expect to spread it before the committee. It is probable that we will ask eminent physicians to give their opinion and the expert alienists of the United States insane asylums and the superintendents of the reformatories should all be summoned before the committee. They would certify that a large percentage of the crimes of juvenile offenders can be traced to the cigarette nuisance and would tell us of the thousands of minds that have been wrecked and constitutions shattered by the cigarette habit. I think the sale and consumption of cigarettes as now manufactured is a crime against humanity.”464

Morris’s career path—he remained a major state Democratic Party figure for many years after he had left the legislature465—made him an improbable

460 See above ch. 3.
461 For an extreme case, see A[bert]. Sims, The Common Use of Tobacco 152 (1894).
465 “Freeman P. Morris, Democratic Leader, Dies at 82,” CT, Nov. 8, 1936 (22).
proponent of such a radical stance and intervention. After all, he was not only a railway lawyer but, as a longtime legislator, was one of a “Big Four” bipartisan House clique “united in their allegiance to the corporations which they served faithfully for a price.” Indeed, even his reference to insane asylum psychiatrists was amusing since virtually on the very day of his bill’s death he was engaged as a “rascal” whose interest in the huge Illinois Eastern Hospital for the Insane at Kankakee (Illinois’ and perhaps the country’s largest) was as a site for patronage jobs.

Occasioned by Pennsylvania House passage of a manufacture/sales ban a fortnight earlier, but in manifest ignorance of Morris’s having introduced H.B. No. 185 almost a month earlier, on February 19 the Chicago Tribune published a fiery editorial calling on “some member” of the Illinois legislature (to whom it promised no “more valuable and proper” measure) to introduce a like bill and to “stick to it” until he got it passed. Significantly, though focused on boys and obsessed with mythic cigarettes qua “worked-over stubs of cigars, fished out of the gutters and loaded with opium,” the newspaper argued that they were also “not safe for men to use,” thus providing a direct justification for eliminating one site of consumer sovereignty for adult males (albeit one that might vanish as soon as cigarettes were discovered not to consist of opium-drenched re-used cigars). Consequently, the editorialist saw but one way to deal with this evil, and that is the radical one. As long as cigarettes are offered for sale in nearly every street boys will manage to get them. Therefore their sale should be forbidden altogether. None should be allowed to be made in the State, and no store should be permitted to keep them. Then it would be extremely difficult for boys to get those opium-soaked abominations....

Two days later, the paper, still blisslessly ignorant of Morris’s bill, but now prompted by the introduction of a bill in the Wisconsin legislature (which it mistakenly reported as a ban on cigarette sales, when in fact it more radically

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466 *The Bench and Bar of Illinois* 2:1125 (John Palmer ed. 1899).
467 *The Portraiture of the 39th General Assembly: Illinois...1895*, at 66.
prohibited use), again cried out for an Illinois legislator to follow suit.\footnote{CT, Feb. 21, 1893 (4) (untitled edit.). On the Wisconsin bill, see below this ch.}

In spite of his chairmanship, the Judiciary Committee did not take up Morris’s bill until February 21, when an effort was made to postpone consideration until March 1 so that expert testimony could be heard, but after the committee had decided not to take such testimony, consideration was scheduled for February 28.\footnote{“Committee Work,” DIO (Chicago), Feb. 23 (10:3). See also “Work of House Committees,” CT, Feb. 22, 1893 (6).}

In the event, however, on that date, replicating his counterparts’ performances in Georgia and Massachusetts,\footnote{Walter S. Haines, a nationally known chemistry and toxicology professor at Rush Medical College who frequently appeared as an expert on poisoning in criminal cases,\footnote{See above ch. 3.} testified before the committee that his analysis of eight or 10 cigarette brands had revealed “no deleterious ingredient or any substance more detrimental to health” than was present in cigars. The press reported that “[n]otwithstanding his testimony” the committee ordered the bill reported to the full House with a recommendation that it pass.\footnote{Though already an established figure in 1893, he became an even greater toxicological luminary during the following three decades. “Dr. Haines, Noted Poison Expert, Teacher, Dies,” CT, Jan. 28, 1923 (11); Wm. McNally, “Obituary: Walter Stanley Haines,” Industrial and Engineering Chemistry 15(4):425 (Apr. 1923). Despite his scientific eminence Haines was not above giving testimonials to Royal Baking Powder as “the purest” and “strongest” in newspapers all over the country. E.g., CT, Mar. 11, 1893 (5); Frankfort Roundabout (KY), Dec. 12, 1891 (1).}

It is unclear whether the verdict delivered by Haines—who purportedly had already in 1889 determined that 10 different samples of Sweet Caporal contained no opium or morphine—prompted Morris to reconsider his “crime against humanity” charge, whether wrangling took place over withdrawing the bill, or whether, once the Tobacco Trust had been exonerated (once again) of the charges of toxic adulteration, which were potentially a public relations threat, it became indifferent to the prohibitory bill because it remained supremely confident of its ability to bribe it to an early death. In the end, the Judiciary Committee’s do pass recommendation and the House order to second reading proved to be the final actions on the bill.\footnote{“Opposed to Cigarettes,” DIO (Chicago), Mar. 1, 1893 (6:3). See also “Work of the Committees,” CT, Mar. 1, 1893 (3).}

\footnote{William Young, The Story of the Cigarette 136 (1916).}

\footnote{Journal of the House of Representatives of the Thirty-Eighth General Assembly of the State of Illinois 355, 386 (Mar. 1) (1893). Two Senate bills also failed to reach floor
The *Tribune* apparently regarded reports of the bill’s death as exaggerated. Two days after the committee’s action it entered an editorial plea that “[s]o meritorious a measure should not be suffered to die for lack of friends” and its supposition that Morris should and would “press his bill earnestly” and that Chicago-area legislators would heartily support it because their constituents had their children under lesser observation than was the case in the country. 478 Two weeks later, under the urgent title, “Stop the Cigarette Evil,” it treated the bill not only as very much alive (albeit without having achieved much progress), but also as lacking “any signs of opposition...among the members, all of whom” were aware that “nothing has done more to destroy the minds and bodies” of the country’s youth than smoking “opium-saturated cigarettes.” After seeking to buttress its position by relating that the Nebraska House has passed such a bill by a vote of 75 to 1 and that Washington State had actually enacted one, it recommended adoption of the latter’s killing-two-birds-with-one-stone anti-trust motivation, which, as implemented in Illinois, would “deprive an obnoxious trust of the large market afforded by the third largest state....” Such an approach was all the more called for since the Democratic and Republican state platforms both denounced trusts and pledged that all of their members elected to the legislature would do all in their power to “overthrow” trusts. Informing both parties that they had the “power to knock out a monopoly,” the *Tribune* urged the bill’s unidentified introducer to “keep up the fight for his measure.” 479

The WCTU continued to fight for its passage, 480 but whether Morris did is unclear. His bill, in any event, remained dead—even after the Swedish-born Chicago Republican Representative (and Cook County deputy sheriff) Samuel Erickson on March 9 introduced another bill to ban the manufacture and sale of cigarettes. The House Speaker ruled it out of order on the grounds that when a bill on the same subject was pending, in order to avoid confusion no further bills

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478 *CT*, Mar. 3, 1893 (4) (untitled edit.). The *Tribune*’s prohibitory stance on cigarettes sharply contrasted with its support of a high license tax for alcohol. *Id.* (editorial on drunkards in bone-dry Maine). The same day the paper reported that the Wisconsin cigarette smoking ban bill had been killed. “Republican Member Is Seated,” *CT*, Mar. 3, 1893 (6).


480 “Move to Abolish All Justice Courts,” *CT*, Mar. 7, 1893 (3).
could be introduced. To Erickson’s claim that his bill (“the Pennsylvania law”) was the only one of this nature that had been introduced during the session, the Speaker (incorrectly) replied that Morris’s was “an exact copy of the Pennsylvania statute....” Eventually, when the House rebelled against the underlying principle of the ruling, the Speaker withdrew it, but Erickson also withdrew his bill.\textsuperscript{481} Perhaps Morris’s four-year stint as the Watseka school board president\textsuperscript{482} accounted for his engagement on behalf of children, but in light of the fact that he had “had a great deal to do with moulding legislation at every session,” was chair of the House Democratic caucus, one of the party leaders, and a member of the steering committee,\textsuperscript{483} his failure to rescue his bill from expiration before it even reached the House floor could also (speculatively) be interpreted as part of a deal he had struck with the Tobacco Trust to use it as a decoy to block any real initiative to ban cigarette sales.

\textbf{Wisconsin}

Mr. Warden said Wisconsin was not ready to adopt the prohibition idea. Control of children should be left with parents and the less legislation we have about the matter the better. ... Mr. Bailey made the point that if parents could not control their children it would be [a] good idea to pass a law prohibiting such people from becoming parents.\textsuperscript{484}

Wisconsin’s enactment at the 1891 session of a risibly weak law that prohibited anyone from selling or giving cigars, cigarettes, or tobacco to minors only if the minor’s parent/guardian had forbidden that person to do so\textsuperscript{485} did not

\textsuperscript{481} “The Legislature,” \textit{Weekly Herald-Despatch} (Decatur), Mar. 11, 1893 (4:5). Morris’s bill was in no way a copy of the Pennsylvania House bill, the penalties of which were much more stringent and which also contained no provisions concerning tonca beans, etc. See above this ch. That Erickson’s bill contained the same penalties as the Pennsylvania bill suggests that, unlike the Speaker, he accurately characterized the two bills. “To Prohibit the Sale of Tobacco Cigarettes,” \textit{CT}, Mar. 8, 1893 (6).


\textsuperscript{483} \textit{Souvenir of the Illinois Legislature of 1893}, at 76 (1893).

\textsuperscript{484} “Money for Milwaukee,” \textit{MJ}, Mar. 18, 1891 (2:1). Warden and Bailey were both Democrats.

\textsuperscript{485} 1891 Wisconsin Laws ch. 434 § 1, at 623. When Bavarian-born Democratic Assemblyman Conrad Krez offered the substitute amendment making the law operative
suggest the presence of a deep reservoir of legislative support for interference with adults’ behavior. Yet in January of that year the press had reported that: “War is being made on cigarettes, and a law will probably be passed prohibiting their sale in the State. The opposition to the ‘paper pipes’ has spread extensively and petitions have been received by a large number of the legislators asking them to support any bill which will do away with the sale of cigarettes. One petition from Geneva Lake was signed by over 7,200 people.” Among the petitioners for a ban on cigarette sales was the WCTU. In 1893 the anti-cigarette bill was introduced through the efforts of Dr. Annette J. Shaw, a physician in Eau Claire, who was the state WCTU legislative superintendent as well as the national organization’s superintendent of health and heredity. The legislator who introduced the bill on February 15, Republican Duncan J. McKenzie, apparently suffered no detriment to his political career as a result of his advocacy of this radical intervention inasmuch as he was elected state railroad commissioner immediately following his one term in the Assembly. The 43-year-old Canadian-born legislator, after having worked in the lumber industry, was appointed district lumber inspector by the governor; he remained in that position for 11 years until 1889, after which he became mayor of the small Mississippi river town of Alma. The bill, No. 286, A., which was “an act to prohibit the use of cigarettes within the state of Wisconsin,” was more radical than the bills passed in 1892 by the Mississippi House or in 1893 by the Alabama House just two weeks before McKenzie filed his since they banned cigarette smoking only in public, whereas

only when parents notified dealers not to sell to their children opponents objected that it was impracticable and/or that it might be acceptable if public notice in a newspaper sufficed, but Krez rejected this alternative and the chamber adopted his substitute by a vote of 49 to 45. “Money for Milwaukee,” MJ, Mar. 18, 1891 (2:1).

486”Wisconsin,” Logansport Reporter (Indiana), Jan. 24, 1891 (3:2).

487”A Busy Morning Session,” MJ, Jan. 22, 1891 (1:1). Oddly, the Wisconsin WCTU’s report to the Superintendent of Narcotics for the national convention omitted any mention of such a bill. Instead, it merely noted that neither of the bills—one denying a school teacher’s certificate to anyone who used tobacco and the other conferring on mothers the same right that fathers had to file legal complaints about tobacco sales to their children—that the group had prepared for the legislature had been introduced. Minutes of the National Woman’s Christian Temperance Union at the Twentieth Annual Meeting...October 18-21, 1893, at 320 (1893).


489Andrew Aikens and Lewis Proctor, Men of Progress: Wisconsin 80-81 (1897).

the WCTU-McKenzie bill made it “unlawful for any person to use or smoke any cigarette or cigarettes within this state” subject to a fine of $25 to $50 or imprisonment in the county jail for 10 to 30 days. Despite press characterization of the Wisconsin legislature as “following in the wake” of its Minnesota counterpart, the House there had, like the two southern states, passed a no-cigarette smoking in public bill five days earlier. As radical as the measure was, it failed to satisfy at least one editorialist, who lamented on behalf of the Monroe *Evening Times* that it failed to ban sales as well: if use and sales bans were paired together, “there is no doubt but that a great good would result.”

In contrast, the proposal encountered sarcastic-skeptical libertarianism from the Republican *Milwaukee Sentinel*, which a few days before McKenzie filed had already weighed in on the issue in response to the adult-coverage bills passed in the Alabama and Pennsylvania House, whose majorities the paper accused of “trading on the general prejudice against cigarette-smoking,” on which they relied “to keep people from seeing the absurdity and viciousness of such legislation.” This verdict was independent of the health impact of the activity: if smoking cigarettes was harmless, there was no more reason to legislate against it than against “turning up one’s trousers when it isn’t raining....” If it was not harmless, then its evils no more called for corrective legislation than did eating candy, “letting yourself get too fat or too thin, or not taking a bath at short and regular intervals.” Moreover, since no one knew whether cigarettes were harmful, legislation would be premature even if it might be justified. Ignoring the understanding of dangers specific to cigarette smoking that physicians and scientists had already developed, the editorialist appeared to dare them to apply epidemiology to the subject: “Some cigarette-smokers die young; others live to

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492 “To Prohibit Cigarette Smoking,” *Evening Times* (Monroe, WI), Feb. 16, 1893 (4:3).

493 See above this ch.


495 Remarkably, the *Sentinel* was a Republican newspaper, although that party predominantly supported anti-cigarette and other sumptuary intervention. *The Blue Book of the State of Wisconsin* 357 (1893).
old age. Some people who do not smoke cigarettes die still younger than those who do. Some cigarette-smokers fail in life; other succeed.” As soon as Bill No. 286 had been introduced, the Sentinel was ready with its next libertarian broadside:

We don’t know who Assemblyman McKenzie is, except that he is a daisy, and that under his conception of the duty of the state to society we are to be rid of the annoyances of life. ... The reason for this bill is that some people do not like the odor of the cigarette, and we suggest that the eating of onions, the smoking of cheap cigars and strong pipes be included in the prohibition. ... If we are going to prohibit the doing by some people of things that other people do not like, we must prohibit the wearing of red neckties as well as of hoopskirts...and also the public chewing of toothpicks. There is no end of the things done by somebody that somebody else doesn’t like.

Astonishingly, such live-and-let-live pseudo-analogies forged in a period when a goodly proportion of the population would have looked derisively on the underlying claim that “[s]urely the eating of mince pie is more fatal to good health than the smoking of cigarettes” almost a century later were still part of the cigarette industry’s mendacious propaganda pooh-poohing government intervention to suppress secondhand smoke exposure.

After 273 people had petitioned for passage of the anti-cigarette use bill, the Charitable and Penal Institutions Committee reported McKenzie’s bill back unanimously recommending that it pass, but with the gutting amendment that the penalty apply only to boys under 16, which the Assembly sitting as the Committee of the Whole adopted. During a 10-minute debate, Democrat John

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496“Cigarettes,” MS, Feb. 10, 1893 (4:3) (edit.). Attacks on cigarette smoking had long preoccupied the paper: in 1892, anticipating late-twentieth-century cigarette-industry propaganda, it made much of the facts that most cigarette smokers were apparently sane and most people who went mad or died did not smoke cigarettes. “Cigarette Smoking and Insanity,” MS, Feb. 16, 1892 (4:3-4) (edit.).
499Indeed, even with regard to smokers themselves, as late as 1976, the vice president for science and technology at Philip Morris USA, Helmut Wakeham (who had a Ph.D. in chemistry from the University of California at Berkeley) asserted that: “Apple sauce is harmful if you get too much of it.”. Death in the West (1976).
501In Assembly: Journal of Proceedings of the Forty-First Session of the Wisconsin Legislature: 1893, at 356, 371 (Mar. 2) (1893); “Bad Boys May Smoke,” MS, Mar. 3,
Ringle, who had been a member of both chambers previously as well as mayor of Wausau and owner of a saw mill and brickmaking company, denounced conviction of and infliction of such penalties on a boy under 16 as outrageous. He was joined by fellow Democrat Michael Edmund Burke, a lawyer who rose to the state senate and eventually to the U.S. House of Representatives, who allowed as he might vote for punishing boys over 16, but not those “under the age of discretion,” because such a bill “would be a weapon in the hands of spiteful neighbors.” Burke’s motion to table the bill was then upheld by a vote of 55 to 23, thus killing the WCTU-McKenzie initiative the day after the Washington State legislature had passed the first cigarette sales ban.

The Assembly vote typified the party-line and religion/nativity-based legislative positions concerning so-called sumptuary laws characteristic of the Midwest in the late nineteenth century. In a chamber controlled by Democrats 56 to 44, fully 21 of the 23 members who voted against tabling the bill were Republicans and only two were Democrats. Conversely, of the 55 who voted to table and thus kill the bill, only 11 were Republicans, while 44 were Democrats. Thus 96 percent of voting Democrats opposed the bill, while 66 percent of voting Republicans favored it. Seen from a somewhat different perspective: 91 percent of supporters were Republicans, while 80 percent of opponents were Democrats.

To be sure, these party-line configurations referred to the watered-down bill that applied only to those under 16; had a vote been taken on the adult

1893: Annus Mirabilis

1893 (1:7). The frustratingly bare-bones Milwaukee Journal did not reveal the wording of the amendment; the report carried by some newspapers that the amendment applied to boys and girls seems more plausible. E.g., “Madison,” Sunday Leader (Eau Claire), Mar. 5, 1893 (3:2).


503 “Bad Boys May Smoke,” MS, Mar. 3, 1893 (1:7).


507 McKenzie, according to the paper in Dr. Shaw’s hometown, “feels bad to think the assembly would kill his famous cigarette bill.” “Madison,” Sunday Leader (Eau Claire), Mar. 5, 1893 (3:2).

508 The data on party affiliation are taken from The Blue Book of the State of Wisconsin 635-56 (1893).
1893: Annus Mirabilis

cigarette smoking ban bill, the polarized proportions would presumably have been even starker. As for religion and nativity/ethnicity, a study of roll call votes on contested issues such as the “cultural questions” of liquor and cigarettes as well as labor relations and taxes in the 1893 Wisconsin Assembly revealed that Democratic German and Irish Catholics, German Lutherans, and Continental Protestants voted cohesively, while Republican Yankees, British, and Norwegian Lutherans achieved a somewhat lesser “degree of bloc solidarity....” 509

The sharp party-line vote reflected conflicts between the Democratic and Republican parties’ platforms so stark that, given the former’s control of the Assembly, they made defeat of the WCTU-McKenzie bill’s radical suppression of adult men’s consumer sovereignty virtually a foregone conclusion. For example, the Democratic state platform of 1890, which generally excoriated the Republican Party’s “unjustifiable interference with individual and constitutional rights,” in particular criticized “the settled republican policy of paternalism” and “opposed sumptuary laws as unnecessary and unwise interference with individual liberty.” 510 The Democrats’ 1892 state platform elaborated on the same theme, assuring voters that “[w]e...will combat the abhorrent doctrine of centralization and paternalism....” 511 Since Democrats had been able to undermine the “Republican hegemony” (that had resulted from “the voting loyalty of most Yankees and Scandinavians, and...Protestant Germans”) and wrest and retain control of state government in 1890 and 1892 in no small part by attacking “Republican intolerance” 512 in connection with the Bennett Law of 1889—which, in requiring, inter alia, English-language instruction in certain school subjects, especially alienated German Protestants from the Republican Party 513—the latter’s proposed ban on cigarette smoking represented a further fertile field for entrenched the transformation of ethnic-religious voting blocs.

When the depression of 1893 swept away the historically aberrational Democratic electoral majority and ushered in four decades of large to


510The Blue Book of the State of Wisconsin 393-94 (1891).


1893: Annus Mirabilis

overwhelming Republican state legislative majorities, a side effect was the creation of ideological space in the Wisconsin legislature for prohibitory anti-cigarette measures, which, following one-chamber successes in 1901 and 1903, led to enactment of a general sales ban in 1905.

Massachusetts

The proposed bill to do away with the smoke nuisance in Boston ought to be made broad enough to cover cigarettes.

A sales ban bill textually identical to Horace Clayton’s. defeated by the Massachusetts House in 1892 by a vote of 73 to 113, was introduced at the next session in 1893. House No. 267 prohibited the manufacture, sale, or exposure for sale of cigarettes with paper wrappers or “cigarette tobacco in any form” subject to a $100 fine. It was introduced by Rev. John Brown of Fall River, an interesting political figure, who, at the request of the presiding officer, offered prayer at the session’s opening. Born in Scotland in 1843, he prepared for the University of Glasgow, but, after leaving it for lack of means, emigrated to the United States, where he was a farm worker until he entered Union Seminary in New York. After graduation he was licensed to preach by the Newark, New Jersey presbytery and headed west, preaching first in San Francisco until failing

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515 See vol. 2.

516 BDG, Mar. 22, 1893 (4:3) (untitled editorial).

517 See above ch. 3.


519 Journal of the House of Representatives of the Commonwealth of Massachusetts: 1893, at 3 (Jan. 4) (1893). According to the Journal his occupation was “minister.” Id. at 1144.
lungs prompted him to move to Elko, Nevada, where in 1870 he built the first church between Omaha and Sacramento and from which he traveled hundreds of miles to preach in mining camps. After helping to put the church history department of Howard University on a firm basis and building numerous churches on the Texas frontier, in 1888 he was put in charge of a Presbyterian church in Fall River, where his espousal of the cotton operatives’ cause prompted workingmen to nominate him for the state House; endorsed also by Republicans in a strong Democratic district, Brown won his seat as a Labor and Independent Republican representative.520

On March 22, the Public Health Committee, the joint standing committee to which the bill had been referred,521 seven of whose 11 members522 smoked,523 held a public hearing on the bill, of which, fortunately, the Democratic Boston Daily Globe published a rather extensive, albeit sarcastic, account,524 whose headline and first three subheads read: “A Woman’s Fancy. Cigarettes Are Pandora’s Box to Her. Ella A. Gleason and Legislators Have a Smoke-Talk.” The redoubtable, irrepressible, and ubiquitous Gleason, the WCTU’s state superintendent of narcotics, who played a key role at the 1892 hearing and would again appear at center stage during legislative proceedings in 1898 (as well as in neighboring Maine in 1897),525 declared at the outset that “she was intensely surprised that there was no one besides herself present to speak in favor of the bill.” (In fact, her surprise must have been rhetorical since, as she regretfully stressed in her closing speech, no “notice” had been given to others interested in the bill’s passage.)526

520 A Souvenir of Massachusetts Legislators: 1893, at 135 (Vol. II).
522 Journal of the House of Representatives of the Commonwealth of Massachusetts: 1893, at 26 (Jan. 10) (1893). Rule 1 of the Joint Rules of the Two Branches prescribed the appointment of three senators and eight representatives to each joint standing committee. Id. at 1180-81.
523 A Souvenir of Massachusetts Legislators: 1893, at 53 (Vol. II). This publication provided only aggregate committee-wide date on smoking without identifying individual members.
524 Neither the Boston Daily Advertiser nor the Boston Evening Transcript appears to have covered the hearing. The Massachusetts Archives shelf list has no separate records for the Public Health Committee that might contain hearing transcripts or minutes. Email from Jennifer Fauxsmith, archivist, to Marc Linder (Dec. 6, 2010).
525 See below ch. 6.
526 “A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6-7). On March 20 and 21 the Boston Daily Advertiser published three columns and two columns, respectively, of descriptive announcements of committee hearings, but none of the Public Health Committee. BDA,
Referring to an WCTU activist, she bemoaned: “‘I don’t know...what the arguments of a white-ribbon woman will have against all the powerful cigarette manufacturers and the lawyers and chemists they hire.’” Proceeding to the nub of her objections, Gleason professed to be speaking for boys and young men under 21 because, she dubiously asserted, “there are not a great many men who are addicted to the habit....” She then advanced three reasons for abolishing cigarettes, one of which, the alleged presence of opium, the Globe helpfully refuted by reference to the state chemist, who, interestingly, added that nicotine caused more injury than opium. In addition to the by this time commonly adduced ruinous health consequences of inhalation specific to cigarettes Gleason denounced their cheapness, which meant that “[a]nybody 6 or 7 years of age can get five cents and buy” a package of 10.

Brown agreed with Gleason’s boy-centric approach—“If we men choose to go to the devil with our eyes open, it is all right; but we make this plea for the boys, who do not know differently”—but did not, at least according to the Globe’s account, explain why his bill deprived those very men of their freedom to go to health hell, though perhaps this proposed curtailment underlay the “laughter” that, to his surprise, met H. 267 in the House when it was first reported. Nevertheless, Brown’s further statement revealed more than a little tension between his position and the WCTU’s by indicating his lingering affection for other modes of tobacco use such as pipes and cigars: “Mr Brown said that there was no doubt but that a clay pipe smoke to a tired man had a soothing effect and also that tobacco was a preventive to some diseases.” Not a compromiser who would cut even her most important political ally the slightest slack, Gleason immediately attacked, seemingly on gendered grounds, extracting from Brown the confession that he “wouldn’t like it” if his wife smoked a clay pipe. Perceiving what an ideologically unreliable fellow she had attached her legislative star to, Gleason also made clear her wish to “answer every question” that the remonstrants’ spokesmen had asked Brown. Thus her insistence that cigarette smoking certainly inflicted greater injury than cigar smoking because the latter did not involve inhalation prompted one of the two pro-tobacco advocates, Democrat John R. Thayer, a lawyer, former state legislator, and

Mar. 20, 1893 (2:3-5); BDA, Mar. 21, 1893 (2:4-5). Announcements of two Public Health Committee hearings appeared a week earlier, but not for the anti-cigarette bill. BDA, Mar. 14, 1893 (2:4-5).

527“A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6).
528“A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6).
529The other was Jacob Otis Wardwell, a corporation lawyer, former state House member, and a leading Massachusetts Republican, who would play a prominent part in
future three-term congressman,530 sought to hurtle her down the slippery slope to utopian failure by remarking that “if you had your way you would stop the smoking of cigars or tobacco in other forms.” Though the newspaper, unfortunately, did not make it clear to posterity whether Gleason was displaying a sense of self-irony, she immediately shot back: “‘My dear sir...if I had my way I would prohibit everything evil on the face of God’s earth!’” Undeterred, Thayer persisted in trying to corner her: “‘Mrs. Gleason, would you not work just as hard to stop the sale of cigars?’” Demonstrating, finally, that she was not an out and out maximalist who eschewed all Realpolitik even with regard to an evil as extreme as tobacco, she emphatically denied that she would.531

Speaking in his own right as a remonstrant, Thayer asserted that, though “not absolutely harmless,” cigarettes “were not so deleterious as cigars.”532 He was followed by Daniel J. Campbell, styled merely a cigarette manufacturer from New York, but in fact of the American Tobacco Company533 aka Tobacco Trust, who proceeded to convert a committee room table into a “miniature cigarette manufactory” and actually “manufacture a cigarette.” He also assured those present that there was no opium or morphine whatsoever in cigarette tobacco and that it “would not pay to use opium....” Going far beyond the chemical testimony at the 1892 hearing, Professor Charles Mayer of Springfield, a chemist and a cigarette smoker, claimed as the result of what he characterized as his “careful and thorough analysis” that smoking 20 cigarettes a day, which were as injurious as three cigars, would be certainly be injurious for a child up to the age of 12, but not to most adults; and even a child of 10 could smoke one cigarette a day without harm, the daily threshold beyond one not being generalizable. If Mayer explained the scientific basis of these assertions, the Globe reported it as little as that underlying a communication that Thayer read into the record from a former state opposing the sales ban bill in 1898. See below ch. 6.


531“‘A Woman’s Fancy,’” BDG, Mar. 22, 1893 (8:6).

532“‘A Woman’s Fancy,’” BDG, Mar. 22, 1893 (8:6).

533“H. F. Clinton Charged with Larceny,” NYT, Oct. 20, 1894 (6). Campbell, who died at the age of 65 in 1918, a decade after retiring, had invented various labor-saving devices for the tobacco industry. “Obituary Notes,” NYT, July 11, 1918 (11). Around the turn of the century he was a member of the board of directors and brother of the president of the Universal Tobacco Co. “Failed to Obey Subpoenas,” NYT, Nov. 22, 1903 (20); McAlpine v Universal Tobacco Co., 57 A. 418 (NJ Chancery 1904).
senator who asserted that in 25 years of selling cigarettes he “never personally knew of a case of injury resulting to any person.” Based on such meaningless charges, Thayer, in his closing argument executed the unmediated leap to the conclusion that it was not within the legislature’s province to legislate a cigarette sales ban because: “‘It has not been proved and cannot be proved...that cigarette smoking is as injurious as cigar smoking, or even injurious at all.’”

Following the hearing, the House took no action on the bill at all, but on April 10, the joint standing Public Health Committee reported the bill to the Senate with an “ought not to pass” recommendation, and the next day that chamber rejected H. No. 267. Despite this infliction of an even more severe defeat than that at the 1892 session, the anti-cigarette forces in Massachusetts would persevere in their legislative efforts during the remainder of the decade.

### A Different Strategy: (Purportedly) Prohibitorily High Licenses for Cigarette Sales

Politicians having licensed the liquor business for so many years are now turning their attention to the tobacco trade and talking about securing more revenue from the sale of tobacco.

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534“A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6-7).
535Pursuant to Rule 4 of the Joint Rules of the Two Branches, “Joint committees may report by bill...to either branch, at their discretion, having reference to an equal distribution of business between the two branches.” Journal of the Senate of the Commonwealth of Massachusetts: 1893, at 1182 (Apr. 10) (1893). Ignorance of this rule presumably explains the opinion of a reference librarian at the Massachusetts State Library that it was more plausible that the House Journal had neglected to include House passage of the bill than that the Senate had rejected a House bill that the House had never passed. Telephone interview with unidentified librarian, Boston (Feb. 17, 2010).
537House, No. 267, Bill File, Apr. 11, 1893 (Senate rejected) (copy furnished by Massachusetts Archives); Journal of the Senate of the Commonwealth of Massachusetts: 1893, at 545 (Apr. 11) (1893). See also Journal of the House of Representatives of the Commonwealth of Massachusetts: 1893, at and 690 (Apr. 13) (1893) (House received notice from Senate of that latter’s rejection of the bill).
538See below ch. 6.
539Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting: Boston, Mass., November 13th to 18th, 1891, at 98 (1891).
In some states and cities—some adversaries of cigarettes—but not the WCTU, which opposed “licensing evil” whether it was alcohol or cigarettes—sought to achieve their ultimate goal of cutting off minors’ access by the more indirect means of financially discouraging dealers from selling cigarettes in the first place by imposing a license tax substantial enough to wipe out their profits. Such initiatives may have been less confrontational (especially vis-a-vis consumers) than outright bans, but they were nevertheless commonly understood as prohibitory in intent—unlike their progenitor, the high license for saloons, which, while perhaps reducing somewhat the total number of places selling alcohol, was intended both as an alternative to, not an instantiation of, prohibition and a source of tax revenue—though, as the case of the 1891 Atlanta ordinance.

540 For example, the city council in Springfield, Missouri “made war on cigarettes by ordering all dealers to pay an annual license of $250. No dealers felt able to pay this license....” “Can’t Pay the Cigaret License,” CT, Sept. 23, 1894 (2). A $100 license in Hartford City, Indiana was viewed as “practically prohibitive.” “Heavy License on Cigarettes,” Fort Wayne News, July 20, 1896 (4:6). When the mayor of Emporia, Kansas—who was also the city’s largest tobacco dealer—vetoed an ordinance, passed unanimously by the city council, imposing a $500 license, he claimed that it would be unconstitutional because the amount made it prohibitory. “Mayor Has An Eye on His Trade,” CT, Feb. 7, 1894 (3). To be sure, if the mayor needed a basis other than profit-seeking self-interest, the “cigarette trust” provided it when, following the ordinance’s passage, it sent its “western agent...to lay its side of the case before the mayor and...also supplied the mayor with a liberal assortment of printed documents in favor of cigarettes.” “A Veto Probable,” EDG, Feb. 3, 1894 (4:3).

541 T. Holman, “Tennessee,” US 19(21):12 (May 18, 1893). The assertion—based on non-primary sources themselves far removed from primary sources—by Jacob Sullum, For Your Own Good: The Anti-Smoking Crusade and the Tyranny of Public Health 30 (1998), that between 1893 and 1909 a number of states enacted anti-cigarette sales and possession statutes and “[t]wo other states, Tennessee and West Virginia, imposed prohibitive taxes. Such laws were supported...by “Gastonites” contained numerous factual errors: the law that Tennessee passed in 1899 imposing a risible $10 occupational tax was in reality a mulct rather than a license tax; many other states did pass cigarette sales license taxes; none of them was prohibitory; and the “Gastonites” (by which he also meant the WCTU) opposed them. See below this ch.

542 Frances Willard stated in her 1894 WCTU presidential address that the Republicans’ advocacy of high license had wrought “devastation” to the temperance movement, which she illustrated by reference to Iowa, whose “degeneracy...is perhaps more marked than of any other in the Union.” Minutes of the National Woman’s Christian Temperance Union at the Twenty-First Annual Meeting...Nov. 16-21, 1894, at 101 (1894).

543 An exemplary statement of the objectives of high license was made by the eminent lawyer James C. Carter in New York: “The sum to be paid for the license must be so large...
had already demonstrated, some dealers challenged them on the grounds that, instead of deterring sales, they merely facilitated monopolization by promoting concentration of sales among the largest dealers whose high volume made it possible for them to pay the tax and still sell with profit.

This view was emphatically argued in 1891 by Tennessee state Senator Thomas J. Alexander in explaining his vote against one of the earliest cigarette license bills:

I do not know the object of the bill, but I do not believe it will prevent the use of cigarettes. The only effect it will have will be to force the man of small means to evade the law and drive him out of the business entirely, and thus turn the whole cigarette business over to the rich capitalist, who is able to pay the tax, thereby giving him a monopoly of the business in that character of goods.

When Baltimore Democrat and lawyer John B. Keplinger introduced a bill on January 30, 1890, in the Maryland House of Delegates to add cigarette sellers to the list of traders required by the state code to pay for a license, barely a week had passed since “[a] gigantic Cigarette Trust...on the lines of the Sugar Trust” had been formed: on January 21, a certificate of incorporation of the...
American Tobacco Company had been filed in New Jersey; ATC, whose capital stock was $25 million, had taken in “the properties of nearly all the large cigarette manufactories” in the United States. As enacted in March, the cigarette sales license cost sellers $50—a small fraction of the charge that several other states would soon impose, but much higher than the mere $10 to which the legislature would reduce it in 1896.

Unsurprisingly, the Maryland Woman’s Christian Temperance Union appears to have had nothing to do with the license bill. Oddly, however, whereas three long field reports from the state group that the National WCTU published in its weekly publication during the first few months of 1890 contained detailed sarcastic commentary on high-license liquor bills being considered by the legislature, they never alluded at all to cigarette sales licensure.

While the legislature was considering the bill, tobacco dealers attending at the statehouse “apparently” favored passage, whereas one large cigarette dealer opposed it on the grounds that cigarette sales did not generate enough profit for 3,000 stores to pay $50 for a license: “It is not just that nine-tenths of the storekeepers are put out of their share of profits...and one-tenth of storekeepers get the entire profit, amounting to about $40,000 a year. It is a bill for the large stores against the small ones, and therefore unjust, unfair and undemocratic.”

Even at $50, proponents argued that the fee “will no doubt have the effect to reduce the use of cigarettes very materially in the country districts, as but few dealers will take out the extra license required to sell them.” (That pattern

547“A Cigarette Trust Now,” CT, Jan 22, 1890 (5).
5481890 Maryland Laws ch. 91, at 75. Sellers were also required to state (falsely) on oath that the cigarettes they sold contained no injurious drug or narcotic. The bill passed the House by a vote of 57 to 0. Journal of the Proceedings of the House of Delegates of Maryland, January Session, 1890, at 471 (Feb. 25) (1890). The Senate vote was also unanimous. “The Cigarette Bill Passed,” Daily News (Frederick), Mar. 11, 1890 (4:1).
5491896 Maryland Laws ch. 439 at 751.
550M.A.L., “Maryland,” US 16(6):10 (Feb. 6, 1890); M.A.L., “Maryland,” US 16(15):10 (Apr. 10, 1890); M.A.L., “Maryland,” US 16(23):10 (June 15, 1890). The last article mentioned “[a]mong the good works of the legislature...the cigarette bill, presented by the W.C.T.U.” Presumably it was alluding to 1890 Maryland Laws ch. 496, at 547, which merely raised from 14 to 15 the minimum age at which tobacco could be sold to minors (unless parents gave written consent). For the liquor license bill applicable to Baltimore, see 1890 Maryland Laws ch. 334 at 365. Similarly, the national WCTU periodical mentioned passage of a high-license bill in Maryland, but not the cigarette license bill. “Since Our Last Issue,” US 16(17):1 (Apr. 24, 1890).
551“The Cigarette License,” News (Frederick, MD), Mar. 5, 1890 (1:7).
1893: Annus Mirabilis

would, later in the decade, be replicated under the Iowa cigarette sales ban, which was more strictly enforced outside of the larger cities.\textsuperscript{553} The law’s supporters also contended that it was in part well designed to secure its objective of reducing boys’ access to buying cigarettes. For example, in Frederick (population 8,193)\textsuperscript{554} it was clear to the local press that:

There is not enough profit on the sale of cigarettes to justify their being handled by many dealers in this city, with the additional rate of license, and the number of convenient shops for purchasing this little article of daily use will be greatly decreased.... The boy who now slyly glides into the grocery store on the corner to purchase his “smoke,” which he indulges in at some distance from his home and away from papa, must boldly walk into a cigar store among the “big men” and buy his cigarettes with a chance of meeting his father or seeing someone who will “tell mamma.” In this respect the law will be of great benefit, while the advantage to sellers of cigars will be quite as great as in the absence of the cheaper and inferior article, cigars, in which there is greater profit, will be in greater demand....\textsuperscript{555}

More importantly, even in the state’s largest and the country’s seventh largest city the \textit{Baltimore Sun} concluded that the $50 license would “undoubtedly check the sale” of cigarettes, but would “not prevent the sale altogether.” The reason for the predicted drop in the number of sellers from 3,100 to 100 was the pre-license low level of profits, which was, according to dealers, rooted in competitively driven “ruinously low” prices. So many merchants nevertheless continued to sell cigarettes “because they were demanded, and no stock was complete without them. ... The point is that trade in other goods would be lost if cigarette smokers went elsewhere to get their favorite form of smoking goods.” This commercial logic required larger downtown stores to keep selling cigarettes as loss leaders “to hold customers for articles of greater profit,” whereas “very small general stores, whose small cigarette profits “had some importance as part” of the business’s general returns would “lose by the new law.” (As a threshold matter, with profits of one cent per package of 10 cigarettes, a dealer would have to sell 50,000 cigarettes a year or 16.6 packages a day just to break even on the license.) If, as was deemed probable, much of the general tobacco trade drifted to the big tobacconists, such “concentration” might enable them to profit from cigarette sales.\textsuperscript{556}

\textsuperscript{553}See below Part II.


\textsuperscript{555}“The Crusade Against Cigarettes,” \textit{Daily News} (Frederick), Mar. 24, 1890 (3:4).

\textsuperscript{556}“The Cigarette Law in Maryland,” \textit{DP}, Apr. 26, 1890 (3:3) (reprinted from \textit{Baltimore Sun}).
In 1891 one legislative chamber in each of two states passed high-license bills for cigarettes. In Indiana, Democrat Henry Thienes of the House (which was controlled by Democrats by more than a three-fourths majority)\(^{557}\) introduced a bill to require cigarette sellers to buy a $200 annual license,\(^{558}\) which was “intended practically to prohibit the sale of cigarettes in Indiana....”\(^{559}\) While the State Medicine and Health Committee was recommending its passage,\(^{560}\) Thienes revealed that tobacco dealers had “telegraphed to the big manufacturers in the East to help them” defeat his bill, which would “make cigarettes so expensive that dealers cannot afford to handle them” and “put them to a large extent out of reach of boys”—of whom alone in Marion County (Indianapolis) 10,000 were smoking cigarettes—whose access had not been cut off by the existing “dead letter” of a no-sales-to-minors law.\(^{561}\) In the course of the House floor debate on the bill, which the Democratic *Indianapolis Sentinel* regarded as supposed to “protect the dudes from the cigarette incense,” Republican lawyer Jefferson Claypool “insinuated that the bill was in the interest of cigar-makers of the state and not for the protection of the youth,” prompting Thienes to reply that the cigarettes manufacturers had formed a trust.\(^{562}\) Following a long discussion replete with advocates’ “horrible pictures of the ravages of the cigarette,”\(^{563}\) the House passed the bill by the overwhelming vote of 79 to 7.\(^{564}\) For at least one Republican

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\(^{558}\)[H.B. No.] 268, § 1 (copy furnished by Indiana Commission on Public Records/Indiana State Archives); *Journal of the House of Representatives of the State of Indiana, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session*, at 205 (Jan. 19) (1891) (H.B. No. 268). The bill, which also applied to manufacturers, required them and dealers to state on oath that they would sell only cigarettes containing “no injurious drug or narcotic....” Violations were subject to fines between $300 and $600 and/or imprisonment in county jail, work house, or penitentiary for six months to a year. [H.B. No.] 268, §§ 2, 4. See also “Legislature” *Fort Wayne Sentinel*, Feb. 4, 1891 (2:3-4).

\(^{559}\)“New Systems of Taxation,” *CT*, Feb. 22, 1891 (6).

\(^{560}\)*Journal of the House of Representatives of the State of Indiana, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session*, at 368 (Jan. 28) (1891).

\(^{561}\)“Odds and Ends,” *IJ*, Jan. 29, 1891 (5:3).


\(^{563}\)“The Horrible Cigarette,” *IJ*, Feb. 4, 1891 (5:3).

\(^{564}\)*Journal of the House of Representatives of the State of Indiana, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session*, at 246 (Jan. 28) (1891).
As would be replicated in other states considering cigarette license laws, Thienes’s bill prompted the criticism that rather than check cigarette use, it would merely “tend to create a monopoly in the hands of larger dealers,” of whom there were only few. Moreover, one dealer complained in a heartstrings-tugging letter to the editor: “More than one-half the cigar and tobacco stands in the United States are owned by men of small means and, in many instances, by crippled soldiers and their widows who would be unable to pay the license fee, and would thereby be deprived of keeping cigarettes in stock, while the larger dealers would.” Little wonder, then, that with cigar makers imagining that licensure would reduce cigarette sales and increase that of cigars, they and larger dealers were the “two classes who are pushing the bill...”

The chief advocate for the bill during floor debate in the Senate (more than two-thirds of whose members were Democrats) was Henry Hudson, remarkably enough an Indianapolis plumbers union president, Knights of Labor member, Irish Catholic, and Democrat, who focused on cigarettes’ ruinous physical effects on boys as well as the “demoralizing effects of the lascivious pictures that decorate every package.” When fellow Democrat Frank Burke, a prosecuting attorney, elicited from Hudson that Thienes was a cigar maker, Burke was able to snap the trap and conclude that the bill’s purpose was to advance Thienes’s interests by increasing cigar sales by restricting those of cigarettes. Insisting that he was opposed to legislating for one industry at another’s expense, Burke also went on record against “creating a monopoly by throwing the sale of cigarettes in a city like Indianapolis into the hands of two or three men.” After a coalition
of 12 Republicans and 11 Democrats had defeated a motion supported only by (17) Democrats to substitute the Public Health, Vital and Other Statistics Committee minority report (which recommended indefinite postponement) for the majority report (recommending passage), in which the House then concurred. Burke offered a killer amendment to subject cigar sales to licensing, too, on the grounds that morality called for movement “all along the line” as well as to provide the state with needed revenue. Hudson’s motion to reject the amendment lost on a non-party-line vote of 17 to 22, but the amendment itself also lost, though only by (another non-party-line) 20 to 21 after the Republican lieutenant governor cast the deciding vote. Then Republican lawyer Robert Loveland moved an amendment to add “vinous, malt or other intoxicating liquors” (thus doubling the liquor license to $200), discussion of which and personal liberty displaced that of tobacco. In the welter of referral and tabling motions the amendment failed to come to a vote. More, doubtless, on substantive grounds,
the *Sentinel* bemoaned that the Senate had wasted a day and a half on a cigarette bill. After further procedural skirmishing, the Senate four days later, killed the bill by indefinitely postponing it, all 23 Yes votes being cast by Democrats.

The Tennessee Senate in 1891 sought to intensify the prohibitory force of cigarette sales licensure with a bill that raised the fee tenfold to $500. The bill was introduced by Van Leer Polk (a grand nephew of former President Polk), the editor of a major Nashville newspaper who two years later was appointed U.S. consul general in Calcutta, India. The Senate passed his bill to make it a privilege to sell cigarettes by a vote of 24 to 5. That Polk pursued an at least partly progressive agenda was signaled by his having moved an amendment to another bill to make common carriers liable for employees’ injuries caused by fellow servants’ and co-employees’ carelessness, negligence, inefficiency, or incompetence; in contrast four of the five senators who voted against his high-license bill opposed this worker-friendly amendment. The licensure bill did not, however, become law because it died in committee in the House—to the relief of the WCTU, which favored the no-sales-to-minors bill, which the legislature passed. While admitting that such a high license fee would amount

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576IS, Feb. 23, 1891 (4:4) (untitled edit.).
577*Journal of the Indiana State Senate, During the Fifty-Seventh Session of the General Assembly, Commencing Thursday, January 8, 1891: Regular Session*, at 776-77 (Feb. 25) (1891). The 18 opponents were divided between 11 Republicans and 7 Democrats.
581*Senate Journal of the Forty-Seventh General Assembly of the State of Tennessee* 272 (Mar. 4) (S.B. No. 216) (1891).
584See below ch. 5. Oddly, three weeks after the first bill had been approved by the governor, the Tennessee WCTU’s state reporter informed the national organization that the legislature had voted down such a bill because it considered the bill that it had just enacted imposing a $500 license fee on cigarette sellers to suffice. T. Holman, “Tennessee,” *US* 17(16):11 (Apr. 16, 1891). In fact, no such bill was passed, and two
to “virtual prohibition in the smaller towns,” the state organization adamantly insisted that “licensing evil is wrong, and no sophistry can make it right. If cigarette smoking is wrong and injurious to boys, I cannot see how a $500 license can make it harmless.”

City-level cigarettes sales license ordinances proliferated during the 1890s. In 1896, for example, several towns in Indiana (which did not enact a statewide cigarette sales ban until 1905) adopted ordinances imposing hefty license fees, which in places with small populations and corresponding cigarette markets were designed to be “practically prohibitive.” The city council of Hartford City (pop. 2,287 in 1890) required dealers to pay $100 for a license and $25 to $100 in penalties. The council in Shelbyville (pop. 5,451 in 1890) “intended” that its $1,000 mandatory retail license “should prohibit the sale of cigarettes”; as a flanking measure, the ordinance also made it a misdemeanor for anyone under 21 “to smoke a cigarette of any kind within the corporate limits of the city....”

“[F]or the sake of the health of the young men and boys who are addicted to the cigarette habit,” Indiana’s second largest city, Fort Wayne (pop. 35,393 in 1890), charged $500 a year for the license and imposed a fine of up to $100 for violators. Such municipal ordinances, given their numbers and high license fees—Denver, for example, in 1897 fixed the charge at $1,000, prompting a police magistrate to void it as excessive and unreasonable—may have eclipsed state laws in prominence, especially after the U.S. Supreme Court in 1900 upheld...
as a proper exercise of the police power the $100 annual license that Chicago had instituted in 1897 after several years of efforts, highlighted by nationally publicized allegations of the American Tobacco Company’s bribes to city council members.

Examination of the license tax laws enacted in Nevada and Ohio in 1893—but soon pared back after being challenged by the industry—and initiated in Texas that year but not enacted until 1897 rounds out the panorama of 1893’s intense legislative attacks on the fledgling commodity.

Nevada

A bill has been introduced in the Nevada legislature to provide for licensing the sale of cigarettes. The license will be $600 a year. Violators shall be fined not less than $100 nor more than $500. The bill ought to pass and the fines collected devoted to the dampool infirmary, which would be without inmates and have no excuse for its existence were it not for cigarette smokers.

As the most sparsely populated state in the country in the 1890s, Nevada was arguably in the best position to deploy a high-license strategy to deter merchants from selling cigarettes. In 1887 Nevada had made it unlawful to sell cigarettes or any tobacco to persons under 18 (except with a parent’s written order) subject to a penalty of a fine up to $200 and/or imprisonment of up to two months. Two years later the legislature increased the penalty to a fine ranging between $100 and $500 and/or 50 days to six months in jail. In addition, any dealer convicted twice of violating the law was required to forfeit his license, and

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592 Gundling v Chicago, 177 US 183 (1900), aff’g Gundling v City of Chicago, 176 Ill 340 (1898).
593 See below ch. 6.
594 In 1892 Kentucky passed and repealed a $300 cigarette license bill. “Kentucky State News,” Hickman Courier, May 13, 1892 (1:6); “Newsy Notes,” Semi-Weekly Interior Journal (Stanford, KY), May 10, 1892 (2:2); Minutes of the National Woman’s Christian Temperance Union at the Nineteenth Annual Meeting: Denver, Col., October 28th to November 2d, 1892, at 94 (1892).
595 Standard (Ogden, Utah), Feb. 15, 1893 (4:2) (untitled).
596 In 1890 and 1900 Nevada had both the smallest population and the lowest density of any state. U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States, Taken in the Year 1900: Population, Pt. 1, tab. 1 at 2, tab. 3 at 6 (1901).
597 1887 Nevada Laws ch. 73, at 80.
no license could be granted to him to carry on a like business again. With a total population of only 45,761 and its three largest towns, Virginia City, Carson City, and Reno, inhabited by only 8,511, 3,950, and 3,563 persons, respectively, Nevada had local cigarette markets whose minuscule sizes lacked the scale that sellers supposedly required to secure profits sufficient to pay off the license. Indeed, since Nevada, as a result of the deep depression that had begun in 1880 when silver mining, its only industry, reached a “standstill,” was the only state whose population shrank between 1890 and 1900 (as it had also been during the 1880s), the aforementioned figures were overstated by 1893 (when the legislature acted), especially in the two largest towns, whose populations by 1900 had plummeted to 2,695 and 2,100.

Nevada’s regulatory initiative in 1893 (Assembly Bill No. 37: An Act licensing the sale of cigarettes) was introduced by William Henry Asbury Pike (1854-1910) on February 2. After having been a Republican and Democratic state legislator in the 1880s, Pike served in 1893 as speaker pro tem and chairman of the Ways and Means Committee as a People’s party member. Born in Maine, a Puritan descendant, Pike attended Bowdoin College and then

598 1889 Nevada Laws ch. 85, at 82.
600 U.S. Department of the Interior, Census Office, Report on the Population of the United States at the Eleventh Census: 1890, Pt. I, tab. 5 at 235-36 (1895). The state’s three population centers were located very close to one another.
602 U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States, Taken in the Year 1900: Population, Pt. 1, tab. 2 at 4 (1901). The state’s population fell to 42,335 by 1900.
603 U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States, Taken in the Year 1900: Population, Pt. 1, tab. 5 at 264-65 (1901). Only Reno’s population rose—to 4,500. Virginia City, on its way to ghost town status, lost population because of the decline of gold and silver mining, while the capital city’s population fell as a result of a shift in railroad routes.
604 The Journal of the Assembly of the Sixteenth Session of the Legislature of the State of Nevada, 1893, at 63 (Feb. 2) (1893).
606 History of the Bench and Bar of Nevada 81 (J. P. O’Brien ed. 1913).
apprenticed in a law office before moving to Nevada in 1874, where he taught school and was a school principal and superintendent before serving another law apprenticeship. Returned as stock raiser at the 1880 Census of Population, Pike, after leaving the legislature, became district attorney of Washoe County and in 1906 was elected state district judge, in which capacity The New York Times pilloried and mocked him—displaying his photograph in the Sunday magazine over the caption, “Judge Pike, Who Decides Half of the Divorce Suits” for presiding over the Reno divorce mill for (celebrity) out-of-staters with no ties to Nevada.

Republicans had been the dominant political party in Nevada until 1892, when state politics were restructured in the wake of the emergence of the Silver party, which supported the People’s party—which also advocated free coinage of silver—whose presidential candidate, James B. Weaver, received two-thirds of the state’s vote, his highest share in the country, while the local Silver party

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6081880 Census of Population (HeritageQuest).
1893: Annus Mirabilis

Pike’s bill imposed a $150 quarterly license for the sale of cigarettes, cigarette paper, or cigarette paper beginning on July 1, required all engaged in dealing, selling, giving away, or offering for sale to take out such a license, and fined convicted violators between $100 and $500 for each offense. The press insisted that a cigarette sales license of $150 per quarter, would be “virtually prohibitory” or “be in effect a prohibitory law, which is doubtless the intent of the introducer,” but even in tiny Reno the high license failed to have that effect. Its failure would be exposed repeatedly by the only dealer there who complied with the law and paid the license. Long before the law went into effect, however, Alfred Nelson, was already intervening in the legislative process, although at this point he had evidently not yet concluded that payment of the $600 annual tax would be consistent with the continued profitable sale of cigarettes. On February 6, before the Public Morals Committee reported the bill back to the full Assembly, Nelson wrote a letter to the editor of the Daily Nevada State Journal insisting that: “In justice to dealers who have been licensed to sell cigarettes and tobacco, the bill now before the Legislature to increase the license so as to virtually prohibit the sale of cigarettes should be amended so as to take effect at least six months from the date of its passage, if not longer. It is not justice to make dealers lose the stock they now have on hand. I, for one, am willing that cigarette smoking should be suppressed, as I think the habit a bad one, but as the business of selling cigarettes has been legalized, it is no more than right and proper that dealers should be given the opportunity to get rid of the stock on hand.” Nelson then added that while the legislators were at it, “why don’t [sic] the Legislature...prohibit the sale of cigarettes or cigarette tobacco altogether, and thereby put a stop to the vice altogether?”

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614 In the 30-member chamber Silverites occupied 15 and Populists 7 seats. Republicans nominally still controlled nine of the 15 Senate seats, with Silverites holding five and Populists one, but when two Republicans voted with the Silverites, the latter secured control of that chamber as well by one vote. “Nevada Legislature,” DNSJ, Jan. 17, 1893 (3:2); Political History of Nevada 254 (Renee Parker and Steve George ed., 11th ed. 2006); Mary Glass, Silver and Politics in Nevada: 1892-1902, at 71-73 (1969).

615 Assembly Bill No. 37, §§ 1-3 (Feb. 2, 1893, by Pike) (copy furnished by Nevada State Archives/Research Library, Legislative Counsel Bureau). The text was also published in “Sale of Cigarettes,” DNSJ (Reno), Feb. 5, 1893 (3:4).


617 “Brevities,” Weekly Gazette and Stockman (Reno), Feb. 9, 1893 (3:1).

618 A. Nelson, “The Cigarette License Bill,” DNSJ, Feb. 7, 1893 (3:3). The licensing to which Nelson referred presumably meant the license mandated for anyone who sold
The 36-year-old Nelson, who had emigrated from Sweden in 1869, arrived two years later in Nevada, where during the 1870s he worked in the lumber and mining and milling businesses, in which latter he was “so badly crippled by an accident as to be entirely disabled for three years....” Then in 1883 he engaged in a small tobacco business in Reno, becoming one of the state’s leading wholesaler-retailers and including cigarettes in his stock. In an advertisement posing as an article, Nelson lauded himself in a Reno newspaper as in autobiographical sync with the fluid class boundaries of the frontier: “Although now a successful business man, Mr. Nelson manifests his warm sympathy for the laboring man by conducting a free employment exchange at his office.”

Nelson did not persuade the legislature to delay the law’s effective date in order to permit him to sell off his stock without having to pay for a permit, but he did ultimately exert a major impact on enforcement.

As the legislature was dealing with the license bill, the Nevada WCTU, which was organized in Reno as early as 1882 and presumably opposed licensing the sale of cigarettes (and liquor) as the WCTU did elsewhere, was focused on other dimensions of tobacco prohibition. At the regular meeting of the Reno group on January 10, 1893, the state Superintendent of Cigarettes and Tobacco was instructed to consult with the district attorney as to the best method for enforcing the aforementioned no-sales-to-minors law. Two weeks later the superintendent reported that the district attorney “was not prepared to make a
definite answer....\textsuperscript{623} Unwilling, apparently, to rely on the district attorney’s good-faith exercise of his prosecutorial discretion, on February 7, five days after Pike had introduced his bill, the WCTU instructed its Committee on Cigarettes to “consult an attorney in regard to drawing up a bill making it a crime for minors to be found smoking Cigaretts [sic], punishable by fine, the Bill to be sent to the Legislature in case the Cigarett Bill now before the Legislature fail [sic] to pass.”\textsuperscript{624}

Why and how the WCTU knew that if the high-license bill passed it would be senseless even to request that the legislature consider prohibiting minors from smoking is unclear, but that bill’s passage within the next 10 days presumably explains why the WCTU bill was not introduced. Expeditiously, following the Public Morals Committee’s recommendation that A.B. No. 37 pass,\textsuperscript{625} the Assembly did pass it by the overwhelming majority of 26 to 1,\textsuperscript{626} and a few days later the Senate followed suit by the similarly lopsided vote of 13 to 1.\textsuperscript{627}

Several weeks after the law went into effect on July 1, Nelson, in another adverticle, announced that he had “secured a license, and will from this date sell cigarettes until his stock is disposed of.”\textsuperscript{628} Apparently, even at this late date Nelson had not yet decided to take out a license for the purpose of selling cigarettes that he had not yet ordered. Since the quarterly license cost him $150, he must have carried a very large stock: at (say) a profit of one cent per 10 cigarettes, he would have had to sell 15,000 just to break even, even though he would have had almost five months between the time he had written his letter to the editor and July 1 to dispose of his stock. However, at the latest by November 9 he appears to have calculated that he could sell cigarettes profitably because on that date he advertised that he was “the only dealer in town authorized to sell cigarettes and papers.”\textsuperscript{629} A rough calculation indicates the constraints under

\begin{footnotesize}
\begin{enumerate}
\item[\textsuperscript{623}]Nevada WCTU, Minutes, Reno, at 159 (Jan. 24, 1893).
\item[\textsuperscript{624}]Nevada WCTU, Minutes, Reno, at 160 (Feb. 7, 1893).
\item[\textsuperscript{625}]The Journal of the Assembly of the Sixteenth Session of the Legislature of the State of Nevada, 1893, at 82 (Feb. 8) (1893). The committee recommended passage with (unidentified) amendments, which the Assembly adopted. Id. at 84 (Feb. 8).
\item[\textsuperscript{626}]The Journal of the Assembly of the Sixteenth Session of the Legislature of the State of Nevada, 1893, at 101-102 (Feb. 11) (1893).
\item[\textsuperscript{627}]The Journal of the Senate of the Sixteenth Session of the Legislature of the State of Nevada, 1893, at 113 (Feb. 16) (1893).
\item[\textsuperscript{628}]“Cigarettes for Sales,” REG, July 26, 1893 (3:3). A few days later he announced that he had postponed the start date until August 1. Id., Aug. 1, 1893 (3:4).
\item[\textsuperscript{629}]“New Goods Received,” REG, Nov. 9, 1893 (3:2). Nelson also sold the Detroit Free Press, gents’ underwear, musical instruments, and novelties.
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which Nelson was operating. On the assumption that a dealer pocketed one cent of profit for every 10-cigarette package he sold, he would have to sell 600,000 cigarettes a year or about 1,644 cigarettes a day to pay off the $600 license tax. Or, as seen from the customers’ perspective: 100 consumers would have to buy 16.5 cigarettes every day before Nelson could turn a profit. By the mid-1890s, Reno’s population numbered about 4,000. Because Nevada’s (frontier) demographic age and sex composition deviated from that of the national average, being strongly skewed toward adult men, approximately 1,600 to 1,700 males 21 years and older lived there at that time. Thus, about 6 percent of them would have to have been daily heavy cigarette smokers to enable Nelson to reach the profit threshold, though, to be sure, either additional nicotine addicts or more intense addiction would have been required to catapult him into sales that insured solid profitability (assuming that he was not selling cigarettes as a mere accommodation/loss leader). Imagining that at least one in 16 or 17 adult men might have constituted such smokers even in the early childhood of the cigarette industry may be plausible—especially if Nelson is presumed to have been a rationally calculating capitalist—but it would be wholly implausible to assume that the market was large enough to permit even one, let alone five other merchants, to clear the $600 license tax and attain profitability. Indeed, these guesstimates explain why no one else took out a license.

By mid-December Nelson’s impatience with his scofflaw competitors burst forth publicly:

Several Reno storekeepers are charged with violating the law licensing the sale of cigarettes and cigarette paper, and on complaint of A. Nelson, warrants were served on Marcus Fredrick, Collin & Lar[l]combe, J. J. Quinn, R. O. Wills and a Chinese merchant.

Mr. Nelson states that the only reason he instituted proceedings was for self-protection. ... Mr. Nelson is the only Reno merchant that has complied with the law so far as taking out the license is concerned, and hence instituted proceedings to compel other

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630 This estimate is, as already noted, based on linear interpolation of the population at the 1890 and 1900 population censuses.

631 In 1900, nationally males accounted for 50.9 percent of the total population, while men 21 and over accounted for 54.6 percent of all males and 27.8 percent of the total population. Calculated according to U.S. Census Office, Census Reports, Vol. 2: Twelfth Census of the United States, Taken in the Year 1900: Population, Pt. 2, tab. 1 at 2 (1902). The corresponding proportions in Nevada—no such census data were published for Reno, whose population fell far below the 25,000 minimum threshold for cities—were 60.5, 69.2, and 41.8 percent, respectively. Id., tab. 2 at 64. Thus, when Reno’s population reached 4,000 in the mid-1890s, 41.8 percent or about 1,672 of them were men 21 and older.
A few days later *State v. Marcus Fredrick* appeared on the docket of the justice court. Fredrick, who, in addition to selling cigarettes, cigar, and tobacco, also repaired watches, clocks, and jewelry, not only sold unlawfully, but called attention to his ongoing commission of a misdemeanor by advertising his offer of cigarettes for sale in large advertisements in the Reno press. In the criminal action for selling and giving away cigarette papers brought by the district attorney against Fredrick, which was just the first of a series of trials against the alleged violators, his lawyer defended “on the grounds that that portion of the act at least was unconstitutional which made it a misdemeanor to give away cigarettes” inasmuch as it was not mentioned in the act’s title. The following day the district attorney asked the judge to sustain Fredrick’s demurrer so that the law’s constitutionality could be tried before a court of competent jurisdiction. A week later Judge Azra E. Cheney of Washoe County District Court heard argument and quickly overruled the defendant’s demurrer. Cheney relied on state supreme court precedent to create the framework for understanding that the constitutional mandate that a law encompass only one subject “‘and matters properly connected therewith, which subject shall be expressed in the title’” was designed to prohibit the “‘vicious practice of rolling together...’omnibus bills,” including sometimes a hundred sections on entirely different subjects, with the title of the enactment of the first section, and for other purposes.” The proscription was not, however, designed to “needlessly thwart honest efforts at legislation.” Against this lenient interpretive background, Cheney then launched into a substantive defense of the prohibitory act—at least as far as “the young” were concerned—taking judicial notice that cigarettes are made by rolling loose tobacco in a prepared paper known as “cigarette
paper,” and that the cigarette rolled, as well as the tobacco and cigarette papers, to be rolled by the user, are sold for the same purpose and used with the same evil consequences. The evident intent of the act indicated its terms and the high license required, was to restrict and as far as therein could be suppress the general and indiscriminate sale and giving away of the material known as cigarettes. The evils flowing from the use of the inferior and adulterated cigarettes and cigarette materials by the young are so pronounced and disastrous that it is not surprising that public sentiment should demand and legislators should endeavor to limit, restrict or suppress it. There can be no doubt of the power of the legislature to do so.642

Since the title sufficiently indicated that the act’s purpose was to require a license to sell cigarettes, “matters properly connected therewith” such as cigarette papers did not need to be mentioned in the title: “It would be farcical to attach a criminal penalty to the giving away of cigarettes without a license and permit the unrestricted selling or giving away of the prepared paper by which the receiver could instantly prepare for use the prohibited article.”643

His nitpicking defense having been rejected, Fredrick appears to have stopped advertising cigarettes in the Reno press, while Nelson continued throughout 1894 and 1895 to advertise that he was “[t]he only licensed dealer in Reno....”644 As much as he was at pains to secure the trade of customers who prized compliance with the law, he was not, however, as he would later make clear, the only merchant selling cigarettes. Whether these noncompliant dealers were concerned that they might be caught, prosecuted, and fined $500, and therefore lobbied legislators to scale back the license tax, or whether the Tobacco Trust conducted the lobbying, such a bill made considerable progress during the 1895 session. (If scofflaw sellers did not fear detection, they would have preferred the status quo since they could keep the $600 a year that Nelson was paying for his license.) On March 2, Silverite Assemblyman Charles Allen,645 who was chairman of the Committee on Public Morals, introduced A.B. No. 125, which slashed the license fee by 90 percent—from $150 to $10 per quarter646 and made it a misdemeanor

644E.g., DNSJ, Sept. 2, 1894 (1:1); DNSJ, Apr. 19, 1895 (4:4); REG, July 3, 1894 (2:2) (“the only dealer in town authorized to sell cigarettes”).
645At the 1900 Census of Population Charles Allen of Eureka County was returned as a mining president; in 1910 and 1920 he was returned as a miner (quartz and silver, respectively).
646The Journal of the Assembly of the Seventeenth Session of the Legislature of the State of Nevada, 1895, at 146 (Mar. 2) (1895); “The State Legislature,” DNSJ, Mar. 6,
for minors (under 21) to smoke cigarettes subject to a fine of $100 or five days of jail.\textsuperscript{647} When the Assembly, sitting as the Committee of the Whole, to which the bill had been referred, took up the bill, it recommended an amendment offered by Republican J. A. Conboie to reduce the fine from $100 to $10 for minors smoking cigarettes. After Assembly Speaker Democrat Lemuel Allen had voiced his satisfaction with the current law and opposition to any reduction of the license, Populist Daniel McDonald remarked that he “was opposed to any law telling any man what he shall or shall not do. That he would smoke cigarettes if he wanted to. If they went on this way it would get so that a man couldn’t drink but one cup of coffee a day.” The bill’s introducer responded to this misplaced outburst of rugged individualism by informing (the inattentive) McDonald that the prohibition applied only to youths under 21. The Committee of the Whole then voted to report progress on the bill. Later the same day Speaker Allen strenuously objected to the bill’s provision relating to minors, wanting it stricken as an “absurd injustice,” which would cause him to oppose the bill. From a “family standpoint” Silverite J. A. Denton reinforced the Speaker’s position and “called upon every father in the House to oppose the bill.” Despite the introducer’s defense of A.B. No. 125, the Committee of the Whole agreed to report recommending that the section be stricken.\textsuperscript{548} The Committee then recommended that the bill pass as amended.\textsuperscript{649} These attacks on the proposed prohibition and penalization of cigarette smoking by those under 21 suggested that if the real basis for the allegedly prohibitory high license was protection of youth, then support for such licensing might be crumbling. Ten days later, after rejecting Denton’s motions to table and indefinitely postpone the bill, the full Assembly (which was composed of 14 Silverites, 11 Republicans, 3 Populists,
and 2 Democrats) passed it by a vote of 22 to 6, three Republicans and one member of the three other parties opposing it. Enactment of the decimation of the high license was, however, thwarted by the bill’s death in the Senate Ways and Means Committee. Just to make sure that the bill had in fact died, Nelson wrote the secretary of state asking whether A.B. No. 125 had passed so that “I can govern myself accordingly.” Presumably in order to put his violating competitors and cigarette consumers on notice that the repeal effort had failed, Nelson then had published in the Reno press the reply that it had not passed and that therefore the old high license law was still in effect.

By 1896 Nelson, apparently suffering from virtue fatigue, stopped running ads announcing that he alone was paying the high license. In February, however, the *Daily Nevada State Journal* made space available for an adverticle pleading for enforcement:

Alfred Nelson is the only cigar dealer and tobacconist in town that pays the license provided by law for the sale of cigarettes. He has paid the license willingly, believing that he would be protected. Notwithstanding the law, it is reported that there are several dealers in town that sell papers and cigarettes and simply evade the law by some slight quibble or scheme possibly originated by themselves. Mr. Nelson has paid $1,507 since the passage of the act, yet the fact that he conforms to the law does not seem to afford him any protection as far as other dealers selling the same goods are concerned. Mr. Nelson feels aggrieved at this and when complaining to those in authority he is simply answered by “well, make a regular complaint and it will be attended to.” He says that he does not feel like acting as a special detective on his branch of neighbors, but believes that the license he pays ought in a measure pay for a reasonable protection to him in this business. The license collector calls regularly for his money, yet other dealers are selling the same goods without a license. The question that Mr. Nelson would like to have answered is “why should I be required to pay the license while others go rent free.” Mr. Nelson simply asks that he receive the consideration due him in hopes that proper attention will be given to the subject by the authors.


653 The last one found by a computerized search was *DNSJ*, June 2, 1895 (1:1).

Since relatively few stores in the small town of Reno advertised the sale of tobacco and the license tax would have amounted to a non-trivial addition to government revenue, it is unclear why the officials refused/failed to undertake the minimal effort to collect the tax from the scofflaws, especially after State v Fredrick had eliminated the only (frivolous) defense that the bar was able to devise to thwart enforcement. Instead of coercing compliance, however, the state proceeded in the opposite direction—namely, turning the high into a low license, as had Allen’s A.B. No. 125 proposed in 1895. After Republican Samuel Hodgkinson, a “dealer in drugs,” had introduced a bill to repeal the 1893 law, on which the Assembly took no action, Allen once again filed a bill to reduce the license to $15 per quarter; A.B. No. 36 also both banned the sale of cigarettes to persons under 21 and made it unlawful for such persons to smoke cigarettes (anywhere), subjecting those convicted of violating this last provision to the same $100 to $500 fine that applied to violations of the bill’s other provisions. The Ways and Means Committee recommended passage, but when the chamber debated the bill, members tried to amend it radically. First, Populist Charles Stoddard moved to lower the minimum age for sales from 21 to 18, but the motion was defeated. Then Republican Frank Oliver unsuccessfully successively moved to raise the $15 tax to $500 and then to $250, but both motions lost. Finally, the chamber adopted Silverite George W. Hatch’s amendment to strike the section prohibiting under-21-year-olds from smoking cigarettes. On third

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655 Unfortunately, the state government reported tax revenues from all types of licenses in one lump sum so that the amount paid for the cigarette sales license cannot be identified. E.g., Annual Report of the Controller of the State of Nevada for the Fiscal Year Ending December 31, 1894, at 6 (Jan. 7, 1895), in Appendix to Journals of the Senate and Assembly of the Sixteenth Session of the Legislature of the State of Nevada, 1895. Even the controller’s ledgers in the State Archives consisted of lump sums for licenses with no line item for cigarette licenses. Email from Christopher Driggs, Nevada State Library and Archives, to Marc Linder (Mar. 12, 2010).

656 1900 Census of Population (HeritageQuest).

657 The Journal of the Assembly of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 52 (Feb. 4) (1897).

658 A.B. No. 36 (Feb. 5, 1897, by Allen of Eureka) (copy furnished by Nevada State Library and Archives); The Journal of the Assembly of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 55 (Feb. 5) (1897); “Legislative Proceedings,” Reno Evening Gazette, Feb. 6, 1897 (1:4) (erroneously attributing introduction to Bradshaw).

659 The Journal of the Assembly of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 63 (Feb. 8) (1897).

660 The Journal of the Assembly of the Eighteenth Session of the Legislature of the
reading the Assembly (20 of whose 30 seats were controlled by Silverites)\textsuperscript{661} passed the bill by a vote of 20 to 9.\textsuperscript{662} When the Senate followed suit by a vote of 11 to 3,\textsuperscript{663} the resulting license with one-tenth of the original financial bite presumably deterred virtually no merchant from selling cigarettes. The $100 to $500 penalty for selling cigarettes to those under 21 swept aside any consideration of cutting off the supply altogether. As the \textit{Nevada State Journal} observed: “While the sentiment was decidedly in favor of prohibiting the selling or giving away of cigarettes or cigarette paper it was the concensus [sic] of opinion that it could not be done and that the only practicable method of restricting the evil was to license both the sale of cigarettes and the paper used in making them and bring the business within the control of the authorities.”\textsuperscript{664} Why the authorities would have been any more willing to enforce the $15 quarterly license than they had its $150 predecessor the editorialist did not explain, but thus ended Nevada’s four-year experience with the high-license approach to suppressing cigarette sales.\textsuperscript{665}

\textit{State of Nevada, 1897}, at 84-85 (Feb. 15) (1897). Hatch was returned at the 1910 census as a barber.

\textsuperscript{661}Political History of Nevada 255 (Renee Parker and Steve George ed., 11th ed. 2006).

\textsuperscript{662}The Journal of the Assembly of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 91 (Feb. 16) (1897).

\textsuperscript{663}The Journal of the Senate of the Eighteenth Session of the Legislature of the State of Nevada, 1897, at 109 (Feb. 27) (1897).

\textsuperscript{664}“Licensing the Sale of Cigarettes and Cigarette Paper,” DNSJ, Mar. 2, 1897 (2:1) (edit.).

\textsuperscript{665}In 1911 the Nevada Senate (of whose 20 seats Democrats controlled 14) passed by a vote of 19 to 0 S.B. No. 12, introduced by a Democrat, John A. Ascher, a physician, that would have prohibited the sale of cigarettes in the state. The Journal of the Senate of the Twenty-Fifth Session of the Legislature of the State of Nevada: 1911, at 20, 33 (Jan. 23 and 26) (1911). A motion to amend by including cigars within the prohibition was defeated by a “resounding vote” because there were “too many Owl devotes among the higher-up colony to stand for that....” “Cigarettes Must Go Says Senate,” REG, Jan. 26, 1911 (1:5, 2:4). Although the bill “caused considerable discussion among the local knights of the brown-fingered delegation” and many of the Assembly members “addicted to the habit” “refuse to speak to Ascher when they meet on the street,” Ascher nevertheless predicted that the bill would “meet with no organized opposition in the assembly unless the cigarette and tobacco trust sends an army of lobbyists to agitate against it.” “Anti-Cigarette Bill Discussed,” \textit{Nevada State Journal}, Jan. 25, 1911 (1:4); “Cigarette Bill Passes Senate,” \textit{Nevada State Journal}, Jan. 27, 1911 (6:4). Even after legislators and the public had understood that under the bill a “person could have a carload of cigarettes
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Ohio

Ohio has gone into the business of regulating the habits of people by statute, her anti-
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cigarette act going into operation this week. ... The wholesale violation of the law may be expected, as those who do not regard a plain law of health are not likely to pay more deference to a mere statute.\textsuperscript{666}

[T]he belief is that the law can be and will be vigorously enforced. Its object is to discourage the habit of cigarette smoking and especially, by concentrating the sale, close up those small shops in the neighborhood of schools where minors are supplied with cigarettes, in some instances at two for a cent. ... Dealers say this result will not be achieved, as those who continue to sell will do the business not done by all.

Cigarette fiends, they claim, like the victims of the opium habit, will go any distance for their pet choice, and cannot be driven to cigars.\textsuperscript{667}

Shortly before the Ohio legislature began considering intervention, the press predicted that in the near future a “crusade” would be inaugurated against the manufacture and sale of cigarettes, the smoking of which was neither a trivial nor a harmless habit. A dealer became acutely aware of the root of the peculiar danger of cigarettes as a result of his “invariably” noticing that “when he sold a boy, who was just acquiring the habit of smoking cigarettes, he was always sure of one more regular customer.” The reason was the apparent presence of an opiate not found in other kinds of tobacco, and this opiate, like a serpent, seizes its victim at once and encoils itself about him,” possibly resulting in “imbecility or insanity.”\textsuperscript{668}

House Bill No. 1172 was introduced in the Ohio House of Representatives, which Republicans controlled by a two to one majority,\textsuperscript{669} on January 25 by 46-year-old one-term Republican lawyer Anselm T. Holcomb of Portsmouth.\textsuperscript{670} It provided for a $300 annual assessment for a wholesale business trafficking in cigarettes/wrappers and $100 for retail dealers; fines for violations ranged between $100 and $300. The lack of controversy surrounding the initiative was reflected in the 71 to 1 vote secured by the bill,\textsuperscript{671} whose tax was deemed high

\begin{itemize}
\item \textsuperscript{666}MJ, Aug 3, 1893 (4:1) (untitled edit.).
\item \textsuperscript{667}“Ohio’s Cigarette Law,” DP, Aug. 7, 1893 (7:7).
\item \textsuperscript{668}“Dangerous,” Newark Daily Advocate (OH), Jan. 16, 1893 (8:3).
\item \textsuperscript{669}History of the Republican Party in Ohio 1:605 (Joseph Smith ed. 1898) (72 to 35).
\item \textsuperscript{670}Journal of the House of Representatives of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893, Vol. XC at 130 (Jan. 25) (1893).
\item \textsuperscript{671}Journal of the House of Representatives of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893, Vol. XC at 661 (Mar. 29) (1893).
\end{itemize}
enough to be “prohibitory...in the interest of the health of the youth of Ohio.” Even those who did not judge the financial disincentive as quite so stringent nevertheless agreed that it would “certainly drive all the small dealers out of the business of selling, and...largely reduce the consumption.” Though not quite so massive, the majority in the Senate, controlled by a similar Republican majority, was nevertheless a comfortable 18 to 5. Despite this appearance of easy passage, the very same day Democratic Senator William C. Gear, who had cast one of the five Nays against Holcomb’s bill, filed a bill which, as amended by the Finance Committee, contained a provision repealing H.B. No. 1172. In a complete reversal, a few days later the Senate, by a vote of 17 to 5, passed the bill with the repealer. The House not having taken up the repeal bill at the end of the session, the cigarette license law remained passed and went into effect on August 1.

The reason for this last-minute effort to repeal the license law was nicely formulated in the press, which noted that the “deadly cigarette has entered into the Ohio campaign, and the whole dude population is up in arms against a Republican legislature.” When the Holcomb bill passed the Senate: “Immediately

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672 “Ohio Legislature,” *Newark Daily Advocate* (OH), Mar. 30, 1893 (2:1).
673 *Iowa State Reporter* (Waterloo), Apr. 6, 1893 (4:1) (untitled). In contrast, the press appears to have misunderstood the purpose of Holcomb’s bill as modeled on Ohio’s (Duncan) Dow liquor tax: “The cigarette fiend is to be taxed. The state is to derive some benefit from the prevailing nuisance in which dudes and other inferior creatures indulge. Representative Holcomb will introduce a bill looking to an increase in the state’s revenue and indirectly the protection of good morals among the youth of Ohio.” “Dangerous,” *Newark Daily Advocate* (OH), Jan. 16, 1893 (8:3) (quoting an unnamed Columbus newspaper).
674 *History of the Republican Party in Ohio* 1:605 (Joseph Smith ed. 1898) (21 to 10).
675 *Journal of the Senate of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893*, at 910 (Apr. 21) (1893).
676 *Journal of the Senate of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893*, at 920 (Apr. 21) (S.B. No. 582) (1893).
677 *Journal of the Senate of the State of Ohio for the Adjourned Session of the Seventieth General Assembly Commencing on Tuesday, January 3, 1893*, at 955 (Apr. 24), 976 (Apr. 25) (1893). The bill also made it unlawful to manufacture, sell, give, or use any cigarette with a substance foreign to tobacco and deleterious to health and penalized giving cigarettes or tobacco to persons under 16. All five senators who had voted against H.B. No. 1172 supported Gear’s bill.
the wires were burdened with protests from tobacco and news dealers, and so emphatic were these protests that Gov. [and future President William] McKinley began to grow alarmed.” When the Senate passed the repealer, McKinley was “directly charged by Republican friends of the cigarette law with having personally interfered in the matter at the request of the dealers, who insist that the only effects of high license will be to give the richer dealers a monopoly.”

During the interim between the Holcomb bill’s passage and its effective date, the press reported on the reactions of retailers, the greater part of whom would stop handling cigarettes. For example, in Hamilton (pop. 17,565 in 1890), where not more than 100,000 were sold annually,680 merchants’ $1.50 profit per 1,000 cigarettes681 meant that one dealer would have to sell more than two-thirds of the city’s total sales in order to break even on the tax, leaving no profitable market share for a second firm. Unsurprisingly, by the day before the law went into effect no retailer had yet paid the $100 license and it was deemed likely that only one would.682 One paper in Hamilton (located near the Indiana and Kentucky borders) concluded that “when our friends wish to enjoy a puff of one of their ‘youth exterminators,’ they must betake themselves to the Hoosier state, or the state of the Blue Grass”683 and that consequently cigarette smoking there seemed “doomed.”684 Once the law was in force, only one dealer in Lorain (pop. 4,863 in 1890) took out a license,685 while in Holcomb’s hometown of Portsmouth (pop. 12,394 in 1890), where until then “[n]early every drug store, cigar store, saloon, restaurant, etc.” had kept cigarettes for sale, only one dealer would sell them, since “nearly 100,000” had to be sold to meet the tax.686 In Noble County (pop. 20,753 in 1890) no dealer took out a license.687 Even in Cincinnati, a city of almost 300,000, only a few dealers were expected to sell cigarettes,688 although, according to a press blurb, ATC “propose[d] to establish agents in all the cities of Ohio, for whom they will pay the license tax.”689 More generally, however, the

680“The Cigarette Fiend,” Hamilton Daily Democrat, May 30, 1893 (1:7). Early on ATC abandoned this tactic, planning instead to give retailers the jobbers’ profits by
press expected that the tax would cause dealers to raise the price, thus making them financially less accessible to “many little urchins, who spend all their odd pennies for the pernicious compound...” Since “the boy with only a few cents in his possession cannot get” cigarettes, the effect would be to keep them “away from the very place [they] should not be....”

Consistently with its litigational modus operandi elsewhere, the Tobacco Trust had secured a wholesaler and retailer in Cincinnati to seek to enjoin collection of the tax even before the law went into effect. At the beginning of August “centrally located cigar stores and hotel stands” filed a test case in superior court. In another test case, filed on September 23, 1893, in the Hamilton County (Cincinnati) court of common pleas, Edward Metz, a 63-year-old German-born cigar manufacturer who also engaged in the wholesale and retail business of trafficking in cigarettes as an incident of his cigar and tobacco business. So small a part of his overall business was his cigarette selling that he complained that the tax would destroy and prohibit it. ATC/Metz argued that the tax was unconstitutional and void because the law failed to apply the tax to trafficking in candies, sweetmeats, cigars, or tobacco, thus denying Metz the equal protection of the law. The Tobacco Trust and its strawman also alleged that the law’s failure to discriminate between intrastate and interstate commerce violated the federal constitutional commerce clause. The court sustained the defendant-county auditor’s demurrer, which judgment the circuit court affirmed.

serving to them directly at a price 13 cents/1000 lower than previously in lots of at least 15,000 cigarettes; supposedly a number of dealers in Cleveland signed such contracts. “The Cigarette Law,” Lima Times Democrat, July 31, 1893 (4:6).


“The Cigarette Law,” Lima Times Democrat, July 31, 1893 (4:6). These strawmen may or may not have included the petitioner whose case was ultimately decided by the Ohio Supreme Court. Metz v Hagerty, 51 Ohio St. 521 (1894). The decision does not mention them, but according to the press the case also included Frankel v Davey and Goeltz v Davey, which arose in Mahoning County. “Cigarette Tax Law,” Lima Times-Democrat, June 23, 1894 (1:3). The latter two cases were filed in the Ohio Supreme Court on Oct. 31, 1893. “Brief Mention,” Salem Daily News, Nov. 1, 1893 (3:1).


1880 Census of Population (HeritageQuest).

Metz v Hagerty, 51 Ohio St. 521 (1894).
1893: Annus Mirabilis

Dueling bills in the Senate and House in 1894 sought to make the Holcomb law more prohibitory by increasing the retail tax and to defang it altogether by lowering the tax to the nominal level. Republican Friend Whittlesey, a farmer, introduced S.B. No. 313, which proposed increasing the retail license tax to $250. With the Sanitary Laws and Regulations Committee’s do-pass recommendation the full Senate debated it. After a Republican senator had “mildly opposed” the bill on the grounds that litigation was pending testing the constitutionality of the Holcomb law, Whittlesey briefly spoke in support of S.B. No. 313, emphasizing that it “was not a revenue measure, but to protect the youth from the body and mind destroying cigarette” and pleading with his colleagues to “check the use of those contemptible imitations of cigars.” The chamber then passed the bill unanimously (20 to 0). The Hamilton Daily Democrat called the Senate’s decisive action “the first step toward practically prohibiting the sale of cigarettes” in Ohio. Since even under the Holcomb law only two cigarette dealers remained in Hamilton, it was “probable that under the new law these dealers will abandon the traffic as there is but little profit in it now.”

In the meantime, Cleveland Republican J. Dwight Palmer had introduced a bill (H.B. No. 828) in the House amending the cigarette license law by drastically reducing the tax to $25 for wholesalers and $10 for retailers. If Palmer’s bill were enacted, cigarettes, as the press pointed out, would “again be sold at every corner grocery and side-street drug store,” thus negating the Holcomb law’s intent

696Journal of the Senate of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, at 560 (Apr. 4) (1894).
697Journal of the Senate of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, at 677 (Apr. 18) (1894).
698“Several Bills Passed,” Newark Daily Advocate, Apr. 21, 1894 (2:2).
699Journal of the Senate of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, at 698 (Apr. 21) (1894).
700“The Cigarette Must Go,” Hamilton Daily Democrat, Apr. 21, 1894 (5:5). The paper saw only one way for retailers to “secure the sale of these youth eradicators”—namely, “to have the cigarette trust pay the tax.”
701Journal of the House of Representatives of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, Vol. XCI at 761 (Apr. 13) (1894) (H.B. No. 828); “Only Routine Work,” Hamilton Daily Democrat, Apr. 14, 1894 (1:4). In the 1890-91 legislature Palmer was listed as retired, while at the 1900 Census he was returned as a justice of the peace. Henry Howe, Historical Collections of Ohio: In Two Volumes, 2:iv (Addenda) (1896).
“to prevent the use of cigarettes...”\textsuperscript{702} (In the event, by 1896, in the wake of the enactment of license taxes very much like Palmer’s, a Republican state senator from Cleveland stated that cigarette smoking by pupils, including the very young, in Ohio’s largest cities had been promoted by “the small stores generally found in the vicinity of schools...”\textsuperscript{703} Although Palmer’s bill made no progress in its own right, its objective was achieved when, on April 26, the House Tax Committee, to which it had been referred,\textsuperscript{704} considering both S.B. No. 313 and H.B. No. 828, decided to recommend for passage a substitute for the former embodying a tax (on the amount of which it was not yet agreed) that “shall not be prohibitory as is provided in the Whittlesey bill” and a ban on selling cigarettes to anyone under 18.\textsuperscript{705} Following “a good deal of heated discussion,”\textsuperscript{706} the full House on May 4 agreed to the committee substitute that reduced the license tax to $30 for wholesalers and $15 for retailers and banned sales to those under 16.\textsuperscript{707} The tax reduction was allegedly designed to “make it productive of revenue....”\textsuperscript{708} An explanation as to why or how the Holcomb law had been unenforceable was not forthcoming, but, whatever the proposed changes were designed to accomplish, they manifestly undermined the principal objective of the 1893 law and Whittlesey’s bill, which

\textsuperscript{702}“The Dude’s Pipe,” Salem Daily News, Apr. 16, 1894 (4:2).

\textsuperscript{703}“Ohio’s Law on Selling Cigarettes to Minors,” WTJ, 22(44):1 (Feb. 10, 1896).

\textsuperscript{704}Journal of the House of Representatives of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, Vol. XCI at 811 (Apr. 19) (1894) (referral to Tax Committee as last action).

\textsuperscript{705}“The Boys Must Not Smoke,” Hamilton Daily Democrat, Apr. 27, 1894 (2:5).

\textsuperscript{706}Though the article put the age at 18, it was probably 16 as stated below.

\textsuperscript{707}“Coffin Nail Tax,” Newark Daily Advocate, May 5, 1894 (2:1).

\textsuperscript{708}Journal of the House of Representatives of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, Vol. XCI at 972-75 (May 4) (1894).

\textsuperscript{708}“Coffin Nail Tax,” Newark Daily Advocate, May 5, 1894 (2:1). This article erroneously stated that the bill increased the penalty for violations to $500. In fact, the Holcomb law provided for the same penalties; the bill did, however, did quadruple the assessments for firms that began selling cigarettes without making the required return after the assessor had made his returns for any year. 1894 Ohio General Acts 91:311, § 4 at 312.
was not to raise revenue—in fact, if they had generated absolutely no revenue at all because the high license tax deterred all merchants from selling cigarettes, their authors and supporters would have deemed them a great success—but to reduce or eliminate consumption.

On May 17, when the bill finally reached its third reading, the full House, after disagreeing to a motion to increase the license tax to $300 and $150, respectively, also rejected the lower amounts of $100 and $50, by a vote of 29 to 52; even to a motion to increase the amounts to a modest $50 and $25, respectively, the House disagreed. By the large majority of 69 to 21 the chamber then passed S.B. 313. The same day the Senate unanimously (27 to 0) concurred in the House amendment, Whittlesey himself joining in the subversion of his own bill. Why Whittlesey concurred is unclear, especially since the quid pro quo strengthening the state’s no-sales-to-minors law was minimal. (In 1896 Whittlesey introduced yet another prohibitory license tax bill, which would have raised the wholesaler and retailer amounts to $500 and $300, respectively, but it too failed to be enacted.)

About a month after the legislature had repealed the Holcomb cigarette license law, replacing it with the almost nominal taxes, a majority of the Ohio Supreme Court opined in the Metz case that the act was constitutional, but, since it had been repealed, “it is not now important to give the reasons of the majority


710 *Journal of the Senate of the State of Ohio, for the Regular Session of the Seventy-first General Assembly Commencing on Monday, January 1, 1894, at 1144-45 (May 17) (1894).

711 The bill strengthened the 1888 law by increasing the age from 15 to 16 and the fine range from $5/$25 to $10/$50. 1894 Ohio General Acts 91:311, § 8 at 313. It also prohibited selling cigarettes with photographs. Id. § 7.

1893: Annus Mirabilis

for so holding.”713 At the same time, however, the Court reversed the judgment below on the grounds that the law did not authorize assessment for 1893.714

Texas

The year 1893 also marked the origin of efforts to enact a prohibitory high license for cigarette sales in Texas, though they did not approach fruition until 1897, when the tax had to be scaled back so drastically to secure passage that the result no longer served advocates’ ambitious purpose. The impetus came from Governor James Hogg, a Democrat, who had first been elected in 1890 with support from the Farmers’ Alliance and the Knights of Labor on the strength of his anti-railroad and anti-corporate reputation as attorney general and despite the opposition of the Democratic right-wing, and was re-elected in 1892 with black leaders’ backing based on his denunciation of lynching.715 In his message to the Texas legislature at the outset of its 1893 session Hogg suggested placing a “tax upon all persons engaged in the manufacture or sale of all classes of cigarettes

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714 “As the time for making the returns by the assessors and the assessments by the auditors, and the June payment to the treasurer, was long past before the law took effect, it cannot be inferred, without a clear provision to that effect, that the legislature intended that an act so penal in its nature, should have the effect to impose an assessment for seven months of the year, before the law was in force.” Metz v Hagerty, 51 Ohio St. 521, 527 (1894).

715 John Hicks, The Populist Revolt: A History of the Farmers’ Alliance and the People’s Party 177, 249 (1961 [1931]); C. Vann Woodward, The Origins of the New South, 1877-1913, at 204, 237-38, 261-62 (1971 [1951]); Lawrence Goodwyn, The Populist Moment: A Short History of the Agrarian Revolt in America; 147, 152-53, 159, 192 (1978 [1976]); Edward Ayers, The Promise of the New South: Life After Reconstruction 230, 243, 274, 276, 284 (1993 [1992]). To be sure, Hogg’s anti-corporatism was shallow as displayed in a gubernatorial campaign speech in Dallas on Oct. 1, 1892: “Capitalists may be said to be divided into two classes: First, those with money willing to permanently invest it where they can get a reasonable return for its use. Second, those with no money who expect to grow suddenly rich from concocted inflations and booms, at the expense of others. ... One is for fair dealing, the other is for fraud; one for honesty, the other for rascality.” Speeches and State Papers of James Stephen Hogg Ex-Governor of Texas, with a Sketch of His Life 196 (C. Raines ed. 1905).
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and the material used therefor.\textsuperscript{716} Less than two weeks later, House Democrat James Green Davis, a Confederate war veteran, farmer and a leading Baptist layman,\textsuperscript{717} introduced a bill to impose a $100 tax on anyone wishing to engage in the manufacture or sale of cigarettes and to set a $200 penalty for violations, but a majority of the Revenue and Taxation Committee recommended a substitute, and the bill died on the calendar.\textsuperscript{718}

At the next session in 1895, Democrats, as they had since the early 1870s, crushingly controlled both the Senate (29 Democrats and 2 Populists) and the House (103 Democrats, 22 Populists, and 3 Republicans).\textsuperscript{719} To be sure, the likelihood of passage of a prohibitory, as opposed to a revenue-generating, cigarette sales license tax appeared not to depend on party composition since these parties all opposed “sumptuary” legislation.\textsuperscript{720} Democrat James Lafayette Greer—who a few days earlier had introduced a bill to require railroads to “provide separate rooms for the white and negro races” in passenger depots\textsuperscript{721}—introduced House Bill No. 162 to “regulate and fix the tax on the

\textsuperscript{716}Message of Gov. J. S. Hogg to the Twenty-Third Legislature of Texas 22 (Jan. 12, 1893) (1893).

\textsuperscript{717}Texas Legislative Manual for 1893, at 36 (1893); 1900 Census of Population (HeritageQuest); Frank Johnson, A History of Texas and Texans 5:2225-26 (1914). After his one term in the House, which he left because “it involved heavy expenses and neglect of business” (\textit{id.}), Davis accumulated sufficient capital to become a stockholder in several banks and an insurance company and to build and own a cotton gin and warehouse. Whether his ownership of a plantation in the county from which he was elected antedated his legislative term is unclear.

\textsuperscript{718}Journal of the House of Representatives of Texas, Being the Regular Session Twenty-Third Legislature 129, 272, 1287 (Jan. 24 and Feb. 7) (1895).

\textsuperscript{719}Michael Dubin, Part Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 181 (2007); “News from Austin,” GDN, Dec. 23, 1894 (2:4-5) (list of all legislators with party affiliation).

\textsuperscript{720}The 1892 Texas Republican platform declared: “We are opposed to all sumptuary laws, and believe in the largest individual liberty consistent with good government.” \textit{Platforms of Political Parties in Texas} 328 (Ernest Winkler ed. 1916). The Clark-Democrats “oppose all sumptuary laws which vex the citizen and interfere with his individual liberty.” \textit{Id.} at 323. The Populist Party Platform was silent on the issue, but the minority report (which was tabled), denounced the liquor traffic and demanded repeal of the state liquor license law. \textit{Id.} at 316. In 1896 the platform of the Gold Democrats declared: “We oppose all sumptuary legislation, no matter under what guise, and demand that the citizen be left free to pursue his own happiness without unnecessary interference by governments.” \textit{Id.} at 368.

\textsuperscript{721}Journal of the House of Representatives of Texas, Being the Regular Session
manufacture and sale of cigarettes” by imposing a $100 tax. Following ten years of school teaching Greer (1836-1922) engaged in merchandising and farming, by the end of the 1880s owning “one of the largest and most valuable black land farms in Collin county,” by means of which he “accumulated a competency for old age, and by renting his farm he lives is ease.” After the Revenue and Taxation Committee had recommended that the bill pass, Greer himself on second reading made a mockery of his own bill by offering an amendment to reduce the tax from $100 to $2.50, which the House adopted. Amendatory dilution proceeded apace on third reading, when the chamber slashed the penalty from $100-$500 to $10-$25. However, after the Senate had amended the maximum penalty to $100, the House took no further action on the bill, which thus died.

For his efforts Greer’s bill received top mention among measures on which the House had “squandered its time”—runners-up included bills dealing with sodomy and prohibiting minors from betting on horse races and playing pool—from the non-party-affiliated Galveston Daily News, which mockingly conceded that despite the time “wasted” on the bill, “if Colonel Greer can succeed in legislating the tobacco taste out of the mouths of the blue-eyed and fair-haired baby boys of the country and steer them clear of that great public enemy, the cigarette, he will have accomplished one of those modern wonders which will entitle his portrait to hang away up near the top of the gallery of fame. There is
nothing like reforming the appetites of rosy-cheeked youth and posterity may yet have occasion to look with admiration upon the memory of the gentleman from Collin as the deadly foe of dyspepsia and a public benefactor.”

Several weeks later death in the House also overtook a Senate bill to prohibit selling or giving tobacco to anyone under 16. Unlike the license bill, which the WCTU throughout the country opposed, the WCTU, in Texas as elsewhere, did support the no-sales-to-minors measure, which was finally enacted in 1899 with WCTU backing. Typical of the opposition to the Senate bill in 1895 was this sarcastic blast in the Galveston Daily News, which avoided libertarian grounds in staking out a realist-defeatist position that has resonated into the twenty-first century:

This bill is doubtless aimed at the young American who smokes cigarettes, but just how the most potent, grave and reverend house of lords expects to enforce such a law after they get it on the statute books surpasseth all understanding. Where a thirsty toper can not get a drink in a prohibition hamlet the irrepressible small boy can corral the seductive cigarette with the greatest ease, and that is saying a great deal. There is not one boy in a hundred who would “give away” the man who provides him with such luxuries, and that being the case, the question arises, how can such a statute be enforced? Besides, these young Arabs will have cigarettes and tobacco even if they have to forge the names of their parents or guardians, and the latter, of course, would not prosecute them. The bill, should

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729 “Times Wasters,” GDN, Apr. 17, 1895 (4:3-4).

730 S.B. No. 72, introduced by Gage, survived amendments to lower the age to 14 and 12 before passing by a vote of 13 to 12. Journal of the Senate of Texas: Regular Session Twenty-Fourth Legislature 55, 95, 249-50 (Jan. 21, 30, Mar. 7) (1895). After the House Public Health and Vital Statistics Committee had recommended that it not pass, Greer moved to suspend the rules and take it up, but the chamber’s last action was to order the bill printed. Journal of the House of Representatives of Texas, Being the Regular Session Twenty-Fourth Legislature 474, 556, 604 (Mar. 13, 25, 29) (1895).

731 “Legislative Petitions,” GDN, Jan. 24, 1895 (4:7); “The Legislature,” GDN, Jan. 25, 1895 (4:3-6 at 5). These petitions were not expressly designated as having been circulated or submitted by the WCTU—in the second article it was attributed to “ladies of Hill county”—but their inclusion with requests for such typical WCTU objectives as raising the age of consent for females and providing an industrial home for young girls clearly identified them.

732 1899 Texas General Laws ch. 139 at 237.

733 For example, 25 members of the WCTU of Denison submitted a petition to the House “defining the evil effects of the cigarette habit on the youth of our State” and urging passage of the Senate bill. Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Sixth Legislature 553 (Feb. 27) (1899).
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it become law, would be practically a dead letter.\textsuperscript{734}

The session of 1897 proved to be more propitious for passage of a high license for cigarette sales. The Populist candidate may have captured 44 percent of the votes in the gubernatorial election in 1896,\textsuperscript{735} but the party’s representation in the state legislature declined below its (low) 1894 peak, giving Democrats continued unfettered control of both chambers.\textsuperscript{736} A flurry of anti-tobacco activity got underway in the House—whose Rule 20 had for many years provided that “There shall be no smoking, eating, nor [sic] cracking nuts allowed in the House during its sitting”\textsuperscript{737}—when Democrat S. P. Evans, a newspaper owner and editor who for 10 years had taught school,\textsuperscript{738} introduced a very weak bill prohibiting selling or giving cigarettes to anyone under 12.\textsuperscript{739} After the Judiciary Committee adversely reported it,\textsuperscript{740} he tried one that raised the age to 15, but following an adverse majority report from the State Affairs Committee, it died,\textsuperscript{741} and not even a WCTU petition (which also embraced such legislative demands as requiring a wife’s consent to the sale of community property and “protecting boys under 17 years of age from the wiles of vile women”)\textsuperscript{742} was able to resuscitate it. Then towards the end of the session, the Democratic chair of the House Appropriations Committee, Thomas S. Garrison, a merchant who was not only a member of the Methodist Episcopal Church, South, but had been a delegate

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\begin{itemize}
\item \textsuperscript{734} “Gage’s Cigarette Bill,” GDN, Feb. 7, 1895 (4:4-5).
\item \textsuperscript{735} Calculated according to \url{http://www.texasalmanac.com/politics/gubernatorial.pdf} (visited May 4, 2010).
\item \textsuperscript{736} In the Senate 28 Democrats faced two Populists and one Republican, while Democrats occupied 118 House seats, Populists seven and Republicans three. \textit{Texas Legislative Manual for 1897}, at 56-58-61 (1897).
\item \textsuperscript{737} \textit{Texas Legislative Manual for 1897}, at 21 (1897); \textit{A Legislative Manual for the State of Texas: 1879-80}, at 177 (1879). As late as 1921, House Rule X.8 provided that “during the session of the House no member shall wear his hat or smoke upon the floor of the House.” \textit{Legislative Manual: Thirty-Seventh Legislature} 120 (1921).
\item \textsuperscript{738} E. H. Loughery, \textit{Texas State Government: A Volume of Biographical Sketches and Passing Comment} 119-20 (1897).
\item \textsuperscript{739} \textit{Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature} 33 (Jan. 15) (1897) (H.B. No. 55).
\item \textsuperscript{740} \textit{Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature} 913 (Jan. 21) (1897).
\item \textsuperscript{741} \textit{Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature} 100, 217, 1427 (Jan. 25, Feb. 3) (1897) (H.B. No. 222).
\item \textsuperscript{742} \textit{Journal of the Senate of Texas: Regular Session Twenty-Fifth Legislature} 140 (Feb. 12) (1897) (petition from WCTU of Denison).
\end{itemize}

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to its last three quadrennial general conferences, introduced a bill imposing a very modest $10 annual tax on selling cigarettes. But despite receiving a do-pass recommendation from the Revenue and Taxation Committee, of which he was a member, the bill “died on Speaker’s table.” In the session’s very last days impetus for imposition of such a tax came from the Senate—pursuant to whose longstanding Rule 21 “No smoking shall be allowed in the Senate chamber during the session of the Senate”—which amended a House bill, amending the state law on occupational taxes, to require all dealers in cigarettes to pay a $10 annual tax, in addition to the occupation tax on merchants, and to obtain an annual license from the county clerk. Its author, Democratic Senator George Greer, a corporate oil lawyer from Beaumont, was also a member of the Methodist Episcopal Church, South. House concurrence would finally have established a statewide cigarette license, if the governor had not vetoed it after sine die adjournment.

Ironically, Governor Charles Culberson made immediate further efforts possible by calling a special session, which began the very next day after the regular session adjourned, primarily in order to pass an appropriations bill for state government and to amend the fellow-servant law. But in a message to legislators several weeks into the special session Culberson placed a general occupation tax law at the head of the list of subjects to which he directed their


744 Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature 1132 (May 3) (1897) (H.B. No. 709); “The 25th Legislature,” GDN, May 4, 1897 (6:2-3 at 3).

745 Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature 1165 (May 6), 1445 (quote) (1897).

746 Texas Legislative Manual for 1897, at 7 (1897); A Legislative Manual for the State of Texas: 1879-80, at 163 (1879).

747 Journal of the Senate of Texas: Regular Session Twenty-Fifth Legislature 843, 865 (May 18 and 19) (1897) (Substitute H.B. No. 207).

748 Frank Johnson, A History of Texas and Texans 3:1593 (1914).


750 Journal of the House of Representatives of Texas, Being the Regular Session of the Twenty-Fifth Legislature 1359-60 (May 20), 1426 (1897).

751 “Proclamation by the Governor of Texas,” in General Laws of the State of Texas Passed at the First Called Session of the Twenty-Fifth Legislature i (May 21) (1897); “Legislature Adjourns,” GDN, May 22, 1897 (4:1).
The following day, in the course of the second reading of House Bill No. 24, which amended the existing general occupation tax law, William Fields, a Democrat and former newspaper reporter/editor/publisher, offered an amendment to increase the bill’s tax on cigarette sellers from $10 to $30. Fields’ motivation was not to raise revenue: “He said cigarettes were a damnable nuisance and should be taxed out of existence.” Giving some economic substance to Fields’ prohibitory objective, Fort Worth lawyer Benjamin P. Ayres, a Democratic Party leader, immediately moved to substitute an increase to $1,000, provoking members to become “exceedingly unruly” in “the most tumultuous” session yet held. While several representatives occupied the floor simultaneously, Jacob Wolters, yet another Democratic lawyer—but also the grandchild of “refugees from Germany where they had identified themselves with the patriots opposed to monarchy,” his maternal grandfather having been a “revolutionist against the German government” in 1848 who “after the failure of the revolution escaped to Texas”—“succeeded in making himself heard”; he opposed both amendments on the grounds that prohibitory taxes “encroached upon the personal liberties of the people. It was not democracy. It was a case of drifting from the democratic moorings. If [Fields] wanted to stop his son from smoking cigarettes it was his

752 “Message from the Governor,” in General Laws of the State of Texas Passed at the First Called Session of the Twenty-Fifth Legislature ii (June 14) (1897).
754 Journal of the House of Representatives Being the First Special Session of the Twenty-Fifth Legislature 163 (June 15) (1897).
755 “The Legislative Record,” GDN, June 16, 1897 (4:5-7 at 6).
756 “An Endorsement of Cleveland,” NYT, Nov. 11, 1890 (1:3); History of Texas Together with a Biographical History of Tarrant and Parker Counties 271-72 (1895); “The Result in Maine,” GDN, Sept. 17, 1896 (8:1-2) (characterizing Ayers as a Free Silver Democrat); E. H. Loughery, Texas State Government: A Volume of Biographical Sketches and Passing Comment 123-24 (1897). In various official and unofficial documents the name was spelled both “Ayers” and “Ayres,” but according to the senior reference librarian at the Texas Legislative Research Library the correct spelling was “Ayres.” Email from Nancy Watson to Marc Linder (May 10, 2010).
757 Journal of the House of Representatives Being the First Special Session of the Twenty-Fifth Legislature 163 (June 15) (1897).
758 “The Legislative Record,” GDN, June 16, 1897 (4:5-7 at 5).
760 F. Lotto, Fayette County: Her History and Her People 231 (1902).
duty to do so and not call on the legislature to do it for him. He was opposed to legislating on the morals and appetites of free born American citizens.” Moreover, he argued that an “exorbitant or double tax on any legalized business would be unconstitutional...”761 Nor, as one of colleagues later observed, was his libertarianism confined to cigarettes:

He was always alert and ready to combat the efforts of certain members to enact sumptuary legislation. Under his leadership a bill prohibiting baseball playing on Sunday was defeated. A bill was reported which in effect would have taxed social clubs out of existence. A majority of the members seemed to favor the passage of the bill. Fayette county is full of social clubs and the proposed measure would have closed them all up. The young man from Fayette County [sic] took the lead in opposition to the measure.762

(Unsurprisingly, in 1908 Wolters, by then one of the state’s leading “corporate attorneys,” became chairman of the Anti-Prohibition Organization. 763 Later still he was Texaco’s chief lobbyist and general counsel.)764

Echoing Wolters’ claims, other members, protesting against violations of individual personal privileges, “contended that such legislation was puerile and ridiculous, but that did not quell the confusion. Members howled at the chair, stood up in the aisles...and bedlam reigned during almost the entire session,” causing the chair to call on the sergeant at arms to seat legislators. Then “[d]uring a lull in the ‘cigarette storm’ it was discovered that several members had disappeared and that no quorum was present. It was also discovered that had four more members voted there would have been a quorum and the thousand

761“The Legislative Record,” GDN, June 16, 1897 (4:5-7 at 6).
762F. Lotto, Fayette County: Her History and Her People 233 (1902).
764Robert Bryce, Cronies: Oil, the Bushes, and the Rise of Texas, America’s Superstate 32 (2004). Wolters (1871-1935), a brigadier general and commander of the Texas National Guard, in 1931 nevertheless commanded more than a thousand troops in their occupation of oil fields of East Texas in support of the Texas Railroad Commission’s plan to institute production controls favored by the large oil companies. But see “Supreme Court Bars Oil Curb by Troops,” NYT, Dec. 13, 1932 (29). In imposing martial law for Texas governors he dealt with labor struggles and race riots. http://www.texasmilitaryforcesmuseum.org/hallofhonot/wolters.htm (visited May 7, 2010). He also became an expert on martial law: Martial Law and Its Administration (Jacob Wolters comp. 1930).
dollar amendment adopted.”

Byron Drew, another Democratic newspaper owner-editor and the occupation tax bill’s sponsor, who opposed both amendments, insisting that Ayres’ in particular was “offered for buncombe and ridicule,” declared that “if such a ridiculous thing as the thousand dollar amendment is engrafted in his bill he will help kill the measure.” However, his motion to table the substitute was defeated by a vote of 32 to 54; lack of a quorum then prompted an adjournment to the following day, when the substitute was adopted in lieu of the amendment by a vote of 54 to 44 and the amendment as substituted by a vote of 63 to 40. During floor debate supporters of Ayres’ amendment openly stated that the $1,000 tax was designed to be prohibitory and not to raise revenue, while others predicted that it would force the governor to veto the whole occupation tax bill.

Some of the passion that erupted on the House floor was captured a few days later by an interview that a (cigarette-smoking) commercial traveler who happened to have been in the House during the debate (which was “the most interesting and spirited” he had ever heard) gave the New Orleans Picayune: “I believe it would make the two-bit dude tremble in his shoes to have heard the thundering solons on the matter of the cigarette and the method that should be adopted incontinently to squelch the coffin spike. Oh, they hit it some heavy jolts.” Advocates of the $1,000 license had urged a prohibitive tax not only because many youths’ health and mind were ruined by cigarette smoking, but because “it was injurious to every user, and did good in no possible respect to any one. It should be stopped and since it could not be done directly, it should be done indirectly, and the prohibitive tax was the thing.” In contrast, opponents “darkly hinted that this was a measure inspired by some vast corporation for the purpose of monopolizing the business of cigarettes in the state of Texas.”

The day after House passage of the $1,000 tax met with approval by all the Galveston wholesalers whom that city’s Daily News interviewed. Echoing opinions voiced by their counterparts and tobacco retailers in states that passed

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765“The Legislative Record,” *GDN*, June 16, 1897 (4:5-7 at 5-6).
767“The Legislative Record,” *GDN*, June 16, 1897 (4:5-7 at 6).
768“The Legislative Record,” *GDN*, June 16, 1897 (4:5-7 at 5).
769*Journal of the House of Representatives Being the First Special Session of the Twenty-Fifth Legislature* 163-66 (June 15-16) (1897).
770“The Special Session,” *GDN*, June 17, 1897 (4:5).
771“Gossip Gathered in Hotel Lobbies,” *DP*, June 26, 1897 (10:3-4); also reprinted as “He Happened in Austin,” *GDN*, June 28, 1897 (2:2).
outright cigarette sales bans, they “argue it from the moral position and that of health. They say they would willingly give up the business if they were forced to it, and they believe that that is what the law would amount to generally, though they do anticipate that a few merchants would keep cigarettes and pay the tax.” Those few would probably raise the consumer price, thus placing cigarettes “out of the easy reach of the youth” but also contributing to the reversal of the trend during the previous few years when cigarette sales “great superseded” those of cigars. Other wholesalers preferred to ignore this convenient profitable outcome, alleging, instead, that the tax “would cut the cigarette business in two, at least, but the moral effect would recompense [sic] for it.” Embroidering on this theme of gratitude for finally being liberated from the terrible dilemma of profiting from evil, another wholesaler could “only wish they would make it $2500 instead of $1000. Every day little hoodlums pass my place and say, “Mister, give me a light, please.” They each have a cigarette. I mean little fellows, 8, 9 or 10 years of age. The cigarette habit is as bad as the morphine habit. When one has smoked cigarettes a few years they can’t quit. ... There is something in these manufactured cigarettes that is rank poison. ... These little cigarette smokers turn out to be thieves and vagabonds and are of no good to a community.”

Two days after the House action the Senate defeated a motion by Democrat Robert Stafford, a lawyer, to slash the tax back down to $10, but Senator Greer, who had advocated that amount in the regular session, successfully moved to reconsider the vote (17 to 9), and the chamber then adopted the radically reduced tax. The next day the House concurred in all of the Senate’s amendments by a vote of 55 to 44, Ayres casting one of those Nays in objection to the slashing

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772See e.g., above ch. 4.
773“In Favor of Cigarette Tax,” GDN, June 18, 1897 (4:7).
774E. H. Loughery, Texas State Government: A Volume of Biographical Sketches and Passing Comment 56-57 (1897). Stafford was a member of the Methodist Episcopal Church, South.
776Journal of the House of Representatives Being the First Special Session of the Twenty-Fifth Legislature 226-27 (June 19) (1897). Not all the Nays represented protests against the cigarette tax reduction: only 22 of the 44 had voted for the $1,000 substitute. Even among this half not all may have voted Nay to protest the tax cut; for example, Democrat and farmer James Crawford, in pursuit of a different moral agenda, stated that he voted against the Senate amendments because, by reducing from $1000 to $100 the tax on tenpin alleys, they would invite opening such establishments in every town in Texas, “which in my judgment will more to demoralize and wreck the youth of our country than
of his tax and that on tenpin alleys from $1,000 to $100.\footnote{1897 Texas General Laws ch. 18, sub. 62, at 49, 51. The $10 occupation tax remained in effect for decades. For erroneous press reporting that the “chappies in Texas will probably roll their own cigarettes after the new law taxing the venders of the ready-made article $1000 goes into effect,” see “Texas Newspaper Comment,” \textit{GDN}, July 1, 1897 (4:4) (quoting \textit{Victoria Advocate}).} Thus in the end, the anti-cigarette forces in Texas failed, as in other states, to impose a prohibitory tax.\footnote{“The End of the Session,” \textit{GDN}, June 20, 1897 (3:1).}
The Only Major Tobacco-Growing and -Manufacturing State to Prohibit Cigarette Sales: Tennessee 1897

A Tennessee woman has killed her 15-year old son with a hatchet because he persisted in smoking cigarettes. An effective method of putting a stop to the pernicious habit.¹

In 1897, one year after Iowa, Tennessee enacted a general prohibition making it a misdemeanor (punishable by a fine of not less than $50) to sell or—which the Iowa statute had not done—to bring into the state for the purpose of selling or giving away any cigarettes.² This state intervention was especially remarkable in light of the fact that Tennessee at the time was the fourth largest producer of tobacco in the United States, growing on 53,351 acres 35,211,660 pounds valued at $2,464,816, and accounting for about one-tenth of the annual national crop.³ Tobacco was grown in all of the state’s counties, in 23 of which it was the leading crop; by 1895, it was the state’s fourth biggest crop by value, almost exactly equal to that of wheat.⁴ To be sure, by and large Tennessee did not produce the type of tobacco used in cigarettes at that time, which was largely grown in neighboring North Carolina and Virginia. (The state was the producer of the greater part of the dark-leaf tobacco supply for snuff, of which it was also a leading manufacturing location.)⁵ However, six counties in the extreme northeastern part of the state bordering on those states did, according to a tendentious, exaggerated, and self-serving statement allegedly presented by tobacco growers, at the time

¹Nashua Reporter (IA), Nov. 8, 1900 (4:3) (untitled).
⁴“Will Seek a Repeal,” CA, Apr. 5, 1897 (5:5).
produce “a very valuable light tobacco that is in great demand for cigarette use.”

But even these counties accounted for only a minuscule proportion of total state output. If it had been the case that the state produced considerable amounts of tobacco for cigarette manufacture, passage of the law without a single no vote in the House would have been even more startling. Even so, the representatives from those northeastern counties did all vote for the law (rather than merely failing to vote). In any event, Tennessee did not manufacture cigarettes—the production of which was dominated by New York, North Carolina, and Virginia—so that any tobacco destined for cigarette manufacture could still have been shipped out of state. Moreover, unlike Iowa’s law, Tennessee’s did not even prohibit the manufacture of cigarettes.

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6“Will Seek a Repeal,” CA, Apr. 5, 1897 (5:5).

7Five of the six counties accounted for only 0.6 percent of total acreage and 0.3 percent of total production in pounds; including the largest producer, Greene county, increased these proportions to only 2.2 percent and 1.4 percent. U.S. Census Office, Census Reports, VI: Twelfth Census of the United States Taken in the Year 1900: Agriculture, Part II: Crops and Irrigation, tab. 10 at 572-73 (1902). For a map of the tobacco-growing areas showing the very low production of tobacco per square mile in these counties, see Twelfth Census of the United States, Taken in the Year 1900: Statistical Atlas, plate no. 167 (1903).


9A brief discussion of the statute and the Tennessee Supreme Court case upholding it in a history of the court remarked on how “unlikely” it was that “Tennessee, a major tobacco growing state, would ban the sale of cigarettes,” but then tried to explain the measure by reference, inter alia, to the (irrelevant) competition of the cigar industry based on a source that also had not studied the situation in Tennessee. James Ely, Jr., “The Tennessee Supreme Court, 1886-1910,” in A History of the Tennessee Supreme Court 152-87 at 172-73 (James Ely, Jr. ed. 2002).
Tennessee 1897

Scientific Temperance Instruction

In 1891 Tennessee, following similar statutes elsewhere, enacted a moderate ban on the sale, giving, or furnishing to minors of cigarettes or cigarette paper, violations being subject to fines ranging between 10 and 50 dollars.11 The very next year a correspondent of the social-reformist *Christian Union* during a trip in Tennessee learned from the seventeen- or eighteen-year-old driver of his buggy that “nothing was easier” than to evade the law by getting an older friend to buy him cigarettes or to buy tobacco himself and make them. Interestingly, since “some dealers were particular enough to ask to see his pipe” when he requested cut tobacco, he sometimes brought a pipe to show.12

Astonishingly forward-looking, in contrast, was the so-called Scientific Temperance Instruction law13 that the legislature passed in 1895 after having been under siege for eight years by the Tennessee WCTU14 “as only W.C.T.U. women know how to fight”.15

[1] In addition to the branches in which instruction is now given in the public schools of this State, Physiology and Hygiene, with special reference to the nature of alcoholic drinks and narcotics and smoking cigarettes, and their effects upon the human system, shall also be taught as thoroughly as other required branches.16

The statute, which made this branch a mandatory course of study for all pupils in all schools supported entirely or partly by public money, also provided that “no certificate shall be granted any person to teach in the public schools” after January 1, 1896, who had “not passed a satisfactory examination” in this specific subject matter.17 (The requirement that elementary school curriculum include

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11 1891 Tenn. Pub. Acts ch. 107, §§ 1-2, at 242-43. The law required judges to give such cases in charge to grand juries. *Id.* § 3 at 243. Later that year at an extra session the law was amended to give grand juries “inquisitorial powers over all offenses committed under this act.” 1891 Extraordinary Sess. Tenn. Pub. Acts ch. 18, § 1, at 37.
13 On the national movement to enact such legislation, see above ch. 2.
17 1895 Tenn. Pub. Acts ch. 180, §§ 2-3 at 378 (May 14). The Tennessee statute nevertheless lacked several features that other state laws embodied such as a penalty for
Violation and mandatory testing of pupils as a prerequisite to promotion to the next grade. For checklists of the major provisions of all state statutes, see W. Atwater et al., *Physiological Aspects of the Liquor Problem* 1:126-27 (1903); *Report of the Commissioner of Education for the Year 1903*, 2:2418-19 (1905).


William Parker Caldwell (1832-1903), an anti-secession Democrat, had served in the U.S. House of Representatives from 1875 to 1879. It is unclear what motivated Caldwell to advocate teaching children about “the evil effects of cigarette smoking,” but perhaps his Methodist religion (the only Christian religion to prohibit its clergy from smoking) was a factor. Robert McBride and Dan Robison, *Biographical Directory of the Tennessee General Assembly*, Vol. 1: 1796-1861, at 111 (1975); *Goodspeed History of Tennessee: Dyer, Gibson, Lake, Obion and Weakley Counties* 991 (1978 [1887]). Two obituaries in his local newspaper shed no light on his anti-cigarette stance. “Hon. W. P. Caldwell,” *Dresden Enterprise*, June 12, 1903 (1:1); Joseph Jones, “Hon. W. P. Caldwell,” *Dresden Enterprise*, June 19, 1903 (1:1-2). The account of the Senate proceedings in the *Nashville Banner* did not add anything to that in the *Senate Journal*. “The State Legislature,” *NB*, May 14, 1895 (1:1-3 at 2). By 1895 Caldwell was a senior politician and leading Bourbon figure, who was elected temporary president of the Tennessee Senate until a permanent president was chosen. *Senate Journal of the First Session of the Forty-Ninth General Assembly of the State of Tennessee* 5 (1895); J. Lewis, “The Tennessee Gubernatorial Campaign and Election of 1895,” *Tennessee Historical Quarterly* 13(4):301-328 at 306-307, 316 (Dec. 1954). Tobacco was a “standard crop...especially in Obion [and]Weakley” counties, which he represented. The tobacco grown there was “suitable for exportation, being...very strong in nicotine, the essential principle of tobacco.” “Everything Grows in Tennessee,” *NB*, May 1, 1897 (21:1-5 at 2). The western areas of Tennessee and Kentucky “grew virtually the world’s entire supply” of so-called Black Patch tobacco used for non-cigarette tobacco. Tracy Campbell, *The Politics of Despair: Power and Resistance in the Tobacco Wars* 12 (1993). Although the Tennessee WCTU took great pride in having secured passage of the law and removed the “stigma of
motion to “amend by including the evil effects of smoking cigarettes” was adopted, whereupon the bill was passed 26 to 2,\textsuperscript{22} and the House concurred in the amendment the same day.\textsuperscript{23}

During the two decades after 1882 all states and the federal government, prodded by the WCTU, enacted very similar laws using some variant of “alcoholic drinks, stimulants, and narcotics....”\textsuperscript{24} Tennessee, however, was the only state expressly to include in its original law any mention of a tobacco product and specifically cigarette smoking.\textsuperscript{25} Nevertheless, it is striking and significant that as early as 1895, before cigarettes had even become a major form of tobacco use, Tennessee chose to focus expressly and exclusively on cigarette smoking. To be sure, the fact that as late as 1915, the Tennessee legislature enacted a statute establishing the fourth Friday in October as Frances E. Willard Day—to honor the longtime president of the WCTU who had died in 1898—on which schools were required to teach students about the “evils of intemperance,”\textsuperscript{26} presumably had considerably more to do with alcohol than tobacco.

\section*{In the Legislature}

Tennessee has gone so far as to prohibit the sale of cigarettes....\textsuperscript{27}

Governor Taylor and the general assembly were in a regulatory mood, for building and

\begin{itemize}
\item being on the list of black states,” and it called the attention of the national organization especially to the cigarette smoking feature, it did not explain the origin of that unique provision. “Tennessee,” US 21(23):11 (June 6, 1895).
\item Senate Journal of the First Session of the Forty-Ninth General Assembly of the State of Tennessee 665 (1895) (May 13).
\item House Journal of the First Session of the Forty-Ninth General Assembly of the State of Tennessee 560 (1895) (May 13).
\item See below ch. 9.
\item A history of the Tennessee WCTU that praises this law and even quotes its full text was apparently unaware of its uniqueness and did not remark on the express reference to cigarettes. Mattie Beard, \textit{The W.C.T.U. in the Volunteer State} 11, 68 (1962).
\item 1915 Tenn. Pub. Acts ch. 134 at 386. Other states also enacted similar laws; Jesse Flanders, \textit{Legislative Control of the Elementary Curriculum} 79 (Teachers College, Columbia U. Contributions to Education, No. 195, 1925).
\item Ernst Freund, \textit{The Police Power: Public Policy and Constitutional Rights} § 130 at 120 (1904). It is unclear what prompted Freund to ignore Iowa and mention only Tennessee—other than the prominence that the U.S. Supreme Court had conferred on it.
\end{itemize}
loan associations were brought under state supervision, insurance companies were compelled to submit to state scrutiny, and the sale of cigarettes was made unlawful.\(^{28}\)

During the 1895 session a bill was introduced in the Senate to prohibit the sale of cigarettes in Tennessee, which progressed as far as a Sanitary Affairs Committee recommendation that it pass and then died.\(^ {29}\) A House bill that would have made selling cigarettes a privilege reached the same stage before expiring.\(^ {30}\)

In the next regular session of the legislature (which Democrats controlled by a 4 to 1 majority),\(^ {31}\) Representative Jesse L. Rogers introduced in the House on January 18, 1897, H.B. No. 158 to prevent the sale of cigarettes.\(^ {32}\) Just what motivated Rogers, a Republican lawyer from Knoxville, who, after leaving the legislature in 1899, was local counsel of the Southern Railway and the Louisville & Nashville Railroad, and a member of the Elks,\(^ {33}\) to advocate an anti-cigarette measure that the WCTU of Tennessee was urging on the legislature\(^ {34}\) is unclear.\(^ {35}\)


\(^{32}\) *Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee* 159 (1897) (Jan. 18). In the original handwritten bill as introduced by Rogers, the title read: “An Act to prohibit the sale, offering for sale, or bringing into the State for the purpose of sale, or giving away of any cigarettes, cigarette paper or substitute thereof.” Copy furnished by the Tennessee State Libraries and Archives. The same day that Rogers introduced the bill a lengthy interview with him concerning substantive proposals before the legislative session appeared in his hometown newspaper, which had taken place the day before. Rogers did not even mention the anti-cigarette bill, which turned out to be his most important contribution. “Hon. J. L. Rogers,” *KDJ*, Jan. 18, 1897 (4:3-4).


\(^{34}\) Oddly, the Tennessee WCTU reports to the Anti-Narcotics Department of the National WCTU annual meetings in 1897 and 1898 did not mention the enactment of the anti-cigarette law at all. *Report of the National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting* 349 (1897); *Report of the National Woman’s Christian Temperance
Tennessee 1897

For his progressive bona fides, however, the Knoxville Typographical Union, No. 100 vouched several months later when it adopted a resolution “commend[ing] the good works of the Hon. Jesse L. Rogers in advocating and securing the passage of measures in the interests of the working people of the State.” A year after enactment of his bill, Rogers did state that “I regard the use of the cigarette as being most injurious of all, and one that is doing more to destroy the youth than any article now in use.” Without shedding any light on this question, several newspaper obituaries in 1911 highlighted his authorship and vital role in securing passage of the anti-cigarette law 14 years earlier.

The Rogers bill read:

Section 1. Be it enacted by the General Assembly of the State of Tennessee, That it shall be a misdemeanor for any person, firm, or corporation to sell, offer to sell or to bring into the state for the purpose of selling, giving away, or otherwise disposing of any cigarette, cigarette paper or substitute for the same; and a violation of any of the provisions of this Act shall be a misdemeanor punishable by a fine of not less than fifty dollars.

Section 2. Be it further enacted, That the grand juries shall have inquisitorial power over offenses committed under this act.

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35 An article that the Memphis Commercial Appeal published the day that the anti-cigarette law went into effect included a paragraph that began: “It may be interesting to the friends to know that the Hon. Jesse L. Rogers is the cause of their present inconvenience,” and continued with information about him, but added nothing about his motivations. “Cigarettes Are Out Today,” CA, May 1, 1897 (5:2). During a House debate in 1897 on a liquor dealer tax, after another member had taken umbrage that Rogers had called him a “crank,” Rogers remarked that: “He was himself a crank on the liquor question—at least some people said so.” “Senate Refuses to Accept,” NB, Apr. 2, 1897 (1:5-6, at 7:6).

36 Undated clipping attached to H. Burnam Price, Rec. Sec. to Hon. John C. Houk, Apr. 5, 1897, in Papers of Leonidas Campbell Houk and John Chiles Houk Papers, Box 67, McClung Historical Collection, Knox County Public Library, Knoxville, TN.


Section 3. Be it further enacted, that this act take effect from and after the 1st day of May 1897, the public welfare so requiring it.\textsuperscript{39}

This measure differed from Iowa’s law in: (1) not prohibiting the manufacture of cigarettes; and (2) prohibiting importation. To be sure, the latter ban apparently did not apply to imports for personal consumption, just as the bill did not outlaw possession or use of cigarettes.

On January 22, after two proposed amendments had been tabled, the House, in accordance with the Judiciary Committee’s recommendation, unanimously voted “with much vigor and determination”\textsuperscript{40} for the bill 81 to 0.\textsuperscript{41} The core argument voiced in speeches in favor of the bill was, at least according to an account in a non-supportive newspaper, cigarette smoking’s “sapping the health and morality from the youth of the land.”\textsuperscript{42} The pithy editorial reaction of Rogers’ hometown Knoxville Daily Journal—the state’s leading Republican daily paper\textsuperscript{43}—was that on the bill’s becoming law he “will have forever made enemies of the undertakers.”\textsuperscript{44} In a more ironic vein, displayed even in its headline, “Smoke—Up, Dudes, for Your Light is Going Out,” the Democratic Nashville American spoke of the “considerable alarm” that the bill was “calculated to cause” both smokers and sellers of “the seductive rolls of tobacco....”\textsuperscript{45} The independent Nashville Banner reported that even if the bill were to become law, the fate of the similar Iowa law raised a question as to whether it, too, conflicted with “the national interstate commerce law.” The newspaper misinformed readers that, since “there was no way of preventing dealers from shipping the cigarettes into the state and disposing of them in the original 5-cent packages,” the Iowa law was “practically ineffective” (though the paper correctly but self-contradictorily added that under the Iowa ruling cigarettes could not be sold in

\textsuperscript{39}H.B. No. 158, Tennessee House of Representatives, 1897, RG 60, Tennessee State Library and Archives, Nashville; handwritten copy furnished by the Tennessee State Library and Archives.

\textsuperscript{40}“Smoke—Up, Dudes, for Your Light is Going Out,” \textit{NA}, Jan. 23, 1897 (3:1-5 at 1).

\textsuperscript{41}\textit{Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee} 242 (1897) (Jan. 22). One amendment would have added, “Providing that this does not apply to cigarettes brought into the State for sale in other States,” while the other would have made the law take effect six months after passage.

\textsuperscript{42}“Smoke—Up, Dudes, for Your Light is Going Out,” \textit{NA}, Jan. 23, 1897 (3:1-5 at 1).


\textsuperscript{44}\textit{KDJ}, Jan. 25, 1897 (2:1) (untitled editorial).

\textsuperscript{45}“Smoke—Up, Dudes, for Your Light is Going Out,” \textit{NA}, Jan. 23, 1897 (3:1-5 at 1).
Tennessee 1897

quantities). The article then went on to confirm for Tennessee the same resistance by tobacco dealers to selling cigarettes that led them in other states to support anti-cigarette laws:

[T]here is not a dealer in the city [Nashville] who would not be glad to see the bill passed in such a way as would really prohibit the sale in this state. A Banner reporter interviewed a sufficient number of tobacco merchants today to justify the assertion that the passage of a law that will really prohibit would give general satisfaction. The pernicious habit of cigarette-smoking has grown to an alarming extent. Its bad effects have even reached the school-rooms and young boys who have become slaves to the habit, show the bad results in their daily recitations and examinations.

The reasons offered by dealers for their position varied markedly. Some agreed with their counterparts in other states that there was “no money” or “no profit” in selling cigarettes; others stated that suppression would enhance the sale of cigars and tobacco (which were presumably more profitable). Still others, however, advanced non-financial reasons: that “even women” in Nashville were beginning to smoke “to an alarming extent”; or that no one outside the tobacco business had any “idea of the debauching influence that this cigarette habit has reached.”

On February 9 the bill proceeded to its third reading in the Senate, which, according to the Nashville American, “it was seriously thought,” would defeat the House measure. Senate opposition appeared first in the form of delaying motions to refer the bill to other committees, which failed. This tactic was in part grounded in the claim—supported by a reading of passages from “the Iowa

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46. “The Anti-Cigarette Bill,” NB, Jan. 23, 1897 (1:3). On Iowa, see below ch. 10-12. As the U.S. Supreme Court dissenters in Austin v. Tennessee correctly pointed out: “[I]f cigarettes cannot be brought into the State of Tennessee and sold in the packages in which they were manufactured, but must be brought in and sold only in barrels or boxes of large size, the right of importation is practically defeated, for no consumer would buy a barrel or box for his own use, and no importer could sell it to a second party with the idea of a resale, because the moment the first sale is accomplished, the law of the State interposes to prevent the second.” Austin v. Tennessee, 179 US 343, 386 (1900).


49. “Forensic Lances Clash,” NA, Feb. 10, 1897 (1:8). The paper claimed that supporters’ police power argument had trumped opponents’ interstate commerce argument.

50. Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 360 (1897) (Feb. 9).
decision”—that the bill was unconstitutional.\footnote{The Cigarette Bill Passed,” \textit{NB}, Feb. 9, 1897 (1:5-6).} Other senators then offered amendments to weaken the bill, which also all failed. Republican Senator Roderick Random Butler moved to limit the prohibition only to the sale of cigarettes “composing poisonous matter or substance,” while Republican Senator John C. Houk (who would soon play an important part in the post-enactment controversy surrounding the law) moved to prohibit only “impure” cigarettes. Butler’s next amendment, which was presumably designed to go in the opposite direction of unacceptably radicalizing the bill, would have subjected cigars and tobacco to the prohibition as well; it resoundingly lost by a vote of 24 to 4. The opposition having spent its force, H.B. 158, with exactly the same text as introduced by Rogers, passed 18 to 8.\footnote{\textit{Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee} 360-62 (1897) (Feb. 9). Two senators provided separate explanations for their no votes based on the bill’s alleged violation of the interstate commerce clause of the constitution. \textit{Id.} at 362. The eight who voted Nay were evenly divided between Democrats and Republicans.} Of tantalizingly great interest is that Butler and Houk between them represented the aforementioned six northeastern counties that supposedly produced tobacco for cigarettes.\footnote{\textit{Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee} 3-4 (1897) (Johnson, Carter, Unicoi, Washington, Greene, and Cocke counties); “Will Seek a Repeal,” \textit{CA}, Apr. 5, 1897 (5:5). These counties were traditionally Republican as was East Tennessee in general, a legacy of the absence of slaves and the population’s staunchly unionist opposition to secession. Paul Isaac, \textit{Prohibition and Politics: Turbulent Decades in Tennessee, 1885-1920}, at 56 n.71 (1965); V. O. Key, Jr., \textit{Southern Politics in State and Nation} 75-81 (1949). One of the six other senators who voted against Rogers’ bill, L. T. M. Canada, represented Robertson and Montgomery counties (in the burley tobacco region on the Kentucky border), which led the state in tobacco acreage, production, and value. \textit{Id.} Canada stated on the Senate floor that while he heartily favored such a measure, he regarded it as constitutionally infirm and first wanted those defects eliminated. “Forensic Lances Clash,” \textit{NA}, Feb. 10, 1897 (1:8, at 2:1). Unfortunately, research found no information concerning possible differences between whites and blacks concerning suppression of cigarettes. Ten years earlier, in 1887, when a state constitutional liquor prohibition amendment was defeated 118,000 to 145,000, blacks supposedly furnished 90,000 of the No votes, leading prohibitionists to conclude that a majority of white voters had favored it, while blacks had been swayed by money, liquor, and prejudice to kill it: “Moral reformers in future contests generally took the position that Negro voting was a threat to progress and that the success of their program depended at least on keeping Negroes out of politics.” To be sure, after 1887 prohibitionists in Tennessee tended to favor disenfranchising blacks, just as many early-twentieth-century Progressives nationally regarded blacks’ political participation as antithetical to securing a whole array of political...}
seemingly transparent connection was muddied by the fact that Butler was the senator who had introduced the aforementioned cigarette prohibition bill at the 1895 session.

The Banner predicted matter-of-factly that if the supreme court upheld the law’s constitutionality, “the naughty coffin tack must bid an adieu to the whole State of Tennessee.” Yet editorially it wondered whether the bill that “went through the Senate with a whoop” would “work like the law forbidding the sale of pistols in Tennessee….. Somehow everybody…who wants a pistol gets it….” Deprecating enforcement, the paper conceded that the “cigarette evil is a great evil,” but charged that even “the existing law against the sale of cigarettes to boys is made a mockery and a sham.” Two days later, cigar-smoking Democratic Governor Robert Taylor—a representative of the party’s agrarian wing whose “major function,” according to some historians, “had been that of uniting dissident forces within the Democratic party” and during whose administration “little of significance was accomplished”—approved the bill. This legislative
success was all the more remarkable since the much older, more broadly based, and stronger Tennessee anti-alcohol movement had been unable to secure passage of any of its temperance bills that session.\textsuperscript{59}

At the end of March, Senator Houk introduced a bill to repeal the newly enacted law, but it died in committee.\textsuperscript{60} Houk (1860-1923), a lawyer and “one of the most influential Republicans in the state,”\textsuperscript{61} was mentioned as a gubernatorial candidate; he was elected to fill the congressional seat vacated by his father’s death in 1891, was re-elected once and, after losing his seat in 1895, served in the Tennessee Senate sporadically from 1897 until his death in 1923.\textsuperscript{62} In 1896 his faction of the Republican Party called itself the “‘native born whites’” and its opponents “‘carpetbaggers.’”\textsuperscript{63} That he was urgently and systematically preparing an interstate commerce-based attack on Rogers’ bill was underscored by the communication that Houk wrote on February 3, 1897, about a week before the Senate floor vote, to U.S. House Speaker Thomas Reed requesting that the latter “answer following questions fully by telegraph. First, What is the trend of U.S. Circuit and Supreme Court decisions upon state laws prohibiting interstate traffic in whiskey, tobacco and cigarettes? Second, Is it or is it not to the effect that such laws are invalid or unconstitutional? Third, What is the trend of Congressional

\textsuperscript{58}Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 509 (1897) (Feb. 12); 1897 Tenn. Pub. Acts ch. 30 at 156.

\textsuperscript{59}Paul Isaac, Prohibition and Politics: Turbulent Decades in Tennessee, 1885-1920, at 77 (1965).

\textsuperscript{60}Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 853, 864 (1897) (Mar. 30-31). Oddly, the author of a master’s thesis biography of Houk, while mentioning his vote against the anti-cigarette bill, not only overlooked his own bill to repeal, but was apparently totally unaware of the extraordinary session of 1898 and the nationally reported controversy about Houk’s role in the attempted bribery of Rogers. Claude Archer, “The Life of John Chiles Houk” at 65 (M.A. thesis, U. Tenn., 1941).


action upon such interstate traffic?” Houk, however, sought not simply to repeal the anti-cigarette law, but to replace it with a watered-down version incorporating the provision that he had unsuccessfully offered as an amendment to prohibit only cigarettes made of any other than “clear tobacco.”

Houk’s legislative initiatives, he insisted in an account he gave to the *Knoxville Daily Journal* the following year, were driven by his belief that Rogers’ law would certainly be declared an unconstitutional interference with interstate commerce—a position that he had set out in a letter during the 1897 session to various religious organizations that had petitioned him to vote for Rogers’ law. He openly admitted to the newspaper that his repeal bill had been sent to him by his friend and fellow Republican New York Senator Thomas Platt, which he “cheerfully considered” and introduced because he thought it constitutional and good and one that in 1898 should still be enacted. Although he did not know it at the time he introduced the bill, even after he later learned that “the bill was satisfactory to the American Tobacco company...no reason presented itself that the bill was not a proper and just one,” and he still continued to support it in 1898.

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64 Jno C. Houk to Hon. Thos. B. Reed, Feb. 3, 1897, in Papers of Leonidas Campbell Houk and John Chiles Houk Papers, Box 66, McClung Historical Collection, Knox County Public Library, Knoxville, TN. The communication, which is handwritten on Tennessee Senate letterhead, appears to be a draft for a telegram. Crossed out is the sentence fragment: “First, If a state passes a law prohibiting interstate traffic in whiskey, tobacco or cigarettes”.

65 Although the Senate *Journal* gave repeal as its short title as did the handwritten sleeve on the original bill, that provision was only § 6. S.B. 542, Tennessee Senate, 1897, RG 60, Tennessee State Library and Archives (typed copy furnished by Tennessee State Library and Archives).

66 S.B. 542, § 1. The bill would also have raised the age to 18, below which it was illegal to sell cigarettes to anyone. *Id.* § 3.

67 “Cigarette Bribery,” *KDJ*, Feb. 8, 1898 (8:2).
Extraordinarily Rare Local Cigarette Sales Data Emerge on the Eve of Prohibition

The rights of interstate commerce have thus far stood between “cigarette fiends” and the prohibitory laws.68

The day (April 30) before the “cigarette business in Tennessee goes out,” the Knoxville Tribune reported that the “dealers in Knoxville intend to obey the law,” thus forcing those who smoked “the deadly cigarette” personally to send out of state for more.”69 On May 1 (which was also the opening day of the Tennessee Centennial Exposition in Nashville celebrating a century of statehood), the Knoxville Daily Journal, which supported the law, caustically observed under the headline, “Coffin Tacks Gone,” that the “fiend” who lacked the cash to stock up “will be compelled to forego the pleasure of gradually killing himself.” In the interim, however, the cash-heavy suicide was stocking up: “More cigarettes were sold in the city [Knoxville] yesterday than in any month since they have been on the market. Just how many were sold will of course never be known, but the number was enormous.” Just one single clerk at one cigar store had sold 21,000; and despite having denied the possibility of knowing, the Journal did an about-face and claimed that “[f]ully 75,000 cigarettes were sold.”70 As in other states, dealers were portrayed as relieved that a burden had departed; in Tennessee, the Journal’s pro-prohibition stance perhaps prompted it to launch self-policing compliance by means of self-fulfilling prophecy:

Many seem to thing [sic] that the law, like many others, will not be enforced. That it will be, there can be no question of a doubt. The firms that have dealt in cigarettes, have often said that there was no money in selling them and that they only kept them to accommodate the trade. These firms will not break a law simply for accommodation and will not keep them on hand. It can be seen from this that the law will be enforced by the tobacco dealers themselves and that the officers and courts will not be compelled to settle the matter.71

Going even further, the Journal asserted that nearly universal popular support would secure enforcement:

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70“Coffin Tacks Gone,” KDJ, May 1, 1897 (2:5). See below on the implausibility that more cigarettes were sold in one day than ever before in a month.
71“Coffin Tacks Gone,” KDJ, May 1, 1897 (2:5).
Tennessee 1897

All people, with possibly a few exceptions, believe the law to be one of the best ever passed by the Tennessee legislature and none believe it more strongly than do cigarette smokers themselves. It is a good thing, not only for those who are addicted to the habit, but is of far more benefit to the small boys, now growing up, who have not commenced to smoke and now will have no chance to do so.

One of the best features of the law is that a heavy fine is imposed on any one who gives away a cigarette. This will prevent those who have laid in a supply from providing smokes for those who did not do so.

Many are glad that the law has gone into effect and firmly believe that the cigarette cough and fingers will, within a month or two, be a thing of the past. 72

The same day’s competing account in the Democratic Knoxville Sentinel, which predicted that the law would create “pandemonium for a while” for “[c]happies” who smoked cigarettes, interviewed “the average cigarette smoker,” who offered this account of nicotine addiction withdrawal symptoms: “When a smoker is out of them, he has a peculiar and gnawing sensation in the breast that is relieved only by inhaling the cigarette smoke. ... It is a terrible habit, and even worse to get rid of than even the whisky or morphine curses. I know many cigarette smokers who dread the effect of cutting off their supply, and yet who would give anything they possess to be rid of the habit.” Potentially even more significant was the Sentinel’s report that: “During the past two days nearly a quarter of a million of cigarettes have been sold, and it is thought that from four to five thousand persons in Knoxville smoke the cigarettes that are often called ‘coffin tacks.’” 73 Since “[m]en addicted to the habit who had the money bought them by the thousand,” 74 the average of 50 or 60 cigarettes that cigarette smokers in Knoxville had purchased during what Tennesseans imagined were the last two days of in-state availability was far from impressive.

This rare datum for the years before the 1930s on the aggregate number of cigarette smokers in a city is well worth dwelling on. The population of Knoxville at the census of 1900 was 32,637, 75 up from 22,535 in 1890, 76 which,

72“Coffin Tacks Gone,” KDJ, May 1, 1897 (2:5).
73“Can’t Smoke Now,” Sentinel (May 1, 1897). This extraordinary selling of 125,000 in a day should be compared with normal daily sales of about 50,000 if the claim below of annual sales of 15,000,000 was accurate and dealers complied with the Sunday blue law. Tenn. Code Ann. § 3029 at 684 (1896).
74“Coffin Tacks Gone,” KDJ, May 1, 1897 (2:5). Another account mentioned a doctor who had bought 5,000 cigarettes for $20. “In Effect Today,” KT, May 1, 1897 (2:5).
75U.S. Census Office, Census Reports: Vol. II: Twelfth Census of the United States, Taken in the Year 1900, Population, Part II, tab. 9 at 133 (1902).
76Historical Statistics of the United States: Earliest Times to the Present: Millennial
by linear interpolation, suggests a total population of about 30,000 in 1897. If it is assumed that virtually no females of any age and no males under 15 years of age smoked (or bought) cigarettes, the relevant group was the total male population 15 and over, which equaled 10,996 in 1900; scaled back for the intervening population increase, they numbered about 9,500 in 1897. Had 4,000 to 5,000 males over the age of 14 in fact been cigarette smokers, the prevalence rate would have been about one-half, which exceeds by a large margin any retrospective estimate for adult men at large before the 1930s. If this prevalence rate had obtained nationally and half of all males above the age of 14 in the United States had been cigarette smokers, the total for the whole country would have been about 12.8 million in 1900. Calculated against total national cigarette output of about 4.6 billion in 1897, per capita annual consumption would have amounted to about 359 or fewer than 1 per day; on the basis of reduced production (of 3.25 billion) in 1900, the annual average would have been only 254 cigarettes or about 5 per week. These numbers are inherently implausible,
suggesting that the Sentinel’s were too, especially since Knoxville was a small town in a rural state with a tiny foreign-born population.

These numbers become even more fascinating and mysterious when supplemented by a further datum appearing in a similar article the same day in the Knoxville Tribune. Its text was in part word-for-word identical with that in the Sentinel, but it also included (in addition to brief reports filed by “a Tribune man” who visited “nearly all the cigarette dealers in the city”) the following empirical missing link: “A careful computation has been made to ascertain the number of cigarettes consumed in Knoxville each year, and as a result the number is thought to be in excess of fifteen millions.”\(^{81}\) The passive voice hid the computational agent, but perhaps the reporter had collected the data from the outgoing dealers, who presumably also furnished him with the same figure of 4,000 to 5,000 that the Sentinel published. In any event, these data would yield an annual average consumption of 3,000 to 3,750 per smoker, which in turn was the equivalent of a much more plausible 8 to 10 cigarettes per day. Nevertheless, these figures too produce inexplicable anomalies. Calculated on the basis of a total population of 30,000, annual per capita consumption would have been a wholly implausible 500, whereas it was only a mere 35 for the United States as a whole in 1900 and did not reach 500 until 1923.\(^{82}\) Similarly, if the adult population (including women) is used as the denominator, Knoxville’s per capita consumption in 1897 was more than 700, a level that, again, was not reached nationally until the early 1920s.\(^{83}\) Looked at somewhat differently: whereas Knoxville residents accounted

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\(^{81}\)“In Effect Today,” KT, May 1, 1897 (2:5).

\(^{82}\)Jack Gottsegen, *Tobacco: A Study of Its Consumption in the United States* tab. x and xi at 27-28 (1940). This comparison is somewhat skewed by the fact that cigarette consumption fell sharply between 1897 and 1900; but even if the aggregate consumption of 1897 is used as the numerator, national per capita consumption would still have been only about 60. Per capita consumption (based on the population 15 and older) in the United States (1,332) did not exceed that in the United Kingdom until 1929 (1,330); total U.S. cigarette production/consumption (30.5 billion) exceeded the UK’s (25.1 billion) for the first time in 1917. *UK Smoking Statistics* tab. 1.2 at 5, tab. 2.1 at 13 (Nicholas Wald et al. eds. 1988). The U.S. data were calculated based on Jack Gottsegen, *Tobacco: A Study of Its Consumption in the United States* tab. x at 27 (1940); and U.S. Bureau of the Census, *Historical Statistics of the United States, Colonial Times to 1970: Bicentennial Edition*, Pt. 1, Ser. A 29-42 at 10 (1975).

\(^{83}\)U.S. Dept of Health and Human Services, *Reducing the Consequences of Smoking: 25 Years of Progress: A Report of the Surgeon General* Tab. 2 at 268 (1989). The gap is understated because national data are based on a definition of “adults” as being 18 and older, whereas the census data for 1900 grouped 15-19 year-olds together; estimating that
for only 0.043 percent of the U.S. population in 1900, according to these figures they consumed 0.33 percent of all cigarettes.

At almost the same time the New York Sun published its own fascinating back-of-the-envelope calculation. Estimating that in 1896 there were about 18,000,000 men and boys of "cigarette smoking age"—that is, between 14 and 44 years old—would yield an annual average of 200 cigarettes for every man and boy, "provided, of course, that cigarette smoking was general, instead of being, as it is, restricted to a very small fraction of the whole population, mostly in the cities and large towns."\(^{84}\)

Unfortunately, this tantalizing set of data thus appears to lead to a quantitative self-contradiction. If, however, for some as yet inexplicable reasons, such a high prevalence and consumption rate really did obtain in Knoxville (and Tennessee), then the statutory imposition of a flat prohibition of in-state cigarette sales was all the more remarkable.\(^{85}\)

To be put into quantitative perspective, the Knoxville data can be compared with several random factoids mentioned in a newspaper in Maine in 1894: "It is estimated that 1,200 boxes of cigarettes are sold daily in Portland, about a sixth of them to women, and probably two-thirds of the remainder to boys under sixteen."\(^{86}\) If the boxes were standard 10-cigarette packages,\(^{87}\) 12,000 cigarettes a day amounted to 3,744,000 in a year (assuming that Maine’s Lord’s Day prohibition on Sunday store operations was effective).\(^{88}\) Portland’s population of a little less than 39,000 in 1894\(^{89}\) yields per capita annual sales of just under

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\(^{84}\)"Cigarettes by the Million," New York Sun (reprinted in Syracuse Daily Standard, Mar. 12, 1896 (5:6-7)).

\(^{85}\)That Tennessee was a major non-cigarette tobacco-growing state might explain an above-average prevalence rate of non-cigarette tobacco use, but not of cigarette smoking. It is possible that the location of the campus of the main state university in Knoxville might have increased the smoking rate, but the Sentinel article did not raise this issue, and the proportion of 20 to 24 year-olds there was very close to that in Memphis and Nashville.


\(^{86}\)"Maine Melange," BDWC, Nov. 9, 1894 (1:6). This column consisted of unrelated snippets.

\(^{87}\)This newspaper made that assumption: “The New Cigarette Law,” BDWC, May 3, 1897 (3:7).

\(^{88}\)Rev. Statutes of Maine, ch. 124, § 20, at 906 (1884).

\(^{89}\)Portland’s population at the 1890 census was 36,425 and 50,145 in 1900; however, a large part of this increase stemmed from the annexation in 1899 of the town of Deering.
Tennessee 1897

100 compared with national per capita sales that year of about 53—aper much closer and more plausible fit for the 83rd most populous city in the United States in 1890 than the Knoxville data generated. Perhaps even more significant is the claim that women in Portland bought one-sixth of all cigarettes and boys 15 and younger bought two-thirds of the rest or about 55.5 percent of the total. The conclusion that males 16 and older bought only 27.8 percent of all cigarettes in a major city seems even more at odds with contemporaneous qualitative accounts than the claim that already in the first half of the 1890s women accounted for such a large share of total consumption. After all, industry guesstimates in the mid-1920s pegged women’s share of total cigarette consumption at 5 to 15 percent. In 1894, Portland’s males 16 and older numbered somewhat under 13,000. If they really accounted for only 27.8 percent of all cigarettes consumed, their per capita consumption was an implausible 0.25 cigarette a day or about 80 a year. In contrast, if boys between the ages of 10 and 15 numbering somewhat which had a population of 5,353 in 1890. On the assumption that Deering’s population increased at the same rate as Portland’s in the 1890s, linear interpolation yields an estimated population in 1894 of somewhat under 39,000. http://www.library.umaine.edu/census/townsearch.asp (visited Aug. 26, 2006).


92Curtis Wessel, “The First Sixty Billion Are the Hardest for Cigarette Industry,” Printer’s Ink 126(5):4-6, 137-46 (Jan. 31, 1924) (“female consumption now is as large as the total output for men twenty years ago,” which was about 3 billion, while consumption in 1923 was 60 billion); Lin Bonner, “Why Cigarette Makers Don’t Advertise to Women,” Liberty 3(24):55-57 at 55 (Oct. 16, 1920) (15 percent). Retrospective birth cohort prevalence rates show that fewer than 5 percent of the female cohort born before 1900 smoked in 1920 compared with more than 40 percent of men of that cohort. U.S. Dept of Health and Human Services, The Health Consequences of Smoking for Women: A Report of the Surgeon General fig. 3-4 at 29-30 (1980). According to more refined estimates, whereas 30 percent of men born between 1881 and 1890 smoked cigarettes by about 1905, fewer than 5 percent of women born between 1891 and 1900 smoked by 1920. Jeffrey Harris, “Cigarette Smoking Among Successive Birth Cohorts of Men and Women in the United States During 1900-80,” Journal of the National Cancer Institute 71(3):473-79, figs 1-2 at 475 (Sept. 1983).
under 2,00093 consumed 55.5 percent of the total, then they smoked about 3 a day or 1,039 in a year. These wholly implausible averages suggest that the demonstration effect ran from boys to men, who needed to be protected from the bad example of 12-year-olds. If these proportions were, however, accurate for Portland and representative for the country (or at least for the larger cities) as a whole, then they would explain why the anti-cigarette movement was so concerned about youth smoking.

In the days immediately preceding and following the effective date of the anti-cigarette law, the Memphis Commercial Appeal published several articles emphasizing that cigarettes sales would really be stopped, though sellers would not regret their disappearance. At first misinforming its readers that the law would go into effect on April 1, the paper declared that “[v]ery much to the discomfiture of the devotees of this habit, no satisfactory solution of the problem” of where they would get them had been offered. The Commercial Appeal assured them that “the dealers say they will not handle cigarettes”—not because they were not profitable, but rather for ethical reasons: “Many of the dealers are glad of an opportunity to quit the sale of the pernicious things, as they realize as fully as the wise legislators who...passed the law that the cigarette is an evil. Therefore it is safe to say that none of the leading tobacconists will handle cigarettes.” But dealers were not the only opponents; in fact: “The almost universal antipathy to the habit of cigarette-smoking is pretty certain to aid in the enforcement...”94

On the eve of the law’s actual effective date the “fiends” must have believed the press because some were buying cigarettes by the box containing 1,000. The dealers, for their part, had in the meantime found a more materialistic reason for accepting the law in line with the reactions of their counterparts in Washington State and Iowa: “The profit in cigarettes is small and they are hardly worth the trouble of handling them. The, the abolition of the cigarette will increase the demand for cigars and tobaccos for pipe use. In fact, it is a question whether the law will have a detrimental financial effect on the retail dealers at all.”95

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93 Department of the Interior, Census Office, Report on the Population of the United States at the Eleventh Census: 1890, Part II, tab. 8 at 127 (1902). Boys under 16 were calculated as including males from 10 to 14 years of age and 20 percent of those 15 to 19 years of age.


95 “Cigarettes Are Out Today,” CA, May 1, 1897 (5:2). To be sure, the paper added that wholesalers exhibited less “complacency”: because they believed that their customers did not want to buy cigars and tobacco in one place and cigarettes in another, they feared that some would leave them. Since the paper’s assumption was that cigarettes would no longer be sold in Memphis—except at the back door in “some places”—the wholesalers’
second day of the new law Memphis dealers, having heard that 20 detectives had been detailed to enforcement, were sufficiently compliant that the Commercial Appeal foresaw “a large number of cigarette sufferers” in a few weeks, some of whom, even if cigars were too expensive for them, would switch to pipes.96

The Nashville American’s contribution to the wave of farewells to the cigarette was heavily tongue-in-cheek, urging its readers to imagine “the overjoyed people” hear the bands play “Thou art gone to thy grave, but we will not deplore thee.” And even though the paper foresaw a world in which the “motorman on the open cars will continue to expectorate over the dashboard on windy days,” it exhorted Tennesseans to thank the legislature and governor for their henceforward being able to ride on street cars, walk along streets, enter businesses and “even private residences, without running up against that foul-smelling, yea, that worse odor than even ancient Cologne enjoyed, which is said to have possessed the flavor of 600 separate and well-defined stinks—the cigarette—which has been banished, banished, let us hope, never to return.” At the next Centennial, when Nashville was as populous as Chicago, some clerk might stumble upon a five-cent box of Duke’s cigarettes in the deep recesses of a bank vault and smoke one, wondering “what manner of man smoked such vile-smelling weeds while he is blessed with fragrant cigars,” and gazing on “the button (given free with every box) upon which is delineated the features of one of New York’s vaudeville chorus girls....” The American closed on a skeptical note: just as whisky was still sold without a license, would the corner grocery stores and saloons sell cigarettes “on the sly,” or would “they bow in humble submission to the will of the law-making power? The public has but to watch the mouths of the ‘fiends’...for the answer.”97

The Tobacco Trust Initiates Judicial Challenges

On May 3, 1897, two days after the Tennessee anti-cigarette law had gone into effect, the criminal court in Nashville met to select grand and petit jurors for the May term. In his charge to the former, Judge J. M. Anderson observed that if he came to agree with numerous lawyers that the law was unconstitutional, “it would be his duty to charge the duty to ignore it, but from examinations he had made of the law he did not see anything in it contrary to the Constitution and he would instruct the jury to indict anyone selling cigarettes, or at least to return a

fear is difficult to grasp.

97“Has Departed from Tennessee,” NA, May 1, 1897 (20:7).
sufficient number of these cases to test the constitutionality of the act."98

Judge Anderson, however, apparently soon changed his mind. Two days after
he had given the aforementioned charge, W.S. Sawrie, “the leading wholesale
broker”in Nashville,99 who owned “considerable property” there as well as an
orange grove in Florida,100 and whose family “stands very high in social
circles,”101 sold a package of 10 Sweet Caporal cigarettes that he had bought
from the American Tobacco Company, which, having no office, factory, or
warehouse in Tennessee, had manufactured them in New York City and sold them
to Sawrie from Kentucky by shipping a number of such packages—“without case,
covering, or inclosure of any kind around or about any of said packages, but each
package loose and separate from each other”—to him in Nashville. Sawrie was
arrested and charged with having violated the new anti-cigarette law, thus
triggering criminal and habeas corpus proceedings. After having been tried
before a justice of the peace, Sawrie, claiming that the Tennessee law was void
because it conflicted with the federal constitution, requested that U.S. Circuit
Court Judge Horace Lurton discharge him from custody to which he had been
committed in default of bail for his appearance at the next term of the county
criminal court.102

Looking back at this train of developments a half-year later when he was once
again charging grand jurors on the cigarette law, Judge Anderson observed that
he himself had been of the opinion that the law was unconstitutional insofar as it
prohibited interstate commerce, but had also realized that since, regardless of any
state court’s view, the federal courts would ultimately decide the question,
seeking to enforce the law would merely fill the federal courts with expensive
habeas corpus petitions. He had, therefore, decided to instruct the grand jury not
to take action until the federal judiciary had ruled.103 The result, according to the

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98“May Term of Criminal Court,” NB, May 3, 1897 (2:5). The statute conferred on
grand juries inquisitorial power over offenses committed under it. 1897 Tenn. Pub. Acts
ch. 30, § 2 at 156.

99“Sensation in Nashville Society,” Trenton Evening Times (N.J.), Feb. 22, 1897 (4:4);
the same report was also published in NYT, Feb. 22, 1897 (2).

100“Mrs. Sawrie Enters Suit,” NA, Feb. 21, 1897 (3:1).

101“Will Seek Separation,” NA, Feb. 20, 1897 (3:2). Sawrie was “the senior member
of W. S. Sawrie & Son.

102Sawrie v. State of Tennessee, 82 F. 615, 616 (Cir. Ct., M.D. Tenn.). According to
“Cigarette Law Test,” CA, May 8, 1897 (2:2), and “Test Case Instituted,” NA, May 8, 1897
(3:1), the person to whom Sawrie sold the package “swore out a warrant against him.”
This statement did not appear in the legal documents, which also named a different buyer.

103“Charge to the Grand Jury,” NB, Oct. 5, 1897 (2:1).
Commercial Appeal, was that from May onwards the sale of cigarettes in Nashville had been “even more universal and open” than in Memphis, where, though sales had never ceased, some dealers had made no secret of their sales, and cigarette smokers had not suffered for want of a supply, nevertheless, other retailers, “holding the law in more dread,” carried on “under cover.” That Judge Anderson’s approach was not the only possible one was made clear by Judge Smith, who, toward the end of August, instructed the grand jury of Trousdale County (northeast of Nashville) to enforce the anti-cigarette law strictly and to return indictments against anyone selling cigarettes or importing them for sale: “He said the State had nothing to do with the fact that a Federal court was considering the constitutionality of the act, and he proposed to enforce the law until higher authority declared it unconstitutional.”

ATC instigated Sawrie as a test case. As its general counsel, Williamson Fuller, admitted a year later: “As soon as the bill went into effect I went to Nashville to test the law. A dealer, acting under my instructions, sold some cigarettes, and when he was arrested I obtained a writ of habeas corpus from the Federal Court.” The Tennessee attorney general, George Pickle, represented the state, while the law’s author, Jesse Rogers, appeared as an amicus. Judge Lurton, who was a former corporation (and especially railroad) lawyer and chief justice of the Tennessee Supreme Court, was later appointed to the U.S. Supreme Court by President Taft, with whom he had become friends when both served as federal circuit judges. Lurton viewed the Tennessee law as an “absolute prohibition of all commerce in cigarettes” because it penalized the sale of cigarettes in their original package by an importer; and whereas the law would not have offended against the interstate commerce clause had it been limited to cigarettes manufactured in Tennessee or to imported cigarettes not in their original packages, the facts of the case (as shaped by ATC) clearly presented the interstate commerce question.

In order to answer that question, Lurton began by examining the legislature’s objects or purposes. In the face of a statute that was silent on the issue, he felt

107“Cigarettes in Tennessee,” NYT, Feb. 7, 1898 (1).
108Gustavus Myers, A History of the Supreme Court of the United States 718-38 (1912), analyzed the capitalist class bias in Lurton’s opinions as a federal trial judge.
109“Justice Lurton Dies at Seashore,” NYT, July 13, 1914 (1). Lurton’s tenure at the U.S. Supreme court ran from 1910 until his death.
110Sawrie v. State of Tennessee, 82 F. 615 at 617 (Cir. Ct., M.D. Tenn. 1897).
“authorized to assent to the assumption of the attorney general, who has appeared for the state, and to treat the act as passed for the purpose of protecting the health and morals of the people of the state against evils incident to the cigarette habit.”

Instead of examining the otiose intricacies of the “original package” doctrine as applied to the facts of the test case, Lurton focused on the more important but difficult constitutional question of reconciling Congress’s commerce powers and the states’ police powers without destroying either one. Lurton argued that Tennessee’s root problem lay in the fact that, under Supreme Court precedents, the only way a state, in regulating traffic in an article by quarantining or inspection, could exercise its police powers without interfering with interstate commerce was to “aim[] at something uncommercial, by reason of its state or condition, such as articles infected, or disguised so as be a cheat calculated to lead a purchaser into buying something he did not intend to buy....” However, in spite of aiming at the suppression of what Lurton himself acknowledged to be “an evil of [sic] most profound character,” the statute was jurisprudentially indistinguishable from Iowa’s ban on the sale or importation of intoxicating liquors, which the U.S. Supreme Court had characterized as “subjects of exchange, barter, and traffic, like any other commodity in which a right of traffic exists, and are so recognized by the usages of the commercial world, the laws of Congress, and the decisions of the courts....” Not only, Lurton opined, could the same be said of cigarettes, but: “If all that can be said touching the evil consequences of the use of the cigarette upon the health and morals of the state be admitted, much more can be said, and was said, of the evils sought to be guarded against by the Iowa prohibition statute.” And since the Supreme Court had held the Iowa law to be inconsistent with the federal constitution “because any regulation of traffic in a commercial commodity of recognized character, as such, was an intrusion upon the exclusive power of the national government,” Lurton held that the Tennessee act was also too broad, and struck it down “partially.”

The Democratic Knoxville Sentinel, which had denounced the law from outset, editorialized that few would regret the decision because the law “smacked of a paternalism obnoxious to any American” and was “doomed to practical
inoperation” anyway.\textsuperscript{118} In Memphis, ten days before Lurton handed down his decision, state Criminal Court Judge Cooper, in charging grand jurors, had been “very pronounced in his declaration that violators of the cigarette law should be brought before him.” Even after Lurton’s decision became known, Cooper announced that he would not recharge the jury because he would await the Supreme Court’s review of the decision; if the grand jury returned any indictments in the interim, he would insure that none was acted on. Because dealers, like the \textit{Commercial Appeal}, regarded the probability as “very dim” that the Tennessee Supreme Court would rule differently than the federal court, they were willing to risk committing indictable offenses by displaying and selling cigarettes again in plain view.\textsuperscript{119}

Several days later Davidson County (Nashville) Criminal Court Judge Anderson declared that he would administer the anti-cigarette law pursuant to his understanding of Lurton’s decision until the U.S. Supreme Court, to which the state attorney general had announced his intention to appeal, reversed it. Descending to the details of the key definition of “original package”—which according to Anderson the Supreme Court had never defined—he instructed the grand jurors that if a Nashville merchant ordered 400 separate 10-cent packages and they were shipped to him in a sealed larger box, he could sell them lawfully only by selling them all to one customer. Despite this significant restriction, Anderson puzzlingly concluded that the effect of Lurton’s decision was to eliminate the benefits to be derived from the statute because it made unlawful second sales (resales down the chain toward the consumer) and thus compel[led] the retail man to go outside of the State of Tennessee and purchase from jobbers or manufacturers.... In the second place, it will tend to deny the privilege of selling cigarettes to those smaller dealers who are not able to buy in sufficient quantities that would justify them in ordering from the factory direct or from jobbers outside of the State of Tennessee and would create a monopoly in the cigarette trade among those retailers who are able to buy in large quantities or in such quantities as the manufacturer or jobber out of the State of Tennessee could afford to ship them and pay the freight on them, etc.\textsuperscript{120}

Why this outcome would have been at odds with the purposes of the statute is unclear, especially since, as the Iowa attorney general had already observed,

\begin{footnotes}
\footnote{118}{“Judge Lurton’s Good Decision,” \textit{Knoxville Sentinel} (editorial), reprinted in \textit{CA}, Oct. 4, 1897 (4:4).}
\footnote{119}{“Mills of Justice Grinding,” \textit{CA}, Sept. 21, 1897 (5:3).}
\footnote{120}{“Cigarettes on Sale Again,” \textit{CA}, Oct. 2, 1897 (5:5).}
\footnote{121}{“Charge to the Grand Jury,” \textit{NB}, Oct. 5, 1897 (2:2).}
\end{footnotes}
shipment of individual packages in keeping with the original package doctrine was simply not commercially practicable.\textsuperscript{122}

Judge Anderson further instructed the grand jurors that the requisite facts to show an illegal sale of cigarettes were that: (1) cigarettes were sold to a consumer; (2) the seller did not buy them within Tennessee; and (3) the cigarettes were not sold in their original package. Although the judge told the jurors that they then had a “duty to indict,” he added that “you can see at once the difficulty in getting at the facts in order to make out a case, to prove where the person who sold the cigarettes bought them, from whom he bought them, in what counties, did he sell them in the original package, for if he bought them outside of the State of Tennessee he has a right to sell them and cannot be indicted. If he bought them from some person within the State of Tennessee he has no right to sell them and ought to be indicted.”\textsuperscript{123}

Finally, Judge Anderson revealed his own personal views when he admitted that: “When we remember that tobacco is one of the oldest commercial articles known to this country, and in the earlier periods of history was used as a medium of exchange, we must remember that it has never been regarded as one of those things that is harmful per se, a nuisance in and of itself. The question is at once raised in my mind, whether or not the Legislature would have any more right to prohibit the use of tobacco than they would the use of coffee or sugar....” In the face of that revelation, Anderson was constrained to concede that the fact that the Supreme Court of Tennessee no longer adhered to a jurisprudence sympathetic to such views “inclined [him] to think that...the Legislature has a right to pass the act.” Consequently, it was his and the jurors’ “duty to see that this provision, so far as it is valid under the Constitution, be carried out.”\textsuperscript{124}

A second decision in federal court, on December 11, 1897, produced a contrary result, but used the same nit-picking factual indicia of the “original package” doctrine without penetrating to any substantive policy analysis. Jacob Blaufield, a dealer in Knoxville (who two years later would lose a similar case),\textsuperscript{125} was arrested in October 1897 for having violated the anti-cigarette law and held for grand jury action; refusing to give bond, he was held in custody by the sheriff, prompting Blaufield to seek a writ of habeas corpus in federal court. Like Sawrie, this case, too, “was begun in the interest of the...tobacco trust,” as a test case to

\textsuperscript{122}See below ch. 10.

\textsuperscript{123}“Charge to the Grand Jury,” \textit{NB}, Oct. 5, 1897 (2:2-3). Some of Anderson’s remarks appear to have become garbled in the newspaper to the extent of inverting their meaning by the erroneous use of negatives.

\textsuperscript{124}“Charge to the Grand Jury,” \textit{NB}, Oct. 5, 1897 (2:3).

\textsuperscript{125}See below ch. 16.
resolve a question left unresolved by Judge Lurton—namely, whether “an original package was the package in which the goods passed the state line.” Finding that precedents were “not agreed,” Charles Dickens Clark, U.S. District Judge for the Middle District of Tennessee, ruled that federal interstate commerce power “follows the original unbroken package so long as kept in that form and for the purpose of re-sale in that condition but no further....” Clark then made the factual finding that the “pine box or crate in which the cigarettes are put up for shipment and transported is the original package and that when this reaches the consignee and is broken for the purpose of selling and retailing the cigarettes in boxes, the goods pass under state control and regulation.” The judge therefore denied the writ and remanded Blaufield to the custody of the Knox county sheriff to be dealt with pursuant to the state anti-cigarette law.\(^{126}\)

The garbled wire-service report in the *New-York Daily Tribune* and *New York Times* to the contrary notwithstanding, the decision neither “effectually settle[d] the cigarette question in Tennessee,” nor gave “the dealers all the liberty they desire[d].”\(^{127}\) That the Tobacco Trust was far from satisfied with the outcome in *Blaufield* emerged clearly from an unusual interview with ATC’s local attorney in the case (and its future national anti-cigarette legislation litigator, general counsel, and chairman of the board of directors), Junius Parker,\(^{128}\) that the *Knoxville Tribune* published. Parker asserted that the difference between *Sawrie* and *Blaufield* consisted in the packaging: in the former, 10-cigarette packages “uninclosed in any other package” were shipped...

\(^{126}\)“Little Smokers Knocked Out,” *KT*, Dec. 12, 1897 (5:1-3). The paper referred to the dealer as “Blaufeld,” but his name was spelled Blaufield in the aforementioned later published state court decision. No person under either spelling was returned at the 1900 population census. The full text of the decision was not located; the *Knoxville Tribune* appears to have published the most detailed account including two paragraphs of what it called “the decision” from a “lengthy” opinion. It is unclear what Clark meant with this concluding sentence: “Judge Lurton has considered with me and concurs.”

\(^{127}\)“Cigarettes in Tennessee,” *N-YDT*, Dec. 12, 1897 (8:3). The identical text appeared as “Cigarette Question in Tennessee,” *NYT*, Dec. 12, 1897 (9). This report misspelled the name as Bensfield, but “Anti-Cigarette Law,” *NB*, Dec. 11, 1897 (1:2), referred to him as Jake Blaufield. Otherwise this article presented a garbled account of the decision, which “held the law as to original packages to be unconstitutional” and “practically renders the anti-cigarette law operative [sic].”

\(^{128}\)J. Parker, 76, Dies; Tobacco Ex-Leader,” *NYT*, June 12, 1944 (19). Parker (1867-1944), was born in North Carolina, practiced law in Knoxville from 1894 to 1899, when he moved to New York to become ATC’s assistant general counsel; after the Tobacco Trust’s dissolution and W. W. Fuller’s retirement, he became general counsel in 1912, and board chairman from 1925 to 1929.
into and sold in Tennessee, whereas in the latter, “the package[s] of cigarettes were put into a box and from the box one of the packages was taken and sold....” The effect of Judge Clark’s decision that the box as the original package had been broken to remove a single package and sell it was that those cigarettes “had lost their quality as imports...and the protection of the interstate commerce clause”; consequently, the state anti-cigarette law “was effective to prohibit such sale.”129 Without admitting his employer’s directive role in the commercial-litigational choreography, Parker furnished enough background information to demonstrate that with the second test case ATC was trying to determine how far it could push the limits of the original package doctrine in order to subvert and nullify the scope of the state’s far-reaching prohibitory law. Asked what the effect of Judge Clark’s decision would be, Parker replied:

“...Its only effect will be to necessitate the continuance of shipment by wholesalers of the loose packages. Ever since the Sawrie case was decided, the wholesalers from outside this state have been shipping the packages loose to the dealers in Tennessee. The sale of such packages has been, and is, protected fully, and the wholesalers have not hesitated to go to the additional expense and trouble incident to this method of shipment. So far as I know, all the cigarettes now on sale in Knoxville have been received in this way.... If the decision in the Blaufeld case had been otherwise, the wholesalers would have been relieved of the expense and trouble of this method of shipment. As it is, they will not be, and this, so far as I know, is the only effect of the Blaufeld decision.”130

If Parker’s account was accurate, its subtext was presumably that the Tobacco Trust had forced some other entities to part with some of their profits in order to finance this charade of a shipment procedure designed to simulate compliance with the outdated interpretations of interstate commerce and of its functions embedded in the original package doctrine. Parker implicitly confirmed this subtext in response to the Tribune’s question as to whether the Blaufeld decision would raise cigarette prices for consumers or retailers: “...No, the wholesalers have borne the increased expense caused by the method of shipment, and will continue to do so.”131

The Tobacco Trust Tries Bribery—Again

“Personal liberty” received a damaging blow in Tennessee; that is to say, the personal liberty of men who want to make money by leading children into bad habits by the sale of cigarettes. ... Smoking cigarettes is still as much of a personal privilege as ever in Tennessee—provided the smoker can get them.\footnote{132}

Despite Judge Anderson’s grand jury instructions delineating the framework of the anti-cigarette law that survived Judge Lurton’s partial invalidation in \\textit{Sawrie}, the executive and legislative branches of the Tennessee state government felt compelled to deal with the subject matter again. On December 29, 1897, Governor Taylor issued a proclamation convening the General Assembly in extraordinary session to attend to matters “requiring immediate legislation.” And while the principal motivation for the session consisted in providing for assessment and taxation of railroad properties and dealing with governance issues of the city of Memphis, Taylor also mentioned the enactment of laws establishing privilege taxes for railroads, cigarette dealers, and circuses.\footnote{133} In his message to the legislature on the session’s opening day, January 17, 1898,\footnote{134} the governor, engaging in the kind of entertaining oratory that had earned him the nickname “Our Bob,” recommended that the legislators carefully consider the imposition of a cigarette sales privilege tax

\begin{quote}
\begin{center}
\textit{...in view of the fact that recent legislation prohibiting their sale has been declared unconstitutional, and laid away in the tongueless silence of the dreamless dust by the Federal Court. Whether or not a law on this subject can be enacted which will live, move, and have its being without being sentenced to death by the Federal Court, is a question which I recommend to the wisdom and genius of your honorable bodies.\footnote{135}}
\end{center}
\end{quote}

And although both chambers did consider imposing privilege taxes on cigarette sales, those bills were overshadowed by Representative Jesse Rogers’ revelations on the House floor that the Tobacco Trust had tried to bribe him into helping repeal his own anti-cigarette bill.

On January 24, Houk introduced in the Senate two similar bills either of which would have effectively repealed the anti-cigarette law by imposing a

\begin{itemize}
\item \footnote{132} “Tennessee’s Anti Cigarette Law,” \textit{Evening Democrat} (Warren PA), Jan. 20, 1899 (2:1-2) (edit.) (reprinted from \textit{Commonwealth}).
\item \footnote{133} 1898 Tenn. Acts 3, 4.
\item \footnote{134} The short session ended on Feb. 5.
\item \footnote{135} 1898 Tenn. Acts 9.
\end{itemize}
privilege tax on wholesale and retail dealers in cigarettes, cigarette tobacco, and cigarette paper. S.B. 21 would have taxed all wholesalers $150 and retailers between $25 and $75 depending on the population size of the county in which they did business, and repealed all laws in conflict with it. The more streamlined S.B. 22 would have imposed a privilege tax of $30 on wholesalers and $10 on retailers. Houk had “introduced these two extremes,” he told the Nashville Banner, “with a view to securing the committee’s careful consideration of the matter, and if possible have them recommend some bill bearing on this subject.”

Two weeks later, in the wake of Rogers’ bribery revelations, Houk gave a lengthy statement to the Knoxville Daily Journal in which he sought to defend his legislative conduct. (Houk, like Rogers, had also returned to Knoxville at the end of the extra session.) Houk (mistakenly) believed that there could be no question that the U.S. Supreme Court would sustain Judge Lurton’s decision, which in Houk’s view fully vindicated his own position; until then, however, Rogers’ law would “continue to serve as the enemy of reform as to the cigarette, in that it will prevent as it has prevented, a sensible and just regulation of the evil by law.” Without explaining how a bill “satisfactory” to the Tobacco Trust could possibly be designed to combat cigarettes as an “evil” or impose cigarette taxes on dealers, Houk went on to assert, without revealing his source, that: “I am reliably informed more cigarettes are being shipped into the state today than ever before without paying a cent of tax, and that at no time has the Rogers law materially affected the trade in that article.” Since the Tobacco Trust never publicly revealed state-level cigarette sales data, Houk’s source was presumably either the Trust or individual dealers; in either case, however, it is unclear why

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136 S.B. 21, Tennessee Senate, 1898, RG 60, Tennessee State Library and Archives (typed copy furnished by Tennessee State Library and Archives); Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 47 (1898). On the $500 tax passed by the House in 1891, see above ch. 4.

137 S.B. 22, Tennessee Senate, 1898, RG 60, Tennessee State Library and Archives (typed copy furnished by Tennessee State Library and Archives); Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 47 (1898). The Tennessee State Library Archives holds two variants of S.B. 22; the second, which exists in a handwritten and a typed version with handwritten emendations, structurally resembles S.B. 21, but with different cut-off points and lower tax levels for retailers ($5 to $15) and wholesalers ($75). According to “Legislation Moves Slowly,” NB, Jan. 24, 1898 (1:5), this bill would have taxed wholesalers $50 and retailers $10. Both variants contained the same repeal provision as S.B. 21.

138 “Legislation Moves Slowly,” NB, Jan. 24, 1898 (1:5).

cigarette sellers would have wanted to devote any resources to repealing a law that promoted rather than prohibited sales. Against this background Houk—who appears neither then nor later to have demonstrated his bona fides as a legislative opponent of cigarettes—allegedly without any suggestion from or consulting anyone (except the state treasurer, who had said that a cigarette privilege tax could bring in $20,000 to $40,000 annually), on his own drafted the two aforementioned bills in the hope that the Judiciary Committee, which heard the treasurer’s testimony, would report a substitute bill that would calibrate the tax to generate the maximum revenue.\footnote{“Cigarette Bribery,” \textit{KDJ}, Feb. 8, 1898 (8:2).}

The Judiciary Committee did recommend for passage a substitute bill (based on the treasurer’s figures), which the Senate adopted.\footnote{\textit{Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee} 71, 76 (1898); “Cigarette Bribery,” \textit{KDJ}, Feb. 8, 1898 (8:2).} On February 1 by a vote of 26 to 4 the Senate passed the bill,\footnote{\textit{Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee} 78 (1898).} which then also passed its first reading in the House the same day.\footnote{\textit{Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee} 33 (1898) (H.B. No. 3, by Democrat Frank Ottenville of Davidson County [Nashville]). In addition, Republican Representative Bennett S. Williams, who was filling a vacancy during the extra session, introduced H.B. 34, which would have imposed a $100 annual privilege tax on cigarette wholesalers and a $5 to $20 tax on retailers depending on the size of the county they did business in, and H.B. 35 to repeal the anti-cigarette law, both of which were tabled after being referred to the Finance Committee. H.B. 34 and H.B. 35, Tennessee Senate, 1898, RG 60, Tennessee State Library and Archives (handwritten copy furnished by Tennessee State Library and Archives); \textit{Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee} 102, 118, 119, 147 (1898) (H.B. No. 34 and 35).} A similar bill had been introduced in the House on January 17,\footnote{\textit{Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee} 96 (1898).} which the next day passed its second reading and was referred to the Finance, Ways and Means Committee,\footnote{\textit{Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee} 102, 118, 119, 147 (1898) (H.B. No. 34 and 35).} which in turn assigned it to a subcommittee chaired by Rogers. Houk stated that after Rogers’ subcommittee had recommended rejection of the bill, it went to the full committee, which was about to recommend passage when, “‘I am reliably informed, Mr. Rogers asked the committee to go into executive session....’” Houk alleged that a committee member had told him that Rogers had told the committee that at the 1897 session
someone had “‘offered him a bribe of more money than he could earn or had earned, practicing law, in twenty-five years,’” to support Houk’s prohibitory bill. Supposedly, then, Rogers was approached by an ATC representative at some time between the governor’s call for the extra legislative session and its opening who asked him to introduce a privilege tax bill like the one that later passed the Senate. Instead, according to Houk, “‘of course, the object of Mr. Rogers in making his statement was to kill the bill of which I was in sense, the father. The effect of his statement was to cause the committee by a small vote, to recommend the bill for rejection.’” In addition to the impending defeat of his bill, Houk experienced a blow to his reputation resulting from Rogers’ statement, which had “‘created the excuse for the inference that while he had not sold out I had done so, having introduced the two cigarette bills on which he had been offered a large bribe or bribes.’”

In a lengthy “full statement” that he gave to the Knoxville Daily Journal on February 13 in response to Senator Houk’s aforementioned statement that the newspaper had published five days earlier, Rogers explained what happened next:

We, the subcommittee, decided that it was better to have no legislation on the subject but to await the decision of the supreme court of the United States. The matter came up before the full committee on Thursday, February 3rd, and a cigarette dealer and a lawyer of Nashville appeared before the committee and urged the passage of the pending bills. I saw that the members of the committee were taken with the idea of raising revenue. I asked the committee to go into executive session which it did, and then, in accord with what I believed to be my duty I disclosed in a general way, but without going into details or giving names, the improper propositions that had been made to me at the regular session, whereupon the committee decided to report the pending bill for rejection and did accordingly so report it, and it was rejected.147

The next day, February 4, Democratic Representative William Craig, declaring that “a gentleman of integrity” had stated before the Finance Committee that “efforts had been made to buy votes and influence of members,” offered a resolution to investigate the bribery charges. When asked by another

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146“Cigarette Bribery,” KDJ, Feb. 8, 1898 (8:2-3).
147“Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 6). The text of Rogers’ statement was reprinted in full as “the Cigarette Bribery Charge,” NB, Feb. 14, 1898 (3:1-3). For the committee’s report for rejection of H.B. No. 3, see Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 123 (1898) (Feb. 4). The bill was then “[o]n motion...amended so as to conform to the Senate bill [No. 22].” Id at 140 (Feb. 5) (presumably by typographic error the bill was referred to here as “House Bill No. 4”).
representative to “name the man,” Craig remarked that he “would do so only on
the gentleman’s authority.”

On a voice vote the House quickly adopted a
House Joint Resolution authorizing an investigation of the bribery charges.
The House Clerk then created a “little stir” when he entered the Senate chamber
to announce the resolution and submit it for the Senate’s concurrence. After it
had been read, Senator Houk finally revealed the origins of the charges in the
cigarette bill he had introduced at the last session: “Rogers, whom he had
solicited to advocate the bill in the House, had said that he was offered large
bribes by someone, and it seemed to be thought by some that Mr. Houk was the
man he had reference to.” Pursuant to Houk’s request, Rogers informed the
Finance Committee that he had not been referring to Houk and that the man who
had offered the bribe was not in Tennessee. After Houk had expressed his
support for the resolution, the Senate concurred in it by a vote of 16 to 14.

On February 5, based on the statement “on good authority that certain parties have
attempted to influence the vote unlawfully and bribed certain members” of the
extra session of the legislature, Governor Taylor approved the resolution
appointing five members of the legislature to a committee to investigate the
charges (as to the regular and extra sessions) and report the relevant information
to the prosecuting attorney and grand jury of the counties in which the attempted
bribery took place.

As the bribery investigation was unfolding, House debate on repeal of
Rogers’ anti-cigarette law began. After the bill that had already passed the Senate
was substituted for the House bill to place a privilege tax on cigarette dealers on
February 5, Rogers took the floor and told his colleagues that he had refused
to introduce a bill drafted by Williamson Fuller, the ATC lawyer, to repeal his
own anti-cigarette law. He further told of the letter from Frederick Gibbs, a
member of the National Republican Executive Committee, requesting that he
actively or at least passively support the Senate bill because the bill’s friends

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148 “Bribery Has Been Attempted,” NB, Feb. 4, 1898 (1:5-6 at 6).
149 Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 115-16 (1898) (H. Joint Res. No. 20).
150 Journal of the Senate of the Fiftieth General Assembly of the State of Tennessee 102 (1898).
152 Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 140 (1898). The bill would have taxed wholesalers $75 and retailers $15 to $6, depending on population. “Will Adjourn This Afternoon,” NB, Feb. 5, 1898 (1:2-5 at 4).
were among the biggest contributors to Thomas Platt’s New York campaign fund. Rogers went on to mention that when an ATC representative asked him what he would do when the bill under debate came up for a vote, he responded that he intended to oppose it:

He said the cigarette was filling the alms-houses, the hospitals and the asylums. In Knoxville the law was observed until Judge Lurton’s decision, and boys had quit the habit. The people who were selling the cigarettes were doing so under the Federal decision as to original packages. If this bill passed not a dollar could be collected off the imported article where it was sold in the original package. It would yield no revenue because all dealers would claim to sell original packages. It would be said to the Supreme Court that Tennessee had made the cigarette an article of domestic commerce, and could not prohibit the sale of the imported article. The only people before the Finance Committee favoring the bill were a cigarette dealer and his lawyer. He said it was singular that the bill to inspect, of the regular session, and the bill to license the sale at this session, both came from the same source. Did the people who favored the original bill have the interests of the people in view? Did those behind the bill under consideration advocate it in the people’s interest. The passage of the bill would destroy the state’s case in the United States Court. Let the case rest in the court. If the decision was against the state it would be only for a few months, and the legislature could remedy the matter.\textsuperscript{153}

Democratic Representative Eliphalet Jarvis, who had called up the bill under consideration, contended that since it was “a purely revenue measure,” it would have no impact on the anti-cigarette statute—for which he had voted believing it to be unconstitutional—or the court case. After asserting that the evidence theretofore taken by the bribery investigation committee (of which he was chairman) had shown that ATC “had had nothing to do with it,”\textsuperscript{154} Jarvis called for a vote on the cigarette privilege tax bill, which, though at 48 to 23 it amounted to more than a two-thirds majority of votes cast, nevertheless fell short of the requisite constitutional majority of elected representatives.\textsuperscript{155} Houk later charged that had it not been so close to the end of the brief session when so members were absent, his bill “would have passed overwhelmingly” because once the

\textsuperscript{153}“Will Adjourn This Afternoon,” NB, Feb. 5, 1898 (1:2-5 at 4-5).
\textsuperscript{154}“Will Adjourn This Afternoon,” NB, Feb. 5, 1898 (1:2-5 at 5).
\textsuperscript{155}Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 140-41 (1898). One representative explained that he had voted for the bill because, if the Supreme Court declared the anti-cigarette law unconstitutional, “the State would not receive revenue which it ought to”; another representative explained his no vote as based on his opposition to the sale of cigarettes. Journal of the House of Representatives of the Fiftieth General Assembly of the State of Tennessee 141-42 (1898).
legislature had passed the resolution to investigate the bribery charges, a “strong reaction set in favor of my bill...”

The extra session having come to a close, the following day, February 6, Rogers returned home to Knoxville, where, while refusing to “make anything public until after the investigation of the committee,” he nevertheless made a lengthy statement to the *Knoxville Daily Journal*, which published it under the title, “Coffin Tack Story.” He explained that, after confiding in a fellow legislator, he had not reported the attempted bribery during the regular session in 1897 because he had decided that he “would be content” with the defeat of Houk’s bill, which would have effectively repealed Rogers’ newly passed bill. He made a different kind of decision at the extra session when faced with Houk’s cigarette privilege tax bill, which would have repealed all conflicting laws without expressly repealing the anti-cigarette law, because, in the presence of a bill that would have effectively destroyed that law, he felt that it was his “duty...to disclose the improper proposition” that had been made to him the previous year. In explaining this decision, Rogers emphasized that: “The statute was drafted by me so as to outlaw the cigarette as a legitimate article of commerce, either domestic or interstate, and one that the state, in the exercise of its police power, has the right to outlaw as being injurious to the health of the people.” Why Rogers believed that his bill or its meager legislative history in any way asserted, let alone documented, cigarettes’ commercial illegitimacy is unclear, but he told the newspaper that if the Supreme Court sustained the law, a cigarette sales privilege tax “would have had the effect of legalizing them as an article of domestic commerce and, of course, the state cannot prohibit an article of foreign commerce which it legalizes by taxing as an article of domestic commerce.”

Houk’s detailed statement to the *Knoxville Daily Journal* and Fuller’s and Gibbs’s in the New York press prompted Rogers to give his own “full statement” to the Knoxville paper on February 13. In it he recounted that about March 20, 1897, that is, more than five weeks after the governor had approved his bill, J. W. Baker of Nashville (whom Rogers did not identify further) brought

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156 “Cigarette Bribery,” *KDJ*, Feb. 8, 1898 (8:2 at 3).
158 See below this ch.
159 Baker, an attorney in Nashville, was during the 1890s chairman of the state executive committee of the Republican Party and the party’s unsuccessful candidate for governor in 1898. *The Official Political Manual of the State of Tennessee* 348 (1890); *Tribune Almanac and Political Register for 1895*, at 261 (1895); *The Daily News Almanac*
him a bill that he said had been prepared by Fuller, ATC’s general counsel, and that would have repealed Rogers’ enacted bill and substituted for it mere inspection of cigarettes; Baker told him that he had received it from New York Senator T. C. Platt or Frederick S. Gibbs, the national Republican committeeman from New York, who requested that Baker ask Rogers to introduce and advocate its passage. At Rogers’ request, Baker left the draft bill with Rogers, who informed Baker a few days later that he would not introduce it (although oddly Rogers did not explain publicly why he would have needed more than a few seconds to reject outright a request from the creator of the evil he was seeking to eliminate to repeal the law that eliminated that evil). Shortly afterwards, on March 30, Houk introduced “a bill that was an exact copy of the one that Mr. Baker” had given Rogers. Then on April 3, “quite an array of lawyers appeared before the senate judiciary committee and with much force pressed the passage” of Houk’s bill; among these lawyers was W. R. Turner of Knoxville.¹⁶⁰ (Turner was Attorney General Pickle’s law partner in Knoxville who represented ATC and testified before the committee on the constitutionality of Rogers’ bill.)¹⁶¹

That same day Rogers received from Frederick Gibbs the following letter (dated April 1):

My Dear Mr. Rogers:—I confirm my telegram of even date. Having met you at St. Louis, I felt warranted in communicating with you upon a matter of great interest to many of our political friends, and ask you if you can find it consistent with your duty to give your support to the passage of the Cigarette Repeal bill, which I am informed has been introduced in your legislature. Such action on your part will receive reciprocation whenever demanded by you. I have written you today more fully and request that this communication and letter be considered “confidential”; and further have to say that the parties most directly interested in the repeal of the present law have been of great use to

¹⁶⁰“Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 4).
¹⁶¹“Fisticuff at Tulane,” NB, Feb. 14, 1898 (1:6).
our organization both as large contributors and by active work in the last campaign, and feel that as a like law has been declared unconstitutional in the Iowa and West Virginia cases, it would seem only proper that this repeal bill should be permitted to pass, which we all conclude is out of the question unless it should receive at least your passive support.

I agree with you and your friends that some law should be passed to prevent the use of all narcotics by minors or at least to prevent their sale to them, and if such a measure could be placed upon your statute books to take the place of the prohibitory law now in force in your state, it seems to me it would have a much more practical and moral effect than the more seeming stringent measure.

... I trust that you will pardon what may seem like interfering or even suggesting interference in your legislative duties....

That same day Rogers learned from the owner of the hotel in Nashville where he was boarding that a Mr. Halpin from New York had also been staying there for 10 days with the purpose of having Rogers’ anti-cigarette law repealed. Wanting to find out exactly what Halpin was doing, Rogers asked Baker, who told him that Halpin was Gibbs’s private secretary and arranged an introduction. Foreseeing a scheduling conflict between his attendance at the legislature during possible consideration of Houk’s bill and his promise to defend an accused murderer before a court in another county, Rogers mentioned to Halpin that he would be unable to appear in court unless final action on the bill could be postponed until his return. (Rogers failed to explain why he would have risked the moral entanglement of asking a favor of the enemy, the Tobacco Trust’s lobbyist, instead of approaching the House leadership directly.) Halpin immediately replied that “his people would be glad to assist my client in the payment of my fees if I would go and attend to the case.” (It is unclear how this deal would have helped Rogers as opposed to his client.) Instead of yielding to his “first impulse” to “resent” this first improper remark, it soon occurred to Rogers that “if I would leave him to his course he would commit himself in such way that I would be easily able to defeat the pending bill which was my first desire.” Rogers then broke off the conversation, but that evening Halpin invited Rogers to his hotel room “to smoke and drink”; Rogers went, but eschewing the tobacco and alcohol, soon left, only to have Halpin ask to see him yet again later than night. The ever persistent Halpin did catch up with him at the railroad station, where he informed Rogers that “his folks would contribute $500” to his fee if he would attend to his court case; prompting no reply from Rogers, Halpin asked Rogers to telegraph

162“Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 4). In fact, the Iowa Supreme Court had upheld the law, while the West Virginia case dealt with a high license, not a prohibitory law. See below ch. 11-12.
him the next day, prompting yet more silence from the departing Rogers. On returning to Nashville from Knoxville two days later, Rogers met Baker at the capitol and told him that he had “better tell Halpin to withdraw the bill and leave town.” Despite having gotten the message from Baker, Halpin, instead of desisting, approached Rogers once again at their hotel and began “apologizing and explaining”; Rogers “hushed him up,” read him Gibbs’s letter, and told him that he had “committed a felony,” repeating his injunction to withdraw the bill and leave Nashville.\textsuperscript{163} Never one to retreat in silence, Halpin then appealed to me not to expose him. I then thought that the best way to defeat the pending bill was to let him remain upon the ground, and I told him that what I wanted above everything else was the defeat of the pending bill, and if no further step was taken in that matter...I would not expose him or those he represented. He then promised me that nothing should be done with the bill that day, and that he would communicate with his people in New York and let me know the next morning whether or not my terms would be agreed to. To this I assented. ... The next day...Halpin agreed that nothing further should be done with the pending bill. No lawyer argued it further. The senate judiciary committee never reported it; and although the legislature remained in daily session until...April 10th, the bill was never again heard of, and the regular session adjourned without the bill even being reported by the senate judiciary committee.\textsuperscript{164}

In spite of the Tobacco Trust’s (false) boasts that anti-cigarette laws did not affect sales, that it had never lost a state anti-cigarette statute lawsuit, and that Judge Lurton’s decision was yet another victory, ATC was apparently worried enough that it risked public denunciation of its attempted bribery by approaching Rogers yet again. In the interim between Governor Taylor’s call in late December for the extra session and its convening in mid-January 1898, Parker, the company’s resident Tennessee counsel, went to Rogers’ office at the behest of general counsel Fuller to find out what Rogers’ reaction would be if a bill were introduced effectively repealing the “Rogers Anti-Cigarette law” and subjecting cigarettes to the privilege tax. Although it seems odd that the Trust would have supposed that its fiercest enemy, who also possessed the evidence to prosecute it for the felony of attempted bribery of a legislator, would be amenable to

\textsuperscript{163}“Makes All Public,” \textit{KDJ}, Feb. 13, 1898 (13:4-7 at 4-5). The first public mention of Halpin appears to have been on Feb. 6 in the \textit{Knoxville Tribune}, which reported that he was of the ATC and had wired that he wanted to testify before the legislative bribery investigation committee. “Extra Session Is Through Its Labors,” \textit{KT}, Feb. 6, 1898 (1:1). Oddly, though both Rogers and Houk represented Knoxville, the \textit{Tribune} later devoted hardly any attention to the controversy.

\textsuperscript{164}“Makes All Public,” \textit{KDJ}, Feb. 13, 1898 (13:4-7 at 5).
acquiescing in let alone promoting repeal of his own eponymous law, Fuller and Parker may have calculated that Lurton’s decision had sufficiently weakened Rogers’ constitutional-legal position to cause him to reconsider. And in fact Rogers and Parker did discuss the Sawrie decision, but Rogers insisted that the U.S. Supreme Court should decide the issue, the upshot being that Parker was to report to Fuller that Rogers would oppose any such repeal measure.\footnote{165}

This rebuff notwithstanding, the Tobacco Trust, as already outlined, found other Tennessee legislators to do its bidding, though Rogers’ last-minute revelations stymied the repeal initiative. In self-justification, Rogers rejected Houk’s (sour-grapes) criticism that he would have done better to have gone public during the regular session in 1897 or earlier during the 1898 extra session; his reasons were merely pragmatic: in 1897 he had been convinced that he had a greater chance of defeating repeal without exposing the bribery attempt, and even in 1898 he would not have made his disclosures if he had not as a Finance Committee member been “brought face to face with a measure that was in exact accord with the one” about which Parker had spoken to him.\footnote{166}

Why, in the face of the manifest overall coordination of the repeal-bribery undertaking by the Tobacco Trust—which had engaged in similar activities in Washington State in 1893 and Iowa in 1896-97\footnote{167}—Rogers concluded his full statement with an exoneration of Baker and Parker, who had, after all, been ATC’s key agents in the conspiracy, as having said “nothing whatever...that was in the slightest degree offensive or improper”\footnote{168} is a mystery. Indeed, it is so much more of one because Rogers himself posed seven unanswered questions at the end of his statement, all of which unambiguously implicated ATC:

Who employed the lawyers that appeared before the senate judiciary committee in advocating the Houk bill on April 2 and 3, 1897?

Why was it that no steps was [sic] taken in that bill after April 3rd?

What interest has Senator Thomas C. Platt, of New York, in cigarette legislation in the state of Tennessee?

What interest has Frederick S. Gibbs, of New York, in such legislation?

Who were the parties most directly interested in the repeal of the Rogers anti-cigarette law referred to by Mr. Gibbs in his letter as having “been of great use to his organization as large contributors?” [sic]

Why was the Houk repeal bill so suddenly dropped?

What did Mr. Gibbs mean in his letter to me when he said twice that my support of

\footnote{165}{"Makes All Public," \textit{KDJ}, Feb. 13, 1898 (13:4-7 at 6).}

\footnote{166}{"Makes All Public," \textit{KDJ}, Feb. 13, 1898 (13:4-7 at 6).}

\footnote{167}{See above ch. 12.}

\footnote{168}{"Makes All Public," \textit{KDJ}, Feb. 13, 1898 (13:4-7 at 7).}
the bill introduced by Mr. Houk would receive reciprocation whenever demanded by me both from him and his friends.\footnote{169}

The impression that Rogers had reportedly left with members of the Finance Committee on February 3 was that he had been offered a “sum ranging up in the thousands” to work to repeal his own bill, but when the joint committee of both houses of the Tennessee legislature met on February 4 to investigate his allegations, he stated that he had been offered $500.\footnote{170} In a House speech Rogers stated that William Whitehead Fuller, general counsel and a director of the American Tobacco Company,\footnote{171} had drafted the bill, while Frederick S. Gibbs,\footnote{172} New York’s Republican National Committeeman, had asked him in writing to support the bill “because its promoters were among the largest contributors to Thomas C. Platt’s campaign fund.”\footnote{173} According to a front-page, above-the-fold account in \textit{The New York Times}, which revealed machinations similar to those that Philip Morris and other cigarette companies would repeat on a much more systematic and lavish scale decades later, Fuller, when confronted with these allegations, stated that he did not understand what had prompted Rogers, “the father of the Anti-Cigarette bill,” to make them. Fuller, who represented the Tobacco Trust in similar litigation across the United States, denied that he had ever drafted a bill repealing the anti-cigarette law for the simple reason that Judge Lurton’s decision had rendered it unnecessary, though he added that he would not have hesitated to draft one if it had been necessary. Sounding like the cigarette companies in the late twentieth century bragging that they had never paid out a penny in suits filed against them by smokers, Fuller, who called Rogers’ remarks “‘the ravings of a disappointed politician,’”\footnote{174} then boasted of the trust’s unblemished litigation record:

“The laws passed in Washington and Iowa prohibiting the sale of cigarettes have been declared unconstitutional, as well as the law in West Virginia imposing a tax of $500 a
year on their sale. The $1,000 yearly license fee which the City of Denver imposed on its retail cigarette dealers met a like fate. Every bill that has ever become a law which tended to interfere with or prohibit the sale of cigarettes has, when tested, been declared void.”

Denial continued up the corporate hierarchy, as ATC’s treasurer George Arents told the Times that the company had never, directly or indirectly, approached any member of the Tennessee legislature. But some light was finally cast on the proceedings when Frederick S. Gibbs, who had allegedly written to Rogers on ATC’s behalf, admitted:

I met Mr. Rogers in St. Louis at the time of the Republican National Convention in 1896, and remember him as a cripple with a bad face. I wrote a letter to Mr. Rogers about a year ago, at whose suggestion I cannot say without consulting my letter book, asking him, if consistent with his convictions, to introduce a bill in the Legislature to repeal the anti-cigarette law, and telling him the Republican Party would consider it a favor.

... I never mentioned the American Tobacco Company in my letter.... If Mr. Rogers was offered a bribe of $500 he must be a cheap man, or the smallness of the amount perhaps insulted him.

Almost a decade later an anonymous piece in the muckraking magazine Collier’s on the nationally even more scandalous legislative bribery by the Tobacco Trust in Indiana shed light on the machinations of Gibbs. During “the high tide of commercialized politics” from McKinley’s election in 1896 until Theodore Roosevelt succeeded him in 1901 Gibbs was one of the “most powerful” men in the Republican Party:

It would not be easy to overestimate Gibbs’s importance and power. From 1896 until 1900 he was the New York member of the Republican National Committee, and after 1900 he was a member of the Executive Committee, the small inner committee in which rests the final control of the party. Within the party in New York State his power, from time to time, over a period of twenty years, had been paramount. He was a dominating member of the New York Assembly and of the Senate.... To his political prestige he added a taste in art and social graces which made him the intimate of all the men of power, in business and politics, in New York.

Gibbs’s occupation was one for which his personal affiliations and his relation to the Republican machine throughout the country abundantly fitted him. He was not a lawyer, but at No. 1 Madison Avenue he maintained offices and did business with stationery which bore merely the inscription, “Office of Frederick S. Gibbs. Among his employees was

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175 “Cigarettes in Tennessee,” NYT, Feb. 7, 1898 (1:5).
176 “Cigarettes in Tennessee,” NYT, Feb. 7, 1898 (1:5).
177 See vol. 2.
Fremont Cole, who today occupies the same offices and was Gibbs’s successor in the same occupation. Gibbs was the prince of professional lobbyists; his office was the meeting place for those who take and those who give, and whenever the necessity arose, in one or many State capitols, for promoting or throttling legislation, Gibbs was on terms of captain and lieutenant with the men who could do the work.

... Of all Gibbs’s clients, the one concerning which accident has brought the record to light is the American Tobacco Company. This company has been peculiarly subject to hostile legislation, very often inspired by a sincere and intelligent interest in the public welfare, but quite as often inspired, as in every case where a corporation has established a “yellow dog” fund, by the itch for blackmail money.178

178 “The Trust and the Legislature: How the Tobacco-makers Fought the Law-makers,” *Collier’s* 40(13):9 (Dec. 21, 1907). One episode in Gibbs’s legislative career appears not to fit in with his later role as an agent of the Tobacco Trust. In 1890, when he was a member of the New York State Assembly from New York City, Gibbs introduced a bill, which as he himself moved to amend it, read as follows: “No person shall sell, exchange, or dispose of cigarettes, cigars or any article of tobacco..., or offer or attempt to do upon any representation, advertisement, notice or inducement that any money..., photograph, lithograph picture or anything likely or calculated to attract, induce or entice minors to become purchasers thereof other than what is specifically stated to be the subject of the sale or exchange, is or is to be delivered or received, or in any way connected with, or a part of the transaction, as a gift, prize, premium or reward to the purchaser, or shall sell any such article with such money..., photograph, lithograph, or picture of any kind inclosed in, or attached to the package.... But nothing in this section shall be construed to apply to the sale, exchange or disposition of any such article...for shipment to any other States or foreign countries.” *Journal of the Assembly of the State of New York at Their One Hundred and Thirteenth Session*, 2:789 (1890) (Assembly Bill No. 1121, Mar. 26). During debate over this bill designed to prevent the use of pictures to increase the demand for cigarettes several members argued that the bill was unconstitutional, while Tammany Democrat Joseph Blumenthal charged that it was “simply intended to ‘strike’ at a great industry.” Gibbs himself was surprised by the 72 to 17 vote for his bill, which he had not believed would pass when he had introduced it. “Pushing Ballot Reform,” *NYT*, Apr. 10, 1890 (5:1); *Journal of the Assembly of the State of New York at Their One Hundred and Thirteenth Session*, 2:1089 (1890) (Apr. 9) (vote was 72 to 18). When the Senate failed to pass the bill, the *Times* was pleased, calling Gibbs’s cigarette measure “idiotic.” “Their Conference in Vain,” *NYT*, May 2, 1890 (5:1-3 at 1). The Senate’s vote of 16 to 9 in favor did not represent the requisite majority of elected senators (i.e., 17). *Journal of the Senate of the State of New York at Their One Hundred and Thirteenth Session*, 1:1137 (1890) (May 1). Several months later Gibbs was expelled from the Republican New York county committee for having entered into a political alliance with Tammany Hall, leaving his then-enemy Thomas Platt absolute leader of the state party. “Mr. Platt’s Triumph,” *NYT*, Sept. 3, 1890 (4) (edit.); “Gibbs’ Final Expulsion,” *NYT*, Sept. 19, 1890 (1).
Among others, the committee deposed Junius Parker, who was litigating the constitutionality of the Tennessee anti-cigarette law together with Williamson Fuller on behalf of ATC. But the key figure in the investigation was William Halpin, the only person whom Rogers accused of having directly offered him a bribe, who traveled to Nashville, was deposed by a single member of the committee (Senator Horace Mann), and left Nashville in secrecy. Interestingly, whereas Rogers had referred to him as Gibbs’s private secretary, Mann called him “‘the representative of the American Tobacco company,’” as did Senator Houk, who added: “‘It is said...he is a responsible person, associated with some of the wealthiest and most distinguished citizens in the country in business and otherwise. He is said to have introduced, while a State Senator, the Greater New York consolidation bill in the New York Legislature.’” In fact, William Halpin was a Republican Assemblyman who during his one term did sponsor the consolidation bill in 1895; he was also “one of Gibbs’s chief lieutenants and...known as a strong Platt man”; and both he and Gibbs were members of the New York County Republican Committee, of which Halpin was chairman from 1903 to 1905 (after Gibbs’s death). Without access to the transcript of the

179 “Exonerates Senator Houk,” NB, Feb. 15, 1898 (8:3). Parker, “a democrat (though not in good standing),” who practiced at the law firm of Welcker & Parker in Knoxville, corresponded with Houk concerning a bill conferring expanded jurisdiction on the Knox County Circuit Court that does not appear to have had any connection to the Trust. J. Parker to Hon. Jno. C. Houk (Jan. 21, 1897), in Papers of Leonidas Campbell Houk and John Chiles Houk Papers, Box 66, McClung Historical Collection, Knox County Public Library, Knoxville, TN (quote).

180 Most newspaper accounts failed to mention Halpin’s first name. “Will Close Today,” KDJ, Feb. 14, 1898 (5:5), referred to him as Samuel. At the 1900 population census five Samuel Halpin’s were returned, all Russian Jews in their 20s and 30s living in New York, but the occupation of none remotely matched that of private secretary. The bribery investigation committee report dealing with Senator Houk called him William. “Exonerates Senator Houk,” NB, Feb. 15, 1898 (8:3). The 1900 population census returned a number of William Halpin’s living in New York, none of whose occupations matched that of private secretary.

181 “Exonerates Senator Houk,” NB, Feb. 15, 1898 (8:3). The texts of this and other depositions were to accompany a separate report to be given to Attorney General Pickle to determine whether to submit the evidence to a grand jury. Id.; “Those Depositions,” NB, Feb. 15, 1898 (1:5). The press seemed to have stopped reporting on the matter before the promised report appeared.


183 “Senator Houk Talks,” NB, Feb. 9, 1898 (3:2).

deposition, the press reported rumors that Halpin’s testimony was “not very favorable to Mr. Rogers.”185 The depositions were notable for having triggered a public fist fight between Houk and Attorney General Pickle, which erupted in the lobby of the Nashville hotel where the depositions were being held. When Houk asked Pickle to state to the bribery investigation committee that in 1897 Pickle had requested that Houk enable Pickle’s law partner, Turner, who represented ATC, to testify before the Senate Judiciary Committee on the constitutionality of the Rogers bill, Pickle’s response that he recalled no such request prompted Houk to insist that Pickle did, leading Pickle to call Houk a liar, who in turn struck Pickle, who reciprocated.186

The report that the joint committee issued on February 14 not only exonerated Houk, but revealed the bias of its members (all five of whom had voted for Houk’s bill at the extra session)187 by asserting that that measure was

“purely a revenue measure and had for its sole purpose the gathering of revenue into the state treasury, and it is in no way connected with the bill introduced at the regular session.... We do not believe that any person connected with the passage of this revenue bill at the extra session...was prompted by any unlawful or impure motives or any other purpose than that of adding revenue to the state. We believe it was a good measure and ought to have become a law, and was defeated by being wrongfully connected with these charges of bribery relating to the bill introduced at the regular session....

“We are further of the opinion that the bill introduced by Senator Houk at the regular session, providing for the inspection of cigarettes sold in the state, was introduced with pure motives, and from all the facts gained by the committee in its investigation of this matter tends to show on the part of the introducer of the bill that he was governed solely from [sic] pure motives and not on account of [sic] any bribe being offered him.”188

(quote); “Gen. Greene to Retire,” NYT, Dec. 20, 1900 (2); “Halpin Approves the Hylan Jubilee,” NYT, Apr. 8, 1923 (20); “William Halpin, 72, Once Assemblyman,” NYT, Aug. 23, 1937 (19). None of these articles (the first of which included a sketch of Halpin’s life and his photograph) mentioned his role in the Tennessee anti-cigarette legislation or his association with ATC.

185“Halpin Has Been Here,” NB, Feb. 14, 1898 (1:7).
186“Fisticuff at the Tulane,” NB, Feb. 14, 1898 (1:6).
187The House members were Democrats Eliphalet Jarvis and William Wesley Craig, and Republican John Edward Cassady; the senators were Democrat Christopher C. Ellis and Republican Horace A. Mann. All except Mann had voted for Rogers’ bill in 1897.
188“Exonerates Senator Houk,” NB, Feb. 15, 1898 (8:3). Even before this report was released, Senator Mann had asserted that Houk had drafted the 1898 bill himself and that whatever the details of the introduction of the 1897 bill, Houk’s actions were “conscientious and sincere.” “Halpin Has Been Here,” NB, Feb. 14, 1898 (1:7). Rogers’ uncontradicted statement in fact revealed that at both sessions Houk had been doing the
The committee report thus also exonerated the committee members themselves and, in all but name, charged Rogers with having misled the legislators in order to prevent passage of Houk’s privilege tax bill.

One group whose position on the anti-cigarette law has remained outside the narrative thus far is Tennessee tobacco farmers, who do not appear to have intervened publicly in the debate in 1897 and whose welfare state legislators did not mention as potentially adversely affected by the sales prohibition. On April 5, 1897, almost two months after the governor had approved the law, but five days before the regular session ended, the Memphis Commercial Appeal published a piece, “Will Seek Repeal: Tobacco Growers of Tennessee Claim Hardship in the Anti-Cigarette Law,” that bore the indicia of an organizationally purchased or planted pseudo-article, but without any indication of the organization or of any spokesperson. Some evidence suggests, however, that the organization was in fact the Tobacco Trust. First of all, the article appeared the same day that Halpin signaled to Rogers that the Trust, according to Rogers’s account, would abandon its efforts to pass the Trust-Houk bill during the remaining days of the legislative session. (Bizarrely, the piece referred to the “iron-bound bill prohibiting the sale of cigarettes” as having been passed in “[t]he last session of the Tennessee legislature,” although the session was still in progress.) Second, the bill allegedly envisioned by the growers encompassed the principal features of the ATC-Houk bill: repeal of Rogers’ law and a ban solely on selling “adulterated” cigarettes. After presenting some interesting data on the size and growth of tobacco production in the state, the piece asserted that:

it is questionable whether the planters and dealers, who number up in the thousands, will approve a measure that so injuriously affects their interests as the prohibitory cigarette bill does. Much muttering is heard that the legislature was carried off its feet by a sentiment that is founded in exaggerated rumors of the great ravages cigarettes are making among the youth of the land.

Those who oppose the measure enacted by the last [sic] legislature claim that Tennessee’s great tobacco interests ought not to be dealt such a blow unless there is a better reason for it. The assertion that the use of cigarettes is deleterious to health is true only in a modified sense, as the tobacco people say, the damage resulting either from misuse of pure cigarettes or the use of impure cigarettes, and it is urged strenuously that the legislature, instead of delivering such a stab at Tennessee’s great and growing tobacco

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189 At this time it was common for the liquor industry to buy even editorials in newspapers. James Timberlake, Prohibition and the Progressive Movement, 1900-1920, at 108-109 (1965).

190 “Will Seek a Repeal,” CA, Apr. 5, 1897 (5:5).
Changing its focus somewhat, the critique of the anti-cigarette law turned toward themes (freedom and autonomy) that in content and tone anticipated the Tobacco Institute’s/Philip Morris’s late-twentieth-century homicidally mendacious advertising:

It is claimed...that this prohibitory law...will not in the least lessen the use of cigarettes. Tell a free-born American citizen that he shall not do a thing, and that is the very thing he will do or die. Cigarettes will be brought into the State by the box, and every man or boy who wishes can buy them over the State line, and having thus to buy them by the quantity, they have more of them at hand and will use them more freely.

It is claimed that the damage done by cigarettes arises largely from misuse by an innocuous article (inhaling), and an excessive use. The tobacco men claim that water is equally dangerous and hurtful if a person should persist in deluging his lungs with it.

In contradiction of this assertion that a prohibition was senseless because it would not only not reduce consumption, but would perversely increase use, the article then claimed that the law was even more damaging to the Tennessee tobacco industry than most people imagined because “if other States follow suit, it will result in incalculable damage to the tobacco industry, and Tennessee being the fourth State, and right along beside the two great tobacco States, Kentucky and North Carolina, will feel it sensibly.” Since presumably none of these states was a major site of cigarette sales (and only North Carolina a major manufacturer), and the Tennessee law did not even prohibit manufacture, it is unclear why enactment of a sales ban in those two states would have especially injured Tennessee tobacco growers, who produced little if any for use in cigarettes; and even if a greater proportion of tobacco grown in Tennessee had been destined for cigarettes, it could have been shipped to New York and other states for processing and sale. To be sure, what the Tobacco Trust more plausibly feared was a nationally snowballing legislative movement that might have ultimately achieved a ban on cigarette sales and manufacture everywhere.

191“Will Seek a Repeal,” C.A., Apr. 5, 1897 (5:5).
192“Will Seek a Repeal,” C.A., Apr. 5, 1897 (5:5).
193“Will Seek a Repeal,” C.A., Apr. 5, 1897 (5:5). The additional assertion that “the privilege taxes that the State was collecting will now be cut off, and the Treasury suffer a direct loss” was nonsensical since cigarettes were not at the time subject to that tax—Houk’s S.B. No. 22 of 1898 would have imposed it.
Sales Ban Bills in Other States Passed by One Chamber (or Both Chambers and Vetoed) in the Late 1890s

When the moral courage of our legislators was tested on the question of reforms as embodied in the bills, which received the sanction of the majority, it was evident that some powerful force was back of it all that compelled these servants of the people to ignore precedent and party lash, and to place themselves on the side of morality....

While we are jubilant over the reforms that were inaugurated, we may be assured that the community was far in advance of the enactments. No man could have had the courage to present such bills as Mr. Voorhees presented [regarding saloons] or as Senator Whiteley framed against selling tobacco to boys, unless he had certainly known that public opinion would endorse him.¹

Following passage of general anti-cigarette sales ban bills by at least one chamber in nine states in 1893, enactments followed in 1895 (North Dakota), 1896 (Iowa), 1897 (Tennessee), and 1899 (Florida). The supra-regional character of the surging sentiment sustaining calls for radical state intervention was amply on display in the latter half of the 1890s when at least one chamber in seven states again passed bills prohibiting cigarette sales during sessions in the odd-numbered years—in which most legislatures met exclusively²—of 1895 (Arkansas, California, Colorado, Nebraska, Oklahoma, Indiana, and Massachusetts) and 1897 (Washington, Indiana, Alabama, Pennsylvania, Pennsylvania,


²In 1894, the Louisiana House defeated a bill to prohibit the manufacture and sale of cigarettes by a vote of 26 to 39 after the Corporations Committee had reported favorably on it. Official Journal of the House of Representatives of the State of Louisiana 492, 607, 917 (June 15 and 20, July 9) (1894) (H.B. No. 369 by Charles F. Burmeister, Dem. N. Orleans).

³Not discussed below is the passage in 1895 by the House of the Territory of Oklahoma by a vote of 22 to 2 of a bill to “prohibit the manufacture, sale or giving away of cigarettes, cigarette tobacco and cigarette paper” subject to a $500 fine. Journal of the House Proceedings of the Third Legislative Assembly of the Territory of Oklahoma...1895, at 464, 808 (Feb. 5, Mar. 6); “Anti-Cigarette Law,” DP, Mar. 9, 1895 (11:7). The bill died in the Council, whose last action on the penultimate day of the session was to refer it after second reading to the committee of the whole. Journal of the Council Proceedings of the Third Legislative Assembly of the Territory of Oklahoma...1895, at 902 (Mar. 7). Also in
Colorado, Maine, and Illinois) in addition to Kentucky in 1896 and 1898, Massachusetts again in 1898, and Arkansas for a fourth time in 1899.

**Arkansas 1895 and 1899:**

The Third and Fourth Sessions to Pass an Anti-Cigarette Bill that Did Not Become Law

Another effort to secure a sales ban was mounted during the 1895 session of the Arkansas legislature when the Democrats’ already huge majorities in both houses were marginally expanded to 88 seats in the House (facing 9 Populists and 3 Republicans) and 31 in the Senate (against one lone Republican). Once again Bradley was the sponsor of the bill (H.B. No. 2) to prevent the sale of cigarettes, which this time included a greater fine, ranging between $50 and $250. Two weeks later the Judiciary Committee submitted a majority report recommending passage and a minority report recommending instead a substitute that unrecognizably dismembered the bill by converting it into a low-license regime requiring a trivial annual five-dollar tax and increasing the minimum lawful age from 15 to 21. At the same time the House defeated a motion to amend offered by physician Alfred Hathcock to include pipes and cigars within the sales ban. On February 7, the House “devoted its entire session” to H.B. No. 2, first engaging in a “long and heated discussion” of the substitute bill, several amendments to which were offered in an effort, presumably, to gain additional

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1895, after the Arizona territorial governor in his message to the legislature had stressed that the 1891 law prohibiting the sale of cigarettes to minors was being “practically ignored by the law officers...whose duty it is to enforce” it, a bill was introduced in the Legislative Assembly prohibiting the sale of cigarettes, but it was promptly postponed indefinitely. *Journals of the Eighteenth Legislative Assembly of the Territory of Arizona...1895*, at 28, 310, 360 (Jan. 29 and Feb. 11) (1895) (H.B. 15).

4On passage of bills by one house in 1891 and 1893, see above chs. 3 and 4.


7“The Arkansas Legislators,” *CA*, Jan. 20, 1895 (2:5).


10“The Anti-Cigarette Bill,” *CA*, Feb. 8, 1895 (8:5).
votes by marginally strengthening it. After an amendment to increase the license fee to $25 had failed, the House adopted (Bradley voting Nay) one to cover giving cigarettes away in addition to selling them. Dr. Hathcock’s amendment to increase the license tax to $10 lost as did another to cover cigars and snuff. On third reading the weak substitute’s weak support was revealed as it secured only 34 Ayes against 58 Nays (and only 25 against 65 on a motion to reconsider). Following a test vote on a motion to put H.B. No. 2 on its third reading, which prevailed 50 to 40, the House passed the bill by the large majority of 71 to 20.11

This victory was achieved despite the fact, tantalizingly reported by the Memphis Commercial Appeal, that a “strong lobby from the East was here working against the bill”; indeed, efforts by the unnamed Tobacco Trust were apparently so feckless, that the newspaper expressed a belief that the Senate would endorse the House action.12 In fact, while wire services carried reports of the vote to towns and cities across the country,13 the bill moved on to its senatorial cemetery.

On H.B. No. 2’s second reading Senator A. G. Gray, a Democrat, farmer, and Methodist,14 immediately offered a killer amendment to confine the sales ban to persons under 21. Two other senators pursued the same hostile intent in proposing to subject snuff and tobacco in all its forms to the ban. The bill together with what the Memphis Commercial Appeal called these “fatal amendments”15 were then referred to the Public Health Committee.16 Two weeks later that

11 *Journal of the House of Representatives, State of Arkansas, Being the Thirtieth Session* 473-82 (Feb. 5) (1895). As the aggregate votes alone indicate, there was no one-to-one correlation between positions on the substitute and the ban bill.

12 *The Anti-Cigarette Bill,* CA, Feb. 8, 1895 (8:5).


16 *Journal of the Senate of Arkansas: Thirtieth Session* 447-48 (Mar. 1) (1895). The chamber’s sole Republican, William B. Morton, a Baptist lawyer (who at the 1900 census was returned as a postmaster), proposed amending section 3 by adding the proviso that “such original package shall not contain less than one thousand cigarettes, or papers for one thousand cigarettes.” Id. at 447. Presumably Bradley’s original bill included some
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

committee returned the bill with a number of amendments and recommended against passage. Although the Senate Journal did not, unfortunately, include the texts of these amendments or explain their relationship to the aforementioned amendments, at least the first one may have embodied Gray’s under-21 proposal, which initially passed (after having itself been amended to ban cigarette manufacture), but was then, by a narrow vote of 16 to 14, reconsidered; when Senator Walter Amis, who had been one of the six Democrats to vote against Bradley’s bill in 1893, offered an amendment to strike out “under the age of 21 years” so that the bill reverted to being one to “prevent the sale either to minors or adults,” floor debate was interrupted by Gray’s process-stopping motion to postpone its consideration indefinitely. Included among the 17 Yes-voting senators who prevailed over the 10 resisters were all of those six bill-killing Democrats from 1893 except Amis. The “anti-cigarette bill, which occupied several days in the house, was disposed of in as many hours in the senate,” thus inflicting on the Arkansas anti’s their third defeat in three successive sessions.

The final nineteenth-century legislative efforts took place in 1899 along two tracks. In the House (in which Democrats numbered 98 and Republicans only 2) Thomas Yadon, a farmer and Methodist, introduced House Bill No. 104, which made it a misdemeanor to sell or give away cigarettes or tobacco or paper for making cigarettes to any minor under the age of 21 as well as cigars, chewing tobacco, or tobacco in any form to any minor under 15; the fine for the former violation ranged between $100 and $300 and that for the latter between $10 and $50. The Temperance Committee to which it had been referred recommended passage with an amendment lowering the former age from 21 to 19. When the full House took up this diluting amendment, Yadon himself and numerous other

interstate commerce-based exception for sales in original packages (unfortunately the Arkansas State Archives does not have bill texts from this period). The next day’s issue of the Arkansas Gazette was lacking on microfilm.

17Journal of the Senate of Arkansas: Thirtieth Session 588-94 (quotes at 592) (Mar. 15) (1895); “Boundary Lines Are in Doubt,” CA, Mar. 16, 1895 (1:5).
18“Boundary Lines Are in Doubt,” CA, Mar. 16, 1895 (1:5).
19All the biographical information concerning legislators during the 1899 session is taken from Biennial Report of the Secretary of State of Arkansas: For the Years 1897-98, at 294-97 (1898).
members who would later vote for the bill supported it—suggesting that they may have believed that passage would otherwise have been jeopardized—whereas many of those who would later vote against the bill opposed it. After the amendment had lost by a vote of 33 to 43, farmer Joseph Howard, an opponent, offered the (by now traditional) bill-killing coverage of cigars and snuff on a par with cigarettes, but it was heavily defeated by a vote of 13 to 62.23 The floor debate on final passage, a month later, shed interesting light on the arguments that advocates urged (and the press chose to filter through and preserve for posterity) to buttress the positions they had staked out. Since his bill did, after all, target children, Yadon focused on them, though his rhetoric was stale and stereotypical by this point. Worried about the “cigarette fiends” which “the boys and even some of the girls” were fast turning into, he warned that cigarettes were being filled with “rank poison” making “the victims fit subjects for the asylums” and taking them to “premature graves.” He also repeated the commonplace that more than half of the disabilities causing rejection of volunteers for the army during the Spanish-American War in 1898 “were due to cigarette smoking.” In sharp contrast, the bill’s foremost opponent, Frederick G. West, a farmer and Missionary Baptist, ignored all such alleged deleterious health impacts and any distinctions between children and adults, prompting Yadon to remind West that his bill did not interfere with adult smoking. (The aforementioned Howard shared West’s confusion in arguing that “if cigarette smoking was to be stopped let the work be begun in the house.”) Instead, he declared that “the use of tobacco was a custom and an American privilege and he would never cast his vote to interfere with the right of any individual to use the weed.” The chamber, according to the Arkansas Gazette, “was in an uproar while he was speaking, the applause being frequent and loud.” Back on the health point, Dr. Richard H. Taylor, a physician and Episcopalian from Hot Springs, “endorsed every word spoken” by Yadon, but expressed doubt as to whether “the law could be made strong enough even for the protection of the boys and girls against the vile habit.”24 The full House then passed H. B. No.104 by the overwhelming vote of 71 to 11.25 The Senate then followed suit about ten days later, passing the no-sales-to-minors bill by the roughly equivalent vote of 23 to 5.26


26Journal of the Senate of Arkansas: Thirty-Second Regular Session 171 (Mar. 13, 1899); “The Cigarette Bill,” AD, Mar. 15, 1899 (4:5). The enactment is at 1899 Arkansas
Several months after adjournment, the Arkansas Democrat, which was an enemy of such state intervention, insisted that the “Yadon cigarette law was run over the members of the last legislature by those who realized that it was either this bill or a more drastic measure. In the interest of the cigarette traffic they were willing to accept the least effective law. Next time we shall see to it that no such mistake is made.”  In fact, that more drastic measure, which part of the press had put on its editorial wish list before the opening of the session, had already been debated in 1899.

In the House, on March 3, the day after H.B. No. 104 had passed, the first and second reading of a much more radical bill took place. Introduced by Charles L. Poole, a lawyer and Methodist, H.B. No. 318 proposed to “prohibit the manufacture, importation, sale or giving away of cigarettes and cigarette papers.” The press called the bill, which sanctioned offenses with fines ranging from $500 to $5,000, a “copy of the Tennessee law.” Three weeks later the House floor debate unfortunately received only scanty attention from the two major newspapers. The Democrat offered no account at all of the discussion, while the Gazette uninformatively noted that Poole himself had given “the cigarette several hard raps.” Two Methodists, one a lawyer and the other a farmer, also spoke up: one criticized the bill for its extremism in telling “free agents in this good democratic state that they could not buy a cigarette if they wished to,” whereas the other boasted that he was “as good a Democrat as anybody” and still wanted cigarettes prohibited. In contradiction of his earlier speech, West (inexplicably) supported the bill, thus garnering frequent applause.
The chamber then passed the bill by the significant majority of 56 to 22, four of the 11 representatives (including West) who had opposed the no-sales-to-minors bill now voting for the total ban.33 The House action was also widely reported in the out-of-state press.34 The Senate, however, killed the bill when it failed to muster the two-thirds majority to suspend the rules and take it up.35

The *Arkansas Democrat*, which editorially attacked the “poor makeshift” of a no-sales-to-minors law, but nevertheless claimed that it should be enforced as long as it was on the statute books, predicted in the summer of 1899 that the “next legislature [1901] will pass the Tennessee law absolutely prohibiting the sale of cigarettes to anyone, and then we can see what virtue there is in a prohibitive law.”36 The newspaper overestimated the speed with which legislators would act, but the anti-cigarette movement did finally secure enactment of a general cigarette sales ban in 1907, which remained in place until 1921, the same year in which Iowa’s law was repealed.37

California 1895: The First Legislature to Pass a Sales Ban Vetoed by the Governor

Alameda, Cal., is evidently misplaced. It ought to be in Kansas or Iowa. It has just passed a very stringent law regulating the sale and smoking of cigarettes, and curiously enough was moved to do it by a petition gotten up and signed by the tobacconists, who evidently are afraid of the cheap smokes destroying their business. ... Alameda is a very

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35 *Journal of the Senate of Arkansas: Thirty-Second Regular Session* 249 (Apr. 13, 1899). The *Journal* confusingly stated that “the ayes and nays were called for and the call sustained” on the motion to suspend the rules and take up H.B. No. 318; it intensified the confusion by adding that the question was “Shall the bill pass” but then describing the result as “So the Senate refused to suspend the rules.” The Senate chief counsel confirmed that since rules suspension required a two-thirds vote and none was forthcoming, there was no vote on the bill. Telephone interview with Steve Cook, Little Rock (Sept. 26, 2006).


37 See vol. 2.
nice place to stay away from. 38

The Californians have sat down hard on the deadly cigarette. A bill has gone to the governor absolutely prohibiting the manufacture, sale or use of cigarettes in that state. 39

In the interim between the Assembly’s failure to pass the Senate sales ban bill at the 1893 session40 and the opening of the 1895 session of the California legislature, anti-cigarette advocates succeeded in securing adoption of a sales ban on the municipal level in the San Francisco Bay Area. The circuitous path to this suppression of adult consumer freedom began with the self-proclaimed “crusade in the public schools against cigarette-smoking by boys under 21” that the independent San Francisco Morning Call inaugurated on January 12, 1894, as the public streets were “filled with urchins puffing at the deadly ‘cigareet,’ as this form of drugged tobacco is vulgarly called.” 41

To be sure, the Call was merely adopting a program that had been initiated just a few weeks earlier in New York City, when Board of Education Commissioner Charles Bulkley Hubbell, a business lawyer, 42 began his own “crusade against the cigarette evil in the public schools” 43 in response to complaints from several principals about the incomprehensible loss of powers of concentration among bright 10- to 14-year-old boys, who had also exhibited signs of truancy: “It was found that nearly all the incorrigible truants were cigaret fiends; that is to say, they were almost hopelessly addicted to the inhaling habit.” 44 To be sure, Hubbell did not present this (scientifically appropriate) emphasis on the unique dangers of inhalation until a decade later. In 1893, in contrast, at least according to The New York Times, the “personal observation” of

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38 “Cigarettes Tabooed,” DP, Mar. 29, 1894 (4:5).
40 See above ch. 4.
42 C. B. Hubbell, Dead,” NYT, July 25, 1939 (26).
43 “Schoolboys Sign Pledges,” NYT, Dec. 3, 1893 (13). According to “Lucy Page Gaston,” BET, May 6, 1905 (1906), Hubbell “acknowledged his indebtedness to the W.C.T.U.” for his school initiative in 1893, but no contemporaneous evidence of such a statement has been found. In its weekly publication the WCTU merely stated that the New York Board of Education “is making strenuous efforts to put an end to cigarette smoking.” “Since Our Last Issue,” US 19(49):1 (Dec. 7, 1893).
cigarettes’ “deleterious effect” was captured by a public school graduate, “his nerves saturated with nicotine, becoming suddenly insane in the Commissioner’s Wall Street office, and another, a victim of the same vice, a hopeless inmate of a hospital....” Impelled by these insights into the etiology of phenomena of which not even today’s anti-smoking zealots have reported a sighting in many decades, Hubbell resolved to form in every boys’ school in New York City an anti-cigarette-smoking league, bound by a pledge whose two principal paragraphs encapsulated the deep flaw inherent in his approach (wholly apart from its bizarre health impact analysis): “1. From this date to abstain from smoking cigarettes in any form until we reach the age of twenty-one years. 2. To use all influence that we possess to induce all public-school boys and other boys of our acquaintance to give up and abstain from smoking cigarettes until such boys shall attain the age of twenty-one years.” This temporally limited self-abnegation was virtually designed to create a marker of maturity that would simply entice children into accelerating their emulation of grown men. Hubbell’s indifference to cigarette smoking at 21 was linked to “the fact that he has no grievance against the use of tobacco in general. He is a smoker himself....” More than health, however, was at stake: above all, it was “the deterioration of the moral principle of a lad” that concerned him because the “cigarette fiend” in time becomes a liar and a thief,” who, “narcotized by nicotine, sits at his desk half stupefied....”

About a month after the Board of Education in New York had “heartily endorsed” the Anti-Cigarette-Smoking League, the Call launched its Pacific Coast knock-off, including the “until we reach the age of 21 years” abstention pledge (because “[w]hen he is 21 he will be safe”) without recognizing the self-contradiction of simultaneously asserting that “[t]he boy wrongly thinks this cigarette-smoking a ‘manly’ amusement.” (In contrast, Dr. Charles A. Clinton, a member of the San Francisco Board of Education and of its cigarette committee, correctly observed that: “Small boys would not smoke if the elders did not use

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47. “Board of Education Meeting,” NYT, Dec. 7, 1893 (1). On its spread to Chicago, see “Vow Not to Smoke,” CT, Apr. 16, 1894 (6).


cigarettes. It is largely a matter of imitation."') However, in boasting that the “anti-cigarette crusade is practically a health crusade” the newspaper did correctly convey physicians’ appreciation that “[t]he trouble is that most [cigarette] smokers inhale” smoke into the lungs resulting in bronchitis and asthma; the concomitant absorption of poisons produced other disease as well.

The Call claimed that tobacco dealers appeared to be unanimously of one opinion concerning the cigarette trade—namely, that if there were any profits, they were “more than counterbalanced by the trouble in handling the growing number of brands” and the concomitant loss of the more profitable cigar and pipe tobacco sales. Indeed, many “legitimate tobacconist[s]” claimed that the cigarette trade had “been the ruin of an otherwise profitable business” which it threatened to swamp. Although dealers had “decided scruples against selling these things to boys,” when the latter came in and “demand their peculiar poison we have no recourse but to sell it to them.” Consequently, in addition to being “heartily pleased to have the trade in cigarettes diminished,” they favored a law making cigarette sales to minors a misdemeanor. (The only problem with the dealers’ lament was that the California Penal Code had been subjecting the sale of any kind of tobacco to anyone under 16 to a $100 fine ever since 1891.) The Call went so far as to assert that “without a single exception, if it was put to a popular vote, the wholesale and large retail tobacconists would cast their ballot to make the smoking of cigarettes a crime.” (At the beginning of 1894 there were 307 retail cigar stores in San Francisco or about one per every 439 males 16 years of age and older.)

50. “A Mighty Host,” MC, Jan. 21, 1894 (17:3). Clinton was a physician and druggist. Langley’s San Francisco Directory for the Year Commencing April, 1894, at 372 (1894).

51. “The Boy’s Anti-Cigarette-League,” MC, Jan. 12, 1894 (10:1-4 at 1-3). Editorially the Call appeared to concede that cigarette smoking was not safe for adults: “Whatever may be said of the right of an adult to ruin his health and impair his mind no one will contend that minors should be allowed like liberty.” “The Cigarette Habit,” MC, Jan. 13, 1894 (6:1) (edit.).


53. 1891 California Statutes ch. 70, at 64 (Penal Code § 308) (providing an exclusion for written parental consent).


55. Langley’s San Francisco Directory for the Year Commencing April, 1894, at 1576-77 (1894). This figure does not include grocery, drug, or any other kind of store selling cigarettes.

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At a meeting of the cigarette committee of the board of education nine days after the newspaper had initiated the campaign one of its members, Jacob Rosewald, a music teacher, opined that special legislation was the only “effectual method of treating the evil”; in particular, he advised petitioning the board of supervisors to pass an ordinance imposing a “high license” on cigarette sales, which would cut off sales in small stores (in which minors supposedly primarily bought cigarettes). This impact makes more than plausible Rosewald’s statement that large dealers had told him that they were in favor of such a proposal. However, Superintendent John Swett doubted whether the supervisors would adopt such an ordinance; instead, he claimed that the existing law punishing dealers for selling to minors would be “effectual, the only trouble with it, however, being the want of somebody to complain” (thus ignoring the fact that it did not apply to students 16 and over). In the event, the Board of Education did not formally adopt Rosewald’s resolution to petition the supervisors, taking it merely as a suggestion. While the Board of Education was deadlocked on the question of making the pledge a formal policy, it did achieve unanimity in adopting a resolution, grounded in medical opinion that cigarette smoking harmed young people’s physical, moral, and intellectual development, requesting the Board of Supervisors to fix a license for selling cigarettes at $25 per quarter “so as to render their purchase by school children practically impossible.”

At the same time, however, the Call’s crusade was finding resonance across the Bay in Alameda (pop. ca. 13,000 in 1894), where the board of education issued a circular to parents announcing that “vigorous measures be taken to stamp out the ‘cigarette habit,’” which was “becoming alarmingly prevalent” among public school pupils. In language that the city government would soon contradict, the board went on to “recognize the fact that no laws can be framed that will to any extent decrease the spread of this pernicious habit”; instead, “wise counsel and kindly instruction must be depended on for the education of our children on
this important subject.” Finally, the board implored parents, “by precept and example,” to teach their children that indulging in cigarettes “will certainly be followed by disease and death.” By the beginning of March 300 pupils in five schools in Alameda had signed the Anti-Cigarette League pledge promising to abstain from cigarette smoking until they were 21.

The Woman’s Christian Temperance Union sought to radicalize this movement in Alameda County, which included the adjacent city of Oakland, by initiating its own agitation under the aegis of the Triple Pledge League of the Junior Christian Endeavor Society of Alameda County, which was headed by a WCTU member, Mrs. H. C. McMath, the County Superintendent of Children’s Work. This pledge, as the Call conceded, was “far more extensive” than its own: “I promise not to buy, drink, sell or give/Alcoholic liquors while I live./From all tobacco I’ll abstain,/And never take God’s name in vain.” Although the newspaper doubtless had in mind the tri-pronged scope, the WCTU pledge’s more relevant characteristic was that it no more permitted children to begin smoking cigarettes on their twenty-first birthday than all of a sudden to utter profanities.

Altogether the WCTU’s propaganda was a bit much for the local authorities. Later that same year a row broke out over the literature that the Alameda school directors had permitted the WCTU to distribute in the school, but to some of which they then took such “vigorous exception” that they thenceforward subjected pamphlets to the superintendent’s “censorship.” After the long-term school board President Cyrus A. Brown had characterized one such pamphlet by Dr. Richard Hayes McDonald (a California capitalist millionaire who had distributed tens of millions of temperance leaflets) as being “in this age of enlightenment...entirely out of place,” he called on one of the other directors to read a section from a pamphlet titled, “The Streets of Hell.” Dr. Charles L.

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63The Alameda union was, in the face of constant violations of the no-sales-to-minors law, convictions for which had been hard to obtain, divided over whether to arrest the children or the tobacconists. “Temperance Meeting,” *San Francisco Call*, Oct. 16, 1895 (11:4).

64For the Parents,” *MC*, Feb. 5, 1894 (8:1-2 at 2).

65“Alameda,” *MC*, Nov. 25, 1894 (8:4-5).

66*Pacific Bank Handbook of California* 6, 8 (1888); “St. John for President,” *NYT*, July 25, 1884 (1). McDonald, who owned the first Atlantic to Pacific Coast overland telegraph, unsuccessfully ran for the National Prohibition Home Protection Party presidential nomination.
Tisdale, a 36-year old Republican who was also a physiology professor at Hahnemann Medical College in San Francisco, after throwing down the paper, supplied, together with Brown, this concise commentary, which underscored that at least this WCTU local melded primitive atavistic pietistic fundamentalism with a much more capacious anti-tobacco agenda, which latter it was able, in most places and at most times, to keep under wraps lest its non-cigarette smoking male tobacco addict allies flee the political embrace of the “good ladies”: “‘What rot! ... That is the silliest kind of stuff for our children to read.’ ‘Why,’ said Chairman Brown, as he felt a cigar in his inside pocket, ‘in one pamphlet it is stated that a man cannot use tobacco and be a good Christian.’ Director Tisdale, who knows the flavor of good tobacco himself, concurred in condemning this statement.”67 The Alameda school superintendent then announced that the only WCTU pamphlets that would be permitted in classrooms would be those teaching about cigarettes’ harmfulness, whereas “nothing relating to prohibition, temperance or the less injurious forms of tobacco-using” would be permitted.68 Instead of backing off, at least to protect its anti-cigarette alliance, the WCTU persisted in defending the “‘lurid literature,” the Dr. McDonald brimstone tracts....” The group, however, made no headway with the board of education, which was “convinced that the white souls of the little innocents will go just as straight without dissertations on hell and its environs.”69

In the midst of its anti-cigarette campaign the Call was able to report much weightier news from Alameda—namely, that its city attorney was preparing an ordinance to ban the sale or manufacture of cigarettes altogether. The 2,700 persons signing the petition to the Board of Trustees requesting this measure included “all the dealers in the weed.”70 The board, which passed the ordinance on March 12, justified the suppression not only on the customary health basis

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67“Alameda,” MC, Nov. 25, 1894 (8:4-5). On Brown, a house builder who first became a board member in 1884 and was still serving in 1903, see http://www.alamedapreservation.org/preservation-awards (visited Mar. 20, 2010); Annual Report and Outline of Studies of the Public Schools of the City of Alameda California for the Year Ending June 30, 1903, at 7 (1893). On Tisdale, who served from 1891 to 1899, see Joseph Baker, Past and Present of Alameda County California 2:510-12 (1914).
68“The Cigarette Only,” MO, Nov. 27, 1894 (2:3).
69“Alameda,” MC, Dec. 6, 1894 (8:3). In a blast at McDonald (which echoed many that had targeted him as a charlatan), Dr. Tisdale stated at a board meeting: “‘When a man gets rich from selling such a concoction as “Vinegar Bitters,” and palms it off as a temperance drink, and then circulates literature to improve the morals of the youths and preaches temperance, things have come to a pretty pass.’” Id.
70“Gossip Tabooed,” MC, Feb. 28, 1894 (8:2-3).
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(derived from cigarettes’ poisonous ingredients), but also on the obscure grounds that the “injury...inflicted upon the user is transmitted to his posterity....” The ordinance—still in force in 1903—in addition to prohibiting minors from smoking cigarettes in any public place, made it unlawful for anyone to sell, offer for sale, or give away any cigarettes or to permit any cigarettes to be sold in any place owned, leased or occupied by him. The penalty for violations was a fine not to exceed $100 and/or imprisonment not to exceed 50 days. The Call showed no reticence about attributing adoption of the ban to its “cigarette crusade....” As the ordinance went into effect in mid-June, the press reported that “it was not thought” that local tobacco dealers would fight it because they had received time to dispose of their stock and “none who had signed the anti-cigarette petitions did so with more readiness than most of the tobacconists.” In the wake of Alameda’s action, 500 citizens of San Bernardino (population ca. 5,000) successfully petitioned the City Trustees to introduce an ordinance to forbid the sale or smoking of cigarettes, which the Los Angeles Times characterized as designed for “clearing the place of dudes and their imitators....”

At the WCTU’s national convention in November 1894 it was revealed that a member from California would “present to the next legislature a petition to prohibit the selling of cigarettes.” At that session in 1895, when the North Dakota legislature was formally enacting a general cigarette sales ban, California passed a broader one by a large majority, which, however, the governor pocket vetoed. With the initiative still in the Senate, on January 15, attorney Henry C. Gesford, a Democrat from Napa who had taught in and been superintendent of schools of that county in the late 1870s and had voted for

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72Ordinance No. 250, in Charter and General Ordinances: City of Alameda 1903, at 155-56 (passed Mar. 12, 1894) (1903).
75“Anti-Cigarette,” LAT, June 16, 1894 (2).
76“San Bernardino,” LAT, June 21, 1894 (9). After having encountered anti-puritanical resistance, the ordinance was apparently watered down to cover only minors. “San Bernardino,” LAT, July 10, 1894 (7); “San Bernardino County,” LAT, Dec. 3, 1894 (9).
77Minutes of the National Woman’s Christian Temperance Union at the Twenty-First Meeting...November 16-21, 1894, at 396 (1894).
78See vol. 2.
79http://www.calarchives4u.com/schools/sns/sns89117.htm (State Normal School
Earl’s bill in 1893, introduced Senate Bill 55, which simply added the following brief section to the penal code: “Every person who manufactures, or deals in, or sells, or offers for sale, or gives away, or otherwise disposes of cigarettes, is guilty of a misdemeanor.” Three weeks later the senate unanimously passed the bill by a vote of 32 to 0. 14 of 15 Democrats and 18 of 25 Republicans voting for the bill. As legislative action shifted to the Assembly, the Pasadena WCTU submitted a petition with 2,988 signatures requesting the chamber to pass equal suffrage, Sunday, and anti-cigarette laws. Two weeks later Republican Judson Brusie “made an impassioned appeal to the House not to pass the bill” on the grounds that it was “an infringement on the liberties of citizens” who would “rise against it.” He complained that at the morning session the House had “‘attacked our wives’ wearing apparel. Now it is our habits. Why do you not include cigars in the prohibition? [Y]ou will be trying to fix what the color of our neckties shall be next.’” He finally got to the point of his protest—which was apparently the right to stave off nicotine withdrawal symptoms at will—“by reciting the hardships of not being able to indulge in a cigarette when one desired,” but his fellow Republican Hart North admonished him for conveying the “wrong impression...that this was an invasion of personal rights, when it was simply a question of manufacture and sale of cigarettes.” More concretely, North pointed

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80Cal. Lego., 31st Sess., S.B. No. 55; The Journal of the Senate During the Thirty-First Session of the Legislature of the State of California, 1895, at 73 (1895) (Feb. 6). The bill was amended to postpone its effective date until six months after passage “to give people a chance to get rid of their goods without loss....” S.B. No. 55 (Amended in Assembly Feb. 18, 1895); “California Legislature,” R-U, Feb. 21, 1895 (5:1-6 at 6) (quote). The senate concurred in the amendment on March 6. “California Legislature,” LAT, Mar. 7, 1895 (2:1).


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out that the “‘bill does not prevent a man’s rolling a cigarette for himself. It does affect the manufacturer though.’”\(^87\) The Assembly then passed S.B. No. 55 by a vote of 53 to 11;\(^88\) eight of 16 Democrats, both People’s Party members, and 43 of 62 Republicans voted for the bill, while eight Republicans and three Democrats voted against.

Hearst’s \textit{Examiner} called it “one of the most sweeping measures” of the session and much more far-reaching than any cigarette bill of previous sessions had “dared to go.” One Republican assemblyman, a former San Francisco cigar dealer, opposed it on the grounds that a million dollars was invested in cigarettes in California and hundreds of people would be rendered unemployed. Another Republican ridiculed the bill because: “‘Every time a man put a cigarette in his mouth he would be disposing of a cigarette and would be violating the law and guilty of a misdemeanor. It would be a dead letter like the Act forbidding the sale of cigarettes to minors.’” A third Republican rejected this claim: since the bill did not prohibit men from buying paper and tobacco and rolling cigarettes, they could smoke them without violating the law. Yet another Republican argued that as an “infringement on personal rights,” the bill “would be resisted by all the men in the State if it became law,” thus increasing “the general disrespect for the law.” Tying the two bills together, a San Francisco Republican offered the laissez-faire argument during the debate on women’s hats that: “The Legislature had no more right to say that the woman could not show their pretty theatre bonnets in theatres than to say the men could not smoke cigarettes.”\(^89\)

Lumping S.B. No. 55 together with the bill to prohibit the wearing of high hats in theaters facilitated ridicule. Thus the \textit{Los Angeles Times} in a big front-page, above-the-fold cartoon, titled, “The Deadly Cigarette and the Big Hat Must Go—So Say Our Solons,” depicted a man clothed as a cigarette walking hand-in-hand with a woman wearing a hat almost half as tall as she. The accompanying text charged: “While our municipal politics are full of corruption and crime is rampant in San Francisco and Sacramento our representatives are wasting their


\[^{88}\] \textit{The Journal of the Assembly During the Thirty-First Session of the Legislature of the State of California, 1895}, at 522 (1895) (Feb. 20). According to “The Silly Season at Sacramento: Gesford’s Anti-Cigarette Bill Passes the Assembly in Short Order,” \textit{Examiner} (San Francisco), Feb. 21, 1895 (1:1), the vote was 53 to 12, with one additional assemblyman recorded as voting No (Brusie). “Great Heads,” \textit{LAT}, Feb. 21, 1895 (3:1-2), put the vote on the prohibition of “the seductive cigarette” at 54 to 12.

\[^{89}\] “The Silly Season at Sacramento: Assemblymen Declare Against the Wearing of Hats in Theatres,” \textit{Examiner} (San Francisco), Feb. 21, 1895 (1:1). Such bills were proliferating in state legislatures; on the bill in Pennsylvania, see above ch. 6.
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time in [sic] idiotic and unconstitutional legislation on these subjects.’’

In a long front-page article headlined, “The Silly Season at Sacramento,” devoted to the assembly’s passage the same day of this bill and that prohibiting the wearing of hats in theaters, The Examiner, echoing reports that had cropped up in 1893 in Washington State and prefiguring others that would resurface in other states that enacted anti-cigarette legislation, noted that there had been “much comment about the vote of [Assemblyman J. O’Day of San Francisco, who has been in the tobacco business for years and yet voted for the bill. O’Day says he voted as he did because cigarettes are full of poison, ruinous to health, and not profitable to sell.”

In a smaller appended piece, “Cigar Dealers Satisfied: The[y] Say the Cigarette Bill Will Not Hurt Their Receipts,” the newspaper focused on the singular role of the American Tobacco Company:

It was supposed that the tobacconists would be the hardest opponents to the Cigarette bill. The cigar dealers in San Francisco say they made no fight against the bill. According to them the cigarette trust only was interested in defeating the measure. If procuring cigarettes is made difficult the dealers believe it will create a larger demand for other smokable merchandise and there is more money in cigars and fancy pipe mixtures than in the popular brands of cigarettes that sell for 5 and 10 cents a pack.

The Examiner went on to quote one dealer as suggesting that whereas the “‘confirmed cigarette-smoker will buy cigarettes somehow,...the bill will probably stop young boys from getting into the habit.’” This outcome was precisely what anti-cigarette activists had intended.

And while awaiting the governor’s final action on the bill, the Los Angeles Times, which, in a retrospective of the legislature’s accomplishments, claimed that under the bill “a host could not pass the seductive cigarette at his own table after coffee,” editorially dismissed the measure on the grounds that an enforcement record was lacking in the one or two (unidentified) states that had passed such laws, which were, in any event, of “doubtful validity.” Befogging the question by referring to (another unidentified) “eminent New York physician” who had attributed more ills to excessive tea drinking than excessive tobacco or

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91. “The Silly Season at Sacramento: Gesford’s Anti-Cigarette Bill Passes the Assembly in Short Order,” Examiner, Feb. 21, 1895 (1:1).
alcohol use, the editorialist denied to the legislature any more right to prohibit a form of tobacco than tea, coffee, or cocoa.\(^95\)

Despite the large bipartisan legislative majorities, and despite press predictions that he would approve the measure,\(^96\) at the end of March Governor James Budd (the last Democrat to hold that office for 40 years) left unsigned, and thus pocket vetoed, a large number of bills, including the anti-cigarette legislation.\(^97\) The narcotics department of the National WCTU prominently mentioned the veto at the organization’s annual meeting later that year.\(^98\)

The 1895 bill’s alleged idiocy and unconstitutionality to the contrary notwithstanding, by May 1897 at least San Francisco was “about to have an anti-cigarette movement,”\(^99\) as Thomas H. Haskins, a member of the board of supervisors, introduced an order making it “unlawful for any tobacconist, saloon-keeper, or any employe thereof, or any person whatever, to sell, barter, exchange, give away, dispose of or deliver to any person” any cigarettes in the city or county of San Francisco. The proposed ordinance was motivated by cigarettes’ being “injurious to health and...a causation of vice and crime.” Violators would be subject to a fine of up to $500 and/or imprisonment up to six months.\(^100\) As conventional as the measure’s purported basis was, the raison d’etre that 36-year-old Haskins—himself a dealer in coffee and spirits—pleaded before the board was novel. To be sure, he assured his fellow members that he would not insist on adoption of the order, which he believed would pass (and had already been referred to the judiciary committee), if it were shown that it would injure retail merchants. But he argued that they were in fact its proponents:

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\(^{95}\)LAT, Feb. 24, 1895 (20) (untitled edit.).

\(^{96}\)E.g., “State Legislatures,” DP, Feb. 21, 1895 (12:5); “National Politics,” GDN, Feb. 21, 1895 (2:2). To be sure, the press also suggested that the bill might be “killed off in reconsideration....” “The Anti-Cigarette Bill,” Call (San Francisco), Feb. 22, 1895 (2:2).

\(^{97}\)Governor Budd’s Busy Pen,” Examiner (San Francisco), Mar. 29, 1895 (3:5); “Last of the Bills,” LAT, Mar. 29, 1895 (2) (misclassifying it as Assembly bill 5). As with the vast majority of bills that died, the press did not offer an explanation of the governor’s (in)action. The out-of-state press did not always wait for the governor’s action to report that the law would go into effect in six months. E.g., “Brevities,” Weekly Gazette and Stockman (Reno, NV), Mar. 7, 1895 (1:1).


\(^{99}\)Oakland Tribune, May 18, 1897 (4:1) (untitled).

\(^{100}\)“A Score of Heads in the Basket,” MC, May 18, 1897 (5:1-2 at 2).

\(^{101}\)1900 Census of Population (HeritageQuest).
“So far as I am able to ascertain the dealers favor the prohibition. They comprehend that the profit in handling cigarettes is very slight, owing to the monopoly in the business. Many dealers have told me they wanted a law adopted absolutely prohibiting the sale. It frequently happens that a man buying a glass of beer will say: ‘Give me a cigarette.’ The request is too small to be refused, yet when the package is broken all must be given away. Then again so many new brands are always coming out that the dealer in a business ever so small must keep from $30 to $50 tied up in cigarettes....

The law against the sale of cigarettes is in force in Alameda...and from all accounts it gives general satisfaction. ... No, I do not anticipate objection from the retail grocers, although I expect that agents of the factories or wholesale firms may present objections. My idea is to abolish a nuisance and an injury without interfering with the rights of trade or the convenience of individuals.”

This notion that San Francisco dealers themselves ardently wished for a ban on the sale of the non-profitable cigarettes and that only the Trust pleaded for their continued availability had, as noted earlier, been a mainstay of the state legislative debate in 1895. Yet the very next day after Haskins had ignited the next round of the struggle to suppress sales, the Call—in an odd about-face from its spectacularly successful catalytic role in bringing about the Alameda ban ordinance—contradicted Haskins’ claim that dealers favored prohibition by reporting that “[t]obacconists all over the City laugh at the proposed law to make it a crime to sell or give away cigarettes....” Interestingly, however, not a single one of them even alluded to, let alone refuted Haskins’ assertion that selling cigarettes was not profitable. That the newspaper may have been partial to a Pickwickian sense of the “well-known local dealers in cigars and tobacco” from surveying whom it divined “the general sentiment” emerged from its inclusion of the American Tobacco Company, which self-servingly opined that it was “ridiculous to try to pass such laws in a free country”—newspaper interviews manifestly being yet another forum in which it could promote the self-fulfilling prophecy that it was pursuing so vigorously in courts and legislatures. The Tobacco Trust’s minions parroted the monopolist’s view, three of the six dealers even using “ridiculous” and all of them conveying the point that such a “crank” measure was not passable, constitutional, or enforceable. One who dealt chiefly in cigars and “care[d] very little for the cigarette trade” colorfully added that “[t]his is the wrong City and the wrong generation for people to try experiments suitable for the dark ages or for puritanical countries.”

Several of Haskins’ fellow supervisors adopted a similar stance. For

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102 “Cigarette Ordinance,” Call (San Francisco), May 24, 1897 (6:2).
103 “Cigarette Law Scored,” Call (San Francisco), May 25, 1897 (7:5).
example, German-born Supervisor John Lackman, a member of the judiciary committee to which the proposal had been referred, thought that it “savor[ed] too much of a blue law,” although at this time it was understood that a majority of the board still favored the Alameda ordinance. Directly at odds with Haskins’ justification for his proposal was the protest against any change in local regulation by the Retail Grocers Protective Association, which insisted that the existing law prohibiting sales to minors was both “duly observed” and “amply sufficient for moral purposes.” They also opposed it because of the hardship it would cause trade. The result of these various rebuffs was the committee’s recommendation that the proposed ordinance be indefinitely postponed. After one of the board members had argued that Haskins had gone too far inasmuch as “the injurious effects of smoking cigarettes were now very well known and the habit was decreasing, and if the police would make arrests” under the no-sales-to-minors ordinance their use “would soon be checked,” the board voted to postpone the order. Thus despite the fact that in 1895 the San Francisco delegations to the House and Senate had supported a statewide cigarette sales ban by a vote of 21 to 1, such backing was lacking on the municipal level two years later even after neighboring Alameda had set the precedent.

Colorado: 1895 and 1897

The state...was at one and the same time an intensely individualistic frontier community and a colony of alien capitalists. ... The state had been virtually colonized by outside capital and was, in a quite literal sense, the creature of financial imperialism. It was to an exceptional degree the victim of absentee ownership and control.

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104 At the time of the 1900 Census of Population Lackman was returned as sheriff of San Francisco (HeritageQuest).
105“Champions Cigarettes,” Call (San Francisco), May 26, 1897 (11:7).
106“Cigarette Ordinance,” Call (San Francisco), May 27, 1897 (4).
107“Dr. Dodge Moves to Reconsider,” Call (San Francisco), June 9, 1897 (9:1-3 at 2-3).
108The Journal of the Senate During the Thirty-First Session of the Legislature of the State of California, 1895, at 361 (1895) (Feb. 6); The Journal of the Assembly During the Thirty-First Session of the Legislature of the State of California, 1895, at 522 (1895) (Feb. 20). The identities of the legislators from San Francisco are taken from http://capitolmuseum.ca.gov/english/legislature/history/year1895.html (visited May 4, 2006).
As was the case in Iowa and many other states, years before statehood the chambers of the Colorado territorial legislature sought to suppress secondhand tobacco smoke exposure. Thus as early as 1865 the House rules specified that “no smoking shall be allowed in the House.” And five years later the chamber defeated the motion of Republican C. M. Mullen to suspend the no-smoking rule for the rest of the session. And in its last session (1876) the Territorial Council (the predecessor of the Senate) followed suit, somewhat less formally, by adopting the resolution presented by Silas Hahn, a Democrat and lawyer, that “no smoking be permitted in the Council Chamber during the sessions of the Council.” Nevertheless, the press reported at the outset of the 1891 legislative session that in the House chamber the air “was thick with tobacco smoke and became very foul when the doors of the lobby were opened.”

In 1887 the Colorado legislature passed a measure, which the WCTU was sponsoring throughout the country, to make compulsory instruction in the public schools about the effects of alcohol and narcotics (usually implemented to include tobacco) on the human system. In Colorado, too, the WCTU was responsible for having secured passage of a bill that opponents dubbed “cranky.”

Likewise, in 1891 it was “through the efforts” of the WCTU that a no-sales-to-under-16-year-olds bill was introduced. The organization began publicly preparing this measure at its annual state convention in September 1890, when Frances McEwen (aka Mrs. J. B.) Belford, Superintendent of Legislative and Petition Work, presented the draft of a bill it had been “decided to introduce” at the next session in January. Belford, who was married to a very prominent Republican politician, James Burns Belford, who had been a territorial legislator

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110 See below ch. 18.
111 House Journal of the Legislative Assembly of the Territory of Colorado: Fourth Session 17 (Jan. 5) (Rule 13) (1865).
113 Council Journal of the Legislative Assembly of the Territory of Colorado: Eleventh Session 30 (Jan. 11) (1876).
115 See below ch. 9.
116 1887 Colorado Session Laws 378.
118 “General Assembly,” RMN, Mar. 3, 1887 (2:1-3 at 3).
120 “The W.C.T.U.,” RMN, Sept. 25, 1890 (3:3).
and supreme court justice as well as the state’s first representative in Congress, was and became such an important figure in Colorado civic life (including the successful campaign for woman suffrage in 1893) that The New York Times obituarized her as “Colorado’s leading woman citizen.” The WCTU proposal provided a penalty for selling or giving tobacco in cigarettes or any other form to any minor under 16 as well as for using the same in any public place.

The bill, S.B. No. 21, was introduced on Jan. 12, 1891, by Richard H. Whiteley, Jr., a Republican, whom the labor movement categorized as having voted for labor legislation during the 1891 session. Whiteley was a Harvard Law School graduate whose father had been an important political figure during Reconstruction in and as a congressman from Georgia and later became the leading lawyer in Boulder until his death in 1890. Whiteley also introduced the age of consent bill supported by the WCTU, which raised from 10 to 16 the age at which the criminal code declared carnal knowledge of a female to be rape.

In late January the Democratic Rocky Mountain News described a visit to the legislature by a delegation headed by Belford as engaged in a “missionary tour...”

122 “Mrs. Frances McEwen Belford,” NYT, Jan. 28, 1921 (11).
125 In 1894, during the run-up to the election after the Populists had gained a spectacular statewide victory, Whiteley was the first to speak at the Republican state league convention to denounce the Populist Party as “Anarchists” and urge Republicans and Democrats to “unite in a solid front” against them. “They Mock at Murder,” RMN, June 26, 1894 (1:4-5, 8:1-5 at 4).
126 “Their True Colors,” RMN, May 11, 1891 (5:3).
127 Portrait and Biographical Record of Denver and Vicinity, Colorado 331-32 (1898).
129 Senate Journal of the General Assembly of the State of Colorado: Eighth Session 216 (Feb. 3, 1891) (1892) (S.B. No. 152). The bill unanimously passed the Senate by a vote of 20 to 0. Id. at 721 (Mar. 3, 1891). In the House the vote was 33 to 8. House Journal of the General Assembly of the State of Colorado: Eighth Session 1725 (Apr. 6, 1891) (1892)
130 “Women in Politics,” RMN, Mar. 4, 1891 (5:5-6).
131 “Called Him a Liar,” RMN, Mar. 4, 1891 (5:1-5 at 5); 1891 Colorado Session Laws 123.

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against cigarette smoking”; calling at every legislator’s desk, the members were “armed with a bundle of circulars” that declared: “Work for this! Cigarette law,” followed by the bill text, which provided for a maximum $50 fine for giving or selling tobacco to under-16-year-old minors in addition to a $2 to $7 fine for anyone under 16 who had, smoked, or in any way used tobacco in any form whatsoever in “any public street, place or resort....” Horace Hale, the president of the University of Colorado, praised Belford’s efforts to “save our boys” because he “verily believe[d] that no one thing is as effectually sapping the foundation of American manhood as the cigarette habit. Were it not for the purity of our girls it would not require three generations to so stunt and enfeeble—physically and mentally—our race as to render it inferior.” His only criticism of the bill was that it drew the line at 16-year-olds rather than covering all minors—a regret that the state Central W.C.T.U. oddly shared once the Senate had sent the measure to its third reading, although Belford’s draft already contained that limitation. Following unanimous Senate passage of S.B. No. 21 by a vote of 21 to 0, the State WCTU in executive session on March 3 requested Belford to present several resolutions immediately to the legislature’s Temperance Committee. In addition to several pertaining to bills dealing with saloons and the liquor traffic, the age of consent, and the metropolitan police (because “owing to the degradation of politics and public officials, metropolitan laws cannot be enforced”), the WCTU focused on:

CIGARETTE FIENDS

Whereas, The cigarette trade is carried on as a menace to the safety and health of the boys, resulting in the physical, moral and intellectual degradation of those who indulge, or the fostering of a tendency to the further stimulation of the appetite,

Resolved, That we view with delight the sentiment of responsibility as expressed in the bill prohibiting the sale of tobacco or cigarettes in any form to boys under 16 years of age, and we earnestly hope that it may become a law, since it voices the consciousness that

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133Hale, a Republican, had been a school principal, territorial superintendent of public instruction, regent, and professor of didactics before becoming president in 1887. “Horace Morrison Hale,” Magazine of Western History 13(1):65-68 (Nov. 1890).


136Senate Journal of the General Assembly of the State of Colorado: Eighth Session 305-306 (Feb. 11, 1891) (1892); “Overcome with Toil,” RMN, Feb. 12, 1891 (8:1-4). By the same unanimous vote an emergency clause was added to expedite the effective date.
the state should share in the guardianship of the child through protection by legal enactments against men willing to further their own personal interests by the ruin of our coming citizenship.\textsuperscript{137}

Three weeks later the House also passed the bill by a vote of 37 to 2,\textsuperscript{138} which on becoming law prohibited selling, giving, or providing tobacco or any article made even in part of tobacco to a child under 16 without the written order of the father or guardian and provided for a fine ranging from five to 100 dollars or imprisonment of up to three months, but the legislature had dropped the ban on public use of tobacco by such children.\textsuperscript{139} On the day the law went into effect the \textit{Rocky Mountain News} dispatched a reporter to query Denver tobacconists, as few of whom knew of the law’s existence as did their small boy customers. Under the headline, “Restricting Idiocy,” the cigar-smoking reporter related that a dealer—who had just sold a package of 10 cigarettes to a 12-year-old “colored lad[ ]” into whose “black hand” the reporter had dropped a nickle to grease that illegal wheel of commerce—confessed to knowing nothing about the law, but supposed that he would have to stop selling to boys, with whom he had been doing a “‘good trade,’” guessing that about half of them at the nearby school either chewed tobacco or smoked cigarettes. He purported to be obliged to the reporter for the legal news because, doing a quick calculation, “‘I don’t make enough money on the sale of tobacco to children to care much for the trade. Of course, it will make some difference in my receipts, but I guess I can stand it.’” Significantly, the journalist discovered the existence of a market segment that in other states had prompted some in the anti-tobacco movement to advocate a high license that would have taxed it out of existence: “Near all the school houses are little stores which sell candy and various other things in this line, and in all of them the cheapest brands of cigarettes were found for sale.” The ironic subhead in the \textit{Rocky Mountain News} article—“School Boys’ Vicious Cigarettes Will Not Be Openly Sold to Senseless Youngsters”\textsuperscript{140}—was apparently prescient: three years later a WCTU delegation trekked to the police board “to urge the inauguration of a war against the deadly cigarette,” which the women knew had not yet begun in the form of the state law’s enforcement because they personally witnessed so many small boys smoking on the street daily.\textsuperscript{141}

\textsuperscript{137}“Women in Politics,” \textit{RMN}, Mar. 4, 1891 (5:5-6).
\textsuperscript{139}1891 Colorado Session Laws 131.
\textsuperscript{140}“Restricting Idiocy,” \textit{RMN}, Apr. 17, 1891 (2:7).
\textsuperscript{141}“Dulled Is the Ax,” \textit{RMN}, May 9, 1894 (8:3). Editorially the newspaper itself
In 1892 the Populists achieved highly significant successes in the national and state elections: presidential candidate James Weaver carried the state with the second-highest proportion of the vote (57 percent) of any state, while gubernatorial candidate Davis Waite was elected with 47 percent of the vote and his fellow party members won all statewide offices. More pertinently here, the People’s Party also elected 12 of 35 state senators and 27 of 65 House members, leaving Republicans with somewhat stronger representations in both chambers (15 and 33, respectively), short of a majority in the Senate and just barely with more than half in the House. Despite its enormous electoral victory, the People’s Party suffered from its composition of heterogeneous elements such as “socialists, nationalists, greenbackers, silverites, and single-taxers” as well as irreconcilable groups such as “Catholic and anti-Catholic,...drinker and prohibitionist, union militant and business leaders.” In particular, “[f]or the silverite businessmen, much of the Populist reform platform was anathema....” And although the Populist revolt in Colorado—whose economy in large part rested on its production of two-fifths of U.S. and one-seventh of world silver output—was occasioned by silver’s diminishing returns and failing prices, which the Populists’ policy of free coinage of silver promised to reverse, “the party of dissent was not primarily a silver organization, but was committed to a thorough-going reform of the entire politico-economic order, a project obnoxious to conservatives of all ranks and party affiliations.” As a result of the Populists’ minority status, the failure of coalition, and conflicts between agrarian and nonagrarian (labor) Populists, the party “accomplished little of substance”

insisted in 1893 that practically the law did “not amount to a row of pins” because all a 10-year-old had to do to buy cigarettes was to announce that he was 16. “The Cigarette Habit,” RMN, Dec. 17, 1893 (12:5-6) (edit.).


In his inaugural address to the legislature on being sworn in as governor, Waite stated that free coinage of silver “was the prime issue in this State at the late election,” House Journal of the General Assembly of the State of Colorado: Ninth Session...1893, at 124 (Jan. 10) (1893).


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during the 1893 legislative session (or the special session of 1894).147 Thus, the efforts by Waite, who regarded “existing law” as “merely the codified will of the ruling class,” to transform the legislative landscape “in the interests of the masses” were “almost completely nullified...by the concerted opposition of corporate and creditor interests” and Populists’ own divisions.148

No legislative initiatives concerning tobacco, cigarettes, or smoking were filed in 1893,149 but at the 1895 legislative session the House did pass a cigarette ban bill. To be sure, the political-economic initiative in the new General Assembly had been shifted by the elections of 1894, which, against the background of two years of Waite’s Populism, had “consolidated all elements of opposition into a coherent organization under aegis of Republican leadership. The crusade of 1894 for the ‘redemption’ of the state was premised on the assumption that Populism...was demonstrably an onslaught upon private property and the capitalist order.”150 Republicans’ charge that capital would never invest in Colorado until Waite’s Populist socialism had been ousted fed on Waite’s campaign pledge that his would be a government for the people, not the

148Leon Fuller, “Colorado’s Revolt Against Capitalism,” Mississippi Valley Historical Review 21(3):343-60 at 355, 356 (Dec. 1934). Although Waite’s “ultimate aim” was “the complete mobilization of the working classes in a war of proletarian against plutocrat,” he “was no Marx.... His program contemplated not so much a reconstruction of the social order as the restoration of a golden age of untrammeled opportunity for all.” Id. at 355, 359.
149The indexes to the House and Senate Journals for 1893 include no such headings. The special session of 1894, called by Governor Waite in the wake of the worsening economic crisis, was constitutionally restricted to the items specified in his proclamation, which focused on the causes and consequences of the crisis which Waite viewed as rooted in undemocratic corporate control of the government. However, the Populists’ minority position and lack of unity prevented passage of any radical laws. James Wright, The Politics of Populism: Dissent in Colorado 171-77 (1974). Waite himself opposed saloons as a mortal enemy of reform, but differed from prohibitionists in advocating nationalization of the liquor industry, which would both eliminate the industry’s politically potent huge profits and facilitate social control of what he regarded as the evils of alcohol. Id. at 144. In the 1880s segments of the Colorado Greenbackers had supported a state constitutional liquor prohibition amendment, while the Prohibition Party also attended to other social problems. Id. at 108-109.
150Leon Fuller, “Colorado’s Revolt Against Capitalism,” Mississippi Valley Historical Review 21(3):343-60 at 357 (quote) (Dec. 1934).
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capitalists. With the central question clearly articulated and in the face of capital’s mobilization of its “vastly superior resources,” Waite still polled 41.4 percent of the vote against 51.7 percent for the Republican gubernatorial candidate, but his performance nevertheless amounted to what The New York Times called a “crushing defeat” and a scholar later analyzed as the end of the Populists’ “role as an independent factor in local politics.” In fact, however, although in the 65-seat House Republicans secured a dominating majority, Populists actually increased their representation in the 35-seat Senate sufficiently to organize it (with the votes of the decimated rump of Democratic senators). Waite himself recognized that: “The capitalists are again in the saddle and they will use their power as they have always used it—to enslave the people.”

152 Leon Fuller, “Colorado’s Revolt Against Capitalism,” Mississippi Valley Historical Review 21(3):343-60 at 357 (quote) (Dec. 1934). Republicans were “supplied with money as they have never been before.” “The Defeat and Its Lesson,” RMN (Denver), Nov. 8, 1894 (4:2) (edit.). The chairman of the Populist state committee asserted that: “We had arrayed against us the strongest combination of capital and liquor that ever existed.” “Causes of Defeat,” EP (Denver), Nov. 8, 1894 (2:4).
153 “Populists Badly Routed,” NYT, Nov. 8, 1894 (1).
155 The numbers differ according to various sources. According to the semi-official Rules and Joint Rules of the Senate and House of Representatives...of the State of Colorado: 1895, at 52-54, 124-28 (1896), the Senate was composed of 16 Populists, 16 Republicans, 2 Democrats, and 1 Democrat-Populist, while 45 Republicans, 19 Populists, and 1 Democrat made up the House. A “correct list” in “The Next Assembly,” Evening Post (Denver), Dec. 5, 1894 (6:3), stated that there would be 16 Republicans and 19 Populists and Democrats in the Senate (although it listed only 34 senators, 14 of whom were Republicans, 19 Populists, and 1 Democrat, the missing 35th senator being a Republican) and 42 Republicans and 23 Populists in the House According to Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 30 (2007), 18 Populists, 16 Republicans, and 1 Democrat sat in the Senate, and 41 Republicans, 14 Populists, and 10 Democrats in the House. According to the Colorado state legislature’s website the House was composed of 39 Republicans, 22 Populists, and 4 Democrats, while its party affiliations for the Senate appear to be unreliable (listing only 12 Republicans, 11 Populists, 1 Democrat, with the rest designated as various Silverites and hybrids). http://www.leg.state.co.us/lcs/leghist.nsf (visited June 28, 2010). For a contemporaneous accounts of the election returns and of the organization of the chambers that include no such distinctions, see “Republican,” RMN, Nov. 9, 1894 (1:8); “Organized,” RMN, Jan. 3, 1895 (1:1).
156 “What Waite Thinks,” RMN, Nov. 8, 1894 (8:2).
Ironically for the Populists, who during the 1893 legislative session, had, unlike the Republicans and Democrats, overwhelmingly supported and made possible women’s suffrage, women voters, whose participation rate at the 1894 elections exceeded men’s, in the words of The New York Times, “redeemed Colorado from the stigma of Populist misrule.” Waite, who attributed his defeat in part to their votes, concluded that women had “not learned to think independently. They voted with the money power...”

At the outset of 1895, the Rocky Mountain News published a survey of jobbers’ reports on sales indicating increases in 1894 over the previous year. Among “tobacco men” business had been especially good in smoking tobacco: “The hard times have turned many former cigar smokers to the use of the pipe....” The 625,000 pounds of smoking tobacco consumed in Colorado cost $150,000 at wholesale compared to 1,100,000 pounds of chewing tobacco valued at $352,000. Most relevant here is that 60,000,000 cigarettes (costing $250,000) were smoked in 1894. Those cigarettes accounted for 1.7 percent of the total production of 3,621,000,000, whereas Colorado’s share of total U.S. population was only 0.68 percent. Consequently, annual per capita cigarette sales were distinctly above the national average in Colorado (129 versus 53), though both figures were very low, reflecting the incipiency of cigarette smoking in the United States.

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158 “Women Saved Colorado,” NYT, Nov. 19, 1894 (9). Among registered voters 90 percent of women and 80 percent of men voted.

159 “What Waite Thinks,” RMN, Nov. 8, 1894 (8:2).

160 “No Reason to Kick,” RMN, Jan. 1, 1895 (20:8). If these data were accurate, tobacco consumption (or rather sales) patterns in Colorado deviated from the national average in that in 1894 nationally chewing tobacco bulked more three times larger than smoking tobacco, whereas in Colorado the ratio was 1.76 to 1. Benno Milmore and Arthur Conover, “Appendix: Tobacco Consumption in the United States, 1880 to 1955,” in William Haenszel, Michael Shimkin, and Herman Miller, Tobacco Smoking Patterns in the United States 107-11 (Public Health Monograph No. 45, 1956).

161 Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298 (1935).

The 1895 session of the Colorado House was epochal in that for the first time in the United States a state legislative chamber was not composed exclusively of men: in fact, three newly enfranchised (Republican) women had been elected in 1894 and now occupied seats. Less important in the present context than their general political orientation was the fact that they would “not tolerate smoking”; the resulting “sadness in the hearts of some of the house members” prompted these “unfortunates” to “organiz[e] a third house on the front steps.”

Thus, although both chambers’ rules had long prohibited smoking, women’s advent in the House had led to “[o]ne very marked difference in the conduct of the two houses [that] is noticeable—there is no smoking in the house, either in session or in committee of the whole. The men began the term by smoking in the usual manner, but the women raised constant objections until the practice was discontinued.” To be sure, even in the womanless Senate, the no-smoking rule did not apply or, at any rate, was not enforced in the committee of the whole, “[b]ut if the whole committee rises and resolves itself into a senate session they quit smoking.”

Newly elected, but well-known, Denver Republican William Brown Rundle, who had been “variously identified with development interests” in Colorado, including railroads and mines, and had a “first-class reputation as a business man,” on January 19 introduced House Bill No. 176, “a bill for an act to
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prohibit the manufacture and sale cigarettes,” which was referred to the Temperance, Medical Affairs and Public Health Committee.\textsuperscript{169} The bill provided for a $100 fine, on conviction, for manufacturing, selling, or giving away cigarettes; for a second offense the fine rose to $500 and included a six-month jail term.\textsuperscript{170}

Rundle’s proposed measure fit in well thematically with a whole slew of similar and related bills that he introduced that session, including ones to prevent the adulteration of candy, dairy products, milk, intoxicating liquors, vinegar, and domestic wine, befouled wells, fraudulent repackaging, and diseased and unwholesome provisions.\textsuperscript{171} “The Story on Rundle, the Adulterated Food Man,”\textsuperscript{172} was, at least according to the intensely partisan Rocky Mountain News (which by this time had shifted from the Democratic to the Populist camp),\textsuperscript{173} really two stories. The first one had Rundle becoming “The Food Champion” after he had looked through the index to the statute books “for the subject that had the least number of laws regarding it….” But the better story that “may account for the avalanche of adulteration bills” arose just before the legislative session opened when a fruit vendor offered him a “bucket heaping full” of apples for a quarter; after Rundle had paid, the vendor poured out the apples into a pile that was smaller because the bucket had a false bottom; in vain, Rundle chased after the seller: “Rundle lost the quarter, but he won a chance to grow famous.”\textsuperscript{174}

To the extent that labor-capital conflicts stood at the forefront in Colorado of the 1890s,\textsuperscript{175} Rundle made it clear which side of the barricades he stood on. Just a year after the Cripple Creek strike, the state’s theretofore “most viciously contended strike,” which was precipitated by mine owners to impose a nine-hour

\textsuperscript{169}House Journal of the General Assembly of the State of Colorado: Tenth Session 198 (Jan. 19) (1895); “Six Bills in Shape,” RMN, Jan. 20, 1895 (3:2).

\textsuperscript{170}“Legislative Gossip,” EP, Feb. 1, 1895 (4:3).

\textsuperscript{171}House Journal of the General Assembly of the State of Colorado: Tenth Session, House Bills No. 55, 56, 72, 73, 74, 75, 118, 120, 121 at 1362, 1364, 1368 (index) (1895).

\textsuperscript{172}“Our Law Makers,” RMN, Jan. 21, 1895 (8:1).


\textsuperscript{174}“Our Law Makers,” RMN, Jan. 21, 1895 (8:1-2 at 2).

\textsuperscript{175}Unlike Populism in the Great Plains, Colorado populists in the 1890s were “labor oriented and labor dominated.” James Wright, The Politics of Populism: Dissent in Colorado 252 (1974). Similarly, whereas a whole series of studies of midwestern politics during these years focused on their ethnocultural and religious bases, in Colorado, which was characterized by “dichotomous economic politics,” “generally questions concerning labor unions, protection of property, and encouragement of irrigation seemed more important.” Id. at 278-79.
working day in lieu of an agreed-upon eight hours, he jumped into the House debate on the miners’ eight-hour bill at the end of February by “deliver[ing] himself of the sentiment,” as the News delighted in phrasing it, “almost refreshing in its novelty, that capital and labor were adjusting their relations in the most amicable and successful manner.” His unremitting opposition to state intervention was also grounded in his insistence that the bill would merely be “legislating trouble.” Rundle sought to justify his proffered amendment imposing the bill’s $500 maximum penalty of one year’s imprisonment for employers on any laborer who worked more than eight hours “by sneeringly referring to the miner who had ‘become a capitalist’ by getting a contract and working twelve or fourteen hours. He denounced the bill as class legislation and claimed that labor was a commodity, pure and simple, and had got to take what it could get. He said the eight-hour agitators were always agitating for themselves and would go home and let their wives work sixteen hours. If the bill could be amended to include wives, he would vote for it.” After several Populist representatives had (contradictorily) pointed out that Rundle himself knew that his own arguments were “fallacious” because the power of money controlled the labor market, not supply and demand, and employers and employees were subject to different laws inasmuch as the former, under Republican laws, could even buy labor in Europe, whereas laborers could find work only rarely, the committee of the whole killed Rundle’s amendment.

On February 9, the day after the Temperance, Medical Affairs and Public Health Committee had recommended that the anti-cigarette bill not pass, Rundle successfully moved that the adverse report be amended and his bill be referred to the Committee of the Whole House. At that session two days later Rundle made it clear that he had been impelled to advocate the ban because “the law against the sale of cigarettes to minors had never been or could be enforced.” Proof that children and cigarettes needed to be kept from each other was furnished by the factoid that “[o]f the last 600 boys in the county jail only ten did not use cigarettes.” He added the commonplace that cigarettes were especially injurious to boys’ health and growth. Rundle was hardly alone in holding these views. Another Republican chimed in that “his greatest trouble in bringing up his

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177 “A.P.A. and Eight Hours,” RMN, Feb. 26, 1895 (8:5-8 at 5, 7).
five boys had been their use of cigarettes,” a sentiment that a Populist echoed.180
Opposition was expressed by Republican Charles Campbell, a clothing salesman and president of the Retail Clerks’ union,181 who “thought it unjust to crush the cigarette manufacture in Colorado.”182 (In fact, there was none in Colorado.)183
The committee of the whole recommended passage with two amendments: (1) application of the prohibition to cigarette paper; and (2) inclusion of a minimum penalty of $10.184

The *Rocky Mountain News* sarcastically characterized the House action, which produced a bill everyone seemed to think was good, as the chamber’s having “acquired a sudden and astonishing streak of morality....”185 It nevertheless editorially supported passage primarily for the same child-related reasons voiced by Rundle and his colleagues: “Every teacher who has to deal with the befogged wits of the drugged child, every physician who has been called in to cure the cigarette fiend, every parent whose sons may be indulging in this insidious and destructive form of vice...has a direct interest in this bill.” However, the newspaper then shifted the focus to a charge that, as trite and uninformed as it was, implicated adult consumers as well: “The use of cigarettes and the use of tobacco are two very different things. The objection to the cigarette is not so much to the tobacco in it, for it contains very little, but to the use of opium and other poisonous drugs in its manufacture.”186 If accurate, the allegation would have conveniently furnished a basis for depriving adult men of consumer freedom.187

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184*House Journal of the General Assembly of the State of Colorado: Tenth Session 434* (Feb. 11) (1895). The bill also included a minimum $200 penalty for additional offenses. *Id.* at 451 (Feb. 13).
185“House in a Moral Mood,” *RMN*, Feb. 12, 1895 (8:1).
186*RMN*, Feb. 14, 1895 (4:4) (untitled edit.). Oddly, the *Post* insisted that: “The opponents of the anti-cigarette bill claim that all the evils so bitterly complained of result from smoking poor cigarettes...contaminated with opium or other deleterious substances. They insist that the smoking of pure cigarettes is as harmless as any other form of mild imbecility.” *EP*, Feb. 19, 1895 (4:2) (untitled edit.).
187On the contemporaneous scientific evidence that manufactured cigarettes contained
On the day the House gave Rundle’s bill its third and final reading, the non-party-affiliated Denver Evening Post, in its “Legislative Gossip” column, sought to manufacture additional controversy about and thwart passage of a bill that it opposed. In order to strengthen what it manifestly hoped would be the self-fulfilling prophecy that H.B. No. 176 “may not get any further,” the Post threw in the vague and unsubstantiated claim that: “An impression is gaining in some quarters of the legislature that public sentiment would hardly support officials in enforcing it should this bill become a law.” Posing a question that with equal or greater justification could have been turned against its own article, the newspaper asserted that Rundle’s bill had progressed so “much faster than many more important bills” that the question had often been asked, “‘was this bill introduced in good faith or in a spirit of buncombe or as a bid for notoriety?’” The principal suspicion that the Post cultivated was that somehow H.B. No. 176 might be some kind of shakedown:

Almost every other bill introduced this session has been a copy of a similar measure that was introduced at a previous legislative session. The anti-cigarette bill of the present session is, however, original. At least so far as Colorado is concerned, it is new. Curious enough, no organized movement is back of it. In eastern states anti-cigarette societies have first tabooed the cigarette dealers before they endeavored to close them by legislation. Here, alone and without much pushing, the proposition for an anti-cigarette law is originated and fairly put in a channel to become a law so quickly that all dealers and manufacturers of these goods are amazed. ...

It is admitted that this bill, if it passes, will be the cause of a loss of much revenue to small storekeepers; and it directly or indirectly affects so many people that it affords a better subject for designing lobbyists than the pawnbrokers’ and other bills that are always recognized as license for “a collection.”

Whatever its role in initiating the measure, the Colorado WCTU, whose 86

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no opium, see above chs. 3-4.

190The 1895 and 1897 Colorado WCTU annual convention reports contained nothing on the anti-cigarette bills, though the latter report stated that the “Denver unions did much anti-cigarette work.” Report of the Eighteenth Annual Convention of the Colorado Woman’s Christian Temperance Union: 1897, at 15, in Archives, University of Colorado at Boulder, Colorado Woman’s Christian Temperance Union Collection, Series II Box 3 Bundle 2; email from Archives, University of Colorado at Boulder Libraries to Marc Linder (May 19, 2010).
local unions by 1894 encompassed about a thousand women,\(^{191}\) was hardly passive during the process: as early as February 12—that is, the day after the bill’s second reading—a letter from the matron of the county jail was read at a Central WCTU meeting asking the organization to support H.B. No. 176. Following a discussion of the “growth of this evil,” one of the members was made chairman of a committee to confer with Rundle and “keep track of the bill” so that when it came up for debate, a notice could be placed in the press “in order that there may be a full attendance of those desiring its passage.”\(^{192}\) Later the WCTU—which a Republican senator in 1895 accused, on the Senate floor, of having “become an adjunct of the Populist party”\(^{193}\)—also petitioned the Senate regarding the bill,\(^{194}\) and the group’s state executive committee quarterly meeting discussed the bill at “some length.”\(^{195}\)

In the event, the House passed H.B. No. 176 by the overwhelming majority of 44 to 9.\(^{196}\) This lopsidedness applied to both parties, Republicans voting 28 to 7 and Populists 15 to 2 for the general ban.\(^{197}\) (The next day Rundle happened to


\(^{195}\)“W.C.T.U. Meeting,” \textit{EP}, Mar. 22, 1895 (8:2). Nevertheless, the minutes of a March 21, 1895 meeting in the Colorado Woman’s Christian Temperance Union Collection at the University of Colorado Archives “contained no mention of the bill.” Email from Archives, University of Colorado at Boulder Libraries to Marc Linder (May 19, 2010).

\(^{196}\)Press coverage of the debate was not detailed. The only issue mentioned in one account was adoption of an amendment to tighten the language of the penalty provision to prevent any misconstruction that after two convictions/fines a dealer would be permitted to “control the Denver cigarette trade....” “M’Intire to the Senate,” \textit{RMN}, Feb. 16, 1895 (8:1-3 at 3).

\(^{197}\)\textit{House Journal of the General Assembly of the State of Colorado: Tenth Session} 488 (Feb. 15) (1895). Two of the women members voted Yea, while Clara Cressingham, the most vociferous opponent of smoking in the House, was absent and did not vote. The sole Democrat voted Yea. Party affiliations were taken from \textit{Rules and Joint Rules of the Senate and House of Representatives...of the State of Colorado: 1895}, at 124-28 (1896). The \textit{Post} reported that: “Senators and representatives who are from districts containing Mexican constituenents say they will oppose the passage of the anti-cigarette bill. ‘If anything is dear to a Mexican,’ said one of these legislators, ‘it is a cigarette. A great many of our people roll their own cigarettes but we cannot deny them the privilege of buying such articles if they choose.’” “Legislative Gossip,” \textit{EP}, Feb. 28, 1895 (4:4).
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be part of a joint subcommittee that inspected the state insane asylum at Pueblo, where he asked the superintendent what his experience had been with regard to patients and cigarette smoking, and received the answer that the physician had found several cases attributable to the "cigarette habit." Despite this surge of support, the bill languished in the Senate, where in the session’s final days it was killed by inaction.

Although the Populist Party “did not figure heavily in any election” in Colorado after Waite’s defeat in 1894, as a movement it remained “a part of the silver consensus and the Fusionist coalition...influenc[ing] political development.” After the Radical Populists had lost control of the party to Fusionists during the run-up to the 1896 election, they bolted and their rump convention nominated Waite for governor yet again, but he received only few votes. Populists gained 33 of 65 House and 14 of 35 Senate seats, but these numbers were deceptive inasmuch as “[n]o less than fourteen different varieties of fusion” generated the composition of the House, while 11 were needed to produce just the newly elected (i.e., non-holdover) senators. As a result, the combinations that might be formed to secure a majority and organize the chambers were “without end.” In the event, 25 House Populists entered into an agreement with the much smaller contingent of nine National Silverites (and a single McKinley Republican) that nevertheless conceded the speakership to a Silverite. In the Senate, a group of 10 Populists, five McKinleyites, three National Silverites, and one Silver Republican agreed on a Populist as president

fact, no House member from the southernmost tier of counties voted against the bill.

198 “ Didn’t Know When Tired,” RMN, Feb. 18, 1895 (8:4).


202 “Next General Assembly,” RMN, Nov. 13, 1896 (4:5). According to Laws Passed at the Eleventh Session of the General Assembly of the State of Colorado 15-19 (1897), the Senate was composed of 11 Populists, 8 Silver Republicans, 6 Republicans, 5 Democrats, and 5 National Silverites, while the House was composed of 22 Populists, 20 Democrats, 10 Republicans, 7 National Silverites, 2 Silver Republicans, 1 Single Taxer, 1 Socialist, and 1 Non-Party. These numbers differ to some extent, at least for the fused members, from those in other sources mentioned below.

203 “Edwin W. Hurlbut Will Be Speaker,” RMN, Jan. 6, 1897 (1:1-3).
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pro tempore. Within the framework of these complex deals, which conceded to House Silverites and Senate McKinleyites naming the committees on railroads and corporations, the Rocky Mountain News did not have to reach to conclude that: “The Populist party in its platform has pledged the people much remedial legislation in which particular classes of corporations are interested. The consummation of the terms of fusion ties the hands of Populist legislators.”

Even before the Eleventh General Assembly convened, Representative Clark W. Roe, a 34-year-old Iowa-born Populist “mining man,” announced that he would “introduce a bill prohibiting the sale of cigarettes to any other person in the state of Colorado” in addition to a measure levying a graduated tax on inheritances when they were paid. On January 13 he did introduce H.B. No. 46, which he aspired to push to “final passage if possible.” The bill provided that beginning July 1, “no person shall sell or give away, by himself, his clerk, steward or agent, directly or indirectly, any kind, form or brand of cigarettes or cigarette papers; and the keeping of cigarettes or cigarette papers with intent on the part of the owner thereof, or any person acting under his authority or by his permission, to sell or give away the same within this state contrary to the provisions of this act, is hereby prohibited.” The penalty for a first conviction was a fine not to exceed $200, while addition convictions were subject to $300 to $500 fines and maximum imprisonment of six months. A week after the Mercantile and Manufacturing Interests Committee had recommended passage of the bill as amended by a proposed strike-out of the imprisonment penalty, the committee of the whole took up H.B. No. 46. First fending off a motion to strike

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204 “Inauguration of Colorado’s Eleventh General Assembly,” RMN, Jan. 7, 1897 (1:1-9 at 9, 5:1-4 at 1).
205 “Was It Best?” RMN, Jan. 7, 1897 (4:3) (edit.).
209 “Governor and Economy,” EP, Jan. 13, 1897 (3:4-6).

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out the enacting clause (that is, to kill the bill on second reading) by a vote of 11 to 24, the committee of the whole then adopted the committee changes, and the motion to report the bill favorably to the full House carried by a vote of 29 to 16.\textsuperscript{211}

Before the final vote on third reading on February 26, the full House made no objection to Representative Celestino Garcia’s request for unanimous consent to amend Roe’s bill by striking “cigarette papers.”\textsuperscript{212} Thus amended, H.B. No. 46 passed by the hefty majority of 43 to 11.\textsuperscript{213} The pervasive electoral fusions make it difficult to sort out party affiliations, but, according to the Colorado legislature’s website, Yeas were cast by 16 Democrats, 14 Populists, 4 Republicans, 2 Silverites, 2 National Silverites, 2 Democrats/Republicans, and 1 Socialist, while Nays were cast by 3 Republicans, 3 National Silverites, 2 Populists, 2 Democrats, and 1 Democrat/Republican.\textsuperscript{214} So much for the accuracy

\textsuperscript{211}House Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 388 (Feb. 5) (1897); “Ladies Will Take Notice,” RMN, Feb. 6, 1897 (8:1-4 at 3).

\textsuperscript{212}House Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 654-55 (Feb. 26) (1897). Garcia, a rancher/cattle stock raiser who served 24 years in the House between 1891 and 1918, was “ranked as a member of both the Republican and Democratic parties” in a county in which Democrats, Populists, and Silver Republicans had fused. Sketches and Portraiture of the State Officers and Members of the Ninth General Assembly of Colorado (n.p.) (C. Swords and W. Edwards ed. 1893); http://www.leg.state.co.us/leghist.nsf (visited July 1, 2010); “Next General Assembly,” RMN, Nov. 13, 1896 (4:5) (quote). Possibly García’s request was related to the aforementioned roll-your-own custom among Mexican cigarette smokers. Garcia, who nevertheless voted against the bill, also “attempted to kill the bill under the guise of friendship” by “slyly” requesting that the title be changed to conform to the bill text and then requesting that it be sent back to committee because it had been materially changed, but the speaker outmaneuvered him parliamentarily. “They Fail to Agree,” EP, Feb. 26, 1897 (8:1).

\textsuperscript{213}House Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 654-55 (Feb. 26) (1897). Mention of the bill in the News account of the House proceedings was cursory, offering no quotations from the floor debate. “Held a Night Session,” RMN, Feb. 27, 1897 (2:1).

\textsuperscript{214}http://www.leg.state.co.us/leghist.nsf (visited July 1, 2010). According to a contemporaneous source, the 11 House members casting Nays were composed of one Democrat, one Republican, and nine representatives with two, three, or four (including Democratic, Republican, Populist, Silverite, and Silver Republican) affiliations. “The Next Legislature,” RMN, Nov. 6, 1896 (1:5-7). According to the state legislative website, the Socialist, Eugene Engley, was the only one ever elected to the Colorado legislature. Engley introduced bills to abolish capital punishment (which was enacted) and to prohibit
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of the report, datelined a week earlier, in the Chicago Tribune that: “A bill absolutely prohibiting the sale of cigarets was laughed into an early grave, notwithstanding it was backed by the most influential women of the State and had the unanimous support of the women representatives.”

More than three weeks after H.B. No. 46 had been referred to the Senate Education Committee, its members presented an adverse report unanimously recommending that the measure be indefinitely postponed “because the bill is in conflict with the laws of the United States relating to interstate commerce, and that [sic] the bill is against the interests of this State.” On March 23 the Senate devoted much of the morning session to “weary...wrangling and filibustering over the cigarette bill.” After the Education Committee chairman had moved to adopt the report, Populist Senator Frank E. Moody—who in 1895 had voted in the minority against making Rundle’s bill a special order, i.e., to kill it—moved to amend the report to refer the bill to the committee of the whole. Moody’s motion encountered resistance from Casimiro Barela (“a Democrat pure and simple until the last campaign, when he took on a particle of Populist doctrine”)

the wearing of tall hats in theaters (which passed the House but not the Senate). “Ladies Will Take Notice,” RMN, Feb. 6, 1897 (8:1-4).

215“Push War on Cigarets,” CT, Feb. 20, 1897 (9:3). The article provided an overview of existing and proposed legislation in 27 states based on “special dispatches.” Of the three female House members (all from Denver), only one (Martha Conine, nonpartisan) voted (Yea). Olive Butler (Silver Republican) was among those absent, excused, and not voting, while Populist Evangeline Heartz was not recorded at all. The latter two were recorded as voting Yea and absent, respectively, on the very next bill that day. Senate Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 845 (Mar. 23) (1897).


217 Senate Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 844 (Feb. 27 and Mar. 22) (1897).

218 “Hanging to Be Stopped,” RMN, Mar. 24, 1897 (5:1).

219 Moody, who as a 21-year-old in 1880 was returned by the census as working in a silver mine, was occupied in mining in 1895. Rules and Joint Rules of the Senate and House of Representatives...of the State of Colorado: 1895, at 53 (1896).


221 Senate Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 848 (Mar. 23) (1897).

1916, in addition to the two preceding terms in the Territorial Council, was the “‘boss’” of the San Luis Valley in southern Colorado, where his house was “patterned after the large Mexican hacienda and maintained by a retinue of servants.” In addition to owning “important properties in Mexico” as well as a coffee plantation in Brazil, Barela invested in banks, railroads, ranches, and urban real estate in the United States. Carey McWilliams, North from Mexico: The Spanish-Speaking People of the United States 96 (1975 [1948]) (quote); Carl Abbott, Stephen Leonard, and David McComb, Colorado: A History of the Centennial State 363 (3d ed. 1994 [1982]). See also Sketches and Portraitures of the State Officers and Members of the Ninth General Assembly of Colorado (n.p.) (C. Swords and W. Edwards ed. 1893); http://www.leg.state.co.us/leghist.nsf (visited July 1, 2010); José Fernández, The Biography of Casimiro Barela (A. Gabriel Meléndez tr. 2003 [1911]).


Moody’s motion to refer the bill to the committee of the whole, Democrat William Adams suddenly “decided that he could not vote intelligently unless he knew what was in the bill. After hearing “this most vicious measure” read aloud, Barela, who had also opposed Moody’s motion, “could not see how any senator could vote for the bill.” Unable to answer Wheeler’s provocatively posed question, “‘What clause of the interstate commerce act mentions cigarettes?’” Barela instead merely “gracefully waived” it and unsuccessfully moved a recess (losing 10 to 19). Reinforcing Barela’s view, Silver-Populist James Crosby explained that he had signed the committee report “believing the majority of the senators had more sense than to vote for such a crazy bill.” In the face of opponents’ further dilatory tactics, Wheeler declared that supporters “‘will stay here until next September...unless we get a vote on this bill.’” Once noon arrived, however, the filibustering minority “having accomplished their object of preventing any business being done,” finally agreed to a vote on Morton’s motion to refer H.B. No. 46 to the committee of the whole, which was overwhelmingly adopted by a vote of 25 to 5. Barela, who, together with Adams, had “manipulated the delay tactics,” yielded “gracefully...to the inevitable” and voted with the majority.226

Well Barela could afford such graciousness: the Senate during the remaining two weeks of the session never took Roe’s “crazy bill” up again.227 And although

226 Senate Journal of the General Assembly of the State of Colorado: Eleventh Session...1897, at 848-49 (Mar. 23) (1897); “Victory of the Ten,” EP, Mar. 23, 1897 (2:1) (quotes). The Post, whose vote counts differed slightly from those of the Senate Journal, stated that Adams also voted Yea, but the Journal had him voting Nay together with three committee members. The Journal also summed the Yea’s as 24 while listing 25 senators.

227 At the next session in 1899, in which a campaign by the Western Federation of Miners and the Colorado State Federation of Labor had helped create a “workable prolabor majority,” a House bill was introduced to prohibit the sale or gift of cigarettes, but no action was taken on it. James Wright, The Politics of Populism: Dissent in Colorado 233
the House in 111, by another overwhelming vote, once more passed a bill prohibiting the sale or manufacture of cigarettes—which *The New York Times* characterized as having been both regarded as a “joke” when introduced and passed under the influence of the Federated Women’s Clubs—the Senate, yet again, killed it, and Colorado never did enact such a law.

**Invalidation of Denver’s $1,000 Prohibitory License Ordinance: 1897-98**

[II]t would seem that the evil will have to be handled as we do the liquor evil, by licensing it, thereby controlling it and restraining its sale.

Such a policy is now finding vogue in some states and with success.... It remains, however, to be seen how soon it will sink into innocuous desuetude. A trouble is that there is not enough moral sentiment abroad against the cigarette—not only of the right kind, what is met being usually of the maudlin kind, which does not impress youth especially when they see cigarette smoking indulged in by their elders with no seeming bad effect and as long as they feel strongly that to smoke is to embrace the first habiliment of manhood and is very pleasant withal. What is wanted and what would be best is...and abandonment of that kind of indulgence by grown men....

Almost as soon as Roe’s cigarette sales prohibition bill had definitively died with the adjournment of the Eleventh General Assembly in April 1897, the


Democrat George Ashton, a smelter, introduced H.B. No. 226, which was a “bill for an act to prohibit the selling, giving away, or manufacturing for the purpose of selling or giving away, cigarettes or cigarette wrappers, or cigarette papers, to any person whomsoever, providing a penalty therefor, and requiring district judges to specifically instruct grand juries of the provisions of this act....” *House Journal of the General Assembly of the State of Colorado: Eighteenth Session* 198 (Jan. 27) (1911). After a majority of the Temperance Committee had recommended tabling the bill “as we believe a law of this kind is not in demand at present,” the House (which Democrats controlled 40 to 25), first voted 51 to 11 to substitute the minority report for it and then voted 53 to 8 to pass the bill. *Id.* at 612, 648, 1198-1200 (Apr. 21).


After the Medical Affairs Committee recommended that it be indefinitely postponed, the Senate (which Democrats controlled 26 to 9), failed to take it up. *Senate Journal of the General Assembly of the State of Colorado: Eighteenth Session* 1720-21 (1911).

Colorado WCTU launched a new initiative in a different forum to achieve the same objective. Later that month the press reported that cigarette trafficking was “among the subjects scheduled for regulation as soon as possible” by the Denver city council. A WCTU member had suggested adoption of an ordinance modeled on one that had recently gone into effect in Chicago providing that: (1) every cigarette dealer had to pay an annual $100 tax; (2) no cigarette license could be issued for use within 200 feet of a school; (3) all cigarettes sold had to be inspected by the health department to verify their “purity”; (4) no cigarette containing opium, morphine, or any other deleterious substance could be sold; and (5) violations subjected dealers to a fine of $50 to $200 for each offense and $25 for each day. The point of the proposal was to “prohibit the sale of cigarettes by small stores and shops in residence neighborhoods and especially to get at the establishments which are closely located to school houses, which are mainly patronized by scholars,” whose consumption of cigarettes would be reduced by virtue of their being forced to go downtown to buy them.232

The proposed ordinance, which was not even intended to—and at $100 could not—be generally prohibitory,233 nevertheless immediately inspired a purportedly mass protest by dealers. In an open letter to the city council board of supervisors, and the WCTU, “Hundreds of Us” opposed the “‘class legislation,’” which made “war on an almost helpless class—‘small dealer’—to the advantage of a class already living in affluence.” The WCTU they accused of fighting a straw man inasmuch as “the antipathy to the cigarette is an hallucination. Many of the best,
most intelligent and respectable citizens prefer a cigarette to a cigar, and don’t care to go down town to get it, preferring also to patronize some poor cripple—”small dealer,”” who “in most cases” was doing no more than “striving to keep from falling into the hands of fickle charity.” The dealers also predicted that everyone who smoked cigarettes (only 1 percent of which were manufactured rather than self-rolled) would smoke as many after passage of the ordinance as before, while the city would receive probably one or two $100 license fees.234

In mid-July Supervisor Orlando B. Scobey introduced a bill for an ordinance that imposed a $100 annual license, prohibited the sale of cigarettes within 400 feet of a public school house, and required a $500 bond designed as surety for the dealer’s good character and reputation, which latter the health commissioner was obligated to examine before recommending that the fire and police board granted the license. The proposed ordinance also required dealers to comply with all state laws (relating to cigarettes) and prohibited the sale of cigarettes containing opium, morphine, jimpson weed, belladonna, glycerine, or sugar. Finally, it was also the commissioner’s duty to inspect all dealers’ goods regularly and report to the police board any violations, which were subject to a $100 fine.235

Though dealers continued, after the board of supervisors had passed the ordinance,236 to file protests against passage of such an ordinance,237 alleging, inter alia, that the ordinance would only create a monopoly,238 by September the board of aldermen239 committee considering the draft ordinance recommended that the annual license fee be raised to $1,000.240 Shortly afterwards City Attorney George Norris began quoting recent court decisions to the councilmen to show that the proposed ordinance would unconstitutionally interfere with interstate commerce.241 When a federal court in Tennessee held that that state’s anti-cigarette sales law violated the federal commerce clause, Norris deemed it

235“Cigarette License,” RMN, July 16, 1897 (10:1). On the virtually universal use of glycerine in cigarettes, which should have prompted a virtually universal sales ban, see below this ch.
236“Cigarette Bill,” EP, July 30, 1897 (2:3); “Appropriation,” EP, July 31, 1897 (3:3).
238“Cost of Lightning,” RMN, Aug. 6, 1897 (8:1).
239The Denver city council consisted of a board of supervisors (composed of at least five members elected at large) and a board of aldermen (composed of 12 to 17 members elected by wards). 1893 Colorado Sess. Laws ch. 78, at 131, Art. II § 1, at 138-39.
241“Cigarette Ordinance Illegal,” EP, Sept. 18, 1897 (6:3).
important enough to spend $6.50 to procure a copy of the full text to use in persuading the council that the license tax was unconstitutional. While awaiting its arrival, the press reported that the council would hold the proposed ordinance and, if the Tennessee ruling corresponded to Norris’s speculation, abandon it.\textsuperscript{242} In fact, not only was Norris wrong in informing the chairman of the aldermanic committee in charge of the ordinance that “every decision has been in line with that of the Tennessee court,”\textsuperscript{243} even non-lawyers who read the Denver \textit{Evening Post} would have known that a federal judge in the beginning of August had upheld the validity of a Montana cigarette tax license against the American Tobacco Company’s interstate commerce challenge.\textsuperscript{244} Moreover, the Tennessee law would soon be upheld by the Tennessee and U.S. Supreme Courts.\textsuperscript{245}

In the event, the aldermen not only passed the ordinance, but amended the supervisors’ version to increase the license tax 10-fold from $100 to a quasi-prohibitory $1,000.\textsuperscript{246} Without debate the board of supervisors passed the amended ordinance,\textsuperscript{247} and as soon as Acting Mayor and Board of Supervisors President Scobey approved the ordinance on November 6,\textsuperscript{248} it became clear that a test case would be filed in court. Because Norris was “very much exercised” over the council’s disregarding his advice that the license fee was invalid, he was “pledged in advance to make a very strong defense of the ordinance....”\textsuperscript{249}


\textsuperscript{244}“Montana Cigarette Law,” \textit{EP}, Aug. 7, 1897 (7:3). The article incorrectly characterized the law as a Helena ordinance. On the law and the decision, see below ch. 11. In addition, a state district court in Iowa had already upheld that state’s general cigarette sales ban. See below ch. 11.

\textsuperscript{245}See below ch. 12.

\textsuperscript{246}“A High Tax on Cigarettes,” \textit{RMN}, Oct. 19, 1897 (3:6).

\textsuperscript{247}“Passed the Anti-Cigarette Bill,” \textit{RMN}, Oct. 31, 1897 (24:8).

\textsuperscript{248}Ordinance No. 79: Series of 1897, in Denver City Ordinances: Clipped from Denver Newspapers and Indexed: April, 1891-December, 1927: Scrap Books of F. A. Williams, City Clerk, Denver, Colo (published in \textit{DR}, Nov. 9, 1897) (copy furnished by Western History Dept., Denver Public Library). The ordinance as adopted was, apart from the increase in the license fee, as set forth by the aforementioned press accounts at the time of its introduction except that fines ranged between $5 and $100 (§ 7). See also \textit{Compiled Ordinances and Charter: The City of Denver} § 612 at 346 (1898).

\textsuperscript{249}“To Contest Cigarette Ordinance,” \textit{RMN}, Nov. 7, 1897 (5:1). See also “Denver Cigarette Ordinance,” \textit{Nyt}, Nov. 9, 1897 (1). Norris immediately protested that the article was “unfair” because he had “found that like laws and ordinances had without exception been held void.” He also obliquely cast ethical aspersions on the council by wondering
For almost two months police and prosecutors “ignored” the ordinance and its violation by “several hundred dealers” who continued selling cigarettes without paying the license. Despite the WCTU’s support for enforcement, the city authorities’ dilatoriness resulted from their extra-legal solicitude for the non-compliant dealers’ “entreat[ies]” to give them the chance to sell off their pre-ordinance stocks profitably: “Far the greater part of the dealers did not care to take out the license required by the ordinance, as it was more than the traffic would bear, and they did not care to lose the stock on hand. The [police] board delayed action a time to allow these dealers to close out. But something has whispered in the ear of the members of the board that no one is going out of business, that as fast as these dealers run down their present stock they buy more.” Under such circumstances, the Rocky Mountain News concluded, “further delay would be merely robbing the city of a license fee due it.”

The procrastination, it soon turned out, was also caused by the fact that, as was also true with regard to the $100 license fee being simultaneously challenged in Chicago (and everywhere else that general anti-cigarette sales and quasi-prohibitory license laws were being enforced), the real litigant in Denver was the Tobacco Trust. Thus, although the members of the city council favored enforcement, it gave them pause to learn that prosecution meant “a long period of litigation with the tobacco trust that will extend beyond the life of the present administration and the employment of a special attorney to carry [sic] it through.” A private lawyer would take on the case only if he were “guaranteed a sufficient appropriation to fight the matter to a finish without asking future councils for more money.” As a result, if the council decided that such funds were lacking, the ordinance would remain a “dead letter.”

Not until the final days of 1897 did the city file complaints in police court against six of Denver’s largest dealers (while not “molest[ing]” wholesalers for...
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The sellers, all of whom were represented by one lawyer, who declared that, instead of disputing the facts, they would attack the ordinance’s constitutionality, were mere straw men was well-known, as it was virtually everywhere that the American Tobacco Company choreographed such litigation: “It is believed that local dealers figure in the case only because they belong in Denver, and that the real defense will be made by the tobacco trust,” which would test the ordinance’s legality “at every stage and in every court between the lowest and the highest.” At the first hearing on January 20, the defense challenged the reasonableness of the $1,000 annual license fee on the grounds that “no dealer, wholesale or retail, made $500 in a year on the sale of cigarettes....” The six defendants’ evidence showed that “their profits were away [sic] below $500 in all cases except one.” John D. Ross, M. Hyman, and Albert Abel, claiming to be the three “heaviest dealers in paper cigars in the city,” stated that their profits “about 70 cents a day or at most $500 a year,” and $365 and $255 in 1897, respectively. An exchange between the assistant city attorney and Police Magistrate Ellis suggested that Denver’s legal representation might leave something to be desired. After hearing the dealers’ argument of unreasonableness, Norris Bachtell announced that he would subpoena the city council members to show that the fee was reasonable, prompting Ellis to ask him how he knew that the council had such information. Bachtel’s reply that having set it at $1,000, the council “‘must know. The city council never does anything except what is right,’” apparently led the magistrate to believe that Bachtel was pulling his leg: Ellis then gave him a minute-long fixed look before saying that he suspected that there was “‘some sarcasm in that answer,’” but the attorney

because Police Magistrate Ellis did “not like to accept made-up evidence—that is, where the inspector goes in and buys the cigarettes in order to make a case. The only evidence that would be accepted by the magistrate was in cases where a man really wanting the article does the purchasing.” Consequently, in several stores inspectors were “compelled to hang about for nearly an hour before a bona fide purchaser...appeared,” although every store did in fact “have the contraband articles in cases, offered for sale, and in every one some one [sic] was seen to buy cigarettes.” Id. To judge by another case, involving liquor, Ellis apparently regarded the aforementioned inspector scenario as a species of impermissible entrapment. “The Drug Store Whisky Cases,” RMN, Aug. 5, 1897 (4:1) (edit.).

258“Cigarette Men Plead in Court,” EP, Dec. 29, 1897 (1:2).
259“The Cigarette Ordinance to Be Tested,” RMN, Dec. 29, 1897 (5:3).
denied the accusation.\footnote{261} At the continuation of the hearing a week later, Bachtell limited his argument to the single strong proposition that the city was authorized to fix the fee at $1,000 or “any sum,” whereas the defense lawyers insisted both that that amount was prohibitory and—using the Tobacco Trust’s litigational mainstay—that it violated the interstate commerce clause.\footnote{262}

As the case progressed,\footnote{263} the WCTU, which in principle did not even support licensing tobacco (any more than it did liquor), became increasingly involved in the case.\footnote{264} In addition to requesting Police Magistrate Ellis to enforce the cigarette ordinance,\footnote{265} the WCTU injected itself into trial tactics and strategy in connection with the aldermen’s discussion of the advisability of offering evidence establishing that cigarettes were injurious after the prosecution at the outset of the court hearings “for the time being abandoned” such efforts “because it seemed an [sic] herculean and costly task.”\footnote{266} Striding into this litigational breach (the existence of which underscored how the Tobacco Trust had succeeded in economically intimidating the government of the country’s largest city between San Francisco and Kansas City into throttling its prosecution of the national mastermind of the for-profit conspiracy to violate and invalidate Denver’s regulation of cigarette sales), Adrianna Hungerford, a WCTU official who in 1904 would become state president,\footnote{267} wrote to one of the aldermen that the

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\footnote{261}{“License Fee Unreasonable,” \textit{RMN}, Jan. 21, 1898 (10:7). After practicing in Denver from 1886 to 1903 (including one term as public prosecutor and three as assistant city attorney, Republican Bachtell moved to Los Angeles, where he became a lawyer for a private corporation. Willoughby Rodman, \textit{History of the Bench and Bar of Southern California} 126 (1909).}
\footnote{262}{“Arguments in the Cigarette Case,” \textit{RMN}, Jan. 28, 1898 (6:4).}
\footnote{263}{Another hearing was held on January 27. “The Cigarette Ordinance,” \textit{EP}, Jan. 27, 1898 (2:4).}
\footnote{264}{On the contemporaneous effort of the cigarette industry in Chicago to co-opt the WCTU in the former’s campaign to repeal that city’s license ordinance, see below this ch.}
\footnote{265}{“Religious Services at Fire Department Houses,” \textit{EP}, Feb. 1, 1898 (10:1). At the same time, the Colorado WCTU, like its counterparts elsewhere, urged the state’s legislative representatives in Congress to pass a law subjecting cigarettes sold interstate in “original” packages to state laws (precisely in order to avoid the Tobacco Trust’s interstate commerce-based constitutional challenges). \textit{Id}. See also below ch. 11}
\footnote{267}{Representative Women of Colorado 100 (1911). In 1897-1898 Hungerford was superintendent of the legislative and petition department for the WCTU district encompassing Denver. “White Ribboners,” \textit{EP}, Nov. 12, 1897 (12:3); “Eighth District W.C.T.U. Election of Officers and Reports for the Year,” \textit{EP}, Nov. 10, 1898 (2:3). Hungerford, who was married to a physician, later perceptively attributed Colorado
\end{footnotes}
organization had gathered 1,118 signatures for a petition to the council requesting prohibition of the manufacture and sale of cigarettes and asked whether enforcement of the existing ordinance would be helped by presenting the petition at that time. Expressing women’s appreciation for “the fight you are making against the cigarette,” she then offered the WCTU’s advice and aid concerning the ongoing hearings: “Would not some of the school teachers testify to the injurious effects of cigarettes? The teachers see more of them than most other people and might exhibit some victims before the police magistrate. Would it help matters if some of us could find teachers who are willing to give testimony?”

The response from Alderman Robert Golder—a Democratic-Populist candidate with extensive interests in all of the state’s mining camps whose department store ordinance “to force proprietors to provide stools for female employees” the board of supervisors passed the day after the final hearing in the cigarette ordinance case—urging Hungerford to “marshal a strong contingent of W.C.T.U. members and bring them to the police court room” when the hearings resumed presumably prompted a number of the group’s leaders to appear and speak there.

The hearing on February 10 was held by Police Magistrate James M. Ellis, a well-known lawyer, Democratic politician, and appointee of a Democratic governor to a two-year term. When Ellis filed for bankruptcy in 1899, it was revealed that the U.S. Government had sued him in 1895 for $3,173.80, which he had received as receiver of the U.S. land office in Denver and failed to turn over. Ellis opened the session by severely criticizing “various ladies” from whom he had received letters “which betray an ignorance of the ordinance. The ladies who wrote these letters have not read the ordinance.” The women—whose colleagues, if not they themselves, were present in the court room—had requested that cigarette sales to children be stopped, but Ellis protested that he lacked the power to enforce the state statute that prohibited such sales to minors.

women’s successes in part to the fact that “[n]ot being afraid of hurting their business, they take the initiative in reform movements and law enforcement.” Adrianna Hungerford, “A Few Facts About Colorado,” American Advance, June 3, 1911, at 10.

273 “City Attorney Ellis Seeks the Bankruptcy Court,” EP, July 11, 1899 (2:4).
members raised these issues toward the end of the hearing. The presence of the three WCTU members marked, according to the Denver Republican, “[p]robably for the first time in this country, if not in any other country, [that] women appeared in the role of amici curiae of a Police court...”

The proceeding was also remarkable for the participation of Guy LeRoy Stevick, a lawyer and fellow Democratic Party activist whom Ellis had appointed as an amicus curiae, “an unprejudiced investigator of facts of [sic] law.” Ellis’s attachment to Stevick, who had “offices adjoining” Ellis’s, may have been linked to the latter’s lengthy defense (“He Flies to the Judge’s Rescue”) of one of Ellis’s decisions half a year earlier in response to an attack on it by the Rocky Mountain News. Stevick, who insisted that he had “tried to be, not an advocate on one side or the other of this case,” presented an “elaborate brief covering all the contested points of the ordinance,” although there were chiefly two questions for him to resolve: “‘Has the court any call or right to inquire into the reasonableness or legality of the amount of the fee imposed on the dealers in cigarettes?’ and ‘What is the criterion of the reasonableness of the fee?’” Stevick’s point of departure was, correctly, the powers that the state legislature had conferred on the city council, which were either given expressly “‘or which are necessary for carrying into effect the powers which are expressly given to it.’” From the legislatively enacted city charter he cited the following enumerated powers: (1) providing for “‘the licensing, regulating, and taxing of all lawful occupations, business places, etc.’”; (2) to “‘provide for and regulate the sale of tobacco’”; (3) to “‘regulate or prevent the carrying on of any business which may be dangerous or detrimental to public health, or the manufacturing or vending of articles obnoxious to the health of the inhabitants’”; and (4) “‘The city council shall have power to enact all ordinances necessary and proper for carrying into execution the powers specified in the act.’” Stevick then placed the limits

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275 “Women and the Cigarette Law,” DR, Feb. 11, 1898 (7:1).
276 Stevick (1865-1955) was an 1888 graduate of the University of Pennsylvania Law School, who moved to California, where he was Pacific Coast manager and vice president of Fidelity & Deposit Co. of Maryland. The Chi Phi Fraternity, Centennial Memorial Volume 454 (1924).
279 Guy LeR. Stevick, “He Flies to the Judge’s Rescue,” RMN, Aug. 6, 1897 (4:5).
280 “The Drug Store Whisky Cases,” RMN, Aug. 5, 1897 (4:1) (edit.). Ironically, the case involved the use of police to make purchases of whisky in bottles from drug stores and then to file complaints against the owners.
281 “Full House,” EP, Feb. 10, 1898 (2:4-5). With one exception, Stevick quoted these
of these powers in their judicially interpreted context by quoting a recent Colorado Supreme Court decision that set forth a bifurcated typology for determining ordinances’ validity: “An ordinance expressly authorized by specific and definite legislative authority will be upheld unless it conflicts with the constitution of the state or nation, while an ordinance which the municipality assumes to pass by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable....” Stevick’s conclusion that regardless of whether the ordinance had been passed pursuant to the power to license, regulate, or tax, “it must be subject to the test of reasonableness” was presumably based on his judgment that the imposition of a $1,000 annual license fee on cigarette sellers was not sufficiently expressly authorized by the legislature to qualify as subject only to the test of constitutionality. But despite his typological framework, Stevick failed to limn any usable specifics for determining reasonableness in this case. All he managed to distill from case law was that a license fee that would be prohibitory in one city would not “seriously interfere with business” in another and that where it was based on a police-power regulation “its amount is limited to a fair or liberal estimate of the various expenses growing out of the police regulation, while in those cases where the license fee is charged as a revenue measure the limitation of such a fee is that it shall not be prohibitory of the business which it attempts to tax.” Later during the hearing he “enlivened...the sitting” with his snide speculation that in connection with the city council’s having “ample power to pass an ordinance demanding a reasonable fee,” it had originally been set at $100, “but the board of aldermen, probably because there was a deficit in the city’s funds on some particular morning, raised that fee to $1,000.”

powers verbatim from the session law (Act to Revise and Amend the Charter of the City of Denver): instead of “‘provide for and regulate the sale of tobacco,’” the charter statute declared that the city council was empowered to “provide for and regulate the inspection of...tobacco....” 1893 Colorado Sess. Laws, ch. 13, Art. II, § 20, Nineteenth, at 131, 148.

282Phillips v City of Denver, 19 Colorado 179, 183 (1894). The newspaper account of Stevick’s brief did not identify the case.

283“Full House,” EP, Feb. 10, 1898 (2:4-5). In fact, according to the leading treatise on the subject: “In the exercise of the power to regulate, a city may exercise all reasonable forms of restraint over the thing regulated so long as it stops short of actual prohibition.” The $1,000 license fee might have satisfied this criterion. John Dillon, Commentaries on the Law of Municipal Corporations 2: § 665 at 1001-1002 (5th ed. 1911 [1872]).

284“Full House,” EP, Feb. 10, 1898 (2:4-5). This comment in particular and the whole tenor of Stevick’s report is irreconcilable with an article in another newspaper stating that he had “argued in favor of the validity of the ordinance, holding that it was discretionary with the City Council the amount of license fee that should be imposed.” “Women and the
Because Stevick self-contradictorily accused the city council of raising the fee to $1,000 for revenue at the same time that he rejected the ordinance as invalid because it was allegedly prohibitory, supporters of the ordinance should not have allowed him to get away with having it both ways: if the ordinance in fact raised revenue because some dealer(s) paid the license fee, then it was not prohibitory, and if it was prohibitory, then no (compliant) dealer would have sold cigarettes or paid a license and the ordinance would not have raised any revenue.

Even assuming that Stevick was right about how to classify the ordinance, his exploration of its reasonableness was too crabbed by virtue of his (and his principal Ellis’s) exclusive focus on the size of the fee and failure to consider the ordinance as an exercise of the aforementioned power to “regulate or prevent the carrying on of any business which may be dangerous or detrimental to public health, or the...vending of articles obnoxious to the health of the inhabitants.” Cigarettes’ deleterious impact on public health was after all precisely the subject on which, as shown below, the WCTU was more than eager to present evidence. Why, if cigarettes were hyper-dangerous, it would not have been reasonable for the city council to use its taxing power to prohibit their sale or—as seems more plausibly to have been its intent—to insure that their most vulnerable victims, boys, would be less likely to gain access to them by taxing the small sellers who predominantly sold to children so steeply that such dealers would no longer have a profit motive than was the case under the statewide ban on sales to minors neither Stevick nor Ellis explained.  

285 After all, as Judge and Professor John Dillon, the era’s leading treatise writer on the law of municipal corporations, who was antagonistic to any expansion of, and contributed to limiting, their powers, observed: “Where the business or matter to be regulated is one which is or has become dangerous to health or safety or injurious to public morals, the power to regulate may, we think, include the power to prohibit where the municipal council reasonably deems the public welfare so to require.” Moreover, if Magistrate Ellis had permitted the WCTU to put on its evidence, perhaps a predicate would

285 Attributing just such an argument to the WCTU (which “went on the proposition that as a cigarette, with a ‘fool on one end and a fire at another’ is dangerous, therefore the ordinance making the license fee so large that the cigarettes cannot be sold, should per se be declared valid”), one newspaper sexistically dismissed it: “The ratiocinations indulged in by the ordinary attorney and circumlocution of the ordinary court are not to a woman’s intuitive mind very appropriate....”  “Women and the Cigarette Law,” _DR_, Feb. 11, 1898 (7:1).

have been laid to assimilate cigarettes to intoxicating liquor, which, according to the U.S. Supreme Court, there was “no inherent right in a citizen to...sell by retail. It is not a privilege of a citizen of the state or of a citizen of the United States. As it is a business attended with danger to the community, it may...be entirely prohibited or be permitted under such conditions as will limit to the utmost its evils. The manner and extent of regulation rest in the discretion of the governing authority.”

If cigarettes could be analogized to liquor in terms of their deleterious health impact, at least on children, then, at least to the extent of justifying the $1,000 license fee to deter non-downtown stores from selling them at all, such an amount might have passed muster under the standard that Dillon synthesized for liquor: “When a license fee is exacted under the power to regulate, the courts generally regard the amount of the fee as largely within the discretion of the licensing authority and will not, as a general rule, hold it to be exorbitant or unreasonable....”

In the event, Stevick’s brief contained the astonishing “fact that the city had made no attempt to introduce evidence to show the deleterious effects of cigarettes. More astonishing still was Assistant City Attorney Bachtell’s admission of his failure to do so, which he attributed to: (1) congressional recognition of cigarettes as an article of commerce “after a thorough investigation of [sic; should be “by”] eminent chemists;” and (2) the inability of local experts whom he had interviewed to “testify so as to sustain the contention that they [cigarettes] are more deleterious than tobacco in other forms....” In light of Stevick’s charge that if the city was seeking to justify the prohibition of cigarette tobacco “on the grounds that it belongs to that class of business designated as dangerous or detrimental to the health of the community, evidence of such fact should be presented,” the city’s defense was incompetent and Judge Ellis’s refusal to hear the WCTU’s evidence on this very issue was perverse.

Before Ellis closed the hearing, 56-year-old Mrs. Theodore (Antoinette) Hawley, president of the Central Union of the WCTU for Eighth District (including Denver), called to Ellis’s attention the provision in the ordinance

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287Crowley v Christensen, 137 US 86, 91 (1890).
288John Dillon, Commentaries on the Law of Municipal Corporations 2:§ 676, at 1021 (5th ed. 1911 [1872]). See also id. at 1022 n.6 (citing license fees of $1,000).
290“Elected Officers,” EP, Sept. 8, 1897 (7:5). In the 1896 elections Hawley (and the other two WCTU members who appeared at the hearing, Mary Wrigley and Elizabeth Craise, unsucessfully ran as Prohibition Party candidates for the state legislature from Denver). “A List of Nominations,” RMN, Nov. 2, 1896 (8). At the 1900 Census of
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requiring dealers to obey state laws: “Could not somebody collect a penalty from the dealer who violates the state law which prohibits the sale of tobacco to minors?” The magistrate agreed, but his remitting her to state court jurisdiction merely prompted Hawley to pose yet another question (which might have been thought to be designed to prove to him that she had read the ordinance, except that she and her colleagues did not arrive in the court room until after he had chastised the letter writers): “But the ordinance says the dealer who takes out a license must give $500 bonds. Could not someone go after the bondholders?” The WCTU’s dogged determination to identify a purchase in the licensing ordinance for enforcing the no-sales-to-minors statute may have seemed out of place at a hearing to determine the constitutionality or validity of the ordinance regardless of the practicalities of deterrence, but it underscored both the WCTU’s primary focus on denying children access to cigarette and the fact that licensing was anathema to the organization. Before Ellis could administer yet a further lesson in jurisdiction, his alter ego, Stevick, injected this confusion: “The ordinance...does not provide a penalty for violation. How much would a dealer damage the state if he sold cigarettes to a boy? The ordinance does not say, and no damages could be recovered.” Since the WCTU was champing at the bit to explain just how enormous that damage was, 52-year-old widow Mary Wrigley, a real estate dealer who was superintendent of the state WCTU department of Christian citizenship and law enforcement, asked Ellis why he did not enforce the ordinance “as you do the laws against theft and murder...” The “startled” magistrate parried her thrust with an irony that went to the core of the WCTU’s inconsistency in promoting enforcement of an ordinance that it abominated: “Madame,...would you have an ordinance enforced that gave leave to murder for $1,000? You say that selling cigarettes is murder. Would you have murder licensed?” Realizing that her analogy gambit had boomeranged, Wrigley saw only one escape route: “Why don’t you prohibit it then?” Although it is difficult to discern the thought processes that would have led her to conclude that

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Population her husband was returned as a “capitalist.”

291“Full House,” EP, Feb. 10, 1898 (2:4-5). The ordinance did, as noted above, impose a fine ranging from $5 to $100 for each violation.

2921900 Census of Population (HeritageQuest).


294“Full House,” EP, Feb. 10, 1898 (2:4-5). Ellis was perhaps waxing ironic while bantering with the WCTU when he “volunteered the information that he thought the ordinance a vicious measure in that it would permit the sale of the paper cigar.” “Must Invoke State Cigarette Law,” RMN, Feb. 11, 1898 (6:6).
the police magistrate was empowered to go the city council one better and outright ban the sale of cigarettes, especially when the state legislature had just failed for the second time to mobilize a majority for precisely such a statute, Ellis nevertheless met Wrigley on her own grounds, albeit disformatively, having overlooked the decision that the Iowa Supreme Court had issued barely two weeks earlier upholding, against the Tobacco Trust’s interstate commerce challenge, the constitutionality of the state law banning the sale of cigarettes.295: “‘The supreme court has decided that the cigarette business is legitimate. It cannot be prohibited. It can only be regulated.’” When Wrigley pleaded that she could bring 20 mothers to the court room to “prove that their boys are in danger of ruin by cigarettes,” she harvested only Stevick’s patronizing advice: “‘The first thing...is to be practical ladies. Go to the city council and get a proper ordinance passed, then go to the legislature.’”296

Reporters who attended the hearing were engaged in vast understatement when they noted that Stevick’s brief clearly expressed the “intimation” that it was “not improbable” that Ellis would hold the ordinance void, especially since he himself had “expressed dissatisfaction with the ordinance even before the arguments were given and after he had received” the brief inasmuch as he had said that the ordinance was “apparently...for revenue only.”297 The Denver Republican ironically characterized this comment, in connection with Ellis’s statement that the ordinance was “‘mischievous,’” as “more his private opinion. If it had been his judicial opinion, there would have been no necessity for proceeding further, but the court has long been noted for having an armor plate panel between the two, only that the aforesaid panel is on sliding grooves.” 298 Indeed, as soon as Ellis issued his decision the same paper contended that its substance had been “expected as the court and the counsel for the city were of the opinion all along that one or two members of the council had allowed sentiment to overcome their better sense, and that the rest had not the courage to oppose the sumptuary legislation proposed.”299

In the event, Ellis’s decision, a brief report on which was furnished by wire

295 McGregor v. Cone, 104 Iowa 465 (1898); below ch. 12.
296 “Full House,” EP, Feb. 10, 1898 (2:4-5). Also replete with sexist aspersions against the WCTU’s position was “Women and the Cigarette Law,” DR, Feb. 11, 1898 (7:1).
297 “Cigarette Ordinance,” Morning Times (Cripple Creek), Feb. 11, 1898 (1:7).
298 “Women and the Cigarette Law,” DR, Feb. 11, 1898 (7:1).
300 Unfortunately, the volume containing the Denver police magistrate reports for 1898 was reported as missing (or never owned) at the Colorado State Archives. Telephone interview with Erin McDanal, Denver (July 8, 2010). Apparently the entire opinion was
service and published in The New York Times\(^3\) and many other newspapers throughout the country,\(^3\) was not based on the federal interstate commerce power at all, but rather on the sellers’ defense of unreasonableness.

The “evidence introduced and admitted by the city into a statement of fact”—but, oddly, not adduced or even alluded to by Ellis in his opinion—specified that defendants Ross, Abel, and Hyman were “the largest individual dealers in the city of Denver, and the profits made by the defendant Ross on the cigarettes sold by him during the past year amounted to between $250 and $350,” while Abel’s books showed that the total cigarettes he sold in 1897 amounted to $1,700, equally divided between retail and wholesale, generating a profit of $170 and $85, respectively; Hyman’s retail cigarette profit in 1897 amounted to $365.\(^3\)

These data are remarkable. In 1894, as noted earlier, 60,000,000 cigarettes had purportedly been sold in Colorado at a cost of $250,000; from 1894 to 1897 national output rose by 36 percent; if Colorado sales increased by that proportion, they would have amounted to 81,600,000 (and perhaps even more since Colorado’s population growth exceeded the national average). Denver’s population accounted for 25 percent of Colorado’s, but, as its biggest city, presumably also accounted for an even greater proportion of cigarettes sold (that is, more than 20,400,000 in 1897). If a package of cigarettes cost five cents, then Abel’s total sales in 1897 would have amounted to 34,000 packages or 340,000 cigarettes or only 0.04 percent of projected state sales\(^3\) and less 0.1 percent of Denver sales (if Denver accounted for half of state sales or 40,800,000); his daily sales would have amounted to only 93 packages. Based on the aforementioned

\(^3\) “Denver Cigarette Ordinance Void,” NYT, Feb. 13, 1898 (6).

\(^3\) E.g., “Anti-Cigarette Law Void,” CT, Feb. 13, 1898 (12); “Sparks from the Wires,” LAT, Feb. 13, 1898 (A2); “Cigarette Ordinance Void,” AG, Feb. 12, 1898 (8:6).

\(^3\) “Excessive License,” EP, Aug. 2, 1898 (12:4). Half of defendants’ cigarettes were manufactured by ATC and bought from local Denver dealers, jobbers, and wholesalers; the other half were bought from manufacturers or dealers outside of Colorado and imported and “sold in the original packages” in which they had been received. “He Knocked It Out,” DT, Feb. 12, 1898 (5:5).

\(^3\) Abel’s $1,700 in sales in 1897 constituted 0.7 percent of the total cost of cigarettes sold in 1894; the fact, however, that this amount included his wholesale business may have inflated the calculated share.
contemporaneous Chicago profit margin of 1.2 cents per package. Ross would have sold between 20,833 and 29,167 packages a year or 57 and 80 per day, while Hyman’s annual and daily sales would have amounted to 30,416 and 83, respectively. Thus none of Denver’s largest dealers was seemingly selling anywhere near the 83,333 packages a year or 228 per day that would have been required to break even while paying the $1,000 license fee. At 10 cigarettes per package, no dealer was selling even 1,000 cigarettes per day or 7,000 per week, whereas in Boston (whose population was four times greater) in 1895 one dealer sold a million per week, three sold 500,000, two sold 250,000, and five sold 100,000. Thus, if the defendants’ self-serving claims were accurate, either per capita cigarette sales were much lower in Denver than in Boston or sales were much less concentrated; if cigarette sales did not bulk large even in the largest tobacco stores, then the $1,000 license might in fact have been prohibitory. In view of the allegedly minuscule economic importance of cigarettes for these local dealers—amounting to a dollar a day or less—it is clear why only the Tobacco Trust, which was motivated to undo and deter all restrictions on cigarette sales anywhere in the United States, had the financial incentive to foment and carry on this litigation.

One further puzzle, however, remains unresolved. In his amicus curiae brief Stevick asserted that, according to the dealers’ testimony, not only was it the case that no one dealer in all of Denver made as much as $400 a year from cigarettes, but that even “if all the business were concentrated into four or five of the largest dealers those dealers would not make profit enough to pay the license.” This claim appears to be wildly inconsistent with the calculations just presented. If, as already noted, cigarette sellers’ profit margin was 1.2 cents per package, a dealer would have had to sell 83,333 packages (or 833,330 cigarettes) per year to generate $1,000 in profit. If only four dealers had remained in Denver, collectively they would have had to sell only 333,332 packages (or 3,333,320 cigarettes). Yet, even three years earlier, 18 times as many cigarettes had been sold in Colorado for $250,000, $60,000 of which should have been profit. Even if Denver sales had been only proportional to the city’s population, even in 1894 $15,000 in profit should have accrued to Denver dealers; assuming that revenues had increased in tandem with increased sales and that per capita sales were higher in Denver than elsewhere in the state, by 1897 profits in Denver should have far

305 This profit amounted to 24 percent of the retail price. Abel’s total wholesale and retail profit of $255 amounted to 15 percent of his total sales.

306 “Good Stories for All: Cigarettes by the Million,” Boston Globe, July 20, 1895 (8). See also above ch. 11.

exceeded $20,000 and made it possible for many more than four or five dealers to pay the license fee and pocket profits considerably higher than the defendants admitted to receiving.

The defendants interposed several defenses and raised as many objections to the ordinance’s validity, but Ellis deemed only two of them important enough to consider—first, that the ordinance violated Congress’s interstate commerce powers, and, second, that the license fee was unreasonable and prohibitory. Although he ultimately decided not to resolve the first issue, his refreshingly blunt commentary on the intractable state of U.S. Supreme Court jurisprudence on the subject is well worth noting. Ellis observed that: “No clear line of demarcation has been laid down to show just how far a state may go in the exercise of its right to protect the health and safety of its citizens without encroaching upon the rights of the general government to regulate commerce.” Adjudication in the case of the cigarette ordinance was made all the more difficult by the fact that it recognized that using cigarettes was injurious to health and applied equally to cigarettes made or bought from importers in Colorado and those manufactured outside the state and imported in original packages without discriminating against either class. Moreover, while the congressional commerce power would not permit a state or local government to prohibit the sale of a recognized article of commerce by the foreign importer in original packages, Ellis also concluded from the relevant U.S. Supreme Court precedents that it “was never intended to cut the states off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country.” After quoting especially pertinent passages from a number of Court decisions, Ellis added that it “would require more time than I care to devote to this opinion to review all the authorities..., but I will content myself by saying” that an ordinance that prohibited the sale of cigarettes by a foreign importer in original packages before it became a part of the property of the state was unconstitutional, whereas “an ordinance which prescribes such regulations as are necessary for the safety of the community is not unconstitutional.” Having thus replicated the Supreme Court’s tangled knot of conflicting principles, Ellis was “not prepared to say that...the provisions of this ordinance are unnecessary for the safety of the community,” but did conclude that the ordinance insofar as it sought to regulate and license cigarette sales was not in conflict with the constitutional commerce clause because it did not discriminate against interstate commerce.308

308“He Knocked It Out,” DT, Feb. 12, 1898 (5:5-6). The pivot of Ellis’s argument was that once cigarettes reached their place of rest for sale to consumers, they became “a part of the mass of the property of this state and are subject to all the laws of this state.”
Having thus outright rejected the Tobacco Trust’s perennially favorite doctrine in such litigation, Ellis proceeded to what to his mind was the “more important question” of the ordinance’s reasonableness and specifically whether the $1,000 license fee made it prohibitory in its effect. Using as his analytic point of departure cities’ “right to regulate or prevent the carrying on of any business which may be dangerous or detrimental to public health, or the manufacturing or vending of articles obnoxious to the health of the inhabitants,” he underscored that the “lines should be definitely drawn between the power to regulate and the power to tax” when a city council attempted to exercise both in one ordinance. (Here Ellis condescendingly hinted that this litigation might not have arisen if it were not “true that municipal legislative bodies rarely contain in their membership men of the legal profession who are sufficiently conversant with the requirements of our state and federal constitutions as to always secure proper legal enactments.”) Thus where a tax was laid for both purposes, it would have to be grounded in both the police and the taxing power; conversely, if the tax amounted to an absolute prohibition of a business that the city was powerless to impose because the business was not per se injurious to the public, then the ordinance was void.  

In spite of his admission that a court needed “sufficient data and evidence to pronounce an ordinance unreasonable as a police regulation” and his citation to a trial court decision from New York that “where the license fee is charged as a revenue measure, the only criterion of reasonableness is the effect upon the profits of the business. If that effect is...to prohibit the business, instead of producing revenue, then it is unreasonable both because it defeats its own purpose and because the city cannot prohibit under the guise of taxation,” he failed...
either to cite, let alone engage, any of the aforementioned profit figures, or even to assert, let alone adduce any evidence, that the Denver ordinance was a revenue measure. The *Rocky Mountain News* reported that Ellis’s holding that “the city had no right to do indirectly what it could not do directly” hinged on the assertion that: “If the city had no right to make an ordinance expressly prohibiting the sale of cigarettes it could not so by placing a license fee so high the dealers could not afford to pay it.”

Apart from the fact that he failed to make such a fact finding, Ellis appears to have believed that the basis for the protasis/antecedent of the foregoing sentence was identical to that for the apodosis/consequent—namely, that the city could not make the tax “so burdensome as to prohibit the lawful exercise of the business, inasmuch as the raising, manufacture and sale of tobacco is regarded as a legitimate business, and is licensed, taxed and regulated both by federal and state laws and cannot be prohibited, except...to minors or persons not sui juris.” Only by that logic could he have felt “constrained to hold that because of the excessive license fee required the ordinance...is unreasonable and, therefore, void. The defendants will, therefore, be discharged.” In fact, however, the best that could be said of Ellis’s opinion is that he might have made a plausible technical point had he faulted the city council for using the taxing power when it should have used its police powers to ban the sale of cigarettes outright based on the need to protect the public health—evidence in support of which the WCTU had been prepared to present if only Ellis had permitted its officials to do so instead of mocking their jurisprudential acumen.

In response to city council members’ request for a statement of “what sort of an ordinance he believed would be legal,” Ellis offered as guidelines that the city was empowered to regulate the sale of tobacco in any form as well as to prohibit the sale of any kind of tobacco to minors and that “the amount of the fee should depend upon the nature of the business and should not be scrutinized too narrowly. A reasonable addition to cover the cost of police supervision may always be made. The whole expense attending the additional supervision should be made.”

The independent *Denver Times* praised Ellis’s opinion as “unusually able” because the ordinance permitted the sale of cigarettes by one or two monopolists to “all who cared to buy,” while doing “a very great injustice...to a very large number of small business interests,” which constituted a “violation of one of the

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312 “He Knocked It Out,” *DT*, Feb. 12, 1898 (5:5-7).
313 “He Knocked It Out,” *DT*, Feb. 12, 1898 (5:5-7).
314 “He Knocked It Out,” *DT*, Feb. 12, 1898 (5:5-7).
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cardinal principles of law and justice....” In other words, the ordinance “merely harasse[d], annoy[ed] and disturb[ed] business interests, without accomplishing any real reforms....” If, however, the ordinance had avoided this predicament banning cigarette sales outright, the Times would have rejected such “sumptuary legislation” too as “extremely repugnant to the principle of free government....” Insisting that such intervention would “not be tolerated by the American spirit of freedom and independence,” the newspaper was chiefly concerned that Denver’s “need[ ] to grow and expand, and to invite the co-operation of wide-awake, progressive men and women” would have been inconsistent with “contraction in ideas and freedom of action.”315

The Rocky Mountain News, asserting that the evidence had shown that “not more than one or two firms would be able to pay the license, and that either the business would center in the hands of those firms or others would sell cigarettes surreptitiously and in violation of the ordinance,” editorially concluded that there could be little doubt that Ellis’s interpretation of the law was correct. 316 Weightier was the paper’s view that if in fact the ordinance’s purpose was to prohibit an injurious product, its supporters would have to find a vehicle other than a license fee:

Until medical experts’ testimony is more strongly against the cigarette than it is at present, the sale of the article is likely to continue. The majority of doctors seem to be far from ready to say that the moderate use of cigarettes is more injurious to adults than the use of tobacco in other forms. There seems to be ample testimony that the use of cigarettes or tobacco by children is harmful, but so long as doctors themselves continue to smoke them publicly, as many of them do, their general use by grown-up persons, with an inclination in their favor, will continue.317

Although such evidence concerning the harmfulness to adults was available in the form of the unique impact of (deep) inhalation,318 the editorialist had unintentionally raised the issue as to whether the even more deleterious impact on children could justify banning sales to adults if mere no-sales-to-minors laws manifestly failed to make cigarettes inaccessible to children.

316“The Cigarette Ordinance,” RMN, Feb. 14, 1898 (4:1-2). The News’s own reporting of the hearing evidence did not disclose the existence of any dealer whose annual profit exceeded $1,000.
318See above ch. 2.
In the immediate aftermath of the ruling it was reported that cigarette dealers in the western town of Grand Junction (pop. 3,500) did “not appear to be alarmed about the passage of the new license ordinance which imposes a tax of $500” because they claimed it was unconstitutional. The City of Denver did not appeal Ellis’s decision; instead, a month later Supervisor O. B. Scobey (who as acting mayor had approved the ordinance in 1897) introduced a $100 ordinance bill before the board of supervisors “intended to correct features of the ordinance...declared unconstitutional.” During the 1899 legislative session two Democrat-Populists tried to overcome judicial obstacles to municipal regulation of cigarette selling by introducing a bill to “license or prohibit the sale of cigarettes within the boundaries of municipal corporations or within one mile beyond the outer boundaries thereof.” One of its authors, who were “tickled” that it had obtained a “good place on the calendar,” stated that the bill, which empowered city councils to “regulate or prohibit the sale or giving away of ‘coffin tacks’ to any person, of no matter what age or sex,” would go through the house, notwithstanding the efforts of the tobacco trust and Otto Mears [a very prominent Russian-immigrant railway capitalist] to smother it. But the next day the House Judiciary Committee recommended that H.B. No. 301 be considered by the committee of the whole without recommendation, and the bill died without any further action. Nevertheless, in 1901 the council adopted an ordinance imposing a $200 license for the privilege of selling cigarettes and (vindicating the WCTU’s demand in 1898) requiring a $500 bond “as a guarantee that no cigarettes will be sold to children under 16 years of age.” And when the City of Denver in 1906 issued its Municipal Code, the 1897 ordinance, including the $1,000 license fee, was word for word still on the books.

320 “March of Progress,” EP, Mar. 11, 1898 (7:3).
324 LAT, Feb. 15, 1901 (8) (untitled).
325 The Municipal Code of the City and County of Denver: Approved April 12, 1906, § 1003 at 384 (1906). One possible reason for the retention of the ordinance is that, despite press accounts that Police Magistrate Ellis had held that the ordinance was void because of its unreasonable license fee, it is possible that he had in reality ruled that the ordinance was not invalid on its face, but merely as applied to the defendants, whose
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Nebraska 1895: “Hugging a Corpse: The Decapitated Cigarette Bill Passes the Senate”

“There is very little prospect,” remarked Col. Franz Zehrung, “of the anti-cigarette bill passing the senate. I do not care to give away any secrets, but I know that Col. Frank Polk has been organizing a strong lobby to work against the passage of the bill in the upper house, and has organized, as a last resort, a band of twenty young men who will, the moment the bill comes up for consideration, light cigarettes in the chamber and continue smoking until they succeed in killing the bill, either by breathing smoke upon it or by driving the senators to suicide.”

Everything will be run by a lot of cigarette smoking dudes in a little while.

At the 1895 session—the 1894 elections had effected “an almost revolutionary reversion to Republicanism,” which secured three-fourths majorities in both houses and proceeded, unlike the Populist-controlled 1891 session and the Democratic/Populist-controlled 1893 session, to evade the big issues—the re-elected Jenkins made another effort to pass his general sales ban alleged annual profits fell below the $1,000 fee. In that case there would have been no reason to repeal the ordinance since it might apply to other, more profitable, sellers then or later. To be sure, this explanation does not explain why the aforementioned $200 license fee did not appear in the code. According to the Denver City Clerk’s Office, the index to ordinances for 1865-1926 contains no entry at all for cigarettes; consequently that office was unable to track the fate of the ordinance. Telephone interview with Joann, Denver (July 14, 2010).

326 “Hugging a Corpse,” ET, Mar. 22, 1895 (1:1).
327 Evening News (Lincoln), Mar. 7, 1895 (4:3) (untitled). Neither man was returned as living in Nebraska at any decennial population census.
328 Goff to Kellie (Mar. 3, 1896), in Farmers’ Alliance MSS, Box 1, Nebraska State Historical Society, quoted in Robert Cherny, Populism, Progressivism, and the Transformation of Nebraska Politics, 1885-1915, at 70 (1981) (old-line Farmers’ Alliance member expressing fear for future of party to state Alliance secretary).
329 Albert Watkins, History of Nebraska 3:262 (1913).
330 Democrats lost all their seats in the Senate, while Populists’ representation was halved there and reduced by 90 percent in the House. Senate Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session x (1895); Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 115 (2007) (stating that Democrats held one Senate seat).
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bill. Though not quite so frictionless as two years earlier, the 79 to 12 floor vote in favor of House Roll No. 60 was nevertheless impressive. “Most dealers,” according to The New York Times, “seem to be pleased that the cigarette is to be barred.” The Senate, once again, proved to be the obstacle, but differently than in 1893.

The Senate’s resistance was ironic inasmuch as both houses had been prohibiting smoking in their own realms since the 1870s. The Senate had been operating continuously, at least since 1873, under a rule pursuant to which: “No smoking shall be allowed in the Senate chamber or galleries during the session of the Senate.” Similarly, as early as 1871 the House had adopted a rule providing that “there shall be no smoking in the bar or gallery of this House while in session,” and ever since 1877 it had been governed by a rule providing that the House Speaker “shall have general direction of the hall, and permit no smoking therein.”

After substituting Jenkins’ bill for a Senate manufacture/sales ban bill, the committee of the whole submitted a gutting amendment to turn the measure into

332 House Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 143 (Jan. 7) (1895) (House Roll No. 60). The same day Jenkins introduced bills to regulate telegraph line charges, for school teachers’ legal holidays, and for controlling telephones. Id. On his 1893 anti-cigarette bill, see above ch. 4.

333 House Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 769 (Mar. 5) (1895).

334 “Will Bar Out the Cigarette,” NYT, Mar. 15, 1895 (8). To be sure, the account in the Times was hopelessly garbled, asserting that the House had passed a bill that the Senate had passed the previous week.

335 Senate Journal of the General Assembly of the State of Nebraska, 6th Regular Session 45 (Rule 43) (1873); Senate Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 137 (Rule 41) (1895). Senate rules in the late 1860s following statehood contained no such rule; the Senate Journal for 1871 failed to publish rules. Email from Prof. Robert Leiter, director, University of Nebraska Law Library (Apr. 5, 2010).

336 House Journal of the General Assembly of the State of Nebraska: Eighth Regular Session 46 (Jan. 9) (1871) (Rules Committee reporting that it had substituted that provision for the previous Rule 49, which had obligated the sergeant-at-arms to keep House secrets).

337 House Journal of the General Assembly of the State of Nebraska, Fourteenth Regular Session 58 (Rule 5) (Jan. 4) (1877); Nebraska Blue Book and Legislative Manual for the Year 1895, at 51 (Rule 5).

338 Senate Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session 198 (Jan. 18), 793 (Mar. 14) (1895). Senate File No. 135 had been introduced by German-born Leopold Hahn. Id. at xxiv.
a no-sales-to-under-21-year-olds bill. On third reading, after “considerable
discussion,” Populist farmer Walter Dale unsuccessfully moved to recommit
the bill for the purpose of striking out the age limitation, and Republican
physician G. E. McKeepy’s motion to postpone the bill indefinitely was ruled out
of order; the severely diluted bill was then passed by the large majority of 26 to
4. The Lincoln *Evening Times* attributed this outcome to the fact that “the
lobby got in its work,” and “[the cigarette manufacturers] are jubilant over
the success of the amendment.” On its return to the originating chamber,
Jenkins’ unwillingness to concur in the subversion of his bill was vindicated by
House adoption of his motion for appointment of a conference committee. But
10 days later he had virtually nothing to show for his resistance when the House
adopted his report that he and his conferees had agreed to the crucial Senate
amendment.

After this incisive setback a full decade would elapse before Nebraska
finally enacted a statewide universal sales ban in 1905, which remained in effect
until 1919. In the meantime, the city council of the state capital, Lincoln, in
1896 passed an ordinance making it unlawful for anyone under 18 to smoke or
use cigarettes, cigars, or tobacco in any form anywhere within the city limits,

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339 *Senate Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session* 877 (Mar. 20) (1895). The amendment also reduced the fine to between $5 and $50, half of which was to be paid to the informant. Nebraska’s first law on the matter prohibited sale of all tobacco to those under 15. 1885 Nebraska Laws ch. 105, at 394.


341 *Senate Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session* 907-908 (Mar. 22) (1895).

342 *ET*, Apr. 16, 1895 (8:1) (untitled).

343 “Restricts the Sale of Cigarettes,” *Logansport Reporter* (IN), Mar. 23, 1895 (1:5-6).


345 *House Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session* 1290-91 (Apr. 4) (1895). The only concession that Jenkins extracted was marginally increasing the minimum fine from $5 to $10. The Senate then adopted the report by a vote of 22 to 6 (five Populists, all of whom had supported the original Senate amendments, voting Nay). *Senate Journal of the Legislature of the State of Nebraska, Twenty-Fourth Regular Session* 1151-52 (Apr. 4) (1895). For the law as enacted, see 1895 Nebraska Laws ch. 80 at 326.

346 Ironically, a “somewhat general belief” held that the legislature had in fact enacted a universal sales ban, causing local tobacco jobbers “considerable annoyance....” *Evening News* (Lincoln), Apr. 16, 1895 (8:1) (untitled).

347 See vol. 2.
“except upon a written prescription of a physician authorized to practice medicine and given within thirty days from the commission of the act complained of.” The ordinance imposed a duty on all on-duty police officers to make warrantless arrests of any violators, who, on conviction, were required to be fined up to $25.\textsuperscript{348}

**Indiana: 1895 and 1897**

A bill has been introduced into the general assembly which not only makes the manufacture and sale of cigarettes an offense, but also forbids a person smoking them under penalty. It is quite evident that the author of the bill is desirous of killing the pampered and perfumed dudes by depriving them of their substance.\textsuperscript{349}

There will be a tremor over the class of cigarette fiends in the state when they read of the bill of Mr. McCaskey of Grant.\textsuperscript{350}

Although from the Civil War to the electoral realignment of 1896 neither Democrats nor Republicans gained legislative dominance in Indiana and Democrats were known as the party of “‘soft money and hard liquor,’” while Republicans advocated for temperance,\textsuperscript{351} the state legislature was almost continuously immersed in temperance issues, blue laws, and general moral regulation between 1890 and 1920,\textsuperscript{352} the aforementioned efforts to pass a cigarette license bill in 1891\textsuperscript{353} being only one example. As early as 1889 the 56th general assembly, controlled by Democrats and historically reputed to have created extensive reform legislation,\textsuperscript{354} enacted an especially strictly formulated ban on sales to children under 16, which provided that it was unlawful both to give, barter, or sell any tobacco, cigars, or cigarettes not only to any such children

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{348}“Lawler’s Latest,” *Evening News* (Lincoln), Feb. 28, 1896 (1:2) (publishing text of ordinance).
\item \textsuperscript{349}FWWG, Jan. 24, 1894 (4:1) (untitled edit.).
\item \textsuperscript{350}“A Blow at Cigarettes,” *Logansport Daily Reporter*, Feb. 9, 1895 (5:1).
\item \textsuperscript{353}See above ch. 4.
\end{enumerate}
\end{footnotesize}
to be chewed or smoked, but to any person with knowledge that it was to be chewed or smoked by any child under 16 and to persuade, advise, counsel, or compel any child under 16 to chew or smoke tobacco—subject, however, to a (minimal) $1 to $10 fine. During the Democratically organized 1893 session—which passed several bills supported by organized labor including a prominent anti-yellow dog contract law—the legislature ramped up the lower and upper fine thresholds tenfold and added a conjunctive county jail sentence of 10 to 30 days.

Although Indiana had no cigarette manufacturing industry to speak of—a mere 9,000 cigarettes were produced in calendar year 1895 and none the next year—hundreds of firms there produced about 62 million cigars or a little more than one percent of total national production. Similarly, Indiana was the ninth largest tobacco growing state, accounting for about 2 percent of national acreage, production, and value.

Five days into the 1895 session in the House, 80 percent of the seats in which were, in the wake of the severe depression beginning in 1893, now occupied by Republicans following a “landslide” electoral victory in 1894 that “virtually buried the Democratic Party,” Republican Harvey M. McCaskey (1849-1932), introduced House Bill No. 76, whose title declared that it prohibited not

355 1889 Indiana Laws ch. 131, §§ 1-2, at 271.
357 1893 Indiana Laws ch. 20, § 2, at 19. The amended statute covered “tobacco or preparations of tobacco....” The Senate passed S.B. No. 179 unanimously (41 to 0).
359 Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1897, at 44 (1897).
360 Five days into the 1895 session in the House, 80 percent of the seats in which were, in the wake of the severe depression beginning in 1893, now occupied by Republicans following a “landslide” electoral victory in 1894 that “virtually buried the Democratic Party,” Republican Harvey M. McCaskey (1849-1932), introduced House Bill No. 76, whose title declared that it prohibited not
only the manufacture and sale, but also the use of cigarettes:\footnote{363}

That on and after June 20, 1895, it shall be unlawful for any person or persons, or for the owners, proprietors, members, employes, managers, officers or agents of any firm, corporation, company, manufacturing establishment or other concern to make, manufacture, or suffer to be made or manufactured, in this State, any kind of cigarette or cigarettes, or to sell or give away or place upon the market for sale any such cigarette or cigarettes, or in any way directly or indirectly to encourage the manufacture or sale of such cigarette or cigarettes, and any person or persons, or owners, proprietors, members, employes, managers, officers or agents of any firm, corporation, company, manufacturing establishment or other concern, who shall buy or offer to buy, trade for or offer to trade for, receive or offer to receive, in any manner, either directly or indirectly any cigarette or cigarettes, to be sold, used or disposed of within the State of Indiana, shall be guilty of a felony and fined in any sum, for each offense not less than one hundred dollars and imprisoned in the States [sic] prison not less than one nor more than three years.\footnote{364}

This seemingly extraordinarily comprehensive and strict prohibition of producing or selling—or encouraging the sale of, presumably even by means of advertising—cigarettes also and equally reached buying or receiving even one cigarette for use in Indiana. Because it also covered giving away a cigarette, the proposed bill would have made it unlawful for anyone to receive for use in Indiana any cigarette brought back to Indiana from another state by another non-seller—coverage that might have exceeded any that the U.S. Supreme Court would at the time have recognized as constitutionally compatible with the commerce clause. Thus, although the substitute did not expressly ban smoking or using cigarettes, it is difficult to discern how anyone could have lawfully come into their possession other than those who brought them back from other states for their own use.\footnote{365} The proposal’s unique stringency was also unoverlookably on display in the classification of the offense as a felony and its punishment by a monetary fine without a ceiling and by imprisonment for at least one year.

To be sure, the bill suffered from what was presumably a drafting error that

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\footnote{364}{H.B. No. 76 (Jan. 15, 1895, McCaskey) (handwritten copy provided by ISA).}

\footnote{365}{The bill would apparently also have prohibited out-of-state sellers from advertising in Indiana newspapers.}
almost laughably undermined its rigor: the use of the word “such” in the phrase that made it unlawful “to sell or give away or place upon the market for sale any such cigarette or cigarettes” would have prohibited the sale only of cigarettes manufactured in Indiana, of which there were, as already noted, virtually none. That the word “such” was in fact used carelessly or inadvertently in that context was underscored by its omission in the coordinate phrase making it unlawful to “buy or offer to buy, trade for or offer to trade for, receive or offer to receive, in any manner, either directly or indirectly any cigarette or cigarettes, to be sold, used or disposed of within the State of Indiana....” McCaskey would eventually strike the word.\textsuperscript{366}

A possible motivation for embarking on this radical anti-cigarette initiative may have been rooted in the fact that McCaskey, a Methodist and Grant County “substantial farmer” who had been a graduate in the scientific course at the National Normal University in Ohio, taught school for 16 years. Moreover, one of his sons was a throat-nose-ear specialist in Indianapolis.\textsuperscript{367} Then, too, the bill appeared to be of a piece with McCaskey’s environmentalist orientation, which manifested itself in the measure he had introduced the previous day to interdict business-created water pollution by “prohibit[ing] any person...from throwing, conveying or depositing, offensive, malodorous, unhealthy, obnoxious and poisonous refuse and offal upon or into the lakes, ponds, rivers, and streams, from any shop, store, hotel, factory, manufactory, warehouse or other house, or business place, through any ditch, drain, trench, trough, sewer, tile, pipe, channel, or otherwise....”\textsuperscript{368}

When the Committee on Rights and Privileges, to which the bill had been referred,\textsuperscript{369} reported back the bill more than five weeks later; it recommended a substitute that not only completely eliminated McCaskey’s radical approach, but, in proposing another no-sales-to-under-16-year-olds bill, stripped out some of the aforementioned stringent language of the then existing law, while merely

\textsuperscript{366}See below this ch.

\textsuperscript{367}Centennial History of Grant County Indiana 1812 to 1912, 2:1316-17 (Rolland Whitson ed. 1914).

\textsuperscript{368}Journal of the House of Representatives of the State of Indiana During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular Session 91 (Jan. 14) (n.d.) (H.B. No. 18). This bill too was referred to the Committee on Rights and Immunities, which reported it back with the recommendation that it be indefinitely postponed, in which report the House concurred. Id. at 700 (Feb. 15).

\textsuperscript{369}Journal of the House of Representatives of the State of Indiana During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular Session 113 (Jan. 15) (n.d.).
bumping up slightly the minimum fine to $20:

SECTION 1. Be it enacted by the General Assembly of the State of Indiana, That it shall be unlawful for any person or persons to give, barter or sell, either directly or indirectly, to any child under sixteen years of age, any tobacco or preparations of tobacco, cigars, cigarette, cigarettes, or any preparations containing tobacco.

SECTION 2. Any person who violates the provisions of this act shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in any sum not less than twenty dollars nor more than one hundred dollars, to which may be added imprisonment in the county jail not less than ten days nor more than thirty days. 370

The House concurred in the report, 371 but 10 days later, on the second reading of the bill, which still bore the title of McCaskey’s original radical bill and not that of the committee’s no-sales-to-minors substitute, 372 McCaskey, moving that everything after the enacting clause of H.B. No. 76 be stricken out, offered the following amendment—which was virtually identical to his original bill except that it omitted the aforementioned “such” that confined the unlawfulness of sales to those cigarettes that had been manufactured in Indiana—be substituted for it:

That on and after June 20, 1895, it shall be unlawful for any person or persons, or for the owners, proprietors, members, employees, managers, officers or agents of any firm, corporation, company, manufacturing establishment or other concern to make, manufacture, or suffer to be made or manufactured, in this State, any kind of cigarette or cigarettes, or to sell or give away or place upon the market for sale any cigarette or cigarettes, or in any way, directly or indirectly, to encourage the manufacture or sale of such cigarette or cigarettes, and any person or persons, or owners, proprietors, members,


372“An Act making it unlawful to give, barter or sell any tobacco, cigars, cigarette, or cigarettes, or any other preparation containing any tobacco, to any child under the age of sixteen years....” Journal of the House of Representatives of the State of Indiana During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular Session 868 (Feb. 22) (n.d.).
employes, managers, officers or agents of any firm, corporation, company, manufacturing
establishment or other concern, who shall buy or offer to buy, trade for or offer to trade
for, receive or offer to receive, in any manner, either directly or indirectly, any cigarette
or cigarettes, to be sold, used or disposed of within the State of Indiana, shall be guilty of
a felony and fined in any sum, for each offense not less than one hundred dollars and
imprisoned in the State prison not less than one nor more than three years.  

The House, which was operating under a standing rule that “[it] shall be the
duty of the Doorkeeper to...prevent smoking in the hall and lobbies at all
times,” on second reading then adopted this unprecedentedly capacious anti-
cigarette measure and ordered it engrossed as amended.  Without explaining
how McCaskey’s substitute differed from his original bill or why he amended the
latter, the Indianapolis News, whose report on the day’s legislative proceedings
included a pictorial sketch of McCaskey smoking a cigar, merely noted that his
substitute, which was placed on the House calendar, made it a “felony to manufacture or sell cigarettes in the State on or after June 20, 1895.” Nor did
the Indianapolis Sentinel understand that his original bill, too, had included the
same felony: “Mr. McCaskey has again changed his cigarette bill. This time he
makes it a felony to manufacture or sell them after June 20.”  

Two days later, in a vote that the Indianapolis Journal called

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373 Journal of the House of Representatives of the State of Indiana During the Fifty-
Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular
Session 1206-1207 (Mar. 4) (n.d.).

374 Journal of the House of Representatives of the State of Indiana During the Fifty-
Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular
Session 86 (Jan. 14) (n.d.) (Rule 74).

375 Journal of the House of Representatives of the State of Indiana During the Fifty-
Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular
Session 1206-1207 (Mar. 4) (n.d.). A sheet in the ISA bill file following the text of
 McCaskey’s introductory motion bears the annotation, “3/4/95 carried & adopted,” the
former presumably referring to the motion and the latter to the amendment. Oddly, unlike
the text of McCaskey’s amendment printed in the Journal, the archived handwritten
version of “Engrossed House Bill, Number 76” retained the stricken out “such.”

376 “Governor Writes a Veto,” IN, Mar. 4, 1895 (2:1-2 at 2).

377 “Legislative Notes,” IS, Mar. 5, 1895 (5:6).

378 “Hoosier Happenings,” Logansport Daily Reporter, Mar. 5, 1895 (4:4); “Legislative
“monotonous,” the House, on third reading, passed the “bill for an act to prohibit the manufacture, sale and use of cigarettes in the State of Indiana” by the overwhelming majority of 77 to 4 (the only Republican Nay being cast by Clemens C. Vonnegut, Jr., the later novelist’s great uncle). Of the nine members of the Rights and Privileges Committee, which had voted to dilute McCaskey’s bill to virtual nothingness, seven voted for and only one against it on third reading. It is noteworthy that of the 20 House members who a week earlier had voted against the widely reported Nicholson bill, which both regulated saloons and conferred on a majority of township or ward voters the right through remonstrance to prevent the granting of a license to any applicant, only Vonnegut opposed the anti-cigarette bill, while 18 supported it.

The press failed not only to remark on the monumentality of the final House action, but even to get the facts straight. The Indianapolis Journal, for example, insisted that: “Mr. McCaskey’s famous cigarette bill, after it had been changed several times, imposes a jail penalty and a fine on any one [sic] who manufactures or sells cigarettes or tobacco to minors under sixteen years.”

Even more wildly inaccurate was the account of the third reading in The Fort Wayne Sentinel: “The bill making it unlawful to sell tobacco and cigarettes to persons under sixteen years was also passed.”

Despite its almost unanimous passage in the House, McCaskey’s bill died in Senate Judiciary Committee five days later on the last day of the session, when it included H.B. No. 76 among numerous “unreported House Bills” in its report,

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379 “Small Caucus Bolt,” IJ, Mar. 7, 1895 (3:2-4 at 3).
381 1895 Indiana Laws ch. 127, § 3, at 248, 249. The law provided that “nothing in...this act shall be construed to forbid the sale of cigars and tobacco in such a place of business....” Id. § 2 at 249.
383 “Has Sold Out,” IS, Mar. 7, 1895 (5:1-6 at 6) (passage of “Mr. McCaskey’s bill prohibiting the manufacture or sale of cigarettes in the state after June 20”).
384 “Small Caucus Bolt,” IJ, Mar. 7, 1895 (3:2-4 at 3).
386 Journal of the Indiana State Senate During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, January 10, 1895: Regular Session 914 (Mar. 6) (1895) (referral to Judiciary Committee).
some of which had been examined by the committee, which also prepared reports on some, but because the Senate had been following the regular order in considering bills on third reading and had been waiting disposition of special orders, it had not been possible for the committee to report back this last batch of bills (especially since the lieutenant-governor had announced that no Senate bills could be passed on the session’s last day). Thus in requesting that it be relieved of any further consideration of the bill, the Judiciary Committee in effect reported it without recommendation.387

Its abolitionist approach may have far overshadowed any other tobacco control measure discussed during the 1895 session,388 but McCaskey’s bill received far less press attention than a mere license measure, Senate Bill No. 12.389 Introduced by the Senator from (McCaskey’s) Grant County, Oscar A. Baker (1850-1931), who had previously run a photographic gallery and a saloon,390 it imposed an annual license fee for traffic in cigarettes and cigarette wrappers of $50 on wholesalers and $25 on retailers while permitting municipal governments to require an additional fee of $25 and $10, respectively. Violations were subject to fines ranging from $100 to $300 and jail sentences up to six

387Journal of the Indiana State Senate During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, January 10, 1895: Regular Session 1075-76 (Mar. 11) (1895). On the titanic battle between the governor and lieutenant governor over the latter’s ruling, see “It Strangles a Veto,” CT, Mar. 12, 1895 (2). Numerous House-passed bills were “killed” in the Senate thanks in large part to “[p]owerful lobbies [that] thronged the Senate chamber in the interest of railroads, insurance companies, and corporations generally....” “Bad Laws Wiped Out,” CT, Mar. 14, 1895 (3).

388The Senate, by a vote of 35 to 2, passed an amendment to the penalty section of the no-sales-to-under-16-year-olds law, but it died in the House Judiciary Committee. Journal of the Indiana State Senate During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, January 10, 1895: Regular Session 808 (Mar. 2) (1895) (S.B. No. 422); Journal of the House of Representatives of the State of Indiana During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, Jan. 10, 1895: Regular Session 1176 (Mar. 2) (n.d.) (committee referral was last action).

389For example, in agreeing with an editorial in the Indianapolis Journal that the legislature should not hastily reject Baker’s bill, another paper urged enactment of a law that would be “prohibitive...if necessary” in order to “save the boys.” FWWG, Feb. 7, 1895 (4:2) (untitled edit.). None of the iterations of S.B. No. 12 ever remotely approached being prohibitive.

months. Finally, the bill also “provide[d] against the evils resulting from the use of such as are deleterious to health” (by prohibiting their sale). But even Baker’s bill, despite having undergone a transformative dilution, failed to come up for a floor vote. After the bill had been amended—one amendment made it a misdemeanor to buy or receive a cigarette from an unlicensed dealer—and recommitted to the Judiciary Committee with instructions to amend, a special committee (headed by Baker himself) to which the bill was referred for amendments recommended for passage a substitute that, inter alia, set the wholesale and retail licenses at $100 and $50 (and the local government supplementary fees at $50 and $25, respectively), and reduced the minimum fine to $10. The provision making it unlawful to sell cigarettes deleterious to health clarified how harmless it was by requiring that that deleterious substance be “other than tobacco...” A month later chairman Baker reported for passage yet another substitute bill, that was watered down to a no-sales-to-under-16-year-olds measure not even as stringent as the one that the previous sitting legislature had passed, but it died without further action.

In seeking to understand how S.B. No. 12 came to distract attention from the broad sales ban bill it is worth noting that “‘Cigarette’ Baker” was a lobbyist for the American Tobacco Company in Indiana at least as early as the very next session in 1897 (and continued in its employ through the 1905 session),

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394 Journal of the Indiana State Senate During the Fifty-Ninth Session of the General Assembly, Commencing Thursday, January 10, 1895: Regular Session 776-77 (Feb. 28) (1895). For example, the substitute made imprisonment discretionary. It did include the same “deleterious to health” provision as the previous substitute.

395 “Grand Jury Call to Probe Bribery,” IN, Feb. 24, 1905 (1:1).

396 “A List of New Laws,” ISJ, Mar. 17, 1897 (2:1-3 at 3).

397 “The Trust and the Legislature,” Collier’s 40(13):9-10 at 9 (Dec. 21, 1907). Baker was a “lieutenant” of Frederick S. Gibbs, “the prince of professional lobbyists...” Id. On Gibbs’s activities on behalf of ATC in Tennessee, see above ch. 5. Justin Walsh, The Centennial History of the Indiana General Assembly, 1816-1978, at 289 n. 10 (1987), incorrectly stated that Baker was a lobbyist for “tobacco growers.”
whose core bribery methods were exposed at the 1905 session in connection with his unsuccessful efforts to frustrate passage of a comprehensive sales ban bill; after one legislator whom he had tried to bribe denounced him publicly, Baker fled to Canada and Europe before he was indicted; despite a legislative appropriation of $5,000 for his apprehension, arrest, and prosecution, he proved to be non-extraditable, and when he returned in 1909 after the bribee had died, the charges were dropped. 399

The national electoral realignment of 1896 did not manifest itself in the Indiana legislature in the sense that, although Republicans remained in control of both houses, their Senate majority was stable and their huge depression-inflated House majority shrank significantly. 399 In December 1896 Republican Representative Orson Woodruff 400 announced that at the 1897 session he would introduce a bill to prohibit cigarette manufacturing and sales. At the same time, “throughout the state” the WCTU was “obtaining thousands of signatures to petitions urging” passage of a ban bill, in support of which “a delegation of Indiana’s representative women” would lobby in the state capital. 401 As the session got underway, the Indiana WCTU, whose membership totaled 3,393, 402

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398 Messages and Documents of J. Frank Hanly, Governor of Indiana: January 9, 1905—January 11, 1909, at 417-18 (1909); Executive Message of J. Frank Hanly, Governor of Indiana, to the Sixty-Fifth General Assembly: January 10, 1907, at 41-42 (1907); “Fugitive Lobbyist Returns and Is Arrested,” FWS, Apr. 17, 1909 (3:3-5); “Bribery Charge Is Nolled; Baker Cleared,” FWS, July 7, 1909 (2:6). For a comprehensive discussion of Baker and the Indiana law of 1905, see vol. 2.

399 According to Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 61 (2007), from the 1894 to 1896 the number of Republicans elected to the 50-member Senate increased from 32 to 33, while those elected to the 100-member House dropped from 82 to 52. For the first time Populists were elected to both houses, two to the Senate and nine to the House. A slightly different composition is presented in A Biographical Dictionary of the Indiana General Assembly, Vol. 1: 1816-1899, at 567-70 (Rebecca Shepherd et al. ed. 1980). The data on Populists are not straightforward because they secured their victories as fusion candidates with Democrats, as which they were listed by the secretary of state. Clifton Phillips, Indiana in Transition: The Emergence of an Industrial Commonwealth, 1880-1920, at 45 and 45 n. 95 (1968).


402 Report of the National Woman’s Christian Temperance Union: Twenty-Fourth
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

was vigorously pushing its petition drive, especially in churches; for example, in Porter County (pop. ca. 19,000), 4,000 signatures of a projected 10,000 had already been secured on 50 petitions. The opening days of the session saw the submission of petitions for a total sales ban. The reasoning behind such a general sales prohibition was briefly set forth in a petition that the faculty of Earlham College, a Friends/Quaker institution, on January 20, 1897, unanimously directed its president to sign and forward to the General Assembly. Driven by their perception of “the evil effects resulting from the pernicious habit of cigarette smoking by the youth” of Indiana, but “recognizing...the impracticability of regulating the sale of cigarettes within our State,” the professors petitioned the legislature to “enact a law to entirely prohibit the manufacture and sale of cigarettes within the State of Indiana....”

Woodruff did in fact introduce such a measure and was hardly alone: at least 11 tobacco-related bills (eight in the House and three in the Senate) were filed during the session’s first two weeks, prompting the hyperbolic press remark that it “seems certain that trusts, cigarettes and noxious weeds have to go, for about half the members have introduced bills to abolish them.” Woodruff’s bill, like McCaskey’s in 1895, prohibited the use of cigarettes as well as their manufacture.

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Annual Meeting...1897, at 182-83 (1897). As a proportion of the state population (in 1890) membership represented 0.15 percent compared to 0.22 percent nationally.


405 Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 283 (Jan. 22) (1897).

406 “Things It Will Do,” ISJ, Jan. 20, 1897 (8:3). It is noteworthy that all of the representatives who introduced anti-cigarette bills voted against the bill “to prohibit obstruction of the view of persons in theaters, halls or opera houses when theatrical or public performances for which an admission fee is charged....” Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 661-62 (Feb. 8) (1897) (H.B. No. 320 by Fornshell, defeated 20 to 68). Such bills, which were considered by numerous state legislatures in the 1890s, were widely decried as the worst kind of intrusive sumptuary legislation. See above this ch. For a range of contemporaneous opinion, see “The Theatre Hat Nuisance,” NYT, Feb. 1, 1895 (8); Irving Browne, “Hats Again,” Green Bag 7(6):304-305 (June 1895); “Ohio’s Anti-High Hat Law,” NYT, Apr. 6, 1896 (9).
and sale.\footnote{Journal of the House of Representatives of the State on \{sic\} Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 99 (Jan. 13) (1897) (H.B. No. 54 by Woodruff).} Two more bills banned sale and manufacture.\footnote{Journal of the House of Representatives of the State on \{sic\} Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 101, 143 (Jan. 13 and 14) (1897) (H.B. No. 64 by Democrat-Populist John Engle and H.B. No. 167 by Republican Elisha Reynolds).} Among the other House bills were two providing for local licensing\footnote{Journal of the House of Representatives of the State on \{sic\} Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 139, 141, 271 (Jan. 14 and 22) (1897) (H.B. No. 152 by Republican Silas Canada, H.B. No. 161 by Republican Francis Lambert, and H.B. No. 313 by Democrat Jacob O’Bannon).} and three prohibiting sales to minors only.\footnote{Journal of the House of Representatives of the State on \{sic\} Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 91, 101 (Jan. 12 and 13) (1897) (H.B. No. 41 by Republican Jaynes Babcock and H.B. No. 66 by Republican John Thomas).} On January 27, the House Committee on Rights and Immunities reported back the manufacture/sales ban, H.B. No. 167 (which had been introduced by Republican Elisha Reynolds, a teacher and physician),\footnote{A Biographical Dictionary of the Indiana General Assembly, Vol. 1: 1816-1899, at 327 (Rebecca Shepherd et al. ed. 1980).} recommending that it be completely stripped of its contents and substituted for by a no-sales-to-minors bill. This amendment, which would have repealed the aforementioned 1893 statute, went beyond the latter in covering all minors (not just those under 16) and cigarette wrappers and doubling the maximum imprisonment to 60 days, but also reduced the upper limit to $50 for first a offense.\footnote{Journal of the House of Representatives of the State on \{sic\} Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 367-8 (Jan. 27) (1897).} The committee then proceeded to recommend that all but one of the other House cigarette bills be indefinitely postponed on the grounds that their substance was covered by the surviving H.B. No. 167.\footnote{Journal of the House of Representatives of the State on \{sic\} Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 368-70 (Jan. 27) (1897) (H.B. No. 41, 54, 64, 66, 161, 313).} (The one proposed measure to escape the committee’s guillotine was another no-sales-to-children bill, H.B. No. 152, to which the committee had already given a “do pass”
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recommendation a week earlier;414 after being recommitted to the Rights and Privileges Committee, the bill was once again recommended for passage and was passed by the full House by a vote 58 to 11,415 but died in the Senate.)416 That the House (and, in this session, the legislature’s) majority limits had apparently been reached and acquiesced in by the extra-parliamentary advocates was signaled by a press report that it was “understood” that this substitute was “a compromise between the demands of the W.C.T.U. and the objections of the cigarette lobby” and was “likely to go through.”417 The latter was personified by the aforementioned “ex-Senator [Oscar A.] Baker, representative of the American Tobacco Company,” who “just as anxiously watched” this bill as it was “anxiously pushed by the W.C.T.U.”418 Although it is unclear whether Baker was already the Tobacco Trust’s secret agent during the 1895 session, when he introduced a cigarette licensing bill, he would remain its publicly known lobbyist until 1905, when his (and its) attempt to bribe legislators into voting against a stringent general prohibition of cigarette sales was revealed by one of its targets, contributing to the bill’s passage.419

When the House took up H.B. No. 167 on the afternoon of February 1, several representatives presented “eighty petitions from numerous citizens of the several counties of the State, praying that the General Assembly pass a law prohibiting the manufacture and sale of cigarettes....”420 During the “long discussion of the cigarette question...the lobbies [were] full of women who ha[d]
been urging prohibitory legislation.”  After the House had agreed to the committee amendments, members began offering their own amendments, the only one of which to be adopted authorized (but did not require) the prosecuting attorney to compel any minor found with a cigarette in his possession to testify as to its source. Once two weakening amendments—to make imprisonment discretionary and to strip the bill’s coverage of non-cigarette tobacco—had been disposed of, the House, apparently in the spirit of the alleged WCTU/ATC compromise, by the overwhelming majority of 86 to 3 passed the no-sales-to-minors substitute for a general sales ban.  (To be sure, Senate amendments eventually restored these two severe dilutions and the House agreed to them.)

If the bill fell far short of the anti-cigarette activists’ goals, the reason, according to the Indiana State Journal, was that although “[m]ost members announced themselves as personally in favor of entire prohibition,” they “believed that it would not stand the test of the federal courts.”  The Concurrent House Resolution that Republican Samuel Nicholson, the eponymous author of the 1895 anti-saloon law and a nationally prominent prohibitionist, offered, was part of a WCTU-inspired nationwide campaign to eliminate the Tobacco Trust’s chief litigation strategy designed to deter legislators from passing general cigarette sales ban bills:

\[\text{Whereas, The cigarette habit is a growing evil and a menace to the health of our people, and,} \]
\[\text{Whereas, On account of the Interstate Commerce Law, the States are forbidden to deal with the question thoroughly and effectively; therefore, be it} \]
\[\text{Resolved by the House of Representatives, the Senate concurring, That we request the} \]

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421 “Cigarettes Must Go,” ISJ, Feb. 3, 1897 (7:7).
422 Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 480-83 (Feb. 1) (1897). Democrats cast all three Nays.
423 Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 561, 677-78, 114-15 (Feb. 8, 12, Mar. 2) (1897); “The Legislature,” ISJ, Mar. 10, 1897 (1:1); Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 1357, 1409 (Mar. 2, 3) (1897).
424 “Cigarettes Must Go,” ISJ, Feb. 3, 1897 (7:7). Editorially the paper would go no further than stating that because the “cigarette habit has become an evil of large proportions,” sentiment prevailed “everywhere” in favor of a prohibitory law regarding boys under 18. ISJ, Feb. 3, 1897 (4:4-5) (untitled edit.).
425 See below ch. 11.
United States Senators and members of the Lower House of Congress from the State of Indiana to bring the matter before the Congress of the United States, of giving such relief to the States, immediately, as will enable them to forbid the sale of cigarettes, entirely, and that they urge speedy action in this matter.426

The House adopted the resolution and two days later the Senate followed suit,427 but this federalist cri de coeur failed to give the legislators courage to act on their own in the interim, though that same afternoon the Senate did, albeit half-heartedly, pass a generalized sales ban bill.

The three Senate bills included one for licensing,428 one to prohibit cigarettes’ manufacture and sale,429 and one to legalize their sale.430 While this last bill was indefinitely postponed,431 the Senate passed the first two.432 The House, however, indefinitely postponed both, the licensing bill purportedly because its matters, too, were embodied in H.B. No. 167.433 More centrally pertinent here is the fate

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426 Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session 483-84 (Feb. 1) (1897) (Concurrent House Resolution No. 15).
427 Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 456 (Feb. 3) (1897).
428 Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 103 (Jan. 12) (1897) (S.B. No. 84 by Republican Charles Shiveley).
431 Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 268 (Feb. 1) (1897). S.B. No. 84, the licensing bill, which also declared certain sales to and uses by minors under 18 unlawful, was passed by a vote of 45 to 1. Journal of the Indiana State Senate During the Sixtieth Session of the General Assembly, Commencing Thursday, January 7, 1897: Regular Session 200, 304-305, 363 (Jan. 20, 25, 28) (1897); “The Legislature,” ISJ, Feb. 3, 1897 (1:1-3 at 2).
432 Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular
of the manufacturing and sales ban on cigarettes and cigarette wrappers, S.B. No. 249, which had been introduced (by request) by William McCord, a 45-year-old Republican lawyer. After the Public Health Committee had recommended its passage, on the afternoon of February 1, at the same time that House was passing the defanged H.B. No. 167, the full Senate passed S.B. No. 249 by a unanimous vote of 39 to 0. To be sure, the Republican *Indiana State Journal*, which characterized the day’s legislative proceedings as “Both Houses Go After the ‘Fool-Killers’ with a Rush,” explained this vote, which had not been preceded by any discussion, as, at least in part, not grounded in substantive support: “Some of the senators voted for it in the belief that it would go no further, and others upon the theory that if the people who are urging this sort of legislation desire a law that will not stand in the courts they ought to have it.” The first group’s prophecy apparently fulfilled itself: the House Rights and Privileges Committee to which the bill was referred took a month to report it back with a “do pass” recommendation, but the very next day the full House killed it by indefinite postponement.

Thus, two sessions in a row the anti-cigarette forces were unable to build on one chamber’s passage to mobilize action in the other. Not until 1905, another national high point of legislative action, would they succeed in enacting one of the most stringent statewide cigarette sales bans.

**Massachusetts: 1895 and 1898**

The very fact that ban bills continued to be introduced in the Massachusetts House after the defeat of Clayton’s bill in 1892 and Brown’s identical bill in

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434 *The Pioneers of Morgan County: Memoirs of Noah Major* 497-500 (Indiana Historical Society Publications V(5), Logan Esarey ed. 1915); 1900 Census of Population (HeritageQuest).
437 *Journal of the House of Representatives of the State on [sic] Indiana During the Sixtieth Session of the General Assembly, Commencing Thursday, Jan. 7, 1897: Regular Session* 493, 505, 1339, 1416 (Feb. 2, Mar. 2, 3) (1897).
438 See vol. 2.
439 See above ch. 3.
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1893 nourished opponents’ fantasies that advocates were nothing but extortionists trying to blackmail the Tobacco Trust. Bills were filed in the House every year during the remainder of the decade. In 1895 the House did pass a cigarette sales and manufacture ban. Republican lawyer Franklin Barnes introduced another sales ban (House, No. 179), which the Health Committee recommended (with one dissent) “ought not to pass.” This rejection, in turn, the full House negatived by a vote of 46 to 68. After the House, by a vote of 70 to 32, had ordered the bill to a third reading, debate finally took place on April 26. Thomas Keenan, a Boston Democrat and journalist, who was apparently seeking to kill the bill, moved to amend by also making it unlawful to smoke cigarettes, but the Speaker ruled the amendment out on the grounds that it was broader than the subject matter that the committee had considered. Keenan

440 See above ch. 4.

441 These bills included H. 267 (1893), H. 706 and H. 901 (1894), H. 179 and H. 364 (1895), H. 246 (1896), and H. 294 (1897). Leonard Adams, Index to Massachusetts Legislative Documents, 1883-1899, at 52 (1994). On House No. 267 (1893), which was identical to Clayton’s bill of 1892, see above ch. 4. After the House by a vote of 80 to 16 had negatived the Public Health Committee’s “ought not to pass” recommendation of an anti-cigarette sales bill (H. No. 706) in 1894, the chamber adopted an amendment limiting the bill’s applicability to minors before passing it. Journal of the House of Representatives of the Commonwealth of Massachusetts: 1894, at 219 (Feb. 8), 673 (Apr. 1), 795 (Apr. 13), 1017 (May 14), 1132 (May 28), 1259 (June 12) (1894). “Bay State Legislature,” Lowell Daily Sun, June 13, 1894 (8:3), did not make clear that the bill had been watered down. H. No. 246, the ban bill in 1896, was withdrawn. Journal of the House of Representatives of the Commonwealth of Massachusetts: 1896, at 98 (Jan. 22), 559 (Mar. 19), 598 (Mar. 23) (1896). The Syracuse Courier hailed the bill’s defeat as a “protest against paternalism.” “Home and State Paternalism,” MO, Apr. 16, 1896 (4:3). H. No. 294, the bill in 1897, was also withdrawn. Journal of the House of Representatives of the Commonwealth of Massachusetts: 1897, at 108 (Jan. 27), 336 (Feb. 23), 353 (Feb. 24) (1897); Journal of the Senate of the Commonwealth of Massachusetts: 1897, at 284 (Feb. 26), 295 (Mar. 1) (1897).

442 Journal of the House of Representatives of the Commonwealth of Massachusetts: 1895, at 89 (Jan. 22) (1895). House, No. 364, based on a petition by A. A. Williams et al., also would have prohibited the sale/ manufacture of cigarettes, but it was withdrawn. Id. at 159, 501, 528 (Feb. 1, Mar. 11 and 12).


then moved to amend by lowering the fine from $100 to one cent, but the House, after voting 55 to 45 to retain the original fine, on a very close vote (61 to 59) passed the bill to be engrossed and sent up for concurrence.\textsuperscript{446} Opponents made a last-ditch effort to defeat the bill three days later on a motion, by Republican William Hayes, a cigar manufacturer and wholesaler,\textsuperscript{447} to reconsider the vote. Hayes insisted that “the tobacco used in cigarettes was pure and the very best,” while the aforementioned Roe continued to insist on their destructiveness and lethality. Calling the bill “ridiculous and absurd, useless and foolish,”\textsuperscript{448} Republican William Tolman, a life insurance company agent,\textsuperscript{449} failed to sway the chamber, which voted 55-76 to refuse to reconsider,\textsuperscript{450} though the larger majority “was due more to dislike of going over the business twice than to belief in the wisdom of the bill.”\textsuperscript{451} As in other years, however, the Senate came to the rescue of the cigarette industry by rejecting the House bill,\textsuperscript{452} without even needing a division,\textsuperscript{453} “with no compunction whatever,” no speech even being offered in its favor.\textsuperscript{454}

In 1898, William T. Worth and nine others petitioned the legislature to prohibit the sale or manufacture of cigarettes or cigarette tobacco and to impose


\textsuperscript{447}A. M. Bridgman, A Souvenir of Massachusetts Legislators, 1895, vol. 4 at 165, on http://www.archive.org/stream/souvenirofmassac1895brid#page/n5/mode/2up (visited Feb. 9, 2010).

\textsuperscript{448}“The Legislature,” Fitchburg Sentinel, Apr. 30, 1895 (4:1-3 at 2). The House had rejected Tolman’s effort to belittle the 1894 House bill by amending it to so that it would not apply to females. Journal of the House of Representatives of the Commonwealth of Massachusetts: 1894, at 1259 (June 12) (1894).

\textsuperscript{449}A. M. Bridgman, A Souvenir of Massachusetts Legislators, 1895, vol. 4 at 141, on http://www.archive.org/stream/souvenirofmassac1895brid#page/n5/mode/2up (visited Feb. 9, 2010).


\textsuperscript{451}“Letter from Boston,” Fitchburg Daily Sentinel, May 2, 1895 (1:4-5 at 5).

\textsuperscript{452}Journal of the House of Representatives of the Commonwealth of Massachusetts: 1895, at 1060 (1895).

\textsuperscript{453}“The Legislature,” BET, May 1, 1895 (3:6).

\textsuperscript{454}“Letter from Boston,” Fitchburg Daily Sentinel, May 2, 1895 (1:4-5 at 5). This Republican paper consoled supporters with the possibility that as some House members became senators the other chamber might turn more supportive of the bill. “Letter from Boston,” Fitchburg Daily Sentinel, May 9, 1895 (4:1-2).
a $100 fine for each offense—\textsuperscript{455}—the arrival of which petition the \textit{Southern Tobacco Journal} duly noted.\textsuperscript{456} Republican Representative Charles Ramsdell of Lynn, who was in the grocery and real estate business,\textsuperscript{457} introduced the bill accompanying the petition as House No. 276, which was referred to the Public Health Committee.\textsuperscript{458} Two weeks later committee chairman Senator Charles Folsom, a Boston Republican in the paint and oil business,\textsuperscript{459} announced in the press that on February 16 the committee would give a hearing for parties interested in the bill.\textsuperscript{460} Of the hearings held that morning in the state house, “the liveliest” was on the anti-cigarette bill—not because of testimony about new chemical assays, but, rather, because of the opposition’s “attempt to show that there was something unusual and mysterious concerning the origin of the bills,” which “aroused some indignation among the women...present as advocates of the measure, and protest from two members of the committee.” Indeed, “seldom,” according to the \textit{Boston Evening Transcript}, had a small committee room been the “scene of sharper questioning....”\textsuperscript{461} The ruckus was initiated by the 46-year-old House chairman of the Public Health Committee, Boston Republican Edward Callender, a lawyer who was a graduate of Harvard College and Harvard Law School.\textsuperscript{462} In explaining to reporters an order that had been passed the previous day empowering the committee to summon witnesses for the hearing\textsuperscript{463} Callender

\textsuperscript{455}Petition—House 250 (Jan. 26, 1898) (copy furnished by Massachusetts Archives).

\textsuperscript{456}“Picked Over,” \textit{STJ} 22(21):3 (Feb. 14, 1898).


\textsuperscript{458}\textit{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898}, at 104 (Jan. 26) (1898).

\textsuperscript{459}A. M. Bridgman, \textit{A Souvenir of Massachusetts Legislators, 1898}, vol. 7 at 119, on http://www.archive.org/stream/souvenirofmassac1898brid#page/n5/mode/2up (visited Jan. 17, 2010).

\textsuperscript{460}E.g., \textit{BDA}, Feb. 11, 1898 (5:5) and Feb. 12, 1898 (5:4).

\textsuperscript{461}“State House Affairs,” \textit{BET}, Feb. 16, 1898 (6:3-4).


\textsuperscript{463}Whereas the House ordered the Public Health Committee to be “authorized to compel the attendance of witnesses at hearings on matters referred to it,” the Senate amended the authorization to include only send[ing] for persons in the hearings upon the petitions for legislation to prevent the manufacture and sale of cigarettes.” \textit{Journal of the Senate of the Commonwealth of Massachusetts for the Year 1898}, at 242 (Feb. 15) (1898).
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stated that “for some years an Essex County politician has circulated a petition for the prohibition of the manufacture and sale of cigarettes.... His custom...was to ask clergymen and school teachers to sign the petition. Mr. Callender...regarded this as ‘strike’ legislation, and...somebody, perhaps, had made a good deal of money out of the manufacturers by means of the petitions and bills....” The target of what turned out to be (as one of the committee members put it) Callender’s “browbeating” was 42-year-old Frank Bonney, by occupation a heeler in a shoe factory in Lynn, where, for the previous three years he had initiated petitions requesting anti-cigarette legislation because “I’ve been interested against tobacco ever since I was a boy, when I smoked a cigar and it made me sick.” Callender directed a series of hostile leading questions at him, accusing him, for example, of having told someone that he received a certain sum of money for every name he got on a petition. This quasi-criminal procedure prompted protests by three committee members supported by expressions of indignation by a delegation of WCTU women “quite innocent of some of the dark ways of the lobby on Beacon Hill....” Callender tried to defend his interrogation on the grounds that “there seemed to be something queer about the way these bills had been brought from year to year,” adding the assertion (with which Bonney disagreed) that at the previous year’s hearing clergymen and others who had initially supported the bill withdrew their support once they learned of the circumstances surrounding the bills’ origins. The chairman permitted Callender to proceed, but he stopped, whereupon the long-time WCTU anti-cigarette advocate Ella Aldrich Gleason, who earlier had “given a vigorous address” supporting the bills, took umbrage and vehemently insisted that “she was willing to stand up anywhere in the United States and say that she had never done a dishonest thing in her life.” At least one member of the public opposed the bill, Jacob Otis Wardwell (1856-1940), a former leading Republican state legislator (who had antagonized the Republican Party’s temperance wing as a

464 “State House Affairs,” BET, Feb. 16, 1898 (6:3-4).
465 1900 Census of Population (HeritageQuest).
466 “State House Affairs,” BET, Feb. 16, 1898 (6:3-4). It is unclear why Bonney was the target since William T. Worth was the person who submitted the petition, which Bonney did not sign.
468 “State House Affairs,” BET, Feb. 16, 1898 (6:3-4).
469 “J. Otis Wardwell, Boston Lawyer, 83,” NYT, Sept. 11, 1940 (34).
470 Commonwealth of Massachusetts, Official Gazette: State Government 1890: Biography of Members 27 (1890); Massachusetts of To-Day: A Memorial of the State, Historical and Biographical 397 (Thomas Quinn ed. 1892).
result of his vote on the liquor question in 1888),\textsuperscript{471} member of the Republican State Committee, and Boston corporation lawyer\textsuperscript{472} held in “favor...by large corporations.”\textsuperscript{473} Wardwell, who in 1896 had successfully represented a tobacco dealer in a case before the Massachusetts Supreme Judicial Court,\textsuperscript{474} opposed the bill on the grounds that its ban on the sale of cigarette tobacco “would prohibit the sale of all tobacco that might be used in a cigarette; in other words, would strike at ordinary prepared tobacco used in pipes.”\textsuperscript{475}

The day after the hearing the House accepted the committee report, “leave to withdraw, on the petition” and accompanying bill.\textsuperscript{476} The next day Republican Charles Beede, a shoe manufacturer from Lynn,\textsuperscript{477} moved both to reconsider that vote and to table his own motion.\textsuperscript{478} Not until almost a month later did the House take up the committee report for consideration, by which time Beede moved to amend the adverse committee report by substituting for it a new bill, House, No. 1059, which motion the House adopted\textsuperscript{479} in spite of Callender’s renewed insistence that the measure was “the rankest kind of strike legislation.”\textsuperscript{480} Beede’s measure weakened the original bill by striking the ban on the manufacture or sale of cigarette tobacco, thus limiting coverage to “cigarettes covered in whole or in part with paper, and filled with tobacco”\textsuperscript{481} and in effect adopting Wardwell’s criticism. This change was, presumably, designed to gain

\textsuperscript{471}“Mr. Wardwell’s Ambition,” NYT, Aug. 22, 1889 (4).
\textsuperscript{472}1910 Census of Population (HeritageQuest).
\textsuperscript{473}Representative Men of Massachusetts, 1890-1900: The Leaders in Official, Business and Professional Life in the Commonwealth (1898), on http://wc.rootsweb.ancestry.com/cgi-bin/igm.cgi?op=GET&db=:2394116&id=I12319
\textsuperscript{474}The case, the opinion in which was written by Oliver Wendell Holmes, Jr., dealt with whether it was legal to include pictures with the sale of tobacco pursuant to a state statute. Commonwealth v Emerson, 165 Mass. 146 (1896).
\textsuperscript{475}“The Anti-Cigarette Bill,” BDA, Feb. 17, 1898 (4:6).
\textsuperscript{476}Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898, at 292, 295 (Feb. 16 and 17) (1898).
\textsuperscript{478}Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898, at 312-13 (Feb. 18) (1898).
\textsuperscript{480}“The House,” BDA, Mar. 16, 1898 (5:4).
\textsuperscript{481}House No. 1059, § 1 (n.d. [Mar. 15, 1898], by Beede).
votes, but when the question of ordering the bill to a third reading arose on March 18, Beede successfully moved that it be postponed until March 21, when his motion to postpone it, again, to the next day was lost. But following debate the bill was ordered to its third reading on March 22 by the overwhelming majority of 90 to 16.\footnote{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898, at 588, 596 (Mar. 18 and 21) (1898).}

The 108 to 70 vote—“without a word of debate”\footnote{The Legislature,” BDA, Mar. 23, 1898 (5:3). The bill’s engrossment was challenged by a rising vote (with 76 for and 50 against the bill), after which a roll call was demanded.}—on third reading in support of the total sales ban represented a sea change compared to the vote in 1892, although the party-line difference remained salient. The overall 61-percent Yes vote was the product of the 70-percent rate among Republicans and 35 percent among Democrats (compared to only 51 and 20 percent, respectively, in 1892). Republicans, who occupied 76 percent of all House seats, accounted for 83 percent of all Yea's and 56 percent of all Nays. (Republicans’ predominance was less prominent because only 71 percent of them voted compared to 84 percent of Democrats.) Once again, the Boston metropole’s opposition was conspicuous: of the 23 (of 29) Boston Democrats who voted 18 (or 78 percent) voted Nay, whereas of the 14 (of 20) Boston Republicans who voted seven (or 50 percent) voted Nay.\footnote{Calculated according to Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898, at 611-13 (Mar. 22) (1898). Party membership was taken from A. M. Bridgman, A Souvenir of Massachusetts Legislators, 1898, vol. 7 at 133, on http://www.archive.org/stream/souvenirofmassac1898brid#page/n5/mode/2up (visited Jan. 17, 2010). Only one representative voted on the two cigarette ban bills in 1892 and 1898—tobacconist Frank Francis, who switched not only from No to Yes, but also from Democrat to Republican.}

The following day, when a motion to reconsider the previous day’s vote was debated and defeated by a vote of 67 to 94,\footnote{Journal of the House of Representatives of the Commonwealth of Massachusetts: 1898, at 623 (Mar. 23) (1898). See also House No. 1059 bill sleeve (1898) (copy furnished by Massachusetts Archives).} the Boston Evening Transcript editorialized that now that for the first time after successive annual failures a bill had gotten so far toward passage, there was also for the first time “real cause for alarm lest a law that is unnecessary and unjust” would be enacted. The newspaper regarded the child-protective purpose of the existing law banning the sale of tobacco to persons under 16 as “worthy,” but also “clearly as far as the State ought to go in this matter.” The editor then raised an important aspect of public
policy that would remain insufficiently debated during the decades to come as legislatures considered universal sales bans: “To prevent the young from using tobacco it is not necessary nor just to forbid its use to adults, which in effect is what is now proposed in the case of cigarettes....” Whether the editorial was engaged in mere alarmist tactics in order to defeat this particular bill or was in fact indicative of a more collectively held assessment of how multifaceted and successful the prohibitionist movement might become, it added: “[I]f the present bill passes, we may look for another step in the same direction and against tobacco in all its forms.” At the same time, pointing to recent studies by chemists refuting (once again) claims of poisonous adulterations, the Transcript warned against “over-magnifying the danger” of cigarettes even to youth; and not content with pooh-poohing the “sensational” stories about cigarette-induced insanity, the paper, in order to support its assertion that even if enacted, a sales ban would not prevent cigarette smoking in Massachusetts, fabricated a U.S. Supreme Court “case of the Iowa law” holding that “under the interstate commerce act no state legislation can prevent the introduction of cigarettes in original packages (which of course can be made conveniently small to meet special requirements)....” Having thus done its part to insure the self-fulfillment of its prophecy, the newspaper had “every reason to believe that the Senate will reject the House bill,” especially since it was possible that “not a few” House members voted for it in the same belief.486

In the event, the Transcript had correctly foreseen the process in the Senate, where, after two hours of debate, the chamber refused a third reading to the bill without even a vote,487 prompting the headline, “Cigarettes Win.” During that floor discussion four Republicans (including Roe) spoke in favor of the bill, while eight Republicans and a lone (Catholic) Democrat opposed it.488 Unwilling to acknowledge that a popular movement might be standing behind the initiatives,
which, after all, were being pushed all over the country by the WCTU, which no one suspected of seeking to blackmail the Tobacco Trust, the Transcript contended that the “evil” perpetrated by the anti-cigarette bill survived its death because its friends’ success in securing House passage would “probably prove a sufficient incentive to the ‘strike’ legislators to bring it up again next year, in the hope that this year’s scare will make the manufacturers come down more handsomely than ever.”

In fact, the anti’s did continue to press the legislature into the twentieth century to ban cigarette sales but failed to secure its passage. By 1901 the press referred to “[t]he annual contest to get a favorable committee report to prevent the manufacture and sale of cigarettes” being waged, above all, by the principal officers of the state WCTU and supported by numerous petitions, but such efforts never came to fruition in Massachusetts.

**Kentucky: The House Passes a Ban on Sales in 1896 and Is Joined by the Senate in 1898 in Banning Sales and Possession**

The prospects of enactment of an anti-cigarette law in Kentucky appeared to improve sharply when William Bradley was elected Kentucky’s first Republican governor in 1895. A leading Republican politician in a Democratic post-Civil War state, Bradley had previously contested and lost many (including gubernatorial) elections, in all of which “he attracted great support from

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489 *BET*, Mar. 30, 1898 (4:1) (untitled edit.).

490 For example, in 1900 Henry C. Long filed a petition, which became House No. 502, which simply provided that the “sale of cigarettes, so-called, is hereby prohibited in this Commonwealth” without imposing a penalty. Copy furnished by Pappas Law Library, Boston University. Long was a prominent Boston lawyer who later ran for Congress as a Progressive.

491 “At Odds over Cigarettes,” *BET*, Mar. 5, 1901 (4:5-6) (an exceptionally lengthy account of a legislative hearing rehearsing all the traditional attack points).

492 In addition to a petition to prohibit the manufacture and sale of cigarettes that accompanied a bill and another like bill, neither of which made any progress, a total of 69 petitions were presented to the House to prohibit the sale of cigarettes. *Journal of the House of Representatives of the Commonwealth of Massachusetts: 1901*, at 102 (Jan. 22) (H. No. 212), 218 (Feb. 1) (H. No. 715), 192, 276, 295, 302, 303, 313, 316, 321, 322, 330, 341, 357, 380, 389, 391, 412, 423, 436, 449, 464, 475, 518, 529, 531, 540, 542, 554, 569, 580, 633, 712, 738, 752 (1901). See also *Commonwealth of Massachusetts: The Journal of the Senate for the Year 1901*, at 1140 (1901) (listing 33 page references to petitions in aid).

493 No such bill appeared in the index to the 1894 House or Senate *Journal*. 

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Kentucky blacks.” In spite of the fact that “[t]he chief obstacle” to a Republican victory in 1895 was his Democratic opponent’s “appeal to Democrats to vote for their party to stop ‘Negro domination’ by Republicans,” Bradley prevailed, aided by the presence of a third-party Populist candidate, who siphoned votes away from the Democrats, and by his own courting of the American Protective Association, a nativist, anti-Catholic organization. However, with Republicans in control of the House and Democrats of the Senate, Bradley was unable to achieve many legislative successes.494

Bradley had, nevertheless, presented an interesting agenda. In addition to calling for “special taxes for the sale of tobacco, cigars, etc.,” under the noteworthy heading, “Public Health,” the new governor, using the by now familiar mélange of pseudo-scientific yet partly accurate denunciations,496 declared in his message to the legislature on January 10, 1896:

And in this connection I desire to call your attention to the sale of cigarettes and cigarette paper. The medical profession almost [sic], if not entirely, condemns the use of these articles. The most serious deterioration of body and mind, especially among the youth, is caused by the use of these slow but deadly poisons. Out of their use grows an appetite for strong drink and opiates in their most dangerous forms, which eventually lead to destruction. In conformity to the request of many of the best citizens of the Commonwealth, I recommend that the sale of cigarettes and cigarette paper be

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494 *Kentucky’s Governors: 1792-1985*, at 108 (Lowell Harrison ed. 1985). With Kentucky Democrats denouncing the APA, its members’ votes went solidly for Bradley, who was then adopted by the organization’s press as a promising national figure, whom it then mentioned as a possible presidential candidate in 1896. Bradley was the most prominent politician in the United States to have supported the APA, which did not push the issue of liquor—except opportunistically because of the alleged link between Catholics and saloonkeepers—let alone cigarette prohibition. Donald Kinzer, *An Episode in Anti-Catholicism: The American Protective Association* 199, 203, 214, 81 (1964); “American Protective Association,” *Catholic Encyclopedia*, on http://www.newadvent.org/cathen/01426a.htm (visited May 30, 2006). The 52 House Republicans represented the party’s first and (apart from that produced by the election of 1919) only majority it ever achieved in that chamber. Michael Dubin, *Party Affiliations in the State Legislatures: A Year by Year Summary*, 1796-2006, at 72-73 (2007).

495 *Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky* 50 (1896).

496 For example, more than 90 years later the monumental Surgeon General’s report on nicotine addiction stated that “adoption of cigarette smoking has been shown to be a risk factor for subsequent adoptions of other types of substance use.” U.S. Department of Health and Human Services, *The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General* 1988, at 400-401 (1988).
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Four days later three bills were introduced in the House prohibiting the manufacture and sale of cigarettes and a fourth two days after that in the Senate banning their sale. Two of the House bills fell by the wayside, but the House passed H.B. 34 by an overwhelming majority of 67 to 2. For violations it imposed a fine of between $100 and $500 and/or imprisonment for one to six months. In addition, it provided that: “It shall be the duty of circuit judges to call special attention to this act.” However, the bill died in the Senate, which, also considered, but failed to act on, its own bill, which the reporting committee recommended not passing.

Two years later, in his message to the next regular session of the General Assembly on January 5, 1898, this time under the rubric, “Public Morals,”

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497Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 57 (1896). Whether Bradley had been influenced by the Kentucky WCTU is unclear, but in 1897 he did appoint its president, Frances Estill Beauchamp, to the first Board of Charities and Corrections. Patsy Woodring, A Glorious Past & A Promising Future: A Brief History of the Kentucky Woman’s Christian Temperance Union 1880-1995, at 10 (n.d. [ca. 1995]). See also below this ch. On the Kentucky WCTU’s efforts to secure enactment of a Scientific Temperance Instruction law, see Nellie Sloy, “Kentucky,” US 19(2):11 (Jan. 12, 1893).


500Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 615-16 (1896) (Feb. 24). The bill was introduced by Republican Jesse C. Speight, a lawyer representing the westernmost black patch tobacco counties of Fulton and Hickman.

501Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 544, 604 (1896). According to the index, further action was reflected on two other pages, but no such action was reported there. The Western Tobacco Journal had predicted that the bill would “probably” pass the Senate, but failed to explain why it had not. “The Cigarette Bill Passes the Kentucky House,” WTJ 22(47):2 (Mar. 2, 1896); WTJ 22(50):10 (Mar. 23, 1896) (untitled).


503Bradley’s racial message, replete with virtually every imaginable post-bellum trope, was profoundly mixed. In recommending repeal of the Separate Coach Law (1892 Ky
which also dealt with an aspect of control of intoxicating liquors, Bradley once more urged passage of an anti-cigarette bill:

Again attention is called to the sale of cigarettes and cigarette papers. Their use is universally condemned by the medical profession and every day [sic] experience. They invariably impair, and in many instances, especially among the youth of the land, destroy both body and mind. They beget a taste for even more deadly opiates and intoxicating drinks. I recommend that their sale be prohibited. 504

Two days after the governor had delivered his message, the House of Representatives appeared to signal sympathy with Bradley’s position by adopting

Acts ch. 40 at 63), he declared that he was “[p]roud of the glorious achievements of the white race, believing that it is the superior of every other, that by reason of its advantages in liberty, education and advanced civilization, it can ill afford to place additional burdens upon others that are struggling for improved manhood, and not fearing for a moment that any race will become its equal....” Appealing to the memory of the slaves who had been “[l]eft in charge of the wives and children of Confederate soldiers, who were fighting to perpetuate their bondage,” and yet who in not even one recorded case were “faithless,” committed criminal assault, or burned down their masters’ house, Bradley observed that: “Those of us who owned, or whose parents owned slaves, can well attest...the mystic tie of affection existing between them and their masters. And now, after we and those who preceded us have lived for years, in whole or part, upon their unrequited toil...reason and humanity alike demand that we should extend to them and their descendants the helping hand, that they may be elevated in the realm of citizenship, rather than...burn more deeply...upon their foreheads the humiliating brand of slavery.” Bradley complained that the statute forced on whites “many persons of our own race with whom we do not desire to be associated in travel,... while we would much prefer the company of intelligent and respectable negroes. Every citizen should be judged according to his conduct, decency and good citizenship, rather than his color....” Ultimately, Bradley proposed giving conductors discretionary power “to place all the rough, indecent, drunken or violent passengers, whether white or black, in a separate car, thus preventing them from associating with the ladies and gentlemen who occupy another.” And even if the legislature rejected his approach, he urged separate cars (rather than separate compartments within cars) for “negroes” because: “Frequently the whites are of the worst class of their race, and their oaths and coarse conversation are forced upon well behaved and respectable negro men and women, while every time the door is opened there is poured in upon them the fumes of mean whiskey and tobacco.” Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 49-51 (1898). No such law was enacted at the 1898 session. For a brief report of Bradley’s message, see “Kentucky Legislature Meets,” NYT, Jan. 5, 1898 (2).

504 Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 52 (1898).
the following resolution: “Whereas, Tobacco smoke is offensive to many persons; Therefore, be it resolved by the House of Representatives of Kentucky, That the Sergeant-at-Arms is hereby instructed to prohibit smoking in this hall at all times during the session of the Legislature.” In fact, the House had adopted the same resolution in 1894—even adding a prohibition on chewing tobacco—and 1896. And at the special session of 1897, a Methodist minister representing a burley-growing county successfully had moved the adoption of this aesthetically motivated resolution:

Whereas, the librarian has cleaned up so neatly this hall, and covered the floor with a beautiful carpet for our comfort and pleasure

Be it resolved by the House of Representatives of Kentucky, That we show our appreciation of this work by instructing the sergeant-at-arms to prohibit all tobacco smoking in this hall, and spitting of tobacco juice upon the carpet during the session of this Legislature.

Several days later, Democratic Representative Robert E. Watkins

505Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 75 (1898).
508Journal of the Special Session of the House of Representatives of the Commonwealth of Kentucky 10 (1897) (Mar. 13). Fred Gridler was pastor of a Methodist church in Barbourville; one of the counties he represented was Casey. Adair County News (Columbia, KY), posted on http://ftp.rootsweb.com/pub/usgenweb/ky/adair/news/1897d03.txt (visited July 13, 2006). The indexes to the House Journal for the next several sessions lack any reference to such resolutions. Legislative chambers remained contested sites between smokers and their opponents. See below ch. 18.
509In 1898 Watkins was a 27-year-old attorney from Owensboro, Daviess County. Thirteenth Census of the United States: 1910—Population (HeritageQuest). Daviess County was located in the so-called Black Patch area of western Kentucky, which “grew virtually the world’s entire supply of...a dark, strong-flavored variety of tobacco, used primarily in the manufacture of snuff, chewing tobacco, and cigars.” Tracy Campbell, The Politics of Despair: Power and Resistance in the Tobacco Wars 12 (1993). After his one term in the Kentucky House of Representatives, Watkins, who had been admitted to practice law in 1898, was a city court judge in Owensboro for eight years. Owensboro Messenger, Dec. 29, 1944 (obituary) (text furnished by Robert Jenkins, Kentucky Legislative Reference Commission). As deciphered by the unpublished “key” to Martindale’s code (which was pasted into the volume for 1913 at the University of Iowa.
introduced H.B. 5 to “prohibit the use of cigarettes,” which was referred to the Committee on Public Morals. Before the end of January petitions were “being circulated all over the state,” like the one in Paducah that already contained several hundred names, “asking the legislature to enact a law prohibiting cigarette smoking.” By mid-February, Frances Estill Beauchamp, president of the state Woman’s Christian Temperance Union, stated in an open letter that a number of senators had promised to work to secure the bill’s passage and “we have the assurance of the Governor that he will affix his signature to it at once. An immense petition has been collected by the various [WCTU local] unions of the state and presented to their various members in the House.” After rejecting a number of amendments, the House passed the bill by more than a two-thirds majority vote of 56 to 27. The Democrats, who controlled the House with 75 seats against 24 Republicans and one Populist, voted 38 to 22 for the bill, while 17 Republicans favored it and only five were opposed.

Law Library), Martindale gave Watkins the lowest wealth rating (less than $1,000). Martindale’s American Law Directory 307 (35th Year, 1903). The basis of Watkins’ intense interest in banning cigarettes is unclear. An amateurish, late-twentieth-century history of the Kentucky WCTU did not even allude to the 1898 cigarette bill, let alone detail the WCTU’s role in passing it. Patsy Woodring, A Glorious Past & A Promising Future: A Brief History of the Kentucky Woman’s Christian Temperance Union 1880-1895 (n.d. [ca. 1995]).

514 On Feb. 1 a committee substitute for the bill was proposed. The differences between them are unknown since bills are not archived. Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 331 (1898).
515 The House voted on the substitute for H.B. 5, which the committee had proposed on Feb. 1. Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 331, 639-40 (1898) (Feb. 24). It is unclear how it differed from the original bill.
The text of H.B. 5 read as follows:

Section 1. It shall be unlawful for any person to sell, barter or loan or give, to make, fabricate or manufacture, to have on his premises, in his possession or under his control, a cigarette, whether made by hand or manufactured, whether it be made of tobacco or other substance, whether it be covered with paper or any other material. It shall be unlawful for any person to have on his premises, in his possession or under his control any substance or material out of which any part of such cigarette could be made with the knowledge or purpose that at any time such substance or material might become a factor of such cigarette.

Sec. 2. Any person who shall violate the law as set forth in the first paragraph of this act, or shall evade it by any trick, artifice or method whatever, shall, on conviction, be fined not less than ten nor [more] than one hundred dollars, or imprisoned in the county jail for not less than five nor more than fifty days, or both so fined and imprisoned in the discretion of the jury, and each violation or evasion of law shall be deemed a separate offense. 517

In its comprehensiveness and scope this bill may have been the theretofore most radical state legislative initiative prohibiting the sale, manufacture, and use of cigarettes even though it, unlike its title, did not use the word “use.” The brief wire-service report in The New York Times, which called the bill “sweeping in its penalties,” noted that it “absolutely prohibits the...use of cigarettes or cigarette material.” 518 The Southern Tobacco Journal, deeming it “ahead of anything of the kind ever before conceived” to regulate “the awfully awful little rolls,” gave free reign to its sarcasm: “While he was at it the author of this great measure should have gone farther, and inhibited verbal and printed mention of the cigarette, and required the expugation [sic] of the foul word from every dictionary now in Kentucky and from all that may hereafter be brought into the State.” 519 Although the Kentucky press did not dwell on identifying the forces advocating and resisting passage of the bill, the New Orleans Daily Picayune, in pointing out that opponents hoped to delay the bill in the Senate long enough to insure that the session ended before a vote could be taken, observed that: “A good deal of the opposition comes from the tobacco interests of the state, while the sentiment in favor has been worked up by the W.C.T.U. and other similar organizations.” 520

Confounding the Louisville Courier-Journal’s prediction (or perhaps wishful

518 “Anti-Cigarette Bill in Kentucky,” NYT, Feb. 25, 1898 (3).
520 DP, Mar. 2, 1898 (4:4) (no title).
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thinking) that the bill “will probably never come up for passage in the Senate,”521 two weeks later the Senate passed it by the even larger majority of 21 to 7.522 The Democrats, who held a 27 to 11 majority in the Senate, split, with 16 voting for and six against the bill; in contrast, five of the six Republicans who voted supported H.B. 5, the only opponent being a German immigrant who was president of a distillery in Louisville.523 Swinging to the opposite extreme, the Courier-Journal reported, without any anchor in the text, that the bill “is so stringent that many think it will prohibit the sale of tobacco in any form.”524 Calling it “the most remarkable product of the legislative session,” an out-of-state paper declared on its front page that “Kentucky Proposes to Shut Out Even the Smell of Cigarettes.”525

The large majority by which both houses of Kentucky’s legislature voted to prohibit the sale and use of cigarettes was little short of astonishing since the state was, after all, by far the country’s leading tobacco producer, accounting for more than one third of the national crop.526 (By the same token, despite the state’s leading role as a bourbon producer, prohibition, especially as promoted by the

521“Encounter,” C-J, Feb. 25, 1898 (1:8). Tantalizingly, the same article stated that Representative “Rev. Mr. Petty” had “led the fight against the bill.” That a Christian minister directed opposition to cigarette control would certainly have been newsworthy; in fact, Petty voted for the bill. Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 641 (1898) (Feb. 24).

522Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 1001 (1898) (Mar. 10). The committee that reported it out expressed no opinion on it. Id. at 1009.

523Party affiliation is taken from Emma Cromwell, Official Manual for the Use of the Courts, State and County Officials and General Assembly of the State of Kentucky 117-18 (1898). The biographical information about the lone Republican opponent, Christian Stege, is taken from the Twelfth Census of the United States (HeritageQuest); http://www.oldlouisville.com/old_louisville_east_tour.htm (visited June 13, 2006). All three senators representing Louisville voted against the bill; in the House, the Louisville representatives split 3 to 3, with one not voting.

524“Over Veto,” C-J, Mar. 11, 1898 (5:1).


526In 1896, Kentucky accounted for 33 percent of the acreage, 36 percent of the production, and 25 percent of the value of tobacco. U.S. Department of Agriculture, Yearbook of the United States Department of Agriculture: 1896, at 573 (1897). At the 1899 census of agriculture, the corresponding proportions were 35 percent, 36 percent, and 33 percent. U.S. Census Office, Census Reports: Volume VI: Twelfth Census of the United States, Taken in the Year 1900, Agriculture: Part II: Crops and Irrigation, tab. 1 at 526 (1902). Kentucky had been the leading producer for decades. Id., tab. 2 at 527.
WCTU, also made considerable progress there). To be sure, nationwide only a small share of total tobacco output at this time was destined for cigarette manufacture: during the 10 years from 1892 to 1901, leaf tobacco used in the manufacture of cigarettes accounted for between 2.8 and 5.8 percent of all leaf tobacco used in tobacco manufacture. However, the Tobacco Trust itself, according to a statement by its general counsel, W. W. Fuller, at a hearing in a New York State antitrust case in 1895, used 10 million pounds, or 25 percent of the 40 million pounds of tobacco it consumed annually, for cigarette manufacture. Kentucky’s burley crop—the country’s largest—was largely used for the manufacture of pipe and “navy plug” chewing tobacco. These relative...

529“Tobacco,” WSJ, Sept. 21, 1895 (2); “Tobacco Trust Attacked,” WP, Sept. 21, 1895 (3). If these figures were accurate, the Tobacco Trust accounted for little more than one-tenth of the 344 million pounds of tobacco used in tobacco manufacture that year. U.S. Department of Agriculture, First Annual Report on Tobacco Statistics tab. 13 at 88-89 (Statistical Bull. 58, 1937).
magnitudes help explain editorial opinion in support of the ban:

Some of our exchanges seem to think the passage of the cigarette bill is a blow at the tobacco interests of the country. We cannot see upon what grounds they form their conclusions. Very little tobacco goes into the manufacture of cigarettes. The bill will not only enable us to raise the same quantity of tobacco, but a better quality of boys.\textsuperscript{531}

The prohibition nevertheless represented a threat to the American Tobacco Company, which not only held a quasi-monopoly on cigarette production, but by 1898 had also formed a plug-tobacco combination (Continental Tobacco Company).\textsuperscript{532} In turn, however, the Tobacco Trust would have been in a position to inflict even greater economic injury on the Kentucky tobacco industry: “The American Tobacco Company, as the principal producers of plug tobacco in the United States, is by all odds the largest buyer of burley tobacco.”\textsuperscript{533} The potential

\begin{quotation}
averaged about one-third of the total tobacco crop. Dark tobacco provided all of the tobacco used for snuff and much of that used for manufacturing chewing tobacco. The Kentucky and Tennessee crops were chiefly exported. Report of the Commissioner of Corporations on the Tobacco Industry, Part I: Position of the Tobacco Combination in the Industry 46-47. The statements by Tracy Campbell, The Politics of Despair: Power and Resistance in the Tobacco Wars 12, 127 (1993), that burley was “used primarily in smoking tobacco and in a relatively new product, the cigarette” and “was a chief ingredient in cigarettes” are not correct for the period in question. Burley tobacco did not achieve that status until after the dissolution of the Trust, when in 1913 R. J. Reynolds Company began manufacturing Camel, which quickly became the best-selling cigarette (taking over 40 percent of the whole cigarette business within five years) and was soon thereafter imitated by Ligget & Myers (Chesterfield) and the American Tobacco Company (Lucky Strike). Nannie Tilley, The R. J. Reynolds Tobacco Company 210-11, 220, and generally 203-25 (1985); Jerome Brooks, Green Leaf and Gold: Tobacco in North Carolina 29-31 (1997 [1963]). Tilley specifically noted that these new cigarettes “paved the way for the increased use of Burley. Actually had Burley leaf not been brought into the manufacture of cigarettes, its production might easily have declined almost in direct proportion to the decline in popularity of chewing tobacco.” \textit{Id.} at 224. An advertisement in 1917 for Lucky Strike in 1917 stated: “We’ve been working for five years to produce a satisfactory cigarette from Burley tobacco.” \textit{WP}, Mar. 6, 1917 (9). In 1920 the chairman of the Burley Tobacco Growers Association stated that the “rise of Burley tobacco in cigarettes has been going on only for a few years.” “Burley Tobacco Growers Urged to Organize,” \textit{Tobacco} 71(2):18-19 at 19:1 (Nov. 11, 1920).
\end{quotation}

\textsuperscript{531}Hartford Herald (KY), Mar. 23, 1898 (2:1) (untitled edit.)


\textsuperscript{533}Report of the Commissioner of Corporations on the Tobacco Industry, Part I:
vulnerability of the state’s agricultural industries was underscored by the fact that Louisville was (together with St. Louis) one of the two leading centers of plug tobacco manufacture,\(^\text{534}\) as early as 1891 the newly formed American Tobacco Company had bought the National Tobacco Works, a leading plug manufacturer in Louisville.\(^\text{535}\)

The threat that ATC’s possible departure posed for the Kentucky economy was exquisitely on display literally at the same time the House voted to ban cigarettes and the following day. On the afternoon of February 24, while the House was debating and voting on H.B. 5, the Tobacco Trust—which, according to the \textit{Courier-Journal}, “is constantly enlarging its mammoth plant at Seventeenth and Broadway, which is already the one of the largest in the country”—(presumably coincidentally) took out building permits for two new warehouses and factories in Louisville, which were to be built “at once.”\(^\text{536}\) The next day ATC’s picking, drying, and steaming warehouses in Louisville were destroyed by fire, throwing 1,400 adult and child workers out of work.\(^\text{537}\) The


\(^{537}\)“Tobacco Fire in Louisville,” \textit{NYT}, Feb. 26, 1898 (3). See also the more detailed account in “The Trust’s Burned Rehandling Plant,” \textit{STJ}, 22(24): n.p. [5:2-3] (Mar. 7, 1898). This trade weekly, edited in Winston, NC, which opposed the Tobacco Trust, found the frequency of fires at ATC plants odd: “This trust has been more unfortunate in this respect than any other combine on earth. ... That there was any crookedness in these [sic] multiplicity of fires is an idea no one will entertain for a moment. Rather it looks as though Fortune frowned upon the unholy combination.” “Many Fires,” \textit{STJ} 22(24): n.p. [1:3] (Mar. 7, 1898). The \textit{Wall Street Journal} published three brief pieces about the fire, the insurance adjustment, and J. B. Duke’s presence in Louisville, but nothing about passage of the bill. “The Tobacco Fire,” \textit{WSJ}, Feb. 26, 1898 (1:2); “Tobacco,” \textit{WSJ}, Feb.
company promised that within several days all these workers would begin working at two of its factories in the city and that, when rebuilt, the warehouse would employ 1,800 workers, while the large addition then being built to one of those factories would increase employment there to between 1,000 and 1,500.\textsuperscript{538} However, the next day rumors began circulating that ATC would move “the immense rehandling plant” to St. Louis. In denying these stories the company emphasized that when the aforementioned rebuilding and addition were completed, “we will give employment to about 4,500 men” in Louisville.\textsuperscript{539} Although these events failed to deter a majority of the Senate a week later from supporting the House bill, perhaps they gave the governor and lieutenant governor pause about the wisdom of encroaching on the Tobacco Trust’s interests.

Finally, the potential for igniting opposition within the state to cigarette prohibition was underlined by the fact that a greater proportion (15.1 percent) of farms in Kentucky derived their principal income from tobacco than in any other state.\textsuperscript{540} Significantly, Virginia and North Carolina, the states producing the bright yellow type of tobacco used in the Tobacco Trust’s cigarettes,\textsuperscript{541} did not pass anti-cigarette legislation.

\textit{But A Waffling Governor Passes the Buck to the Lieutenant Governor to Veto the Bill}

Business resistance to the bill, which, according to the \textit{Courier-Journal}, had “attracted so much attention throughout the state,”\textsuperscript{542} was encapsulated in a letter to Governor Bradley from the Louisville Board of Trade requesting that he veto
it. Written by the Board’s President, lumber merchant Charles Mengel, it presumably provided the basis for the aforementioned claim that the bill was so expansive that it could be interpreted to outlaw possession of any and all tobacco:

This bill is unjust and unreasonable, and must work a serious hardship to the citizens of Kentucky of almost all classes, and must necessarily drive capital from the State. It is unconstitutional for the reason that it deprives citizens of the right to contract for any material which might be converted into cigarettes, whether such material should have other uses or be intended for such specific purpose. It would, in fact, deprive a citizen of his liberty, through liability to arrest and imprisonment for various trivial acts, such, for instance, as having in his possession any material out of which any part of a cigarette could be made.

Visitors or transient travelers within the limits of Kentucky would... be... liable to imprisonment or fine for being found in possession of cigarettes or, indeed, cigarette material of any kind.

As far as the Board of Trade is advised, every fair-minded citizen to whom this bill has been read pronounces it thoroughly iniquitous and calculated to work harm to the citizens of this Commonwealth in ways too various to be mentioned.

Since a U.S. Treasury Department report on internal commerce had noted as early as 1886 that “Louisville is the natural outlet of the greatest and most productive tobacco-growing market in the world, a fact which for many years has been utilized to her commercial advantage,” the Board of Trade’s intense opposition to any state intervention that might disrupt the local industry’s continued growth and profitability was a foregone conclusion.

In the following days the press abounded with speculation as to whether Governor Bradley would sign the bill at all and before he left the state to attend the launching in Virginia of the battleship Kentucky and what the lieutenant governor would do in his stead. Earlier, the Paris Bourbon News had reported that it was believed that he would not veto the bill and would allow it to become law without his signature. But now the Nashville Banner insisted that “the best guessers say that the cigarette bill will not be signed” and repeated the next day that Bradley was “still in the veto business at the same old stand,” adding that two

543 Twelfth Census of the United States, 1900, Schedule No. 1—Population, HeritageQuest.
544 “Cigarette Bill,” C-J, Mar. 20, 1898 (sect. 1, 7:2).
545 Treasury Department, Report on the Internal Commerce of the United States 652 (1886) (by Wm. Switzker).
546 Bourbon News (Paris), Mar. 15, 1898 (4:1) (untitled).
547 “Just From Old Kentucky,” NB, Mar. 21, 1898 (4:6).
unnamed vetoes were being prepared. Others admitted their inability to predict. Two days before his departure Bradley was so inundated with telegrams requesting that he sign or veto this or that bill that his “remarks and his manner,” on receiving, at one time, a “bunch” of nine telegrams urging him to veto the cigarette bill, were, according to the Courier-Journal, “such as to make a friend of the senders of the messages go out and send the following message to headquarters: ‘Don’t let any more telegrams come here. He is mad enough now to resolve his constitutional doubts in favor of the bill.’” The Louisville newspaper matter of factly asserted in a subheadline, “And Cigarette Measure to Be Knocked Out,” and then added in the body of the article: “The Cigarette Bill will also be vetoed.” Whose “headquarters” were involved and why Bradley would have expressly requested legislation prohibiting cigarettes in 1896 and 1898 and then vetoed what he had wished for are questions that the newspaper neither raised nor answered. But it did inadvertently shed light on the decisive influence the governor decided to permit himself to be saturated with during the ten days after adjournment at the end of which the bill would become law without his signature: on his trip to Newport News, Virginia, Bradley “will have a private car attached to the big Louisville Board of Trade special next to the sleeper in which his staff will travel.”

On the eve of his departure Bradley finally revealed that he would not act on the cigarette bill or several other important measures, leaving them for the lieutenant governor to veto or become law without his signature. On March 24—the next to last day before bills would become law without gubernatorial signature—the very morning on which Lieutenant (and acting) Governor William Worthington finally acted, the Courier-Journal reported that the cigarette bill might be allowed to become law without a signature. Instead, however, he issued a lengthy veto message. Worthington, who had fought in, and helped raise a Kentucky company for, the Union army during the Civil War, became the state’s first Republican Lieutenant Governor in 1895. Earlier he had been owner-manager of an iron furnace. A very unusual document in the early history of tobacco regulation, his message is well worth quoting in extenso:

548“Just From Old Kentuck,” NB, Mar. 22, 1898 (2:1).
552“Pardons,” C-J, Mar. 24, 1898 (5:1).
553G. Glenn Clift, Governors of Kentucky 1792-1942, at 223-24 (1942).
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While being in full sympathy and accord with the motives which prompted the Legislature to enact the law for the suppression of a vice which has become alarmingly prevalent in the State. And while I am free to admit the power of the state to impose restraints and burdens upon persons and property in conservation and promotion of the public health, good order and prosperity of the citizens thereof, subject, however, to the restrictions and limitations contained in the state and Federal constitutions I am compelled to refuse my approval of Bill No. 5...for the following reasons:—

1st The act, as I conceive it, is in direct violation of section 1 of the constitution of Kentucky, in this, that it deprives the citizen of his inalienable rights which are higher and above all law. This bill interdicts and makes it unlawful for any person to have on his premises, in his possession or under his control any substance or material out of which any such cigarette could be made. Thus striking a fatal blow at one of the most profitable industries of the state and one that has been coextensive with the state, and one from which the state and citizens have derived more profit than from any other branch of industry pertaining to the industries thereof. Could not the Legislature with as much justice and propriety enact a law prohibiting the breeders of horses in the state from having in their possession anything in the way of the high spirited symmetrical and fleetfooted [sic] thoroughbred, because perchance he might fall into the hands of some turfman and be made to exercise his powers upon the course, simply for the reason that some bigoted individual or class of individuals might urge that it was subversive of the morals of the good people of the state, and thus strike down another of the profitable industries of the state and one that the true Kentuckyan takes more pride in than any other that pertains to this favored land.

The fiction upon which the advocates of this bill urge its approval is that the use of cigarettes is deleterious and destructive of the health of the user, not only physically but mentally. If this is true, and doubtless is, there should be some law to prevent their use. But the question arises is the use of tobacco more unhealthy when smoked through a paper tube than if smoked in the clay, cob or more fashionable meerschaum. The use of several hundred years has demonstrated to the American people that the use of tobacco is not detrimental to health but on the contrary is one of the most harmless luxuries now in use. The evil therefore resulting from the use of cigarettes is not chargeable to the tobacco, the principal ingredient in their make up, but to the adulteration thereof by the admixture therewith of the poisonous and destructive drug which allures the victim on to the destruction of both mind and body; it is also contended by the friends of the bill that the wrappers are medicated or impregnated with certain poisonous drugs, which are deleterious to health, if such be the result, which is admitted, why strike down this great industry in which so many of our citizens find employment, because unprincipled and avaricious individuals who for the sake of gain are catering to their artificially created, pernicious and destructive appetites.

Let a law be enacted making it a felony for any person [sic] persons or corporation to adulterate by the admixture of any poisonous drug or the intermingling therewith [of] any substance, whatever, deleterious or detrimental to the consumer thereof, whether in the form of cigars [sic] cigaretts [sic] smoking or chewing tobacco, and you at once strike at the root of this evil which the community is justly in arms against today and thus save the state one of its most profitable industries and to the citizen his personal liberty, to pursue,
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unvexed by sumptuary and fanatical laws, the calling of his choice and in his opinion best calculated to subserve his personal happiness and material interests and promote his happiness and those associated with him or dependent upon him. Also we deem it a violation of Section 5 of the constitution of the State, the right of acquiring and protecting property; and also in violation of section 2 of the State constitution, which declares that absolute and arbitrary power over the lives [sic] liberty and property of freemen exists nowhere in a Republic, not even in the largest majority. Another and most serious objection to this bill is that it fails and is powerless under the decisions of the Federal Court, that prevent the evils sought to be suppressed by this act: to wit, the sale and use of cigarettes in the Commonwealth as it is violation of Article One Section three of the Constitution of the United States. “The Congress shall have the power to regulate the commerce with foreign Nations and among the several states and with the Indian tribes. See decision in the case of the state of Tennessee 82 Federal reporter page 615, in which case it was decided that citizens of the several states had the right to ship under the provisions of the section above quoted into the several states articles of commerce in unbroken packages and expose the same for sale. See also the decision in case of the State of Iowa vs McGregor 76 Federal Reporter page 956 and various other decisions of the Federal Courts upon this point. This being the case the only effect of the law would be to deprive our own citizens of the right to manufacture the article in question, and deprive them of the profits arising from the manufacture and sale of this one of our most profitable industries, thereby throwing out of employment thousands of our worthy and most valuable citizens.

Under these circumstances and a thorough conviction that the law is unconstitutional and destructive of the best interests and prosperity of the state I decline to append my signature to the bill. 554

Since Worthington’s central concern was manifestly to protect the tobacco industry, he would, presumably, have simply dropped the interstate commerce argument had he faced the veto decision in 1900 after the U.S. Supreme Court had upheld the Tennessee law. 555 More interesting, however, would have been the way in which he would have sought to resolve the conflict between profit and health had more robust scientific arguments been available demonstrating that cigarettes’ peculiar dangers had nothing to do with greed-driven adulteration 556—especially since the accumulation of unprecedentedly

554 Executive Journal of Governor William O. Bradley, Mar. 24, 1898, at 296-99, in Kentucky Department for Libraries & Archives, Public Records Division. The message was published the next day as “Vetoed,” C-J, Mar. 25, 1898 (4:7), but is quoted here according to the handwritten original because the printed version contained several typographical errors.

555 See below ch. 12.

556 To be sure, knowledge of the health impact of inhalation on cigarette smokers was
overwhelming medical evidence of cigarettes’ unique lethality has, more than century later, yet to prompt any legislature to pass such a sales ban.

After Further Legislative Measures Stall, the Initiative Reverts to the Local Level

Worthington’s veto did not end the legislative campaign for a cigarette ban. In his message to the legislature in January 1900, Bradley’s Republican successor, William Taylor (who served only very briefly before the legislature nullified his election, declaring his Democratic opponent governor), proposed much diluted legislation that would apply only to minors:

Your attention is called to the widespread evils resulting from the use of cigarettes and cigarette paper. The medical profession universally denounce this habit, as a menace to the youth of the country. From such habit flows all manner of vices, which too often culminate in physical wreck and mental disorder. A more stringent law preventing the use of these articles by minors is urged.

Nothing came of the governor’s proposal nor did the legislature take any action on Representative Watkins’ reintroduced bill prohibiting the use, manufacture, or sale of cigarettes.

In 1902 two Democratic members of the House of Representatives introduced two anti-cigarette bills, one of which proposed to prohibit their manufacture or sale and the other their use. The former was read a second time and placed in the orders of the day, but the House took no further action on it. The anti-use bill came up for a roll-call vote on whether it should be made the special order of the day two days later, on which its supporters prevailed 48 to 32, but the

\footnotesize{available. See above ch. 2.}

\footnotesize{557 Taylor v. Beckham, 108 Ky 278 (1900).}

\footnotesize{558 Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 43. (1900).}

\footnotesize{559 Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 116 (1900) (H.B. 22).}

\footnotesize{560 Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 75 (1902) (H.B. 108 by Millard North). North had voted against H.B. 5 in 1898.}

\footnotesize{561 Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 208 (1902) (H.B. 284 by Robert Tomlinson).}

\footnotesize{562 Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 294, 299 (1902).}
chamber failed to take any action.563

The more important proceedings in 1902 took place in the Senate where on January 23 Democrat George T. Farris introduced S.B. 140 “to prohibit the use of cigarettes.”564 Farris, who had voted for H.B. 5 in 1898, represented Garrard County, where Carry Nation had been born a few years before Farris, who was a commercial printer.565 After the Committee on Public Health had reported it out with the recommendation that it ought to pass,566 Farris’s motion on March 6 that the Senate take up the bill for consideration passed by a vote of 28 to 6, with all the No votes being cast by members of Farris’s own party, which controlled the chamber 25 to 13. Twelve Republicans voted Yes along with 16 Democrats.567 Sections 1 and 3 of S.B. 140 were identical to sections 1 and 2 of H.B. 5, but it contained three other sections rendering it even more comprehensive and stringent than Watkins’s bill, in particular by prohibiting commercial importation:

Sec. 2. It shall be unlawful for any person, firm or corporation to sell, offer to sell or to bring into the State for the purpose of selling, giving away or otherwise disposing of any cigarette paper, or substitute for the same.

Sec. 4. Be it further enacted, That the judges of the criminal courts, and circuit courts of this State with criminal jurisdiction, shall give this matter in special charge to the grand juries of the county.

Sec. 5. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it.568

No sooner had the bill been read the next day than Farris himself began proposing amendments to weaken his own bill and presumably make it less unpalatable to opponents. First, he proposed striking from section 1 the last

563Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky 652-53 (1902). Twenty-five of the 32 No votes were cast by Democrats, who controlled the House 75 to 25. Ex-lieutenant-governor Worthington, now the minority floor leader, voted for the motion.


568Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 786 (1902).
sentence making it “unlawful for any person to have on his premises, in his possession or under his control any substance or material out of which any part of such cigarette could be made with the knowledge or purpose that at any time such substance or material might become a factor of such cigarette,” which opponents four years earlier had claimed would have destroyed the entire tobacco industry. Having adopted this amendment, the Senate also voted for his proposal to strike section 5, which would have accelerated the law’s effective date.\textsuperscript{569} The chief arguments deployed by those opposed to regulation were the harm that the law would do to the tobacco industry in Kentucky and the ability to prevent boys from smoking cigarettes if the already existing law were enforced.\textsuperscript{570}

Despite these dilutions, Senator James Campbell Cantrill then tried to kill the bill by moving that it be recommitted to the Committee on Agriculture and Manufactures. Cantrill, who had voted against Watkins’ bill in 1898, was a farmer who in 1908 would become president of the Kentucky branch of the American Society for Equity, which conducted an intense campaign to secure higher prices for tobacco farmers from the tobacco companies.\textsuperscript{571} In that year and position he also supported a bill (opposed by the Tobacco Trust) that would have placed the tobacco industry under the police power and imposed a ten-cent per 1000 lb. tax on dealers buying tobacco leaf for manufacturers, whose author defended it as a response to the oppression of grinding monopoly that had reduced producers to “abject misery and want.”\textsuperscript{572} In 1902, however, Cantrill apparently placed a higher value on promoting the interests of the entire tobacco industry than on inflicting a considerable material and even greater symbolic blow on the cigarette monopoly of the oppressor American Tobacco Company. At the very same time Cantrill was also Farris’s main adversary on the Senate

\textsuperscript{569}Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 786-87 (1902) (Mar. 7). The Senate also adopted his proposal to amend the bill’s title to insert “importation” as one of the prohibited acts to reflect the contents of section 2, which Watkins’ bill had lacked.

\textsuperscript{570}“Defeated,” C-J, Mar. 8, 1902 (1:4).


\textsuperscript{572}“Legalizing Kentucky’s Anarchy,” USTJ, vol. 69, May 22, 1908 (3:4).
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Cantrill’s recommittal motion lost 13 to 21, with all 13 Yes votes cast by Democrats. After Cantrill and several other senators had proposed various amendments, “further action thereon was cut off” and resumed the next day, March 8. That morning the Courier-Journal published a lengthy editorial attacking the bill. Just two days earlier it had editorially defended the Tobacco Trust by arguing that with tobacco—“an article of universal consumption and...as much a staple as iron or steel for the whole world is a buyer”—“a natural monopoly of this State...it is idle to preach that a monopoly will force the price down below the cost of production.” In the face of ATC’s growing monopolization of the entire tobacco industry (other than cigars), which had unleashed protests nationwide, the newspaper, welcoming the recent advent of tobacco factories in Louisville, asserted that despite centralization by means of consolidation: “There would always be a great leaf market here and there will always be competition for the crop.” Then on the morning of the final legislative debate the Courier-Journal protested that the pending anti-cigarette bill was “a menace to the tobacco growing interests of Kentucky, the principal tobacco growing State.” The aforementioned decade-old no-sales-to-minors law was “well enough, but for the State to attempt to regulate the tastes and practices of adults in so simple a matter is preposterous and undemocratic. The personal liberty of the citizen guaranteed by the Bill of Rights would be nullified. Such a law has no place in a republic, even if it did not mean a hardship to the tobacco planter.” The editorial then stated that Burley tobacco production was “one of the most profitable industries,” with especially high prices being paid for those types used by cigarette manufacturers, which were growing more and more Burley; increased foreign demand was likely to maintain prices at profitable levels for Kentucky planters. Consequently: “Any blow to this industry would result in heavy losses to the planting interests as well as to the manufacturers.” While admitting that cigarettes were “being used less and less in this country,” the newspaper underscored their popularity in Europe and Japan and warned against “crippl[ing] one of our greatest agricultural industries.”

The Courier-Journal exaggerated both the decline in domestic cigarette consumption (which unbeknownst to contemporaries was about to end after five

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573 The outcome was the same and the voting pattern was similar. “Finish Fight,” C-J, Mar. 5, 1902 (2:3-5); “Decisive,” C-J, Mar. 6, 1902 (1:2).
576 “Menace to a Great Industry,” C-J, Mar 8, 1902 (6:2).
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years) and the role of burley tobacco as an ingredient in cigarettes, which it would not occupy for another decade. However, even if, contrary to the newspaper’s claims, enactment of the anti-cigarette bill would not have directly, immediately, or significantly harmed the tobacco industry in Kentucky—which, just a few weeks earlier, the paper in a full-page article had emphasized was the state’s biggest manufacturing industry according to the census of 1900, though cigarettes did not yet play a major role in tobacco growing, manufacture, or consumption—the editorial nevertheless intuitively grasped the symbolic and ideological importance of such a prohibition.

That day Democrat Charles Carroll, an opponent of the bill, proposed in effect to nullify section 2 by amending it not to apply if there was “no poisonous or deleterious substance in the wrapper or filler; and a certificate from a director or other officer of the agricultural experiment station at Lexington shall authorize the manufacture or sale of the cigar or cigarette, subject to the penalties of this act if there is any deleterious substance or poison in the manufactured article.”

577See above this ch. Until 1913 “cigarettes were made largely of straight bright tobacco or a blend of bright with Turkish. ... In 1913, Camel cigarettes...were the first...to use a heavily flavored...burley as part of its blend.” Elmo Jackson, “The Consumption of Tobacco Products: A Descriptive Economic Analysis: United States, 1900-1940” at 69-71 (Ph.D. diss., Harvard U., 1942). In 1912 it was estimated that only 1.4 percent (3 million of 215 million pounds) of burley tobacco was used for cigarettes; this share rose to 10.0 percent in 1917 and 53.4 percent in 1935, by which time about 30 percent of the tobacco in the new Camel-type cigarette was burley. E. Mathewson, The Export and Manufacturing Tobaccos of the United States, with Brief Reference to the Cigar Types 81 (USDA, Bureau of Plant Industry. Bull. No. 244, 1912); Jackson, “The Consumption of Tobacco Products” tab. 4 at iii, 62. Although it concurred in the policy conclusion, a North Carolina-based trade journal had remarked at the time of the previous legislative debate: “Offering as a reason why the Kentucky legislature ought not to pass the absurd anti-cigarette bill now before that body, the ‘Weed,’ of Louisville, states that ‘since the West has gone into this line of the tobacco business, more Kentucky tobacco is being used in cigarette manufacture than any other kind.’ There we take issue with our much esteemed contemporary. This statement needs revision.” STJ 22(25):n.p. [1:3] (Mar. 14, 1898) (untitled).

578“Fine Showing Made by Kentucky’s Manufacturing and Mechanical Industries,” C-J, Feb. 15, 1902 (4). Tobacco was the biggest industry only in terms of value of products, but not with respect to wages, wage earners, capital, or number of establishments.

579No cigarette factory was established in Kentucky until 1918-19. Annual Report of the Commissioner of Internal Revenue for the Fiscal year Ended June 20, 1919, tab. 11 at 135 (1919) (first listing for tobacco excise purposes).

580Journal of the Regular Session of the Senate of the Commonwealth of Kentucky 832
The Senate then voted 20 to 8 for the amendment, which would have gutted the bill, with 18 of the 20 Yes votes cast by Democrats. The two Republicans may have voted Yes solely in order to be on the prevailing side and thus entitled to move for reconsideration; on that motion Farris and 14 other senators voted to reconsider, thus barely prevailing over Cantrill, Carroll, and 12 other Democrats. 581

There then followed a new round of proposed amendments. Carroll proposed amending his own amendment by adding a phrase that appeared to exclude from the entire bill coverage of any non-deleterious cigarettes or cigars. The Senate adopted both this amendment and another Democrat’s amendment eliminating the option of imprisonment from the penalty section. The Senate also adopted Cantrill’s proposal to strike section 4 and replace it with a ban on selling or giving cigarettes to anyone under 21 years of age or to anyone “with the knowledge that” they were to be sold or given to such child, but rejected (by a tie vote) his other proposed amendment to strike out section 2 altogether. 582 On the deciding vote as to passage of the bill the chamber defeated it by a vote of 18 to 12 with Democrats casting 16 of those No votes, Farris himself among them. 583

With this defeat the statewide legislative anti-cigarette movement in Kentucky appears to have become a spent force. The introduction in 1904 of a lone House bill to prohibit the manufacture and sale of cigarettes prompted no further action; 584 a House bill in 1906, titled merely “An act concerning cigarettes and cigarette materials,” was also unable to make progress; 585 and the House in

581 *Journal of the Regular Session of the Senate of the Commonwealth of Kentucky* 833-37 (1902) (Mar. 8).
582 *Journal of the Regular Session of the Senate of the Commonwealth of Kentucky* 834-36 (1902) (Mar. 8).
583 *Journal of the Regular Session of the Senate of the Commonwealth of Kentucky* 836-37 (1902) (Mar. 8). It is unclear whether Farris voted against the bill because the amendments had rendered it unacceptable to him or simply to be entitled to move for reconsideration; in the event, Cantrill so moved and to table his own motion (i.e., to kill it), in support of which the Senate voted to 17 to 12, 15 of the No votes having been cast by Democrats. *Journal of the Regular Session of the Senate of the Commonwealth of Kentucky* 836-37 (1902). See also “The Bill,” C-J, Mar. 9, 1902 (sect. 4, 1:1).
585 *Journal of the Regular Session of the House of Representatives of the Commonwealth of Kentucky* 234, 647 (1906) (H.B. 258, by Louis Arnett). The House took it up for consideration, but did not debate it.
1908 did take up for consideration “An Act prohibiting the manufacture and sale of cigarettes in the State, and providing punishment therefor,” but took no action on it.\textsuperscript{586} The Kentucky WCTU had not, however, abandoned the struggle, and in 1914 strenuous lobbying by its longtime president, Frances Estill Beauchamp, succeeded in securing passage by large majorities of a much more comprehensive prohibition relating to minors\textsuperscript{587}: not only did it outlaw smoking and possession of cigarettes by anyone under 18, but it also made it a misdemeanor for anyone to smoke cigarettes in any school building or on school grounds while children were lawfully assembled there.\textsuperscript{588} Five years later, Beauchamp, noting that fighting cigarettes through education was a preliminary thereto, announced her intention to present to the legislature in 1920 a bill to prohibit the manufacture and sale of cigarettes.\textsuperscript{589} And in 1921 the Kentucky WCTU declared a campaign to prohibit the manufacture of cigarettes in Kentucky, which it was undertaking “as a preliminary to an appeal” to the legislature in 1922.\textsuperscript{590}

As it had before the state legislature became the central battleground, the anti-cigarette campaign, which appeared to draw its strength from widespread popular sentiment, continued at the local community level after efforts at statewide action had run their course. Emblematic of the opening of a new front was a radical ordinance passed in 1908\textsuperscript{591} by the Board of Council of the small town of Barbourville (population 1,633 in 1910),\textsuperscript{592} which was located outside the state’s
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tobacco growing areas. It provided: “That if any person shall smoke a cigarett or cigarette within the corporate limits of the city of Barbourville after such person shall have had actual notice of the passage of this ordinance, he shall be deemed guilty of a misdemeanor and upon conviction shall be fined not less than one dollar nor more than fifteen dollars, for each offense.” After having been arrested for and convicted of violation of the ordinance in 1909, Henry M. Hershberg was jailed for failing to pay the fine. He then sued the city for $5,000 in damages for unlawful arrest and imprisonment on the grounds that the ordinance was void. The Knox Circuit Court agreed, holding the ordinance void as an “unreasonable invasion of the citizen’s right of personal liberty,” but declined to grant him damages. Arguing in the slippery slope mode, Judge William Lewis opined that if Barbourville had the power to prohibit cigarette smoking within the city limits, then the legislature could not only do the same throughout the whole state, but also prohibit the use of all other kinds of tobacco as well as of liquor. Greasing the slope still further, the judge continued: “May they not go still further and do away with ‘Grandmother’s cob pipe,’ even in the privacy of her own home? [I]f all this can be done by legislative enactment, then may not the same power regulate our eating, especially the quantity [sic] because, I presume it will not be contended that a few puffs at the end of a good cigar would be more detrimental to the health of the individual, or contaminating to the public, than a ‘founder’ on pork chops?” Expressing his persuasion that “the government has no power to regulate what a man may eat, drink or smoke or to...
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prohibit him any liberty, the exercise of which will not directly injure society,”

Judge Lewis concluded by sliding to the bottom of the slope:

If a citizen of the City of Barbourville should, in the privacy of his bed room, at home, and in the night, smoke a cigarette, he would violate the ordinance in question; if he should while sitting on one of the beautiful hill tops (in the corporate limits), overlooking the city of Barbourville and while dreaming of its future greatness, take a few whiffs at the end of a cigaret, he would likewise violate this ordinance, but in the court’s judgment, although opposed to the habit of cigaret smoking, he would be guilty of no act directly injurious to society or the rights of the public.598

Although the Court of Appeals, Kentucky’s highest court, acknowledged that the city council had passed the ordinance as an exercise of the police power based on its having regarded cigaret smoking as “injurious, especially to the young,” it nevertheless affirmed the lower court’s ruling that the ordinance was “not a reasonable ordinance.”599 Where Hershberg had been smoking and whether the city council had actually intended to suppress cigaret use in smokers’ own residences were questions neither posed nor answered by the court, which struck down the ordinance apparently for its spatial overbreadth and failure to explain the discriminatory treatment of one of several smokeable tobacco products:

The ordinance is so broad as to prohibit one from smoking a cigarette in his own home or on any private premises in the city. To prohibit the smoking of cigarettes in the citizen’s own home or on other private premises is an invasion of his right to control his own personal indulgencies. The city council is authorized by statute to enact and enforce all such local, police, sanitary and other regulations as do not conflict with general laws. (Ky. St. Sec. 3637, Sub. 7.) But under this power it may not unreasonably interfere with the right of the citizen to determine for himself such personal matters. If the council may prohibit cigaret smoking in the city, it may prohibit pipe smoking or cigar smoking, or any other use of tobacco. The Legislature did not contemplate conferring such power upon the council. If the ordinance had provided a penalty for smoking cigarettes on the streets

597Hershberg v. City of Barbourville at 13-14 (Knox Cir. Ct. 1909).
598Hershberg v. City of Barbourville at 14 (Knox Cir. Ct. 1909).
599Hershberg v. City of Barbourville, 142 Ky. at 62, 61. The court failed to disclose the source of the statement that the city council viewed cigaret smoking as especially injurious to the young. Nothing in the record revealed such a position. In its brief the city barely argued the issue of the ordinance’s constitutionality, confining itself to the odd claim that “it would be prepostorous [sic] to require or expect the thinking and judgments of a board of unlearned Councilmen to always conform to the judgment and thinking of our learned judges of this court.” Hershberg v. City of Barbourville, Brief of Appellee at 2; Kentucky Dept. of Libraries & Archives.
of the city, a different question would be presented, but whether such an ordinance would be valid is a question not now presented or decided.\footnote{Hershberg v. City of Barbourville, 142 Ky. at 61.}

For the jurisprudential underpinnings of its libertarian decision the Kentucky Court of Appeals relied on its two-year-old decision in a case involving the violation of a 1908 Nicholasville ordinance prohibiting the bringing into town of intoxicating liquor for personal use in excess of one quart. There, citing Blackstone and John Stuart Mill at length, the court had held that:

The history of our state from its beginning shows that there was never even the claim of a right on the part of the Legislature to interfere with the citizen using liquor for his own comfort, provided that in so doing he committed no offense against public decency by being intoxicated. ... Therefore, the question of what a man will drink, or eat, or own, provided the rights of others are not invaded, is one which addresses itself alone to the will of the individual. It is not within the competency of government to invade the privacy of a citizen’s life and to regulate his conduct in matters in which he alone is concerned.... The right to use liquor for one’s own comfort, if the use is without direct injury to the public, is one of the citizen’s natural and inalienable rights, guaranteed to him by the Constitution.... Under our institutions there is no room for that inquisitorial and protective spirit which seeks to regulate the conduct of men in matters in themselves indifferent and to make them conform to a standard not of their own choosing, but the choosing of the lawgiver; that inquisitorial and protective spirit which seeks to prescribe what a man shall eat and wear, or drink or think, thus crushing out individuality and insuring Chinese inertia by the enforcement of the Chinese shoe in the matter of the private conduct of mankind.\footnote{Commonwealth v. Campbell, 133 Ky. 50, 57, 58, 63-64 (1909).}

In spite of this orthodox libertarian framework, the logic of the court’s argument clearly left open the possibility of the constitutionally permissible prohibition of smoking in public places where it injured others and (though perhaps only in a distant era) even in private residences where it injured smokers’ children.

\section*{Alabama: 1896-97}

Yesterday, the house declared by a vote of forty-four majority, that cigarettes shall not be smoked in this state. We have no love for cigarettes. We do not waste our time smoking them. \cite{Daily Register (Mobile), Feb. 16, 1897 (2:1) (untitled edit.)}
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The bill that the Alabama House had passed during the 1892-93 session banning the sale and public smoking of cigarettes was not that state’s last legislative effort in this direction. At the 1896-97 session, when Democrats controlled both houses by large majorities, the Populists, who had reached their high point in Alabama in 1892, still held about one fourth of the seats but following their Bryanesque defeat in the 1896 election, were “reduced to impotence.” Democrat Dr. Mathew Bunyan Cameron, who “worked industriously” on its behalf, introduced the bill in the House “To prevent the sale, giving away, or disposing of cigarettes, cigarette tobacco, or cigarette papers or any substitute for any of them in the State of Alabama,” which was referred to the Public Health Committee, of which Cameron, who had been president of the county health board in Sumter and Greene counties, a county health officer, and member of the state health board, was chairman. Having grown up on his father’s plantation, the 37-year-old Cameron was a prominent physician, who had been president of the Sumter County Medical Association as far back as 1890; by 1903 he was elected president of the Medical Society of the State of

603 See above ch. 4.
605 In the House sat 74 Democrats, 3 Republicans, and 23 Populists, while 22 Democrats, 2 Republicans, and 9 Populists sat in the Senate. Michael Dubin, Party Affiliations in the State Legislature: A Year by Year Summary, 1796-2006, at 17 (2007).
610 Albert Moore, History of Alabama and Her People 2:564 (1927).
612 Albert Moore, History of Alabama and Her People 2:564 (1927).
613 Transactions of the Medical Association of the State of Alabama: Session 1890, at 197 (1890).
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Alabama, whose historian he had become in 1899. His political stance can be gauged by the fact that at the 1892 Democratic convention of Sumter County (four-fifths of whose population was black) Cameron offered a resolution to restrict future primaries to white Democrats; though chosen as one of gubernatorial candidate Reuben Kolb’s four anti-Bourbon county delegates to the state Democratic convention, he was the only one of the four who refused to bolt that Bourbon convention for the Kolb reform convention. The chief antagonist of H. 489 during the floor debate on February 15, 1897, was Representative William R. Waller, a planter of “limited education,” who had been sheriff of Montgomery County from 1892 to 1896 (and returned to that office in 1900). On third reading Cameron sought support for his bill by focusing on cigarettes’ impact not on children, but adults. He alluded to several cases in which “cigarettes had been the cause of the physical wreck of the victims of the pernicious habit” and cited a letter written by the city editor of a Mobile newspaper describing his personal experience with cigarettes during the many years he was at their “mercy.” The strength of the support for the bill manifested itself in the defeats inflicted on the numerous amendments offered to exempt various counties from the bill; similarly, motions to table to indefinitely postpone were stymied by rulings from the chair: “The members on the floor applauded and the ladies in the galleries joined them. It was evident that the gallery and lobby wanted cigarettes relegated to the rear.” H. 489 passed by the large majority of 62 to 16, which, while not a party-line vote, nevertheless concealed certain prominent differences between the major parties: whereas all 19 voting Populists supported the bill and none opposed it, Democrats, 40 of whom voted Yea, cast 15 of the 16 Nays. To be sure, the fact that Waller’s motion to reconsider that

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614 JAMA 40(21):1447 (May 23, 1903).
615 Transactions of the Medical Association of the State of Alabama: Session 1899, at 228 (1899).
616 “Victory!” SCS, May 5, 1892 (2:1). See also above ch. 4.
617 “The County Convention,” LJ, May 6, 1892 (2:1-2); “The State Convention,” LJ, June 10, 1892 (4:2). Robert H. Seymour, the father of William H. Seymour, the sponsor of the anti-cigarette bill of the 1892-93 session, was among the three delegates who did bolt. See above ch. 4.
618 1900 and 1910 Census of Population (HeritageQuest); Notable Men of Alabama: Personal and Genealogical [1]:50-51 (Joel DuBose ed. 1904) (quote).
621 Party affiliation is taken from Acts of the General Assembly of Alabama, Passed at
vote went over until the following day meant that, unless Senate action interfered, the bill would be killed since it had to be read three times in each house before passage and only two more days remained in the session.

In the event, although the Senate Public Health Committee reported the bill favorably, the Senate, on the motion of Senate President Pro-Tem Francis L. Pettus (a very influential former and future House Speaker from the heavily black-majority, planter-dominated Dallas County who was a pioneer in black disfranchisement), recommitted it to the Judiciary Committee, thus terminating that session’s initiative. In a much more optimistic alternative account, the New Orleans Daily Picayune reported that the anti-cigarette bill had been “smothered to death [in a moment of abstraction]” when an unidentified opponent moved to refer the bill, calling it only by its number, to the Judiciary Committee to examine its constitutionality, and the senators, “worn out and weary,” so voted. Because the chamber did not meet the next day and the bill therefore could not be reported back until the day after, which was the last day of the session, it would be unable to progress any further. This reversal left Dr. Cameron “astonished” especially because H. 489 would allegedly have passed the Senate with but three Nays.

Despite an Alabama press claim in 1901 that “we have come to the time...
when legislatures will not pass a law affecting so great an interest” as
cigarettes,626 two years later the House once again, this time by a vote of 61 to 35,
passed a universal cigarette sales ban bill,627 which left “the smoker to the sole
device of having them shipped from abroad. After he gets them into Alabama
from another State he must smoke them himself. He cannot give them away.”
Although the bill was “strongly opposed...the House wanted it,” and a strong
efforts were made to “rush it through the Senate,”628 where, however, it once
again died in the Judiciary Committee.629

South Carolina 1896 and 1897:
House Passage of a 25-Cent per Package Prohibitory Privilege Tax

Dr. Speer, [Representative] of Abbeville, said that it was a question whether the
people would rather protect their sons or the tobacco growers. The bill should pass.630

The South Carolina House, whose session did not open until the end of
November 1893, brought that remarkable year’s anti-cigarette legislative activity

626 “No Cigarettes,” Pratt City Herald, Feb. 23, 1901 (2:1) (edit.). Ironically, the
editorial concluded that “[t]he corporation will drive out the cigarette” in the sense that
“railroads and express companies and the greater business firms will not employ cigarette
smokers” because they were “not capable of hard work that requires accuracy....”

627 Journal of the House of Representatives of the State of Alabama: Session of 1903,
at 117, 182, 276 (Jan. 21, 24, 30) (1903) (H. 102, by William Edgar Byars). In this first
legislature elected after the 1901 disfranchising constitutional convention Democrats held
103 of 105 seats. By severely reducing the number of poor white voters and virtually
eliminating blacks, the convention prevented any resurgence of populism. William
For detailed accounts of the convention, see Malcolm McMillan, Constitutional
Development in Alabama, 1798-1901: A Study in Politics, the Negro, and Sectionalism
233-359 (1978 [1955]); Sheldon Hackney, Populism to Progressivism in Alabama 180-

628 “The Cigarette Business Knocked Out in Alabama,” Landmark (Statesville, NC),
Feb. 6, 1903 (1:4).

629 The first and last Senate action on the bill was referral to the Judiciary Committee.
Journal of the Senate of the State of Alabama 193 (Jan. 31) (1903). A Senate bill with the
same title died after being favorably reported by the Public Health Committee. Id. at 485,
856 (Feb. 20, Sept. 5) (S. 271, by Walter Acree).

630 “The General Assembly,” WNC, Feb. 17, 1897 (10:1-4 at 2) (referring to the bill,
discussed below, to impose a 25-cent tax on a package of cigarettes).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

to a close, when the bill prohibiting the manufacture or sale of cigarettes that Zerah Hammett, a farmer from the non-cigarette tobacco growing northwestern county of Greenville, had introduced was, after the Judiciary Committee had submitted an unfavorable report on it, killed by the chamber’s agreeing to a motion by Charleston lawyer George Von Kolnitz to strike out its enacting words.

Although South Carolina never enacted a general anti-cigarette law, its House of Representatives on February 24, 1896, passed a bill to require those engaged in the manufacture and sale of cigarettes to obtain a special permit and pay a tax of 25 cents for each box of ten cigarettes. The bill’s author, farmer Lawrence Summerfield Connor—who was championing repeal of the privilege tax on fertilizer and tried to show how far the privilege or special tax could be

631 Journal of the House of Representatives of the State of South Carolina, Being the Regular Session Commencing November 28, 1893, at 549 (1893). Hammett (1842-1926) was superintendent of several Baptist Sunday schools. Jean Flynn, History of the First Baptist Church of Taylor’s South Carolina 62, 65 (1964).

632 Journal of the House of Representatives of the State of South Carolina, Being the Regular Session Commencing November 28, 1893, at 64, 122, 205 (Nov. 29, Dec. 4 and 8) (1893) (No. 86). See also “After Its Charter,” AC, Nov. 30, 1893 (1:3). The cigarette bill was the sole measure introduced by Hammett, who the same day also presented a petition to repeal the act regulating the hours of labor of factory operatives. Journal of the House of Representatives of the State of South Carolina, Being the Regular Session Commencing November 28, 1893, at 57 (Nov. 29) (1893). That act, which the legislature had passed in 1892, covered only the cotton and woolen industry (and excluded, inter alia, engineers, mechanics, and the “clerical force”) and permitted very long daily and weekly hours, which could be extended for “making up lost time.” South Carolina Code, Criminal Statutes, § 268 (1893). Though a Democrat who had always voted for Democrats, in 1896 von Kolnitz spoke to the Harlem Republican Club in New York because he was “willing to receive political death advocating Mr. McKinley’s election,” which was “absolutely essential to the prosperity of the country.” “Open-Air Rally in Harlem,” NYT, Oct. 4, 1896 (2:6).

633 In 1889 the legislature had enacted a law prohibiting the sale of cigarettes, tobacco, or cigarette paper to minors under the age of 18, subject to a penalty of $25 to $100, or imprisonment of two months to one year, or both. 1889 South Carolina Acts No. 196, at 321.

634 Journal of the House of Representatives of the General Assembly of the State of South Carolina 269, 592, 599 (Jan. 31, Feb. 21 and 24) (1896) (H.B. 303 by Lawrence Summerfield Connor); “Rethreshing Old Straw,” WNC, Feb. 26, 1896 (5:1-3 at 2) (bill text). The bill initially applied also to cigars and tobacco, but the House agreed to the introducer’s own motion to amend by striking those words. Id. at 592.

635 On Connor, see “Lives of Our Legislators, WNC, Jan. 20, 1897 (11).
pushed by introducing a bill that imposed one, inter alia, on all books, furniture, and office supplies used by person engaged in literary or professional pursuits, but that was defeated by a vote of 73 to 0—declared on the House floor that: he was targeting only cigarettes; the House Medical Affairs Committee favored it; the existing (no-sales-to-minors) law was inoperative; “[e]very doctor favored everything possible to stamp out the cigarette evil”; and the Northwest was already taking such action. Despite being “altogether a surprise,” No. 303 “met with no opposition....” In contrast, however: “The cigarette consumers are already calculating how much postage it will cost them to get a week’s supply of cigarettes from some neighboring city. It will certainly be cheaper to do this than to buy cigarettes with a 25-cent tax tag on them.” No. 303 may have passed the House “with such a whirl” as to leave Connor satisfied that it would become law but two weeks later the Senate rejected the House bill.

The following year a bill was introduced in the House to prohibit the manufacture and sale of cigarettes, but after it had received an unfavorable committee report, its own introducer, later district judge George W. Gage, moved to substitute a regulatory tax bill for it and then tabled it. In introducing a prohibitory bill Gage had been “actuated by the views of the best men in his community,” who “asked...to be protected from this cigarette evil.” No. 271, introduced by York County farmer Samuel Epps, who declared that he had a petition requesting the introduction of such a bill and that “[a]ll he wanted was a law to protect the boys of the State,” imposed a 25-cent privilege tax on each...
box of cigarettes—which was not permitted to contain more than five cigarettes—sold.\footnote{According to the full text of the bill as published in a newspaper, violations of the law were subject to a fine of between $50 and $100 or imprisonment at hard labor for between 20 and 30 days. It is not clear whether it was a typo that according to this version the tax was 20 cents. “The General Assembly,” \textit{WNC}, Feb. 3, 1897 (5:1-4 at 3).}

Epps was actuated by the belief that “it was time to put a stop to the injury that was being done to the youth of the State by the sale of cigarettes.”\footnote{“The General Assembly,” \textit{Journal and Review} (Aiken), Feb. 17, 1897 (1:2).} After the Committee on Medical Affairs had submitted an unfavorable report on the bill,\footnote{Journal of the House of Representatives of the General Assembly of the State of South Carolina 342-43 (Feb. 6) (1897).} on February 9 the House “struggled with” the magnitude and projected impact of the tax. Following proposals of a 10-cent tax for a package and three for a quarter, Dr. John Smith, characterizing the 25-cent tax as prohibitory, argued that unless it was so intended, the bill should be killed. Charleston lawyer Huger Sinkler insisted that the proceedings should be halted because the bill was “plainly unconstitutional,” adducing as proof “the Federal decision on the Iowa case, declaring a cigarette law unconstitutional.” A more discerning lawyer, Cornelius Winkler, pointed out Sinkler’s illogic since the Iowa law prohibited the manufacture and sale of cigarettes, whereas Epps’s bill did not prohibit their sale, but permitted it with a tax. Winkler’s argument harmonized with his policy preference, “as he knew of no more damnable habit than that of smoking cigarettes.”\footnote{“Brilliant Young Man Dead,” \textit{Times} (Richmond, VA), May 23, 1900 (2:4).} Moreover: If the bill “injured the tobacco industry, let the tobacco industry go rather than ruin the boys of the State.”\footnote{“The General Assembly,” \textit{WNC}, Feb. 17, 1897 (10:1-5 at 2).} Debate on the bill that day concluded with a speech by yet another lawyer, Henry Cowper Patton of Columbia, who was “regarded as the most brilliant young man in South Carolina politics.”\footnote{“The General Assembly,” \textit{Journal and Review} (Aiken), Feb. 17, 1897 (1:2).} (Unclear is whether his brilliance was attributed to his proposal two years earlier at the state constitutional convention to radicalize disfranchisement of blacks by grandfathering in anyone who had served in the Confederate military or was a lineal descendant of such a person if alive at the time of the convention; this very first southern grandfather clause was a wee bit ahead of its time, being defeated by an overwhelming vote of 20 to 117 by the other white supremacists, who rejected it as clearly subversive of the Fifteenth Amendment since blacks could not be enlisted or drafted into that military.)\footnote{Journal of the Constitutional Convention of the State of South Carolina 42, 429-30 (1895); Michael Perman, \textit{Struggle for Mastery: Disfranchisement in the South, 1888-1908}, 448} The 33-year-old Patton
declared that “he had been using cigarettes and tobacco for twenty years, and he thought he was as good a specimen of a man, physically, if not mentally, as those who were favoring the bill.” Whether he had any death-bed second thoughts about this invidious comparison three years later his obituaries did not reveal, but on the House floor he rebuked his colleagues for desiring to “correct the foibles of others” instead of looking at their own: “As he smoked everything ever yet known and occasionally chewed, he could speak out,” but he was amused that those who “munched their tobacco like goats find so much evil in cigarette smoking.... Personally he never saw any evil or horror in the smoking of cigarettes, certainly no more than so than in the use of other forms of tobacco.” In any event, he urged that “a mother could do more with a shingle than all the statutes to break boys from smoking cigarettes.” Perhaps this legislative speech did not belong to those that an obituary lauded as “models of persuasive argument, logical, dexterous, conciliatory:” the next day the House passed the bill.

In the brief interim before the Senate took up the House bill on February 16, South Carolina tobacco farmers intervened in the legislative process by protesting against the proposed measure. What distinguished the public debate over anti-cigarette legislation in South Carolina from its counterparts in the larger tobacco-growing states of North Carolina and Kentucky in 1897 and 1898 was the transparency of the opposition by the cigarette-tobacco growing industry. To be sure, the scale of tobacco farming in South Carolina was dwarfed by that in the two leading states. As late as 1896, the U.S. Department of Agriculture’s Yearbook did not even list South Carolina’s tobacco production separately together with that of the 17 largest producing states. But South Carolina’s tobacco industry was expanding: its rank, according to acreage, rose from 25th at the 1880 census to 21st in 1890 and ninth in 1900. Yet even by that last...
census, its output of just under 20 million pounds was only about 6 percent of Kentucky’s.\textsuperscript{658}

Unlike Kentucky, however, but like North Carolina (and Virginia), South Carolina specialized in tobacco for cigarettes. On February 12, two days after the House had passed the proposed measure to impose a 25-cent tax, the Timmonsville tobacco growers, through their board of trade, passed a resolution focused on this very issue:

Whereas, it has come to our knowledge that a certain bill proposing to lay a prohibitory tax on cigarettes is pending in the General Assembly of South Carolina, having already passed the lower branch; and whereas, the passage of the said bill would work great and irreparable injury to our tobacco growers by forcing from our State and markets all buyers for cigarette manufacturers; and whereas at least one-half of the crop of tobacco raised in the State is cigarette tobacco. Therefore, be it resolved:

2d. That we earnestly entreat the honorable Senators to save our State this growing and profitable industry, which the pending bill would kill.

4th. That if the said bill should become a law the reduction in consumption of cigarettes would be very slight as, under recent Supreme Court decisions, the consumers could import, by mail or express, cigarettes in any quantity, and the only tangible injury would be to injure the sale of South Carolina tobacco and entail severe loss upon the planters and citizens, who have invested hundreds of thousands of dollars in leaf factories, ware houses, pack houses, barns, etc.\textsuperscript{659}

Against this background it was hardly surprising that the bill was a “debate provoker”\textsuperscript{660} in the Senate, where Altamont Moses, corporate secretary of the Sumter Cotton Mills,\textsuperscript{661} moved to kill it (that is, strike out the enacting clause) on the grounds that it would be “another dead letter on the statute books.”\textsuperscript{662} In the ensuing debate on this motion—in which Connor, now a senator, supported the

\textsuperscript{658}U.S. Census Office, \textit{Census Reports}, Vol. 6: \textit{Twelfth Census of the United States, Taken in the Year 1900: Agriculture: Part II: Crops and Irrigation}, tab. 1 at 526 (1902).

\textsuperscript{659}“Friends of Cigarette Fiends,” \textit{WNC}, Feb. 17, 1897 (3:5).

\textsuperscript{660}“The Work of the Senate,” \textit{WNC}, Feb. 24, 1897 (13:4-6 at 5).

\textsuperscript{661}Census of Population 1900 (HeritageQuest); \textit{History of South Carolina 4:45-46} (Yates Snowden ed. 1920); Barrett Elzas, \textit{The Jews of South Carolina: From the Earliest Times to the Present} 252-53 (1905); \textit{Biographical Directory of the Senate of the State of South Carolina, 1776-1964}, at 278 (Emily Reynolds and Joan Faunt comp. 1964).

\textsuperscript{662}“The Work of the Senate,” \textit{WNC}, Feb. 24, 1897 (13:4-6 at 5).
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bill—George Mower, a lawyer\textsuperscript{663} who would soon vote against the bill, presented a letter from The New York Society for the Prevention of the Use of Tobacco Among the Youth, which stated that “the cigarette injury would only be checked by enacted stringent laws.” Senator William Love, a farmer from the same county (York) that Epps represented, thought the bill was “necessary to check a growing evil.”\textsuperscript{664} The aforementioned tobacco growers of Timmonsville were confronted directly by their Florence County senator, J. E. Pettigrew, a farmer who had been “an enthusiastic Granger, then an active [Farmers’] Allianceman,” to the extent that he became a statewide lecturer and interstate organizer. Because he was “so intensely Democratic in his nature,” the Charleston News and Courier underscored in its biographical sketch, alluding to the inner-Democratic Party split between Benjamin Tillman and the Conservatives, that he “easily fell into the Reform Movement, but tenacious as he is of the rights of the people, he regards as of paramount importance the unity of the white people of his state.”\textsuperscript{665} Even though he represented a “a cigarette tobacco constituency,” Pettigrew “took a bold and conscientious stand upon the bill, which he supported vigorously despite the fact that it may injure him at home.” Strongly opposed to the bill was Stanwix Greenville Mayfield, a planter-railroad lawyer, who boasted that: “I have never used alcoholic liquors or tobacco. I believe these two cause more misery than all other evils which beset mankind.”\textsuperscript{666} (The next year Mayfield

\textsuperscript{663}Mower was also a cotton mill director and had been a delegate to the state constitutional convention in 1895.  \textit{Biographical Directory of the Senate of the State of South Carolina, 1776-1964}, at 279 (Emily Reynolds and Joan Faunt comp. 1964).

\textsuperscript{664}“The Work of the Senate,” \textit{WNC}, Feb. 24, 1897 (13:4-6 at 5).

\textsuperscript{665}“Lives of Our Legislators,” \textit{WNC}, Feb. 3, 1897 (9:1-5 at 2).  Although the Tillmanite split “involved no fundamental matters of political principle,” Tillman “rekindled opposition to the Democrats. Conservatives revolted against his rhetoric, less wealthy whites against the timidity and irrelevance of his economic programs,...and Negroes against his virulent racism.”  J. Morgan Kousser, \textit{The Shaping of Southern Politics: Suffrage Restriction and the Establishment of the One-Party South, 1880-1910}, at 145-46 (1975 [1974]).  As a result of the 1882 disfranchising law and the 1895 constitutional convention, the number of black state legislators—in a 60-percent black-majority state—plummeted from their Reconstruction highs: the last black senator was elected in 1886, while the elections of 1892, 1894, and 1896 produced the last black representatives (three, two, and one, respectively). \textit{Id. at} 84-91, 145-52; George Tindall, “The Campaign for the Disfranchisement of Negroes in South Carolina,” \textit{Journal of Southern History} 15(2):212-34 at 216 (May 1949).  For a biographical sketch of the last black Republican in the General Assembly (Robert Anderson), see “Lives of Our Legislators,” \textit{WNC}, Jan. 20, 1897 (12:1-7 at 6-7).

\textsuperscript{666}J. Hemphill, \textit{Men of Mark in South Carolina: Ideals of American Life: A Collection

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offered an amendment to the Senate rules to prohibit smoking in the Senate that was adopted.)

His animus was directed at “destroying a growing industry” by means of a dead-letter law. In response, Edgar Archer, an “ardent advocate of the temperance cause” and one-time Methodist Episcopal circuit preacher, argued that “the effort was to place a tax on cigarettes and not to stop the sale.” To be sure, he added: “If the tobacco industry depended upon the cigarette industry it was not ‘worth a pin.’” Ultimately, however, the Senate voted 25 to 8 in favor of Moses’s motion, thus rejecting the bill.

The editor of the newspaper that riveted editorial attention on this debate, the Charleston News and Courier, was himself conflicted, having changed his view of the tax in accordance with proposed changes in its size. At 25 cents the paper deemed the tax “useless” because it would “fail either to prevent the sale of cigarettes, or to produce any revenue from their sale, as it would certainly serve only to throw the sale of the goods into unscrupulous hands and encourage importations from neighboring States.” However, at a “moderate” five cents these objections seemed less weighty to him. But once “the tobacco interests” voiced their opposition, the newspaper bluntly admitted being “at some loss” as to what it should think: “On the one hand, we have the earnest appeal of Mr. Waddill [a reader], who represents every home and household in the State, for the
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protection of the boys and youths of the State from the free temptation and indulgence in a vicious and hurtful practice; on the other hand is the equally urgent appeal of the representatives of the new and growing and important industry of tobacco raising, to protect that industry from heavy loss and injury, if not ruin.\footnote{672}

Although the editor was glad that the decision was for the legislature and not him to make, he posed a vitally important question to the tobacco growers that at the time was little discussed in tobacco-growing states considering cigarette regulation:

Why should a moderate tax, of...5 cents per package, on the sale of cigarettes “force” from the State and its markets all “buyers for cigarette manufacturers?” \footnote{673} It should not be necessary for the boys of the State to smoke cigarettes in order to provide a market for the sale of the cigarette tobacco grown in the State. The country and the world affords \footnote{sic} “a market” for the sale of such tobacco.... Are we to understand, as has been asserted, that if the State of South Carolina imposes a small tax on the sale of cigarettes, the “trust” or “someone,” which controls the manufacture and sale of cigarettes, will withdraw its buyers of cigarette tobacco from our market as a coercive or punitive measure of retaliation for such legislation? And if not, why should the tobacco buyers desert this market? It appears to us that...the representatives of the tobacco interest should be invited to explain, definitely and clearly, why the imposition of the tax would drive out the buyers of tobacco and close our markets to them?\footnote{673}

Having articulated the politically explosive question, the editor proceeded to pose what he deemed “really the radical question before the Legislature”: “Is it to raise more revenue for the State? Or is it to restrict the sale of cigarettes to anybody and everybody? Or is it simply to restrict their sales to boys and young men, who are most injured in body and mind by indulgence in cigarette smoking?” The editor, assuming that there was no intention to restrict smoking by adult men and that there were other ways of raising revenue, counseled that the bill should be so structured as to “make it unprofitable for tobacconists to sell tobacco to minors, and for minors to smoke tobacco in public.”\footnote{674} South Carolina failed to achieve either.\footnote{675}

\footnotetext[672]{“The Anti-Cigarette Bill,” \textit{WNC}, Feb. 17, 1897 (4:2-3 at 2).}
\footnotetext[673]{The Anti-Cigarette Bill,” \textit{WNC}, Feb. 17, 1897 (4:2-3 at 3).}
\footnotetext[674]{The Anti-Cigarette Bill,” \textit{WNC} (Charleston), Feb. 17, 1897 (4:2-3 at 3).}
\footnotetext[675]{In 1912 a bill to prohibit the manufacture and sale of cigarettes was progressing through the Senate when its introducer had it tabled because the chamber had voted 18 to 17 to exempt a number of counties from it. \textit{Journal of the Senate of the State of South Carolina} 256, 292-93, 379, 412, 434-45 (Jan. 18 and 23, Feb. 1) (S. 259 by Thomas}
Pennsylvania: 1897

The Pennsylvania legislature dealt with no radical anti-cigarette bill during the 1895 session, but in 1897, despite Representative John Fow’s absence as a result of his defeat by a Republican barber, Republican Representative Philip Reinhard took up the cause by introducing H.B. No. 17, which simply made it unlawful for anyone to “manufacture and sell any paper wrapper cigarettes or cigarette paper” and imposed a maximum $500 fine and/or maximum 12-month imprisonment. It was, together with a fellow Republican’s bill to prevent minors from obtaining intoxicating liquors, referred to the Law and Order Committee.

The 67-year-old Reinhard, who had been in the printing business and a newspaper editor before moving to Indiana where he read law, was a division chief in the Interior Department from 1861 to 1876, and then returned to Pennsylvania to practice law.

The Republican Lebanon Daily News, which was published in Reinhard’s district, may have eventually come around to support his bill on the grounds that “[t]he way to effectually keep boys from buying cigarettes is to prevent their manufacture and sale,” but the day after the bill’s introduction, the independent Republican Philadelphia Inquirer classified H.B. No. 17 under the rubric, “crank bills,” the “usual number” of which, it predicted, would make their appearance at the session. Unencumbered by memory, it credited Reinhard’s bill with being “a step in advance of the act presented by John Fow,” which had “merely prohibited the sale of cigarettes to minors.”

Rainsford) (1912). On the passage in 1920 by the South Carolina Senate of a bill that would have made illegal smoking tobacco during meal hours in public eating places, see below ch. 17.


677 Smull's Legislative Hand Book and Manual of the State of Pennsylvania: 1897, at 661, 1043. On Fow’s bills that passed the House in 1891 and 1893, see above chs. 3-4.

678 Legislature of Pennsylvania, File of the House of Representatives, No. 17, Session of 1897, Mr. Reinhard, in Place, Jan. 25, 1897 (copy provided by the State Library of Pennsylvania); Journal of the House of Representatives of the Commonwealth of Pennsylvania 411 (1897) (H.B. No. 17 by Reinhard).


680 Lebanon Daily News, Apr. 22, 1897 (2:2) (untitled edit.).
Reinhard’s measure was keeping included Republican Augustus Seyfert’s bill to make it a misdemeanor to engage or participate in a football game. He, the paper recalled, had “made himself famous a few years ago by presenting a bill which was to prevent the wearing of tights upon the stage. In the present state of the drama this would have ruled three-fourths of the theatrical companies out of existence. His anti-football bill...would close one-half the colleges of the country. There was a titter of merriment when he presented his bill in the House and prospects of its passage are very poor, indeed.” Seyfert, who for two decades had been a public school teacher and administrator, was apparently not such an extreme crank that the McKinley administration decided that it would be undiplomatic to appoint him U.S. consul in Canada and Mexico.

The Inquirer had omitted to lambaste the genre that in several states during the 1890s enjoyed the highest profile as a “crank” bill—H.B. No. 18, “prohibiting the wearing of hats, bonnets or other coverings for the head which will obstruct the view of any public performance or entertainment to which an admission fee is charged” and imposing on owners and managers of theaters, opera houses, music halls, etc., the duty to “compel” anyone wearing such a hat “to remove the same, and in case of a refusal by such person...to eject such person from the building”—which was proceeding in tandem with H.B. No. 17. On second reading a Republican opponent who classed it with the anti-cigarette and anti-football measures as crank bills characterized it as “one of the most ridiculous bills...ever...presented to a legislative body.” He proffered his experience-based opinion that a man sitting behind a lady wearing a hat who was unable to turn his head to the left or right to get a full view of the performance “was too small to be called a man.”

Ten days after its introduction the Law and Order Committee reported

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681 “An Extra Session May Be Called,” PI, Jan. 26, 1897 (5:5). On Fow’s anti-smoking bill, see above ch. 3.


684 Legislative Record 220 (Feb. 17, 1897). Section 2 of H.B. No. 18 also made it owners’ duty to provide a toilet room to which women could retire to remove their hats and in which the hats could be safely kept. The bill received a simple majority of 79 to 71, but fell considerably short of a constitutional majority of all 204 elected members and was thus defeated. Journal of the House of Representatives of the Commonwealth of Pennsylvania 561-62 (Feb. 23) (1897).
Reinhard’s bill as committed\(^{685}\) and a few days later the House agreed to it on first reading.\(^{686}\) On second reading on February 17, Reinhard finally moved to correct the drafting error that would have rendered his measure a practical nullity because the bill literally applied only to those who both manufactured and sold cigarettes. After the chamber had agreed to substituting “or” for “and,” Seyfert was unable to secure a majority for expanding the prohibition to the frontier crossing which had given Fow himself cold feet six years earlier—namely, smoking cigarettes. The bill nevertheless passed its second reading\(^{687}\) and a week later the House passed H.B. 17 by a massive majority of 128 to 11, with 22 of 25 voting Democrats casting Yeas.\(^{688}\) The subhead of the legislative report in that evening’s *Harrisburg Telegraph* (“Cigarettes Must Go”\(^{689}\)) turned out to be premature: despite the overwhelming House support, the Senate, once again, procedurally killed the bill before it even reached the floor.\(^{690}\)

The Pennsylvania legislature closed out the nineteenth century without passing any other radical anti-cigarette measure and ultimately never joined other

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\(^{685}\) *Journal of the House of Representatives of the Commonwealth of Pennsylvania* 463 (Feb. 2) (1897); *Legislative Record* 150 (Feb. 2, 1893).

\(^{686}\) *Journal of the House of Representatives of the Commonwealth of Pennsylvania* 486 (Feb. 8) (1897); *Legislative Record* 176 (Feb. 8, 1893).

\(^{687}\) *Journal of the House of Representatives of the Commonwealth of Pennsylvania* 515-16 (Feb. 17) (1897); *Legislative Record* 219-20 (Feb. 17, 1893). On Fow’s anti-smoking bill, see above ch. 3.

\(^{688}\) *Journal of the House of Representatives of the Commonwealth of Pennsylvania* 560-61 (Feb. 23) (1897); *Legislative Record* 253-54 (Feb. 23, 1893).

\(^{689}\) “High Hats May Be Worn,” *HT*, Feb. 23, 1897 (1:4).

\(^{690}\) After the Health and Sanitation Committee had reported the (recommitted) bill with a negative recommendation, an unsuccessful attempt was made to adopt a resolution to place it on the Calendar, but it lost 18 to 16, only one Democrat voting for it, and, the press noted, “the bill will not be heard from again this session.” *Journal of the Senate of the Commonwealth of Pennsylvania* 659, 796, 825, 993, 1012 (Feb. 25, Mar. 11, 16, 23, 25) (1897); “Our Legislators,” *HT*, Mar. 25, 1897 (1:6) (quote). A negatived bill required a majority of all elected senators (i.e., 26 votes) to be placed on the calendar. Rules of the Senate of Pennsylvania XLIV, in *Smull’s Legislative Hand Book and Manual of the State of Pennsylvania: 1897*, at 915. Republican Senator William Flinn, a British-born Pittsburgh general contractor, supported the resolution on the grounds that the bill was important: “It had passed one branch or the other ever since he had been a member of the Senate [1891] but for some reason had failed to become law.” “The Legislature,” *Gettysburg Compiler*, Mar. 30, 1897 (2:2). See also “Work in Both Branches,” *PI*, Mar. 26, 1897 (5:5). On Flinn’s career, see *Smull’s Legislative Hand Book and Manual of the State of Pennsylvania: 1897*, at 1035.
states in enacting a statewide ban in the early twentieth century.

Maine: 1897

It had been clearly demonstrated that there was not a particle of good arising from the use of cigarettes, while on the other hand they were exceedingly detrimental to health in a great many ways.\(^{693}\)

By the end of the nineteenth century “Maine was a one-party, Republican state”\(^{692}\); not a single Democrat (or third-party member) held a seat in the 31-member state senate in 1895 and 1897, while Republicans occupied 146 and 145 of the 151 House seats, respectively.\(^{693}\) By building liquor prohibition—Maine had been the first state to enact rigorous general liquor prohibition in the 1850s\(^{694}\)—into its party platform, the Republican Party reinforced its position as the representative of the state’s “moralistic political culture.”\(^{695}\) This constellation, together with the presence of a strong and active state WCTU—whose president from 1878 until her death in 1914, Lillian Stevens, was also president of the national organization from 1898 until 1914\(^{696}\)—furnished Maine with favorable preconditions for enactment of a universal sales ban, which

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\(^{694}\) The Cyclopaedia of Temperance and Prohibition 411-12 (1891).


\(^{696}\) Maine: A History, [vol. 4:] Biographical 215-17 (1919). To be sure, Stevens never adopted the anti-capitalist politics that her predecessor as national president, Frances Willard, had developed over time. In her 1895 presidential address in Maine, for example, under the rubric “Capital and Labor,” after observing that the fact that a sweated needlewoman barely earned enough to feed and clothe her children while a man in the same city spent $7,000 to provide dinner to his friends revealed “an unfair adjustment of capital and labor,” she reiterated that turning the two billion dollars spent annually on liquor “into right channels...would do more toward the right settlement of the vexed question than all the...strikes which have been or ever will be.” Twenty-First Annual Report of the Woman’s Christian Temperance Union, of the State of Maine, for the Year Ending September, 1895, at 44, 45 (1895).
were, however, diminished by the Republicans’ aligning their interests with those of resource extracting corporations. In the event, such a law never came into being: in Maine, as in some other states, the best that the anti-cigarette movement was able to achieve was Senate dilution of a House-passed bill covering adults into one strengthening the no-sales-to-minors law by lifting the minimum age from 16 to 21.

The presence of a radical anti-tobacco element in Maine was visibly on display as early as 1881, when the House received a petition for a law to prohibit smoking at public places. To be sure, an adverse committee report terminated this initiative, but the fact that a week later the Senate adopted an amendment offered to an amendment to a bill on loitering in public places that would have treated pipe and cigar smoking in railroad or steamboat stations as a nuisance also suggested early resistance to secondhand smoke exposure, even though the underlying larger amendment was ultimately rejected by a vote of 3 to 21.


698Journal of the House of Representatives of the State of Maine: 1881, at 69 (Jan. 18) (1881) (petition of Henry A. Sprague and others from Charlotte). See also “Maine Legislature,” DKJ, Jan. 19, 1881 (1:2-5 at 4); “From the State Capital,” BDWC, Jan. 19, 1881 (3:1). Charlotte’s population was only 381 in 1890. U.S. Census Office, Twelfth Census of the United States Taken in the Year 1900: Population, Part II, tab. 5 at 194 (1901). Sprague was, according to the 1880 census, a 36-year-old farmer and medical student, who appears to be the same Henry A. Sprague (a farmer according to the 1900 census) who with six others in 1897 submitted the first petition in that session in support of a bill prohibiting the manufacture and sale of cigarettes. See below this ch. The Maine WCTU may not have been involved in this petition since the section in its biennial report dealing with “Legal Work” did not mention it or any legislative initiative relating to tobacco. Report of the Woman’s Christian Temperance Union, of the State of Maine, 1880-81, at 32-35.

699“Maine Legislature,” DKJ, Feb. 4, 1881 (2:3-6 at 5) (“reported leave to withdraw on petition”); “From the State Capital,” BDWC, Feb. 4, 1881 (3:1). The only action reported in the House Journal, assuming that the same bill was meant, was that the Judiciary Committee reported leave to withdraw a petition of H. W. [sic] Sprague. Journal of the House of Representatives of the State of Maine: 1881, at 159 (Feb. 3) (1881). See also Journal of the Senate of Maine: 1881: Sixtieth Legislature, at 127, 180-81 (Jan. 27, Feb. 4) (1881)

700Journal of the Senate of Maine: 1881: Sixtieth Legislature 309 (Mar. 2) (1881). See also “The State Legislature,” BDWC, Mar. 3, 1881 (2:3). The amendment was offered by Independent David Dudley, a merchant, who advocated passage of female suffrage. “Local and State News,” DKN, Feb. 15, 1881 (3:1); “From the State House,” BDWC, Feb. 16, 1881 (3:1). It is unclear that the defeat of the larger amendment was even related to
In 1885 the legislature enacted a so-called scientific temperance instruction law of the type for which the WCTU was in the process of successfully lobbying throughout the country. It required the instruction of all pupils in all schools supported by public money in physiology and hygiene with special reference to the effects of alcoholic drinks, stimulants, and narcotics on the human system, and conditioned the granting of a teaching certificate on passing an examination in the aforementioned subjects.

By the end of the 1880s the Maine WCTU was pushing intensely for enactment of a no-sales-to-minors law. In order to appreciate this struggle, this anti-tobacco initiative must be embedded in the simultaneous battle that legislators in both houses, neither of which regulated this behavior in their rules, were conducting over smoking in the chambers during the 1889 session. In the House, 125 of whose 151 seats were occupied by Republicans, on January 17, Democrat Francis A. Fox, a 31-year-old lawyer who had earlier taught school for 10 years, cast a “small bomb” and provoked a prickly debate by presenting an order that “no smoking be allowed in this hall during the remainder of the session; any member violating this order shall be subject to a
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fine of five dollars.” A race to the top was unleashed as Republican James W. Wakefield, a former and future mayor of Bath—who resigned as federal port collector on Grover Cleveland’s election in preference to serving an administration that gained office by suppressing the rights of a large proportion of the southern population—moved to increase the penalty 10-fold. In turn, another Democrat, attorney Edwin Poor, moved to expand the order’s coverage to include chewing tobacco. After the motion by Republican Ezra Pattangall, a retail grocer (who may therefore have sold tobacco), to postpone the whole matter indefinitely had been ruled out of order, Wakefield’s amendment, which was purportedly of the killer type, was defeated. Then, “amid shouts of laughter,” 59-year-old Joseph B. Peaks, a lawyer who was a prominent Republican, declared that he wanted to move an amendment “in all seriousness. I notice that some gentlemen come into this house, not smoking, but having a half-smoked cigar, completely gone out, and if there is anything more stale than that I don’t know what it is.” He therefore moved to add “or with a cigar in his mouth,’ or words to that effect.” Now Pattangall, barely able to contain himself, intervened again to bring this “mock session” to a halt: “[W]e who come here, representing respectable constituencies, can hardly afford, at this stage of the session, to indulge in a great deal of nonsense.” Urging his colleagues to attend to “business in a decent, respectable and dignified manner,” he again moved for indefinite postponement. This trivialization of his protest against secondhand smoke exposure incurred Fox’s wrath: noting that Pattangall wanted the House to get down to work, Fox wanted to “know how the young men in this house who don’t smoke can get down to work when they are half stifled by tobacco smoke. This order moved to have smoking done away with. I would like to know how


708 Representative Men of Maine 189 (1893); Parker Reed, History of Bath and Environs, Sagadahoc County, Maine, 1607-1894, at 191 (1894).


710 1870 and 1880 Census of Population (HeritageQuest).

711 “By Telegraph,” BDWC, Jan. 18, 1889 (2:8 at 3:1).


713 “By Telegraph,” BDWC, Jan. 18, 1889 (2:8 at 3:1).

they expect us young men to stand here and do our business as we should do it under the influence of so much smoke?”

Significantly, this plea came not in sexist defense of female spectators in the galleries, but in self-defense of men against (presumably) cigar-smoking by other men. It received support from Greenville Shaw, a 36-year-old owner of several tanneries and over a million acres of Hemlock stumpage, and fancy horse breeder, a smoker who had “some respect for the feelings of those who don’t smoke” and believed that the order “would pass without any trouble....” But trouble was precisely what it did encounter as Peaks’ and Poor’s amendments were lost and Pattangall made a third call for indefinite postponement, this time denying that “personal habits ha[d] anything to do with this question.” His position was reinforced Portland Republican William Looney, a 35-year-old lawyer and never-smoker who had not “suffered any serious inconvenience by the smoke of cigars of gentlemen who do smoke.” In voting to support Pattangall’s motion and thus killing off this serious anti-smoking rebellion, a majority may have agreed with him that the whole matter was “a perfect farce.”

Ironically, by the close of the hearing held on January 29, 1889, in the Judiciary Committee room, on the bill to prohibit “the sale of the deadly cigarette or tobacco in any form” to minors under eighteen, “the lack of proper ventilation was actually visible.” This incident immediately reignited in the Senate (every one of whose 31 seats was occupied by a Republican) the secondhand smoke exposure debate that had been extinguished in the House less than two weeks earlier. The next day Senator Leander A. Poor, a 55-year-old farmer, called his colleagues’ attention to the “great annoyance” of fumes of tobacco smoke in the Senate chamber, which was “intolerable” to some persons. Unwilling to

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719 A legislative report by the Maine WCTU stating that “in proportion to their numbers the Republican members favored our measures more than did the Democratic members, thus disproving the statement that we are a ‘Democratic annex,’” was manifestly meaningless for the Senate. “Legislative Enactments in Maine,” US 15(12):4 (Mar. 21, 1889).
720 1880 Census of Population (HeritageQuest).
presume to complain on his own behalf, with alacrity he intervened for the sake of others, including “ladies.” He reported that a “prominent and estimable lady had said to him that she was laboring in behalf of moral reform and that she felt that she could not very well go into an assemblage of respectable and cultivated people to speak in favor of a great moral principle with her clothing saturated with the fumes of tobacco smoke. But if she remained in these halls and was subjected to the annoyance as she was obliged to do yesterday she would be incapacitated....” Because she had “only uttered the sentiment of a great many others...also present,” Poor presented an order that “the House concurring, the Messenger of the Senate be directed to have printed in bold type and to post in conspicuous places, in both the Senate Chamber and the House of Representatives, placards requesting gentlemen not to smoke in the halls or galleries.” As amended by another senator’s motion to make the bold type red, the order was adopted by the Senate. (Significantly, in spite of the lack of a formal rule, smoking in the Senate chamber was apparently prohibited by custom, as was suggested by Poor’s “No” to the Senate president’s question: “The chair supposes that the senator does not mean that there is smoking in the chamber during the session of the Senate.”) The press interpreted the Senate’s swift response as indicating that it had “been taken with the anti-tobacco fever which has become contagious in the House.” The same day the House passed the Senate order in concurrence. To be sure, less than a week later the House passed an order presented by the aforementioned Looney, the smokers’ nonsmoking friend, that “the clerk be directed to have the unsightly signs now posted upon the walls of this House removed forthwith.” His reasoning was arguably even more notable than the order itself: while not doubting that the legislator who had introduced the order had been prompted by “the best motives,” he nevertheless believed that all his colleagues “would agree with him that the attempt to degrade the House into the condition of a bar room or place of disreputable amusement, was a disgrace to the House and an insult to every member....” Whether Looney was suggesting that bars and the like prohibited smoking is as unclear as whether his aesthetic opposition to “the unsightly signs

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which disfigure the hall” extended to the ban that they proclaimed and that he and a majority of his colleagues had just turned down a dozen days earlier.

By the middle of January both houses of the legislature began to be bombarded with WCTU-orchestrated mass petitions to prohibit selling or giving cigarettes or tobacco to minors under 18. (The other issues on which the WCTU was lobbying the legislature were municipal suffrage for women, a reformatory prison for women, and an increase in the age of females’ consent from 13 to 18.) During the Maine winter the WCTU “women circulated the petitions, going through snow and ice, bidding defiance to wintry winds. Longs lists of names were secured upon the petitions, among them physicians, lawyers, clergymen and school directors.” Alone from January 14 to 17 five petitions bearing a total of 1,018 signatures were submitted. So many were received that on January 19 the Judiciary Committee published a notice that it would hold a hearing on the subject on January 29.

Press coverage of the Judiciary Committee hearing on January 29, 1889, which also dealt with other issues and took place in a room that was “packed to overflowing,” was, in part, bizarrely nonsubstantive. For example, the Republican Portland Evening Express focused on the role reversal: “instead of being the interested and curious listeners that the ladies usually are in legislative matters” in the chamber galleries, as witnesses “they attracted universal attention....” Instead of devoting any space at all to the arguments they presented, the paper focused exclusively on physical and stylistic descriptions. Thus, Mrs. L. M. N. Stevens’ “style was more declamatory. Her features, so well known in Portland, lighted up as her various addresses progressed (she spoke on all the
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subjects in hearing). Her style was more that of a public speaker, and she showed that she believed that she had a mission to perform and entered upon it with unbounded assurance.\textsuperscript{732} In contrast, the \textit{Daily Kennebec Journal} at least reported that Stevens had “cited the testimony of physicians all over the country as to the deleterious effects of tobacco upon youth,” while a colleague accounted for how other states had regulated the tobacco sales to minors.\textsuperscript{733}

By the end of January the Judiciary Committee agreed to forbid the sale of cigarettes to those under 16 and to impose a penalty on the same group for smoking in public or on the street.\textsuperscript{734} On February 1, Senator Charles Libby from the committee submitted a bill, “on numerous petitions, asking that the sale of cigarettes to minors be prohibited, to “restrain[ ] the sale of tobacco and use of same by minors under sixteen years of age.”\textsuperscript{735} The bill fell short of the petitioners’ proposal in setting the minimum age for sales at 16 rather than 18, though it did encompass snuff and tobacco in any form in addition to cigarettes (§ 1). A loophole was built into § 2, which prohibited anyone, “other than the minor’s parent or guardian,” from giving anyone under 16 any of the forbidden tobacco products, “for such minor’s personal use.” The fine for violations was capped at $50 (§ 3).\textsuperscript{736} These first three sections were almost identical to the Massachusetts statute enacted three years earlier.\textsuperscript{737} New was the bill’s final section, which punished any minor under 16 who smoked a cigarette or any form of tobacco “in any street, alley, way, park, school yard, public conveyance, place of amusement, or other place of resort,” by a maximum fine of five dollars for a first offence and ten dollars for a subsequent offence.\textsuperscript{738}

When the Senate took up the bill on February 6, two lawyers were the chief protagonists, James S. Wright\textsuperscript{739} for its enemies and the more prominent Charles


\textsuperscript{733}“Committee Hearings,” \textit{DKJ}, Jan. 30, 1889 (4:5).


\textsuperscript{735}\textit{Journal of the Senate of Maine: 1889: Sixty-Fourth Legislature} 201 (Feb. 1) (1889).

\textsuperscript{736}Sixty-Fourth Legislature: Senate No. 50, §§ 1-3 (1889) (copy furnished by Maine State Law and Legislative Reference Library).

\textsuperscript{737}1886 Mass. Laws ch. 72, at 57. The Massachusetts law lacked the phrase “for such minor’s personal use,” the presence of which is puzzling since Libby unsuccessfully offered it as an amendment. Senate Amendments, in Sixty-Fourth Legislature: House No. 199 (Feb. 8, 1889) (copy furnished by Maine State Law and Legislative Reference Library).

\textsuperscript{738}Sixty-Fourth Legislature: Senate No. 50, §§ 4 (1889).

\textsuperscript{739}\textit{An Album of the Attorneys of Maine} 231 (E. Bowler ed. 1902).
Freeman Libby (1844-1915) for its supporters. The son of a leading woolen manufacturer, Libby himself was both a corporate lawyer and manager. After attending Columbia Law School and being admitted to the bar, he spent two years in Paris and Heidelberg studying law and metaphysics. On his return to Portland, he became city and county attorney, in which capacity during the 1870s, while “disbelieving in Prohibition, theoretically, he enforced” the Maine liquor law vigorously. Chiefly, however, he was a corporate lawyer (and later a railroad president in his own right): “Few lawyers in the State are so actively identified not only legally, but in a managing capacity, with such large business interests.” In 1882 he became the mayor of Portland and in 1891 both Senate president and president of the Board of Overseers of Bowdoin College. After securing the presidency of the Maine State Bar Association, in 1909 he became president of the American Bar Association.\textsuperscript{740}

“The enemies of the bill,” as the press reported, “first tried to kill it by amending it.”\textsuperscript{741} The three weakening amendments that Wright offered all fit this description. The first struck out coverage of snuff and other forms of tobacco, thus confining the prohibition to cigarettes. Like the votes on all the amendments, the roll call revealed the narrowest of divisions, the members of which barely changed from vote to vote: by a vote of 15 to 14, the Senate adopted this crucial restriction. Because a single senator changed his vote from Yea to Nay and another voted Yea who had not participated in the first vote, the Senate rejected Wright’s second amendment, which would have struck out the ban on giving non-cigarette tobacco to minors. And finally, the third amendment, which would have struck out the ban on and punishment of public smoking by minors, was also rejected by a vote of 15 to 16. After having succeeded in watering down the bill significantly, its opponents then voted against it, leaving Libby and its supporters to vote in favor of a bill that, because of its constricted scope, no longer corresponded to their objectives. In the event, the chamber denied it passage by a vote of 14 to 17.\textsuperscript{742}

\textsuperscript{740} Representative Men of Maine 119 (1893) (quote); “Charles Freeman Libby,” NYT, June 4, 1915 (obit); Maine: A History: Centennial Edition [vol. 4:] Biographical 84-87 (1919).

\textsuperscript{741}“By Telegraph,” BDWC, Feb. 7, 1889 (3:1).

\textsuperscript{742} Journal of the Senate of Maine: 1889: Sixty-Fourth Legislature 233-34 (Feb. 6) (1889); “Both Houses Working,” PEE, Feb. 6, 1889 (4:5) (stating the amendments but incorrectly stating that the amendment to strike out § 4 carried); Senate Amendments, in Sixty-Fourth Legislature: House No. 199 (1889) (copy furnished by Maine State Law and Legislative Reference Library).
The Senate engaged in a “long debate” before reaching this final vote only part of which is reflected in press accounts. Contrary to his voting record, Wright contended that he was opposed only to the provision punishing youths for public smoking; while allegedly approving of the other sections, he would “not...consent to become a party to the incarceration of a boy of 12 or 14 years in jail for smoking a cigarette. And it would amount to that in cases where boys have no money or whose parents are unable to pay the five dollars fine.” He had had the bill tabled because of “some obnoxious features,” but he insisted that he “did not in any way wish to attack any measure that had even a tendency to elevate the morals of the State,” but a line had to be drawn somewhere because if the legislature enacted all such bills, it would become a “laughing stock.” Wright agreed with complaints that cigarette smoking was more injurious to young boys than (other) tobacco: “Boys under 16 as a rule did not, in the country places, go to stores and buy tobacco, but they commence upon cigarettes and get initiated in the use of tobacco in that manner.” He argued that legislating against cigarettes would largely lead to a situation in which, over time, dealers would stop selling them and in many instances a boy who reached the age of 16 without having used tobacco would not use it afterwards. His objection to penalizing a dealer who sold snuff or tobacco to a boy who was sent by his parents was rooted in his belief that legislation should be consistent with a community’s wants and needs: unless proponents wanted to prohibit tobacco entirely, men had to be expected to send their boys to buy it; it would, therefore, be unjust to penalize the dealer. Moreover, penalizing the boy for smoking in public would (as some anti-tobacco advocates still believe more than a century later) forever stigmatize him and “perhaps lead to his ruin.”

In contrast, Libby defended the bill not only on the grounds that the committee had unanimously reported it and numerous petitions supported it, but also because everyone saw boys younger than 12 smoking all forms of tobacco on the street. Projecting a view that would resonate for many decades, Libby avowed that he was not prejudiced against adult use, but declared that he would use all his efforts to prevent tobacco use during the formative growth period. In adopting the position that the “evil...is not the sale of cigarettes, but the smoking of them,” he took a very hard line (which is still controversial in the anti-smoking movement) concerning statutory punishment of youth: “No sentiment as to what might happen under certain circumstance to a boy who deliberately broke this law ought to restrain members if they believed there is real evil, from meeting that...

744“Solons at Augusta,” PEE, Feb. 6, 1889 (1:2).
745“Maine Legislation,” DKJ, Feb. 7, 1889 (1:5-9 at 6-7).
evil in a straightforward, manly fashion.” He sought to ground the reasonableness of the proposed intervention in the fact that the bill did “not undertake to dictate what people shall do in their own homes or in private,” but nevertheless contended that if smoking was an evil, “then boys under 16 should not be encouraged to walk the streets puffing cigarettes and tobacco; not perhaps because of sentiment, but because it is an evil undermining the health and constitution of the youth.” His argument then culminated in a strategy centered on children’s personal moral responsibility and dismissing the role of profit-makers (that would find less and less support among tobacco controllers a century later): “It was time to take hold of the difficulty at the right end, and that was to direct repressive legislation, if need be, against the parties who use and abuse dangerous articles of food and drink, and not against the parties who happen to be engaged in commerce. He would direct the legislation against the evil itself and make the youth...understand that such habits are not commendable.” Hence his advocacy of leniency for merchants, who should not be exposed to a penalty unless they knowingly sold for a minor’s personal use. Libby was also persuaded that making an example of one or two youths would suffice “to cause offenders to refrain from further exhibitions of their tastes.”

Wright persisted in disavowing any intent to kill the bill, which he believed in “to a certain extent.” He personally would not object to a measure punishing a man who drank even a drop of liquor because he personally “did not believe in such habits,” but he wondered whether the Senate agreed, and if it did not, why would it punish smoking? Moreover, he raised the objection that it would be more consistent to punish an adult man for drinking liquor than a 14- or 15-year-old boy lacking the “discretion of mature years.”

Of Maine’s huge northernmost county, Aroostook, Senator George Collins, himself a merchant, remarked that tobacco use was almost universal there and “all sorts of traps were being set for the purposes of prosecution.” Merchants were “all obliged to keep tobacco and...were constantly receiving orders for it from people living at a great distance. He could see how such a law would” injure parties and he therefore opposed it, though he did not object to the cigarette provisions, but “there would be no safety in keeping tobacco if the bill became law.”

The next day Wright moved to reconsider the vote by which the bill had been

746“Maine Legislation,” DKJ, Feb. 7, 1889 (1:5-9 at 6-7).
747“Maine Legislation,” DKJ, Feb. 7, 1889 (1:5-9 at 6-7).
748“Maine Legislation,” DKJ, Feb. 7, 1889 (1:5-9 at 6-7). Collins was returned as a merchant at the 1870 Census of Population.
defeated, and the following day, when his motion passed, he offered as an amendment his stripped-down bill that covered only cigarettes and did not penalize youth smoking. He insisted that his substitute “was all that the friends of the bill could reasonably ask,” adding, implausibly, that his conversations with petitioners had convinced him that they would be content. Libby offered a diametrically opposed narrative, explaining that petitioners “preferred to have no bill unless they could have the penalty for smoking by minors under 16 years in public places.” Dramatically, he proposed as a title for Wright’s substitute bill “‘an act to impose additional burdens upon shop keepers and to encourage the smoking of cigarettes by minors under 16 years in public places.’” Wright, in turn, tried to justify jettisoning the no-smoking provision on the grounds that since the unamended law would not prevent boys from smoking all they desired in some secret place—because “a boy over 16 could buy cigarettes and give them to his comrades of 14 or 15 years”—it would not accomplish the petitioners’ purpose any more than the amended version. Wright added, perhaps with an ironic touch, that his substitute would be as effective against the sale of cigarettes as the state’s prohibitory law was against that of liquor. Senator Henry Daggett (a miller/farmer) expressed surprise that any senator could believe that Wright’s substitute would comply with the petitioners’ request; his own inquiries had revealed that the petitioners’ “unanimous voice” was that all forms of tobacco be prohibited to boys under 18. The amended bill lacked even the appearance of being of some benefit inasmuch as it was not to be supposed that boys would not use some other form of tobacco if they were unable to get in “the milder form” (i.e., cigarettes). Senator (and future Attorney General and Governor) William T. Haines partially undercut this critique by correctly pointing out that the petitioners’ “object...was to prevent cigarette smoking because the smoke is inhaled into the lungs, thereby doing serious injury to those who used tobacco” in that form. (Concurring, another senator related that his personally having seen young boys and young ladies smoking and inhaling cigarette smoke prompted his belief that the sale of cigarettes was more pernicious than that of tobacco.) Ranging far beyond that issue, however, Haines charged that although the legislature had prohibited certain articles that it deemed injurious to health, it had “never gone as far as to say what things a man should personally use.” At least in part because he believed that merchants would respect a law against cigarettes, he declared it to be his colleagues’ duty to stand up “manfully” for the substitute. To the same end another senator reported that petitioners preferred something like

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the substitute to no bill at all in 1889.\textsuperscript{750}

At this point Libby offered an amendment to Wright’s that would have inserted the phrase “known to be” before “under the age of sixteen years” in sections 1 and 2 prohibiting the sale and giving of cigarettes to such minors. Senator Herbert Heath, another lawyer, immediately opposed the amendment, declaring that he would rather see the bill defeated than passed with this provision because an indictment of a dealer would have to include the allegation that he knew that the buyer was under 16, thus making prosecutions difficult. Glad that the senators were “really getting at the meat in the cocoanut and finding out what the effect of the bill is,” Libby retorted: “If merchants were to be punished under the bill for selling cigarettes to boys, innocently, without knowledge that they were under 16 years he thought senators would agree that it was unwise legislation especially if they refused to meet the real evil—which is the smoking of the cigarettes—by legislation directed to that result.”\textsuperscript{755} Libby’s convoluted argument attracted but three of the other 24 voting senators, almost exactly the reverse of the count (20 to 5) on Wright’s underlying substitute amendment. The Senate then passed and sent it on to the House for concurrence,\textsuperscript{752} which the lower chamber furnished later in February.\textsuperscript{753}

In its report to the weekly periodical of the national WCTU on the legislative session, the Maine organization displayed a sense of irony in describing the fate of its request for a law prohibiting the sale of tobacco in any form to minors under 18. Calling the no-cigarette-sales-to-under-18-year-olds “a step in the right direction, for cigarettes are used to an alarming extent in some localities,”\textsuperscript{754} the report observed of the aforementioned Senate floor remarks by Senator Collins that:

The speech in the Senate which seemed to lead to the change from “tobacco in any form” to that of “cigarettes” only, was made by a Senator from Aroostook county, who dwelt “touchingly” upon the way it would affect some of his constituency—county traders, who sold a great deal of tobacco; delivered in most instances, to the boys. This had more

\textsuperscript{750}“Maine Legislature,” \textit{DKJ}, Feb. 9, 1889 (1:5-9 at 6).

\textsuperscript{751}“Maine Legislature,” \textit{DKJ}, Feb. 9, 1889 (1:5-9 at 6-7). On Heath, see \textit{An Album of the Attorneys of Maine} 172 (E. Bowler ed. 1902).

\textsuperscript{752}\textit{Journal of the Senate of Maine: 1889: Sixty-Fourth Legislature} 251-52 (Feb. 8) (1889); “By Telegraph,” \textit{BDWC}, Feb. 9, 1889 (3:1).


\textsuperscript{754}“Legislative Enactments in Maine,” \textit{US} 15(12):4 (Mar. 21, 1889).
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weight than the petitions of hundreds of educators, presidents of colleges, members of school boards, teachers, etc., and many thousands of others. However, we are thankful for the little bit granted in this direction.\textsuperscript{755}

Half a year later, however, the WCTU exhibited little gratitude. At its annual convention at Bar Harbor, Stevens, the superintendent of legislative work, explained how she had appeared before the Judiciary Committee “with the strongest arguments and a very influential petition, embracing hundreds of educators of Maine.... The committee made a very favorable report, but it was so cut down and modified in the Senate that when it passed it was, and is, very unsatisfactory, viz., prohibiting the sale of cigarettes to minors under 16.\textsuperscript{756} This judgment was mild compared to the plaint issued by the superintendent of narcotics, Mrs. I. S. Wentworth, which underneath a patina of Christian optimism contained what should have been profoundly troubling information for future tobacco control efforts:

You all know the result of our efforts. As one of our superintendents aptly expressed it, “We asked for bread, instead of which they gave us a very small stone.”

But who wonders at this when we consider that nearly if not quite every man in that honorable law-making body himself uses the “filthy weed,” and when the city of Portland about that same time (if the papers were correct) raised several hundred dollars to furnish Legislature [sic] with cigars and other necessaries?

But we are in no wise discouraged. \textit{That} word has no place in the vocabulary of the Woman’s Christian Temperance Union. ... The outlook is hopeful. Light is being diffused, more and more, people are beginning to see the danger in the tobacco habit not only to themselves but to their posterity, and how closely it is allied with the drink habit. Ministers from their pulpits are ringing out the words of the Apostle, “Having therefore these promises, dearly beloved, let us cleanse ourselves from all filthiness of flesh and spirit,” and Christian men are beginning to see as never before that they cannot use tobacco “to the glory of God.”\textsuperscript{757}

While still taking credit for passage of the no-sales-to-under-16-year-olds, the WCTU at its annual convention in 1890, perhaps in contemplation of future supplications to the legislature, toned down its criticism, remarking now that it


\textsuperscript{756}Fifteenth Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending Sept., 1889, at 71 (1890).

was “not all we asked for, but it is a step in the right direction....” With its wonted persistence, the WCTU continued to press for additional state intervention. At its annual meeting in 1896, for example, the Maine organization:

Resolved, That we condemn the elaborate and incessant advertising of tobacco, especially in the ways designed to catch boys, as a distinct menace to the health and brain-soundness of the race, and we urge upon all our Unions serious attention to this evil, and some well-considered and united effort to suppress it.

Resolved, That we will cry aloud and spare not against the cigarette curse, as one which no community can afford to tolerate, and we recommend to our legislators the example of Iowa which has passed a law forbidding the sale of cigarettes in the State.

Nor did the WCTU confine itself to appeals to the government to act for it: direct action self-help also formed part of its political repertoire. In 1896, Wentworth was able to boast in her annual report, members of various local unions succeeded in extracting from all the cigarette dealers in the small towns of East Corinth, Kenduskeag, Pittsfield, and Skowhegan a signed agreement not to sell any more cigarettes, while in Greenville all except one signed an agreement not to sell for one year. Engaging in imaginative political theater in East Corinth, “the ladies bought the stock on hand and cremated it.” Such tactics were well received by the press. In the retelling of the Corinth caper, the Bangor Daily Whig and Courier had the WCTU committee first buying and burning all the cigarettes and then obtaining the pledge. At the beginning of the year, when the merchants in the town of Milo (pop. 1000) agreed not to sell any cigarettes for a year, the same paper opined that if the other dealers in the country followed suit, “more of our boys and young men would live to fill the positions in life they were intended for.” (Not until 1897, “after two years’ crusade,” was Milo, thanks to a WCTU boycott of two holdout dealers, able to “rejoice[ ] in victory....”) Towards the end of the year two churchmen, a Methodist and a Congregationalist, took a page from the WCTU play book by persuading the

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758 Sixteenth Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1890, at 26 (1890).


761 BDWC, Feb. 7, 1896 (4:3) (untitled).


763 Twenty-Third Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1897, at 71 (1897).
dealers in Brewer, a town of 5,000 adjacent to Bangor, to sign and carry out an agreement to stop selling cigarettes “to old or young.” The cessation was a relief to the Republican Daily Kennebec Journal in the state capital of Augusta, which had become alarmed by the extent to which “many Brewer boys, even little fellows who are scarcely out of dresses [are] being seen smoking.”

S. Graves, a school district principal in Augusta, a town of about 11,000, impressed upon its residents that, just like their counterparts in Chicago, schoolboys from eight to 16 were “smoking away brain power every day” despite the no-sales-to-under-16-year-olds law. That “a boy of any age may be seen at almost any time on the street with a cigarette in his mouth” moved Graves to pose a sarcastic rhetorical question: “Very often the same boy is destitute of necessary clothing which, if he ever has, the city or private society must provide. Why not furnish the youngster with his cigarettes and allow him to buy his shoes?” The principal sought to mobilize non-cigarette-smoking parents for some type of decisive intervention by focusing on the “obnoxious” stench broadcast by the smoking boys, which was “sickening to the teacher and to every neat pupil in the room. I am not sure but it is the duty of school officers to provide a special department for the instruction of the cigarette fiend and thus relieve those who abstain from the unpleasant influences.” In any event, it certainly did “not seem right that a girl or boy coming from a home where such impurities do not exist should be obliged to sit five hours in close proximity to so nauseating an agent.”

The Kennebec Journal, which published Graves’s report in October 1896, used it as a springboard for governmental action at the 1897 session: “The Legislature soon assembles and would it not be a good plan to know, before that time, just how much of practical value the existing law is and what is needed to render it more effective.”

764DKJ, Nov. 11, 1896 (4:6) (untitled).

no measure was “too rigorous to be avoided [sic] if it but assures practical results.” 766 The paper achieved what it no doubt regarded as just the right histrionic pitch by limning the awful possibility of dependence on a female military (which was, ironically, undercut by an 1894 estimate that women bought one-sixth of the 1,200 boxes of cigarettes sold daily in Portland, the state’s largest city). 767

The very thought of a nation of cigarette fiends, lunatics and idiots, physical and mental incapa- bles, is enough to make one shudder, but it is not preposterous to imagine enough of our young men being so debilitated and unmanned that the future of the country would be imperilled. Should the cigarette habit continue to increase among the boys and young men...there would come a time when we should be compelled to look to the women for national defense, for they would be the physical superiors of the males.... The present law is not enforced when by constant supervision it could be to quite a degree. Because the vice does not send its victims reeling and brawling through the streets, however, does not excuse laxity in legislation and in enforcement.... 768

The bill in the 1897 legislative session to prohibit the manufacture and sale of cigarettes was presented in the House on January 26 769 by Republican Lyman L. Walton, 770 a 47-year-old lawyer from Skowhegan, 771 who was also a Congregationalist Sunday school superintendent 772 and a vice president of his local unit of the million-strong Young People’s Society for Christian Endeavor. 773

767 “Maine Melange,” BDWC, Nov. 9, 1894 (1:6) (two-thirds of the remaining five-sixths bought by boys under 16). The WCTU reported that cigarette smoking was “a prevailing habit with most criminal women. It is not unusual in visiting their rooms [i.e., prison cells] to find them filled with the fumes of tobacco smoke.” Twenty-Second Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1896, at 88 (1896).
768 “An Evil that Demands Attention,” DKJ, Oct. 19, 1896 (4:2) (edit.).
770 “Lobbyists in Evidence,” BDWC, Jan. 27, 1897 (1:5).
771 1900 Census of Population (HeritageQuest); Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 20 (Howard Owen comp.).
Later, during House debate on the bill, Walton explained his motivation: “I introduced this bill for the purpose of having the matter agitated. I believe that the agitation of this measure is important for our boys. I myself have known of several instances where the use of the cigarette has resulted in the complete wreck of the boy.”

The very brief bill provided that: “Whoever, by himself, his clerk, servant or agent, directly or indirectly, manufactures for sale, sells, offers for sale, has in his possession with intent to sell, or gives away, any cigarette, shall be punished by fine not exceeding fifty dollars or by imprisonment not exceeding sixty days.” In the light of the then perceived reach of the judicially created original package doctrine, the Bangor Daily Whig and Courier overstated the case when it claimed that if the bill passed, “no cigarettes can be bought in the state.” Less exaggerated may have been its report that the bill’s referral to the Temperance Committee “raised a laugh” among House members.

Surprisingly, despite the intensity of the Maine WCTU’s dedication to the anti-cigarette struggle, it did not initiate the 1897 bill. As I. S. Wentworth, who was in her tenth year as superintendent of the organization’s narcotics department, explained to the annual convention later that year: “We have greatly desired a better cigarette law, yet we have hesitated about undertaking the task of getting it, but when a bill was introduced in the Legislature prohibiting their manufacture, sale and gift in the State, I at once sent petitions and circular letters to all the Unions, and to many towns not having a Union. These petitions were faithfully circulated, more than 16,000 names being obtained, among them many cigarette dealers. Very few persons refused to sign. The petitions were sent to the Representatives accompanied by letters asking their help. Every member of the committee on temperance also received letters asking their help.”

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(4). The YPSCE was founded in Maine in 1881. Francis Clark, *World Wide Endeavor: The Story of the Young People’s Society of Christian Endeavor* (1895). A South Berwick local union of Christian Endeavor, including six unions with 150 members, submitted a WCTU pre-printed petition in support of Walton’s bill. Maine State Archives, 1/1 1897 ch. 405 Box 778.

774*Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897*, at 241 (Mar. 4) (1897).

775An Act to Prohibit the Manufacture and Sale of Cigarettes, § 1, Sixty-Eighth Legislature, House No. 171, State of Maine (1897). The bill, which was to take effect on May 1, also conferred jurisdiction on trial justices and municipal and police courts over the described offences. §§ 2-3.


The Maine WCTU did in fact have a large membership base to call on. In 1897 its 173 individual unions—of which only a single one recorded a decrease in membership during the previous year—reported a total of 3,930 members. By 1898, membership rose by 14 percent to 4,482. These members represented 0.65 percent of the total state population that year. More relevantly, they also constituted 2 percent of all women above the age of 18. Looked at from a slightly different perspective, in 1897 the Maine WCTU, which had been organized as early as 1875, accounted for almost 3 percent of total National WCTU membership but only 1 percent of U.S. population. Alternatively, its membership as a proportion of state population was, at 0.62 percent, the third highest behind that of New Hampshire (0.78 percent) and North Dakota (1.1 percent).

The WCTU’s petition campaign was, within a week of the bill’s introduction, reflected in the entries in the House and Senate Journal. The pre-printed WCTU “Cigarette Petition” stated that the undersigned citizens, “realizing that the Cigarette is an unmitigated evil, injuring morally, mentally and physically, a great many of our youth, often causing insanity and death, and feeling that we greatly need a more stringent law than the one now in force, respectfully ask that the bill prohibiting the manufacture, sale and gift of Cigarettes, heretofore

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778 Calculated according to Twenty-Third Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1897, at 44-50 (1897). If the separately tabulated 634 honorary members were not included in membership column, the two together amounted to 4,564.

779 Twenty-Fourth Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1898, at 34 (1898).

780 Calculated according to Department of the Interior, Census Office, Report on Population of the United States at the Eleventh Census: 1890, Part II, tab. 2 at 40 (1897); U.S. Census Office, Twelfth Census of the United States Taken in the Year 1900: Population, Part II, tab. 2 at 46 (1902). The data for 1898 were calculated on the assumption that the population increased at the same rate every year between 1890 and 1900.

781 Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting…1891, at 229 (1891).

782 Calculated according to Report National Woman’s Christian Temperance Union Twenty-Fourth Annual Meeting…1897, at 182-83 (1897). The WCTU data compared membership for 1897 with population for 1890.

introduced and now pending before said legislature, be given a passage.  784 But in the brief interval before the responses to Wentworth’s initiative literally inundated the legislature with a large number of mass petitions during the latter part of February, it was the much smaller number of remonstrances (signed by relatively few remonstrants) protesting Walton’s bill on the grounds that “it would be an unwarrantable infringement of personal liberties, and would seriously menace the hotel and summer resort business of the State” that prompted the Temperance Committee to hold a hearing on the matter.  785 Also received was the remonstrance of Spanish-born Ernesto Ponce, a long-time Portland cigar dealer and manufacturer 786—a decade earlier he had been the prevailing eponymous defendant in a U.S. Supreme Court cigar trademark case 787—who then operated a cafe and hotel and casino.  788 By the end of the session, the House received 19 remonstrances with at least 291 signatures; the corresponding volume, which was in large part overlapping, in the Senate reached 34 and 301, respectively. In contrast, the avalanche of largely WCTU-inspired

784 “Cigarette Petition” (of citizens of Mapleton & vicinity, Aroostook County) (Feb. 1897) in Maine State Archives, 1/1 1897 ch. 405 Box 778.

785 “An Hour’s Session,” BDWC, Feb. 10, 1897 (1:2-3). The language quoted in the newspaper presumably stemmed from remonstrances submitted to the House the previous day by hotel owners; the first named remonstrant in the House Journal was H[enry] E. Judkins, of Waterville, whom the 1900 Census of Population listed as a hotel proprietor. His remonstrance was also signed by 20 others. The fashionable resort town of Bar Harbor was the source of at least one other remonstrance; a hotel owner in Kennebunkport also submitted one. Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 209-10 (Feb. 9) (1897); Journal of the Senate of the State of Maine 1897: Sixty-Eighth Legislature 217 (Feb. 10) (1897). For additional remonstrances, see Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 244, 338 (1897); Journal of the Senate of the State of Maine 1897: Sixty-Eighth Legislature 328 (Feb. 25) (1897). Unfortunately, although some petitions have survived, the bill file at the Maine State Archives contains no remonstrances. Telephone interview with Anne Small, MSA, Augusta (July 20, 2010).

786 Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 217 (Feb. 10) (1897); 1880 Census of Population (HeritageQuest).


788 Biographical Review: Cumberland County Maine 251 (1896), on http://www.raynorshyn.com/raynorshyn/megenweb/cumberland/biographies/ponce.txt. A check of remonstrants’ names in the 1900 Census of Population revealed that many of them were hotel owners.
and also largely duplicative petitions bore more than 12,405 signatures in the House and more than 15,388 in the Senate. Both chambers’ petitions were bulked up by two, one of which was signed by more than 4,000 female members of the WCTU itself and the other by 4,000 members of the United Societies of Young People, Free Baptist church.789

On February 10, Walton appeared on behalf of the petitioners and the Augusta corporate law firm of Williamson & Burleigh for the remonstrants.790 Although the hearing was postponed to grant petitioners additional time to prepare their case and secure witnesses, it was already clear to the press that the bill had “many enemies as well as friends,” both of whom would “make a strong fight.”791 At the continuance of the hearing on February 24,792 the Temperance Committee, finding the “crowd,” which was “strongly anti-cigarette in sympathy,” too large for the assigned room, resumed the proceeding in the hall of the House, in which “[s]cores of ladies were present...and many clergymen.” Once again Walton conducted the hearing for the bill’s supporters,793 whose attendance the WCTU had mobilized and first and “foremost” among whom was Ella Gleason, who had played a prominent part in similar proceedings in Massachusetts,794 and whom the Kennebec Journal certified as “a speaker and


791“In Memoriam,” DKJ, Feb. 11, 1897 (9:1-3 at 3).

792Because petitioners had asked for additional time to prepare their case and “get witnesses present,” the Feb. 10 hearing was adjourned until Feb. 27, but was actually held on Feb. 24. “Before Committees,” BDWC, Feb. 12, 1897 (3:6); “Legislative Notice,” BDWC, Feb. 22, 1897 (2:3). Presumably, Wentworth’s account referred to the second hearing, press coverage of which was spotty. E.g., “Committee Hearings,” BDWC, Feb. 26, 1897 (3:5).

793“After the Ball,” DKJ, Feb. 25, 1897 (5:2-4 at 4).

794Twenty-Third Annual Report of the Woman’s Christian Temperance Union, of the
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debater of unusual skill and power.” After she had “explained the evil effects of cigarette smoking with great force” and the need for legislation, Wentworth, two ministers, a physician, a school principal, several politicians, and State Superintendent of Public Schools William W. Stetson pleaded for the bill’s passage. Representing the bill’s opponents, Joseph Williamson, Jr. conceded tobacco’s injurious effects on the human system, “but claimed cigarettes to have less nicotine than other forms of the weed.” Rehearsing his client’s chief legal defense, he contested the bill’s constitutionality on the (false) grounds that, since no cigarettes were manufactured in Maine, “all brought here are in the original package from other states and over this Congress alone has control.”

Wentworth later reported to the Maine WCTU that “[t]he only opposers were lawyers hired by the American Tobacco Trust Co.,” thus confirming its ubiquitous vigilance whenever legislative bodies were considering restrictions on the monopolist’s cigarettes. Following the hearing the Temperance Committee reported the bill favorably.

The day after the hearing the Bangor WCTU, purporting to speak on behalf of “the overwhelming majority of the women in this community,” adopted a resolution that touched on so many of the salient and heterogeneous topoi of the anti-cigarette movement that it is worth reproducing at length. After expressing its gratefulness for the legislators’ focus on “the cigarette curse” and praying that they do “their utmost to deliver our State from this dangerous and intolerable

State of Maine for the Year Ending September, 1897, at 72 (1897). Gleason had also come to Maine to speak in connection with the 1889 bill. Sixteenth Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1890, at 26 (1890). On Gleason’s role in Massachusetts, see above ch. 4 and this ch.

795“After the Ball,” DKJ, Feb. 25, 1897 (5:2-4 at 4).
796Born in 1869, Williamson, a Democrat, in 1911 was himself elected to the Maine House. Who’s Who in Finance 241-42 (John Leonard ed. 1911); Joseph Williamson, History of the City of Belfast in the State of Maine, Vol. II: 1875-1900, at 146 (1913) (posthumously published history written by his father).
797“After the Ball,” DKJ, Feb. 25, 1897 (5:2-4 at 4).
798Twenty-Third Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1897, at 72 (1897). A Bowdoin College chemistry professor had testified that he had found trace of poison in any of the many brands of cigarettes he had examined “except the nicotine common to all tobacco.” “After the Ball,” DKJ, Feb. 25, 1897 (5:2-4 at 4).
799“Maine Legislature,” BDWC, Feb. 27, 1897 (2:6); State of Maine, Committee on Temperance (Feb. 26, 1897) (reporting that bill “ought to pass”), in Maine State Archives, 1/1 1897 ch. 405 Box 778.
evil,"800 the group viewed the matter from the vantage point of its members’ various capacities and roles:

As human beings, we want pure air to breathe in the streets and all other places and the cigarette continually trespasses upon our rights in this respect, and we are often sickened by the fumes of its poisonous ingredients.

As mothers, teachers and friends of youth, we want all boys and girls delivered from this omnipresent and apparently irresistible temptation.

As tax-payers, and as law-abiding and temperate citizens, loyal to the widest welfare of the community, we object to any other citizens debauching themselves mentally and physically with cigarettes, while the whole community, including ourselves, is held responsible for the care, and taxed for the relief and support of the insane, defective, depraved and dangerous classes. While these classes are becoming a heavier burden to society every year, we protest that the cigarette ought not to be allowed to continue its work of impairing the brain-soundness and industrial ability of men, thus at once recruiting the dependent classes, and reducing the power society to take care of them.

As sane and impartial observers we see that a law which forbids a sale to persons of a certain age while permitting it to persons of another age is vastly more difficult of administration than a law forbidding the sale altogether.801

Of overriding significance is that, unlike the stereotypical rhetoric in the above-quoted pre-printed petition, none of these arguments was, as latter-day scholars claimed was typical of the WCTU’s opposition to cigarettes,802 rooted in morality, let alone religion. Instead, the Bangor WCTU protested against secondhand smoke exposure and nonsmokers’ being forced to share the collective economic costs generated by the adverse health impacts of smoking and stressed the superior enforcibility of a general over an age-restricted sales ban.

On March 4, shortly after this resolution, which closed with the assurance that only by using “their heartiest efforts” to pass the anti-cigarette bill would the

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800 Resolutions Adopted by Bangor W. C. T. U. (Feb. 25, 1897), in Maine State Archives, 1/1 1897 ch. 405 Box 778. The resolution was printed as J. Bucknam (Rec. Sec’y), “Anti-Cigarette Bill,” BDWC, Mar. 2, 1897 (3:7) (letter to edit.) (adopted Feb. 25). The resolution was also presented to the House the day that it first took up the bill. Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 389 (Mar. 4) (1897). The resolution was accompanied by a petition signed by the president and recording secretary of the Bangor WCTU representing 75 women. Maine State Archives, 1/1 1897 ch. 405 Box 778.


802 See above Preface.
Bangor representatives in the legislature “adequately or justly represent the overwhelming majority of the women of this community,” was presented to the House, that chamber took up Walton’s bill on the motion of Republican Isaac Rounds, a physician, who also moved that it be put on its passage. Debate—the content of which is available because, coincidentally, at the 1897 session the Maine legislature initiated production of verbatim transcripts of its debates—opened when Republican Carl King, a lawyer, merchant, and farmer, moved that the bill be referred to the Judiciary Committee to secure its decision regarding the question of the measure’s constitutionality. Rounds resisted the motion on the grounds that that committee was not authorized to make such determinations—only the supreme court was—though he added that many Maine lawyers had thought that the bill was constitutional in the same sense in which the state’s venerable liquor prohibition law was. King hoped, oddly for a lawyer, to sway some votes by reading from a letter from an ex-judge who, after admitting that he had had no time to investigate, merely “as a matter of recollection and impression,” weakly and tentatively opined: “‘I should not suppose it competent for one state to impose such an absolute prohibition against interstate commerce....’” While regarding referral to the Judiciary Committee as a “waste of time,” another legislator reminded his colleagues that one thing they did know was that “the sentiment throughout...Maine is overwhelmingly in favor of this bill” inasmuch as the legislature had received “[v]ery nearly 2000 petitions” for and fewer than 400 against the bill, several of the latter having been signed by only one person. In fact, the latter figure was inflated and the

803 Resolutions Adopted by Bangor W. C. T. U. (Feb. 25, 1897), in Maine State Archives, 1/1 1897 ch. 405 Box 778.
806 Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 18 (Howard Owen comp.).
807 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 240 (Mar. 4) (1897).
808 Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 14 (Howard Owen comp.).
809 1900 Census of Population (HeritageQuest). By the time of the 1910 census King was a bank president.
810 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 240 (Mar. 4) (1897).
imbalance even more lopsided: as a senator pointed out later, but 228 remonstrants stood against 16,000 petitioners. The mood among legislative enthusiasts can be gauged by the remarks of life and fire insurance agent Archie Talbot, who did “not know of a smoker but who will vote to annihilate the cigarette. It ought to be an outlaw in ever civilized community. We cannot pass legislation which is too radical against such things as this.” Portland wool and leather merchant Frederick Winslow, a long-time YMCA worker, struck a similar chord in declaring that “if the constitution of the United States interferes with the moral sentiment of the State of Maine, then we had better have the constitution of the United States changed.”

The author of the bill himself, Walton, came closest to grappling with the core constitutional and libertarian issues by (unnecessarily) conceding that if his bill were unconstitutional, so, too, would the existing no-sales-to-under-16-year-olds be. As a lawyer he could claim to know something, if not all, about constitutional matters, but in any event he knew enough to know that the question at hand was a “very grave” one.

The claim is made that it is unconstitutional, for the reason that while you can prohibit the sale of intoxicating liquor, you do it upon the ground that the man may become so intoxicated that he will injure other people, but that if he takes poison and injures himself he does not necessarily affect other people; and that on that account he has a right to use any kind of poison to destroy himself, body and soul. But I take issue with those who make that claim upon that ground. I say that anything that a person takes which breaks down his constitution, which destroys his intellect, which makes him a wreck, body and soul, is a matter which the people of the State of Maine have an interest in and which they have a right to legislate upon, and that as police legislation we have a right to pass any law in regard to such matters, because the germs of disease which are implanted in a person not only affect his children after him, and so in respect to such matters the people of Maine

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812 Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 20 (Howard Owen comp.).
813 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 241 (Mar. 4) (1897).
814 Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 20 (Howard Owen comp.).
815 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 241 (Mar. 4) (1897).
816 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 241-42 (Mar. 4) (1897).
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as well as the people of all other states have a deep and abiding interest.\footnote{Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 242 (Mar. 4) (1897).}

To be sure, Walton’s approach was—even assuming that he was not positing some form of inheritance of acquired traits or diseases—so crudely and boundlessly expansive that it could have justified profoundly intrusive majority governmental suppression of an enormous swath of human activity. (For example, reading certain books or whole genres of books or failing to read any books at all might be prohibitable on the grounds that it was intellect destroying.) Nevertheless, he articulated a form of extremist paternalism that could serve as a counterpoint to mirror-image libertarianism and thus enable legislators (and citizens) to orient themselves, by attraction or repulsion, along a spectrum of policy positions on cigarettes.

In the event, King’s dilatory (if not murderous) motion to refer Walton’s bill to the Judiciary Committee was defeated by the overwhelming vote of 15 to 106. Among the 15 proponents were two hotel owners (one of them the only Democrat who voted Yea) and two grocers, who may therefore have sold cigarettes.\footnote{Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 395-97 (Mar. 4) (1897). The two hotel owners were John Kaler (Dem.) and Edward Rodick; the grocers were James Coffin and James Hancock. Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 13, 17 (Howard Owen comp.); 1900 Census of Population (HeritageQuest).}

Immediately after this vote, Portland banker Arthur Merrill, who had voted Yea, “threw a bomb shell into the House with startling effect,”\footnote{"Cigarette Bill," DKJ, Mar. 5, 1897 (5:2).} which prompted members and spectators to become “convulsed with laughter.”\footnote{"Maine Legislature," BDWC, Mar. 5, 1897 (4:7).} Professing to regard the bill as “a good one as it stood” and claiming that he had voted for referral only on the grounds of its legality, he  insisted that he would now vote for it. Then he added (no doubt with a constant flow of winks): “But the bill does not go far enough. I notice that about this State House tobacco is used and it is very noxious, and I think that some of the tobacco which is used is as noxious and as deleterious as cigarettes. Now I think that the members of this House, even if it deprives them of some comforts or pleasures, would be willing to go the entire length in this reform if they go at all. It is no more than just, it is no more than

\footnote{"Maine Legislature," BDWC, Mar. 5, 1897 (4:7).}

\footnote{Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 242 (Mar. 4) (1897).}

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right, and I think it would be a great advance...." The amendment, according to
Kennebec Journal, was “so extreme that it was farcical, and the curious
spectacle was presented of all the constant smokers of the House voting against
the use of tobacco, and the enemies of tobacco voting against the amendment.”
Despite the inconsistency, “the smokers felt they had the anti-cigarette men in a
most embarrassing dilemma.” In effect daring the anti-cigarette legislators to
rebut the implicit charge of hypocrisy by voting to cut off their own and their
friends, relatives, business acquaintances, and customers’ ready access to cigars
and pipe tobacco, Merrill called for a roll call vote. “There was applause and
laughter, badinage and fun...as the aye and nay vote was taken, which,
predictably, defeated his killer amendment 42 to 79, the Yeas artificially
inflated by several members “just for the fun of the thing” knowing that the
motion would not pass.

The press characterized these votes as “the means of making the powerful
lobby, which, it is alleged, the American Tobacco Company sent to the capitol,
feel somewhat anxious.” Whatever level of anxiety weighed down on the Trust
must have been mightily alleviated by the prediction that, even though the bill
seemed poised to pass the House, it would “undoubtedly receive its demise in the
upper branch.”

On third reading three weeks later, Benjamin Hamilton, a Methodist, farmer,
president of the Maine State Agricultural Society, Harvard Law School graduate,
and lawyer, who had voted for both King’s and Merrill’s amendments, offered
two of his own. The first, which would have radically diluted the bill by
restricting coverage to minors under the age of 21, was voted down. The second
proposed to expand coverage by prohibiting anyone from “bring[ing] into this
State” any cigarette. Since this provision would presumably also have applied to
anyone who brought cigarettes into Maine for his own personal consumption, it

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822“Cigarette Bill,” DKJ, Mar. 5, 1897 (5:2).
823Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 242 (Mar. 4) (1897).
824“Cigarette Bill,” DKJ, Mar. 5, 1897 (5:2).
825Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 397-98 (Mar. 4) (1897); Amendment A to House bill # 171 (n.d.), in Maine State Archives, 1/1 1897 ch. 405 Box 778. Of the 15 members who had voted to refer the bill to the Judiciary Committee 12 voted Yeas; Walton voted Nay.
826“Maine Legislature,” BDWC, Mar. 5, 1897 (4:7).
828Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 12-13 (Howard Owen comp.)
would have run afoul of the original package doctrine and thus insured that it would be judicially invalidated as an interference with the federal constitutional commerce clause. For that very reason it was doubtless backed by opponents of Walton’s bill, who on a division were defeated by a vote of 30 to 52. All the unfriendly amendments having been disposed of, the House voted to pass the bill and sent it to the Senate.

Two days later, when the Senate took up Walton’s bill, it was immediately faced with the same 21-and-under diluting amendment that the House had just voted down. Republican Cyrus Witham, a 26-year-old clerk and member of Sons of Temperance, opposed it for the very reason that the other chamber had rejected it. The amendment’s sponsor, Frederick Walls (who was returned at the 1900 Census of Population as a “Capitalist”), while presuming that it was legislators’ duty to “prohibit all those things that would be to the injury of mankind,” nevertheless urged his colleagues to restrict such prohibitions to “those who were already under guardianship or in their minority. Those who were over over age should have left to them the possession of their rights and individuality, and the responsibility left upon them relative to their own actions. There should be a line drawn somewhere, establishing a just medium of legislation....” Farmer Matthew Morrill closed the debate by pointing out the huge disproportion between the 16,000 petitioners and only 228 remonstrants and emphasizing the clear demonstration that “not a particle of good” arose from using cigarettes, which were “exceedingly detrimental to health in a great many ways.” On a roll call the Senate then voted 15 to 10 to adopt Walls’s amendment. After passing the bill so amended the Senate sent it back to the House for

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829 Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 409-10 (Mar. 24) (1897); Amendments A and B (Mar. 24, 1897), in Maine State Archives, 1/1 1897 ch. 405 Box 778.


831 Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 6 (Howard Owen comp.).

832 A farm laborer was also returned as his boarder. 1900 Census of Population (HeritageQuest). He had previously been a school teacher, merchant, sheriff, non-practicing bar member, deputy customs collector, and granite company director; in 1897 his occupation was business manager and school supervisor. Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 6 (Howard Owen comp.). See also Joseph Williams, History of the City of Belfast in the State of Maine, vol. 2: 1875-1900, at 146 (Alfred Johnson ed. 1915).

Unsurprisingly, given the large majority for Walton’s universal cigarette sales ban, the House refused to recede and concur, as, Cyrus Blanchard, who had voted against both proposed amendments on March 4, moved; instead, it insisted on its version of the bill and called for a conference committee with the Senate by a vote of 61 to 11. Of the three Republican members appointed by the speaker to the conference committee two had also voted against both amendments, one of them, James Hamilton, a Methodist, order organizer, lecturer, and life insurance agent, having moved that the House insist.835 When the Senate received notice of the House action, Witham moved that the Senate recede and concur with the House, but his motion was defeated by a rising vote of 4 to 12, and the Senate proceeded to appoint to the conference committee three members who had all voted for Walls’s amendment.836 In the event, in conference the Senate’s defanged version of the House bill was agreed on, and on the final day of the

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834Journal of the Senate of Maine 1897: Sixty-Eighth Legislature 579-80 (Mar. 26) (1897); Senate Amendment “A” to House Doc. # 171 (Mar. 26, 1897), in Maine State Archives, 1/1 1897 ch. 405 Box 778. Between the 15 Republicans who voted Yea and the 10 who voted Nay biographical profiles do not appear to have differed decisively: the average age of the first group was 48 compared to 45 in the second; occupationally, the first group included three farmers, three lawyers, two merchants, two manufacturers, and a physician, while the second group included four farmers, two surveyors, one manufacturer, and one physician; nor was denominational affiliation within Protestantism markedly different. The average population of their hometowns did exhibit some difference: 5,500 and 3,500 respectively; the arithmetical reason for the difference lay in the fact that none of the non-compromising senators lived in a town with a population above 6,000, whereas four of those backing the bill’s severe dilution lived in towns with populations ranging from 8,000 to 22,000. However, eight of the Yea-voters lived in towns of 1,000 to 3,000. Data taken from Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 3-7 (Howard Owen comp.); U.S. Census Office, Twelfth Census of the United States Taken in the Year 1900: Population, Part II, tab. 5 at 189-95 (1901).

835Legislative Record of the Sixty-Eighth Legislature of the State of Maine: 1897, at 437 (Mar. 26) (1897); Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 641 (Mar. 26) (1897). Blanchard was a 27-year-old Free Baptist and former school principal, who by 1897 was a lawyer and school board chairman. Biographical Sketches of the Members of the Senate and House of Representatives of Maine for 1897, Vol. 18, at 8-9 (Howard Owen comp.). On Hamilton, see id. at 12. The other two conference committee members were Thurston Burns (who had voted to refer the bill to the Judiciary Committee) and Benjamin Burton.

session both houses accepted the committee report and passed the no-cigarette-sales-to-under-21-year-olds bill, which became law.

Thus the House, as the Maine WCTU noted at its annual convention, “at first refused to concur, but at last yielded.” Rather than assessing this outcome of the pro-tobacco strategy of dilution, which was frequently implemented in state legislatures, as a bill killing, the WCTU portrayed it, at least for public consumption, as contributing to “a stronger and more universal sentiment against cigarettes than ever before....” Thus while regretting the amendment, narcotics superintendent Wentworth assured the membership that “we are glad of so much advance...."

The law may have been designed to prevent boys from smoking cigarettes, but when it went into effect at the beginning of May the press reported that people generally hoped that “the noisome pestilence of a cigarette may become less and less until it may some day die a horrible death.” Though not for health reasons, tobacco dealers, as was the case in other states too, “would be just as well pleased to have the sale of cigarettes prohibited altogether.” Their indifference was grounded in their mere 1.2 cent profit from a 5-cent box of 10 cigarettes.

As predictions of the cigarette’s demise proved to be premature, the Maine WCTU radicalized its anti-tobacco program. For example, in 1899 the organization, recognizing that “the injurious effects of the use of tobacco upon the young, in cigarettes or any other form, cannot be combated successfully except by example,” adopted a resolution “urg[ing] that no certificate shall be granted to teachers who use tobacco in any form” and that church members “shall discountenance” its use “by their Sunday school superintendents and all other church officials.” Taking the next logical step the following year after receiving information “at only one remove” from a faculty member that cigarette smoking was being “practiced” by University of Maine students, the WCTU adopted a resolution expressing the belief that “our state university should imitate

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837 Journal of the Senate of Maine 1897: Sixty-Eighth Legislature 603 (Mar. 27) (1897); Journal of the House of Representatives of the State of Maine 1897: Sixty-Eighth Legislature 666 (Mar. 27) (1897); State of Maine, Committee of Conference (Mar. 27, 1897) (reporting bill in a new draft and that “it ought to pass”), in Maine State Archives, 1/1 1897 ch. 405 Box 778.

838 1897 Maine Laws ch. 333, at 406.

839 Twenty-Third Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1897, at 72 (1897).


841 Twenty-Fifth Annual Report of the Woman’s Christian Temperance Union, of the State of Maine for the Year Ending September, 1899, at 37 (1899).
the regulations of the United States [sic] academy, of Bates college and other progressive institutions, and receive no students who will not refrain from cigarette smoking and the use of tobacco in other forms." With such an arch-paternalistic, anti-libertarian intervention still on no anti-smoking agenda more than a century later, little wonder that even in the shorter run Maine failed to enact a statewide ban on cigarette sales.\footnote{Twenty-Sixth Annual Report: Woman’s Christian Temperance Union of Maine for the Year Ending September, 1900, at 22.}

Illinois: 1897

Under penalty we forbid apothecaries from dispensing morphine, laudanum, or prussic acid without the order of a physician. Yet we tolerate the slow destruction of the minds and bodies of schoolboys and young men by the toxic abominations concocted in the laboratories of the cigaret trust.\footnote{“The Poisoned Cigaret,” \textit{CT}, June 6, 1894 (6) (reprinted from \textit{Evening Post} (Chicago)).}

Despite the failure of the Morris bill in 1893,\footnote{Report National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting...1897, at 182-83 (1897). Nevertheless, in 1897 the WCTU, as discussed below, while strongly supportive of the legislative anti-cigarette agitation, did not spearhead the campaign. On its support, see, e.g., “Upper Alton W.C.T.U.,” \textit{Alton Evening Telegraph}, May 7, 1897 (4:5).} efforts to pass a cigarette sales ban in Illinois continued unabated throughout the 1890s, in part because the WCTU’s national headquarters was located in Chicago and the Illinois WCTU’s membership (12,766) was the third largest in the country,\footnote{See above ch. 4.} but also because the militant anti-cigarette crusader Lucy Page Gaston lived in Cook County. (At the 1900 and 1910 Census of Population the enumerator even recorded her

\footnote{According to the indexes to the Senate and House \textit{Journal}, no other anti-cigarette bills were even introduced between 1895 and 1903. As late as 1919, a bill was introduced in the House to prohibit the smoking, manufacture, sale, importation, or handling of cigarettes, cigarette paper, or cigarette tobacco subject to a fine of $100 and 60 days’ imprisonment (plus an additional 60 days in default of payment). Seventy-Ninth Legislature of State of Maine, House No. 78 (Jan. 31, 1919). The bill died after the Public Health Committee had voted that it “ought not to pass.” \textit{Journal of the House of the State of Maine: 1919: Seventy-Ninth Legislature} 382 (Mar. 5) (1919).}
occupation as “reformer.”) The momentum for state legislative action was also reinforced by the constant agitation for and adoption of a prohibitory high license in Chicago.

By the time the next round of initiatives was launched at the 1895 session, comfortable majorities in both houses had shifted back to the Republicans (who would continue to control the legislature until the New Deal). No fewer than five bills were introduced by Republicans and Democrats in both chambers, representing Chicago and smaller towns, and engaged in various occupations; the three House bills all died in committee, while the two Senate bills at least received a committee report. The first to be introduced and the one that gained the most press attention was H.B. 235, by first-term Chicago Democrat Frank J. Brignadello, a 30-year-old merchant. When it was referred to the Judiciary Committee, Brignadello moved to suspend the rules and refer it to the Committee on Manufactures, but his motion lost. His bill to prohibit the manufacture, sale, and giving away of cigarettes carried forward, almost intact, the language of Morris’s bill by including “all preparations of tobacco wrapped in paper, or any kind of tobacco for such use, and impregnated with opium, stramonium, belladonna, alcoholic liquor, valerian, tonca bean, or mellotis [sic], or any other deleterious matter.” The bill also made it “devolve upon the defense to show the

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847 Twelfth Census of the United States, Schedule No. 1—Population, Series T623, Roll 295, Page 159 (1900) (HeritageQuest); Thirteenth Census of the United States, Series T624, Roll 241, Page 96 (1910) (HeritageQuest). In the latter year she was returned as superintendent of the Anti-Cigarette League. For a typical hyperbolic claim of Gaston’s influence, see Frances Warfield, “Lost Cause: A Portrait of Lucy Page Gaston,” Outlook and Independent, Feb. 12, 1930, at 244-47, 175-76, at 246 (“Directly or indirectly through her efforts, total anti-cigarette laws had been passed in eleven states by 1913”).

848 “As a direct result of the anti-cigarette movement, a municipal license went into effect, which prevents the indiscriminate sales of the obnoxious ‘smokes.’” “New War on Cigaretts,” CT, Sept. 22, 1897 (8).

849 Republicans controlled the Senate 33 to 18 and the House 92 to 61. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 57 (2007). Between 1864 and 1932 Democrats were the majority party in the House only in 1890, 1892, and 1912, and in the Senate only in 1876 and 1892.

850 The Portraiture of the 39th General Assembly of Illinois: 1895, at 202; Official Directory of the Fortieth General Assembly of Illinois: Session of 1897, at 48 (1897). Brignadello was returned at the 1900, 1910, and 1920 Census of Population as a real estate merchant.

851 Journal of the House of Representatives of the Thirty-Ninth General Assembly of the State of Illinois...1895, at 155 (Feb. 6) (1896).
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articles in question are cigarettes.” As soon as the bill was filed, the Chicago Tribune reported that it did not “disturb dealers much” because they had become used to ordinances and license and adulteration measures. Indeed, cigarette dealers in Chicago, like many elsewhere, were not worried even if an absolute ban were implemented because there was “more profit in other smokes and their use would increase.” At the ATC’s Chicago office nonchalance was purportedly the reaction as it puffed to the press that “as a rule measures of the kind introduced had little power. It had been known in the office for a week that such a bill was contemplated, but the knowledge had not roused action.” Two other bills, both introduced by Republicans, followed Brignadello’s to an early grave in the House Judiciary Committee, in which an effort was to be made at the end of February to combine the three in one and report it back to the full House as a committee bill. In the Senate, Democrat Albert Brands, a physician who was opposed to “any legislation that will be likely to foster trusts or monopolies,” and 77-year-old retired merchant Thomas Hamer, a Republican, both introduced manufacture/sales ban bills, which the Corporations and Education Committees took almost four months to report, in the one instance recommending against passage and in the other without any recommendation.

Despite the House and Senate Journal’s virtual blank legislative history slate and ATC’s studied insouciance, in fact, as the Tribune also reported, the “cigaret trust” industriously lobbied the bills to death. A few days after the last of the five bills had been introduced, the newspaper noted that the “cigaret trust is being made painfully aware” of the legislative session, early in which “a couple of gentlemen representing the cigarette trust came to Springfield and remained here a week or ten days. One was a portly, fine looking, middle-aged man and the

852“To Keep the Cigarets Out of the State,” CT, Feb. 7, 1895 (5).
853“Not Worried over the Cigaret Bill,” CT, Feb. 8, 1895 (12).
854H.B. 395, introduced by Swedish-born Lars Noling, authorized local governments to regulate the manufacture, sale, and traffic in cigarettes, while farmer James Fletcher’s H.B. 452 prohibited their sale and manufacture. Journal of the House of Representatives of the Thirty-Ninth General Assembly of the State of Illinois...1895, at 224, 259 (Feb. 20, 27) (1896); The Portraiture of the 39th General Assembly of Illinois: 1895, at 100, 76.
855“Many Bills Come Up,” CT, Feb. 25, 1895 (2).
856Souvenir of the Illinois Legislature of 1893, at 22 (1893).
859“Will Resume with a Rush Today,” CT, Mar. 5, 1895 (2).
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other about 55 years of age, thin and spare in flesh. They were rather cavalierly treated, particularly by some of the Chicago members, who remembered the unpleasantness over the cigaret legislation in the City Council between the representatives of the cigaret industry and Ald. Powers. Ordinarily the representatives of an interest assailed or assailable by legislation is royally welcomed during sessions of the Legislature; the cigaret men were the exceptions to the general rule.” At this point the Tribune’s narrative turned opaque as it alluded to the ATC lobbyists’ sudden departure from the state capital after they had made the acquaintance of two unidentified non-legislators. As for the fate of the bills, the paper knew no more than intimations that either the House Judiciary Committee would soon consider them or that a duplicate Brignadello bill would be introduced and expedited to a second reading without a committee referral, “thereby demonstrating to the world that the cigaret trust is resting its hopes for absolution from hostile legislation on broken reeds.”

Nevertheless, a few days later, in early March, a “good many” legislators were still “dissatisfied over the failure of some of the committees to act on measures of importance which are being juggled by lobbyists.” Chief among them was the House Judiciary Committee, which for several weeks had been sitting on “bills calculated to abolish the trade in cigarettes, or bring it within proper restrictions.” The Tribune bluntly noted that the “cigaret trust has men here watching these bills and the consequence is that the committee, although promising day after day to take them up, has done nothing with them.” A similar blockage had stymied the Pullman bills in the House Corporations Committee. Once again, the paper predicted, that, with time for action passing, unless the bills were soon reported out, duplicates would be introduced to bypass the committees because: “Nothing can stop these bills if they ever get before the House, and the project of the parties interested contemplates their smothering in committee.”

As the members who were “making war on the cigarette [we]re getting uneasy about the bills,” one of them declared that unless the committee considered them at once, he would offer a resolution instructing it to report them forthwith without

860“After the Cigaret,” CT, Mar. 2, 1895 (4). On the city council ordinance, see below this ch.

861“Will Resume with a Rush Today,” CT, Mar. 5, 1895 (2). Many legislators’ belief that the great Pullman strike could have been averted if Pullman had entertained arbitration or compromise with the workers engendered considerable bitterness toward the corporation. In conformity with Governor Peter Altgeld’s proposal to protect people against the “extortion” in sleeping-car rates, several bills were filed to reduce rates. “Broth in the Fire,” CT, Feb. 28, 1895 (1).
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recommendation so that the House could consider them. 

Insuring that they not reach the House floor was presumably in part the doing of the chairman of the House Judiciary Committee, Daniel S. Berry. A railroad attorney and one of the “Big Four” who controlled legislative destinies that session, he was “accused of boodling.” Consequently, Berry, who declared that a legislator could also serve constituents by preventing legislation, was the chief target of reformers.

So adroit were the Trust’s lobbyists and their legislative assistants that they swiftly succeeded in euthanizing the sales-prohibition bills without witnesses:

There was a small business transaction in the House Committee on Judiciary one day last week which attracted little attention at the time, but it seems to have been the death knell of the anti-cigarette bills. At the time no newspaper correspondents were present. A clever move was made and all four of the bills for the prohibition of the sale of cigarettes were sent to a subcommittee. This was for the alleged purpose of combining the four into one bill. It has since leaked out, however, that these bills were sent there for burial and that it is not the intention of the cigarette trust that they shall ever again see daylight.

Nor did they—at least during the 1895 session.

But in November 1896, shortly after the elections had boosted the number of Republican-held seats in the 51-member Senate to 39, while leaving the party’s House majority virtually unchanged, the executive committee of the Christian

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862“Plans for the Week,” DIO, Mar. 4, 1895 (7:4).
863“Meyer Announces His Committees,” CT, Jan. 30, 1895 (2); “Illinois Lawyer Slain,” NYT, May 23, 1905 (1); “Mystery Deepens in Savanna Crime,” CT, May 24, 1905 (1, at 5:2) (quote); (“D. S. Berry Will Fight Vicious Bills,” CT, Jan. 7, 1895 (2); “Politician Slain,” CT, May 23, 1905 (1, at 4:2). In 1905 a jealous husband killed Berry.
864“Up for Final Action,” CT, Mar. 11, 1895 (2); “Work of the Week,” DIO, Mar. 11, 1895 (4:3-4). A week earlier the same paper had reported that the Senate Manufactures Committee would consider the anti-cigarette bill in two days with the plan of combining them into one “radically modified” license measure because a sales ban was unenforcible. “Plans for the Week,” DIO, Mar. 4, 1895 (7:4-5). Since the Senate bills had not been referred to this committee, it is unclear how it would have jurisdiction over them.
865Eleven Democrats and one Populist were elected to the Senate; the House was divided among 89 Republicans, 62 Democrats, and two Populists. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 57 (2007). Because one Democratic senator (Albert Wells) died in early March without being replaced, by the time the Senate dealt with the House-passed anti-cigarette bill in late May, it was composed of 39 Republicans, 10 Democrats, and 1 Populist. Official Directory of the Fortieth General Assembly of Illinois: Session of 1897, at 73a (1897).
Citizenship League—a proto-Christian Socialist organization—issued an appeal to the state’s Christians to exert their influence on the legislature to enact three pieces of legislation at the 1897 session: preserving the Sabbath as a day of rest, establishing local option alcohol prohibition, and prohibiting the manufacture and sale of cigarettes. In mid-January Republican farmer George Stubblefield initiated the session’s flow of anti-cigarette measures by introducing in the Senate a bill “to provide for the licensing of and against the evils arising from the sale of cigarettes,” which, by imposing a $2,000 and $5,000 annual license (the money to go the school fund) on retailers and wholesalers, respectively, and a fine ranging between $100 and $1,000 and imprisonment up to one year, was said to “amount to prohibition.” Four days later third-term Republican Representative Lars Noling, a Swedish immigrant who was president...
of numerous agricultural implement factories and a newspaper, introduced a bill to prevent the manufacture and sale of cigarettes.872 These two bills were quickly superseded—neither saw any further action—as a result of coordinated intervention by the League and various Chicago school and women’s clubs and organizations, including the League and the WCTU, which met on February 3. Chicago school principal Mary Darrow Olson (Clarence Darrow’s older sister) and Edith Nelson, the president of the Chicago Teachers’ club, then decided to issue a call for a conference on February 20 to mobilize support for an anti-cigarette bill, which was drafted by William W. Wheelock, a lawyer, who had been a member of the Illinois House of Representatives in 1893 and also attended the meeting, as a League representative. The plan also contemplated, following the conference, mass meetings throughout Illinois organized by local boards of educations and teachers groups.873

Wheelock’s bill, which the Tribune printed in full before it was ever introduced, imposed a fine of $50 to $100 and/or 30 to 60 days’ imprisonment on anyone who made or manufactured, kept on hand for sale, offered or advertised for sale, or sold or gave away cigarettes. The proposal also defined “cigarettes” to include any tobacco “soaked in nicotine, or impregnated with” any of the substances cited in the Morris and Brignadello bills. Wheelock’s draft bill also provided that any “shifts to evade” the law such as changing the name of the thing sold when it was in fact a cigarette would be held to be a violation. The bill did not require the prosecution to show “the guilty knowledge of the principal in order to convict him for the acts of an agent or servant; or that the defendant knew the ingredients used were poisonous or deleterious....” Finally, Wheelock also

873 “Crusade on the Cigaret,” CT, Feb. 8, 1897 (7). On Wheelock, see Souvenir of the Illinois Legislature of 1893, at 90 (1893). Lucy Page Gaston, who was editor of the NCCL’s Christian Citizen, also attended the meeting. The New Encyclopedia of Social Reform 52 (William Bliss ed. 1909). Without any substantiation, Cassandra Tate, Cigarette Wars: The Triumph of “The Little White Slaver” 47 (1999), asserted that in “1897, Gaston enlisted the aid of the Christian Citizenship League in petitioning the Illinois legislature to again consider prohibiting cigarette sales and manufacturing.” The National WCTU mentioned the League’s primacy in this campaign, which the WCTU and other groups “reinforced.” “Notes and Comments,” US 23(6):1 (Feb. 11, 1897). The following month the National WCTU expressly stated that it was the League that would or would not succeed in securing passage of H. B. No. 221, while the WCTU and other groups were cooperating with it. “An Anti-Cigaret Bill,” US 23(12):8 (Mar. 25, 1897).
relieved the prosecution of the burden of showing that the cigarettes were saturated or impregnated with any of the aforementioned poisonous or deleterious substances, making it instead the defendant’s to show that they were not. 874

The anti-cigarette coalition announced that the bill would be introduced within the week and that “tremendous pressure w[ould] be exerted in its behalf from all parts of the State.” 875 Two days later Cook County Democrat and lawyer Ross C. Hall introduced the groups’ bill. 876 The day before the conference the Tribune used the occasion to publish a long article detailing the state-by-state legislative “campaign against the drugged, poison-laden, memory-destroying, corrupting cigaret,” which had “attained national proportions,” whether in the form of manufacturing and sales bans or “practically prohibitory” licensing. To be sure, the newspaper offered a cautionary retrospective of the Illinois legislature’s performance in 1893 and 1895: “There was a cigaret bill in the General Assembly four years ago which was killed in the House. There was also a bill in the session two years ago, but it did not cost the cigaret people much to kill it.” 877

The “enemies of the cigaret habit in the State of Illinois” who assembled in Masonic Temple on February 21, 1897, made it clear that their focus was school children without—at least as far as the Tribune’s extensive report reflected the proceedings—explaining, let alone justifying, the necessity of a universal sales ban that also prohibited selling cigarettes to those children’s fathers. This orientation underlay the resolutions that the various groups’ representatives passed with regard to both securing the Chicago Board of Education’s “active support...in the campaign now being waged in Springfield for the extermination of the ‘coffin nails’” and requesting it to “devise some system for the regulation of and proper licensing of school supply stores with a view to the suppression of

874“Crusade on the Cigaret,” CT, Feb. 8, 1897 (7).
875“Crusade on the Cigaret,” CT, Feb. 8, 1897 (7).
877“Push War on Cigarets,” CT, Feb. 20, 1897 (9:3).
“To Shut Out Cigarets,” CT, Feb. 21, 1897 (13).

“Women Take Charge of a Committee,” CT, Mar. 24, 1897 (10).

“To Shut Out Cigarets,” CT, Feb. 21, 1897 (13).


“To Shut Out Cigarets,” CT, Feb. 21, 1897 (13). The account here appears to be garbled since it had Hall as not having introduced his bill yet and described the hearing as devoted to Noling’s bill.

“Go to Fight Cigarets,” CT, Feb. 23, 1897 (12).

Journal of the House of Representatives of the Fortieth General Assembly of the State of Illinois 219 (Feb. 24) (1897). The press report that the bill set the maximum fine at $1,000 and imprisonment at one year appears to be incorrect. “Means Defeat for Bill,”
succeeded in persuading the judiciary committee of the Chicago city council to recommend that the aldermen pass a resolution directed to the state legislature in support of the bill. A week later she wept at a small meeting held under the auspices of the WCTU in the People’s Institute devoted to the bill as she expressed her discouragement at the small turnout and related that money had been lacking for the stamps to mail issues of the Christian Citizen. After one minister, unnerved by the tears, had to abandon his attempt to break the silence, Rev. J. B. Silcox, a Canadian who since 1895 had been leading a Congregationalist church in Chicago, came close to articulating a basis for a general sales ban that was nevertheless primarily designed to “give the boys a chance to come to full moral, mental and physical manhood. The men are responsible for much of the cigaret smoking. Fathers smoke in the presence of their sons, and the latter become imbued with the idea that it is a manly thing to smoke. I should like to have a law that would put men who pollute the air by foul smoke into dens and caves until they learned better.”

On April 22, when the House finally took up H.B. No. 221 on its second reading, it adopted all the amendments offered, several of which strengthened and none of which weakened the bill. The Judiciary Committee reported its amendment, which struck out the aforementioned final provision of the bill placing the burden on defendant-sellers to show that its cigarettes were not impregnated or saturated with any of the listed poisonous or deleterious substances. Then Hall offered an amendment to his own bill incorporating
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several significant changes: (1) expanding the scope of prohibited acts in § 1 by adding “or has in his possession with intent to sell or give away”; (2) adding cigarette papers to the prohibited objects for sale; (3) increasing the minimum fine from $50 to $100 and the maximum fine from $100 to $200; and (4) expanding the definition of “cigarettes” to include tobacco in tobacco wrappers (in addition to paper wrappers). Finally, Democratic floor leader Caleb Johnson offered an amendment making it unlawful to sell or give away cigarettes to anyone under 21 subject to a fine of $25 to $200.889 A week later the House, “without debate”890 and “amid enthusiastic applause,”891 unanimously passed the bill by a vote of 100 to 0. Notably, only 33 (or barely half of the) Democrats voted compared to more than three-fifths of Republicans. (Both Populists failed to vote.) Among those 33 Democrats only five represented Chicago, which elected 17 Democrats to the House; in contrast, 16 of 25 Chicago Republicans voted.892

The Tribune’s report that the effort to pass the bill in the Senate would “not
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encounter serious opposition” soon proved to be surpassingly inaccurate. The Education Committee, to which it took the Senate 12 days to refer the bill, two weeks later “practically killed” H.B. No. 221 by voting 8 to 6 to postpone its consideration until the session’s penultimate day (June 3). Although the vote may not have been party specific—the Yeas were cast by six Republicans and two Democrats, the Nays by six Republicans (while two Democrats did not vote)—remarkably, senators from Chicago cast all but one of the Yeas and none of the Nays. The bill’s extra-parliamentary advocates—the “women who have been here all session urging the passage of the bill”—though “greatly disappointed, assert that a majority of the Senators are for the bill, and through the friendly offices” of Education Committee chairman Senator Bogardus, they “still hope[d] to get the bill into the Senate in time to pass it.” That chance came (and went) the very next day when Senator Henry Dunlap, the chairman of the Republican steering committee—who was an apple orchard owner, past president of the State Horticultural Society, and graduate of the University of Illinois, which was located in his district—offered a resolution directing the Education Committee to report H.B. No. 221 “without delay” and moved to suspend the rules in order to consider his resolution. The anti-cigarette women had, apparently, not exaggerated the strength of senatorial support for the bill: a clear majority (23 of 42) voted to take up the resolution, but it fell five votes short of the two-thirds required for suspension of the rules. If the Tribune’s report that, when Dunlap offered the resolution, “[o]bjections were heard from all parts of the Senate,” was meant as a reference to party affiliation, it failed to capture the reality that Republicans cast 20 of the 23 Yeas (joined by only one Democrat, one Democrat-Populist, and the sole Populist), while five Democrats and 14 Republicans voted Nay. In addition to the fact that 90 percent of Republicans voted compared to only 60 percent of Democrats, perhaps the most striking dimension of the 14-member Chicago delegation’s behavior was that all three Democrats and nine of 11 Republicans voted against considering the resolution.

893“Hard Blow at Cigarette,” CT, May 1, 1897 (3).
894Journal of the Senate of the Fortieth General Assembly of the State of Illinois 743 (May 12) (1897).
895“House Cigaret Bill Is Killed,” CT, May 27, 1897 (2).
897Journal of the Senate of the Fortieth General Assembly of the State of Illinois 875 (May 27) (1897).
898“Bills Passed by Both Houses,” CT, May 28, 1897 (2).
899Journal of the Senate of the Fortieth General Assembly of the State of Illinois 875
Two days after the House had unanimously passed H.B. No. 221 a Tribune editorial sarcastically wondered whether “[p]erhaps Mr. Yerkes will allow the twenty-nine [Senate] members who belong to him to amend it so that it will hold water.”900 The allusion was to Charles Yerkes, Chicago’s street railway magnate, whose bribery of Chicago aldermen had been instrumental in turning that city into the “Boodle Capital of the World.” However, dissatisfied with the mere 20-year maximum monopoly franchises that the city charter permitted, Yerkes in 1897 sought to circumvent that limitation by securing from the state legislature passage of a bill granting him a 50-year extension of his franchises. Since Yerkes’ machinations called forth massive protests by municipal reformers901—even “dignified merchants ranted of the tyranny of organized capital”902—a comparison of the Senate vote on H.B. No. 221 with those on the two sets of high-profile street railway bills may shed light on the anti-cigarette legislators’ progressive character.

On April 16 the Senate passed Yerkes’ Humphrey bills by a vote of 29 to 16. Of the 16 senators who voted against it, on May 27, 11 voted for consideration of H.B. No. 221, while only four voted against it; of the 29 who voted for the “Humphrey Boodle Bills,” 15 voted against H.B. No. 221 and only eight for it. Of the 11 Chicago senators who voted for Yerkes’ bill, 10 voted against considering the anti-cigarette bill and only one for it; of the three Chicago senators who voted against Yerkes, one voted for and two against H.B. No. 221. Of the 13 non-Chicago senators who voted against Yerkes 10 voted for the anti-cigarette bill and only two against it; of the 18 non-Chicago senators who voted for Yerkes seven voted for the anti-cigarette bill and five against it. Looked at from the other perspective, of the 19 senators who opposed considering H.B. No. 221, 15 voted for the Humphrey bill and four against, while of the 23 who voted for the anti-cigarette bill, eight voted for and 11 against the Humphrey bills. Of


902“Tribulations of Chicago,” NYT, June 13, 1897 (6:1).
the 12 Chicago senators who voted against considering H.B. No. 221 10 voted for the Humphrey bill and only two against it, while the two who supported the anti-cigarette bill split on the pro-Yerkes bill. 907 The 31 to 18 vote on June 4 in favor of the Allen bill, 904 the second iteration of Yerkes’ bill following House defeat of the Humphrey bill, 905 was marked by a similar configuration. Of the 18 (including 4 Chicago) senators who voted against it 14 (2) supported considering H.B. No. 221 and 3 (2) opposed the anti-cigarette bill; of the 14 non-Chicago senators voting against Yerkes 12 voted for considering H.B. No. 221 and only one against it. Of the 31 (10 Chicago) senators voting for the Allen bill 15 (9) voted against and 9 (1) for H.B. No. 221; of the 21 non-Chicago senators voting for Yerkes 6 voted against and 8 for considering the anti-cigarette bill. 906

The correlations between votes on the cigarette sales ban bill and the Yerkes bills were considerably more polarized when viewed from the perspective of those who voted against rather than for the former. Thus, 79 percent of those who voted against H.B. No. 221 voted for the April Yerkes bill (that is, consistently took the non-progressive position on both), whereas only 58 percent of those who voted for H.B. No. 221 voted against Yerkes (that is, consistently took the progressive position). Similarly, whereas 86 percent of Republicans who voted against H.B. No. 221 also voted for Yerkes, only 50 percent of Republicans who voted for H.B. No. 221 also voted against Yerkes. The same relationship obtained with regard to Chicago senators: 83 percent of those who voted against H.B. No. 221 also voted for Yerkes (the pro-H.B. No. 221 votes being too few to be significant); likewise, 89 percent of Chicago Republican senators voted consistently. Only with regard to non-Chicago senators was the polarization somewhat less prominent: 71 percent versus 59 percent, respectively, and among non-Chicago Republican senators 80 percent and 50 percent, respectively. The core of the discrepancy was seven non-Chicago Republicans—including the high-profile anti-cigarette Stubblefield, who had filed his own aforementioned bills—who voted for both H.B. No. 221 and the Humphrey bill. 907

903“The Humphrey Bills,” CT, Apr. 17, 1897 (12); Journal of the Senate of the Fortieth General Assembly of the State of Illinois 875 (May 27) (1897); “Humphrey Boodle Bills,” CT, Apr. 17, 1897 (3) (quote).
904“House Adopts Senate Amendments to Allen Bill,” CT, June 5, 1897 (1).
905“Are Defeated in the House by a Vote of 123 to 29,” CT, May 13, 1897 (1).
906“House Adopts Senate Amendments to Allen Bill,” CT, June 5, 1897 (1); Journal of the Senate of the Fortieth General Assembly of the State of Illinois 875 (May 27) (1897).
907 Rather than bribery Yerkes-arranged “logrolling” may have induced some of these non-Chicago senators to vote for his bill, which did not affect their constituents. See
correlations between voting on H.B. No. 221 and the June Yerkes bill were similar.\textsuperscript{908} That non-progressives on the cigarette bill were more consistently non-progressive on the streetcar franchise bill than progressives on the cigarette bill were on the Yerkes bill may in part be explained by the fact that, although, contrary to the \textit{Tribune}'s aforementioned sarcastic commentary, Yerkes did not have all 29 senators who voted for his bill on April 16 in his pocket, 65 percent of those (23) who voted against the streetcar franchise bill two weeks later as did even two of the three Chicago senators who had voted against Yerkes.\textsuperscript{909}

The death of the House bill in the Senate by no means put an end to efforts to ban cigarette sales in Illinois, especially since both Republican Governor John Tanner assured the bill’s backers of “his personal interest in the measure” and “legislators testified that more correspondence” was carried on concerning the cigarette bill “than all the rest before the House put together.”\textsuperscript{910} Indeed, the century’s last legislative session in 1899 witnessed the introduction of even more such bills by members of both parties in both houses, although none reached the floor. In the Senate Stubblefield once again offered his bill to provide for licensing of and against the evils arising from the sale of cigarettes,\textsuperscript{911} while a fellow Republican introduced another to ban the sale or bringing into the state of cigarettes for sale or giving away,\textsuperscript{912} but the chamber took no action on either.

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\textsuperscript{908} For example, 78 percent of those who voted against H.B. No. 221 voted for the June Yerkes bill, while only 59 percent of those who voted for the former voted against the latter. Because only 10 senators were Democrats and only seven of them voted on H.B. No. 221 their voting patterns are less significant.

\textsuperscript{909} Comparison of voting on the two bills may be skewed by the fact that the vote on H.B. No. 221 was ostensibly procedural, but senators’ knowledge that failure to expedite reporting the bill was tantamount to killing it may have rendered the vote substantive.

\textsuperscript{910} “New War on Cigaretts,” \textit{CT}, Sept. 22, 1897 (8). An effort, led by Lucy Page Gaston as agent of the National Christian Citizenship League, to persuade the governor to include the anti-cigarette bill in his call for an extra session failed. Id.

\textsuperscript{911} \textit{Journal of the Senate of the Forty-First General Assembly of the State of Illinois} 70 (Jan. 24) (1899) (S.B. No. 57, by Stubblefield).

\textsuperscript{912} \textit{Journal of the Senate of the Forty-First General Assembly of the State of Illinois} 70 (Jan. 24) (1899) (S.B. No. 59, by Harry Hall).
Three House bills also saw no action, but a fourth received a do pass recommendation from the Judiciary Committee, got as far as being ordered to second reading, and was supported by petitions. The detailed proscriptions recited in the title of H.B. No. 238, which was introduced by Republican Oliver J. Page, a high school principal and school superintendent turned journalist, are worth calling attention to: “An act making it unlawful for any person, either by himself or another, to sell, barter, loan, give, make, fabricate or manufacture or have on his premises, in his possession or under his control any of those articles commonly called ‘cigarettes,’ and making it unlawful for any person to have on his premises, in his possession or under his control any substances or material out of which any part of such cigarettes can be made, with the knowledge or purpose that at any time such substances or material is to become a factor in such ‘cigarettes’…."

As it had in every regular session since 1893, the Illinois legislature continued considering anti-sales bill until 1907, when the anti-cigarette movement finally succeeded in securing an enactment that placed the state in the midwestern mainstream (joining North Dakota, Iowa, Oklahoma, Nebraska, Indiana, Wisconsin, Minnesota, South Dakota, and Kansas). To be sure, Lucy Page Gaston’s victory was short-lived: two days before it was to go into effect, a Cook County superior court declared the general sales prohibition unconstitutional on the technical grounds that that provision was broader than its title, which spoke only of “regulate[ing]” sales.
Chicago’s License Ordinance, 1894-1907: Did the Aldermanic Boodlers Sandbag the Tobacco Trust or Was the Vice Versa?

The mayor [Carter H. Harrison] announced that hereafter no smoking of cigars will be allowed during the sessions of the Council.


“The cigarette day is past,” was the reply.919

There is growing conviction among business-men and employers that the inhaling of cigarette smoke is physically and intellectually injurious, and many are inclined to discourage or prohibit the use of cigarettes among their employés.920

We have had much less fact than fancy in our notions concerning the effects of smoking.... For example, we have the ever-prominent opposition to the cigarette, which prejudices opinion and even legislation as actively as ever, in spite of the fact that the claims on which this prejudice is based, namely, that cigarettes are “doped” with opium and other expensive drugs by extravagant manufacturers,...have been disproved over and over again by chemists and commissions.921

Concurrently with efforts in the Illinois legislature to pass a bill to prohibit the cigarette sales statewide the Chicago city council was engaged continuously from 1894 well into the first decade of the twentieth century in passing and defending in litigation, instigated by the Cigarette Trust, ordinances to license

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919“All Are Confirmed,” CT, Apr. 25, 1893 (3). On Powers’ later involvement in a bribery scandal over a cigarette licensing ordinance, see below.

920“Cigaret Ordinance Valid,” CT, Apr. 11, 1900 (12) (edit.).

On April 30, 1894, pursuant to the antitrust law that the state legislature had passed in 1893, Illinois Attorney General Maurice Moloney filed an information in circuit court to prohibit ATC—“one of the most ingenious, dangerous, and gigantic trusts in America...and the world”—the “octopus” that manufactured and sold 98 percent of all the cigarettes consumed in the United States, from doing business in Illinois. About this time, too, the Chicago Board of Education and School Board were receiving an increasing volume of complaints about the growing use of cigarettes by young boys, which was “nourished and fostered by the sale of cheap varities [sic] at every corner grocery, school-book shop, and variety store.” After teachers’ attempts to suppress the practice and discourage the trade had failed, “some persons interested in children...decided to make a crusade against the poisoned cigaret trade and as a result of their efforts” Alderman John McGillen, who was also chairman of

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922The Tribune editorially proclaimed licensure as more effective than a sales ban because it would be “practically impossible in any considerable number of cases” to prove that the cigarettes had been sold. It is unclear why the police would have greater difficulty determining whether cigarettes were being sold than whether the dealer had a license, which latter task the paper readily acknowledged “would not entail any hard work of consequence....” “Perfect the Cigaret Ordinance,” CT, Mar. 7, 1897 (28) (edit.).

9231893 Ill. Laws 182. Both houses passed the bill unanimously. “Half-Rate Fares,” DIO, June 26, 1893 (3:1). The law defined a “trust” as a combination of capital by two or more persons or firms to carry out trade restrictions, reduce production or raise prices, prevent competition, or enter agreements not to sell below a list price (§ 1). Any corporation with a charter that violated the law forfeited the charter (§ 2) and any foreign corporation violating the law was prohibited from doing business in Illinois (§ 4).

924“Turn on the Tyrant,” CT, May 1, 1894 (8). A dealer’s commission for selling and all business expenses was 35 cents per 1,000 cigarettes sold at not less than $2.50 per 1,000. The Trust was also accused of requiring dealers to enter into an agreement, which the Trust construed to prohibit dealers from handling any other producer’s cigarettes, to sell only at prices prescribed by ATC. On the state court decision declaring ATC an illegal corporation and prohibiting it from doing its business in Illinois and ATC’s unsuccessful contention that the state lacked the power to restrain an out-of-state corporation from shipping in and selling an article of commerce, see “Smoking Them Out,” N&O, May 16, 1897 (1:5); “Hits the Cigaret Trust,” CT, May 16, 1897 (13); “The Cigaret Trust Hit,” CT, May 16, 1897 (28) (edit.). ATC’s general counsel, W. W. Fuller had argued the case at trial. “American Tobacco Case,” NYT, Jan. 8, 1897 (1); “Tobacco Case Under Advisement,” CT, Jan. 9, 1897 (6).

925“Children Poisoned by Cigarettes,” CT, May 27, 1894 (9).

926Returned as an “alderman” at the 1900 population census, McGillen, who was born in 1861, at the next two decennial censuses appeared as a surety company Western agent and general manager, respectively. See also The Book of Chicagoans: A Biographical
the Cook County Democratic central committee,\footnote{Dictionary of the Leading Living Men of the City of Chicago 444 (Albert Marquis ed. 1911); Illinois Political Directory: 1899, at 159.} was to introduce before and urge adoption by the city council of an ordinance prohibiting the sale of cigarettes containing opium, morphine, glycerine, jimson weed, belladonna, or sugar, subject to a $50 to $100 fine and an additional daily $25 penalty for every day the person or firm persisted in violating the ordinance after conviction for the first offense. The Tribune reported a belief that the measure would be generally supported and passed to protect school children’s health, which was seriously affected by the aforementioned ingredients. The newspaper singled out for mention glycerine and sugar, which, when “inhaled as gas in cigarettes are rank poison to children....”\footnote{“Indictments Cut No Figure,” CT, May 27, 1894 (6).} McGillen’s role was presumably shaped by the attitude of his sister, a Chicago city school teacher, who helped galvanize action by characterizing boys who smoked cigarettes as “‘dull, sallow, and listless.”\footnote{“Children Poisoned by Cigarets,” CT, May 27, 1894 (9).}

When pyrolized, glycerine, a moistening agent that began to be used in the manufacture of tobacco products in the 1880s,\footnote{“When It Is Poison,” CT, June 6, 1894 (6) (quoting Board of Education President Trude).} yields acrolein, which is extremely toxic and irritating and inhibits or stops the lung-clearing movement of the cilia.\footnote{Charles Nystrom to Dr. Alan Rodgman, Subject: Comments on “The Smoldering Flavors Issue of Cigarettes,” by Arthur L. Schell, in the Chemical Business, April 6, 1981, pg. 18-24, Bates No. 504339225; Charles Nystrom to Wayne Juchatz (RJR Interoffice Memorandum), Subject: Use of Glycerine as Humectant in Cigarettes (Apr. 29, 1983), Bates No. 502856928. Much more recently, scientists have discovered that “acrolein and acetaldehyde had the greatest potential to be respiratory irritants.” U.S. Department of Health and Human Services, How Tobacco Smoke Causes Disease: The Biology and Behavioral Basis for Smoking-Attributable Disease: A Report of the Surgeon General 29 (2010). More specifically: “Acrolein...is present at high levels in cigarette smoke. Acrolein binds covalently to form protein adducts, and acrolein-induced modification of proteins has been implicated in atherogenesis. Acrolein modifies apolipoprotein A-I (APO A-I), the major protein in HDL.... HDL protects against atherosclerosis. Acrolein-protein adducts co-localize with APO A-I in macrophages in the intima of human atheromatous blood vessels.... Acrolein also oxidized thioredoxins 1 and 2 in endothelial cells. Thioredoxins are prominent antioxidant proteins that regulate the oxidation-reduction balance critical for normal cell function. These results suggest that oxidation of thioredoxins can result in dysfunction and death of endothelial cells, contributing to} That acrolein was a toxic product of glycerine had been known
since the mid-nineteenth century.\textsuperscript{932} (By the end of World War I knowledge of acrolein’s toxicity had seeped sufficiently into popular consciousness that a Mormon poet conveniently rhymed it in her admonitory “The Cigarette Boy”: “Though he’s barely turned sixteen/He is dwarfed from nicotine/And the poison acrolein/Of cigarettes!”)\textsuperscript{933} Sugar, when pyrolyzed during smoking, yields acetaldehyde—\textsuperscript{934} as does glycerine—which the Environmental Protection Agency a century later classified as a probable human carcinogen, \textsuperscript{936} as well as formaldehyde, acetone, acrolein, and furfural.\textsuperscript{937} Although claims as to the use

atherosclerosis. In addition, acrolein induces production of the enzyme cyclooxygenase-2 (COX-2) in human endothelial cells in vitro.\textsuperscript{...} This finding is relevant because COX-2 is expressed in atherosclerotic lesions and may participate in atherogenesis. Acrolein may contribute to thrombogenicity in smokers by inhibiting antithrombin activity.\textsuperscript{...} Finally, acrolein induces hypercontraction in isolated human arteries and could contribute to smoking-induced coronary vasospasm.\textsuperscript{...}” \textit{Id.} at 365.

\textsuperscript{932}M[ark]. Delafontaine, “Glycerine in Cigaretts,” \textit{CT}, June 7, 1894 (9). The French-born Delafontaine was a high school chemistry teacher. Oddly, “Report on Cigarettes by Professor Willis G. Tucker of the Albany Medical College, Analyst of the New York State Board of Health—From the Ninth Annual Report of the New York State Board of Health” (Feb. 22, 1888), in \textit{The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 10-11 at 11 (n.d. [1892]), Bates No. 950297842 (originally in \textit{Ninth Annual Report of the State Board of Health of New York 516-18 (1889)}), found that leaf tobacco in “some cases” was “treated with sugar, molasses, glycerin and licorice and the like, or flavored with various substances which, so far as known, are neither poisonous nor harmful.”


\textsuperscript{934}D. Phillpotts et al. [Imperial Tobacco Ltd.], “The Effect of the Natural Sugar Content of Tobacco upon the Acetaldehyde Concentration Found in Cigarette Smoke” (Jan. 5, 1974), Bates No. 501013682/4. In 1912, the \textit{Journal of the American Medical Association}, which was by no means on the cutting edge of tobacco research, included furfural and some other aldehydes among the tobacco combustion products that “share a possible responsibility for any untoward symptoms which may be charged to smoking.” “Some New Evidence on the Tobacco Question,” \textit{JAMA} 59(20):1798-99 at 1798 (Nov. 16, 1912).


\textsuperscript{937}Reinskje Talhout, Antoon Opperhuizen, and Jan van Amsterdam, “Sugars as
of the narcotics opium and morphine and the toxic and hallucinogenic jimson weed and belladonna in cigarettes were outlandish, there was no gainsaying that the Tobacco Trust used glycerine,938 whose chemical properties had long been well known. After all, less than a year earlier, when an ATC factory in Manhattan burned down, it was reported that the fire had started in the basement where large quantities of glycerine were stored.939 In 1895, when a license ordinance containing the same provision had just been defeated, one Chicago tobacco seller stated that: “All tobacco...except that in cigars contains glycerine or sugar. Otherwise the tobacco would dry up and become too brittle for use.”940 And two years later, when the Chicago license battle was raging, dealers freely admitted that it was “impossible to manufacture the common American cigarette without placing glycerine in the tobacco, as the latter would ‘shuck’ from the paper unless it was kept pliable by some substance.” In the same connection the Chicago city chemist pointed out that when glycerine was burned it attacked the mucous membrane “in a vicious manner.”941 Scientists were merely confirming

938When the French government tobacco monopoly announced that it would produce cigarettes “‘with the American flavor,’” by spraying them with brown sugar and glycerine, the Times observed that American cigarettes were “flavored only with glycerine or some other simple sweetener for the purpose of retaining their moisture and making the smoke less irritating to the tongue.” “Tobacco Flavors Obtained for Strange Ingredients,” NYT, Nov. 3, 1929 (XX9). In a report on cigarettes a chemist in 1888 noted that leaf tobacco in “some cases...is treated with sugar, molasses, glycerin and licorice....” “Report on Cigarettes by Professor Willis G. Tucker of the Albany Medical College, Analyst of the New York State Board of Health—From the Ninth Annual Report of the New York State Board of Health” (Feb. 22, 1888), in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 10-11 (n.d. [1892]), Bates No. 950297842 (appeared originally in Ninth Annual Report of the State Board of Health of New York 516-18 (1889)).

939“Tobacco Factory Burned,” NYT, Apr. 3, 1893 (1). J. B. Duke stated that the factory manufactured chewing and smoking tobacco.

940“Points on the Cigaret Ordinance,” CT, Apr. 24, 1895 (3).

941“Licensed Cigaretel Dealers Worried,” CT, Mar. 15, 1897 (4). In spite of all of these admissions against interest, a much celebrated lecture just a few months later, referring to the prohibited substances (including glycerine) in the Chicago ordinance, insisted that “you have an idea of the ingredients of which popular prejudice has manufactured a cigarette, which has never had any existence other than this phantom of a superactive imagination.” W. H. Garrison, “A Brief for the Cigarette,” Medico-Legal Journal 15:280-91 at 284 (Dec.
what, according to the Chicago Evening News, the world already knew: “myriads of cigarettes...need no chemist to certify their utter vileness—a whiff of their noxious fumes as one passes by leaves no doubt that they are things to be suppressed.”

The Tobacco Trust even publicly stated and physically demonstrated that it used glycerine. At a Massachusetts legislative hearing in March 1893 before the Public Health Committee on a bill to ban cigarettes’ manufacture and sale, Daniel J. Campbell of the ATC, while manufacturing a cigarette in the committee’s presence, explained that “tobacco if dried might fall to dust, and to keep it soft there was a composition of sugar, water and glycerine poured over it.”

If additional corroboration were needed, the primary unimpeachable source identifying glycerine as an ingredient was the cigarette monopoly’s co-owner, Benjamin Newton Duke, who in 1893 internally gave the “formula” used by the W. Duke Sons & Co. Branch for “flavoring and casing ‘Cameo’ Cigarettes”: 3.75 lbs of Spanish saffron soaked in 7 gallons of alcohol; 14 gallons of New England rum, 7 gallons of water, and 7 gallons of glycerine. After saffron and alcohol stood for 6 days, the saffron was strained out, the remaining liquid was added to rum, water, and glycerine and allowed to stand for 15 days. To this mixture were then added 1.5 lbs of pulverized angelica, mixed with a half gallon of alcohol, which mixture was allowed to stand 5 days and added to the above mixture. When it was ready for use as a casing, one quart of the mixture and 8 to 10 lbs of glycerine were used per 100 lbs of leaf, the quantity of glycerine being regulated by weather conditions.

1897).

“Enforce the Cigaret Ordinance,” Evening News (Chicago), June 6, 1894 (6).

“A Woman’s Fancy,” BDG, Mar. 22, 1893 (8:6). On Campbell and ATC, see above ch. 4.

B. N. Duke to Wm. G. Emery, Dec. 16, 1893, in BNDP, RBMSCL. ATC had selected Emery to be superintendent of a proposed factory in Australia. William Butler (ATC secretary) to W. Duke & Sons Branch, Dec. 13, 1893, in BNDP. Angelica is an herb, which has been found to be carcinogenic in animals. Philip Morris U.S.A. Inter-Office Correspondence, J. Charles to J. John, Subject: Mutagenicity and Carcinogenicity of Angelica Root Abstract, Coumarin, Caramel, Eugenol, Orange Peel Oil, and Invert Sugar, May 18, 1981, Bates No. 1000123610. The aforementioned generous quantities notwithstanding, a study done by The Lancet Analytical Sanitary Commission purported to find “extremely limited amounts” of glycerine in cigarettes, which in the commissioners’ “opinion” were “not in the smallest degree injurious,” although they did not study the decomposition products (such as acrolein). To be sure, they conceded that “it is not easy to assert with absolute confidence that glycerine is added at all on account of the difficulty attending its detection.” “The Report of The Lancet Analytic Sanitary Commission on
Thus the proposed ordinance—barring the sale of so-called medicated brands—that McGillen presented to the city council on May 28 was in part steeped in the urban myth (which served the Trust’s long-run interests by deflecting attention from the real health hazards of cigarette smoking that were known even then) that cigarettes were spiked with opium, but was in part also based on a scientifically defensible critique. Interestingly, in the mid-1880s, before the Trust was formed, one of the largest cigarette manufacturers repeatedly placed large ads in the Tribune warning consumers of “the dangers attending cheap cigarette smoking” and boasting that its high-price cigarettes were “truly A GREAT LUXURY. Do not be imposed upon by imitations or cheap brands, which are always flavored with poisonous drugs.” Although the measure at first glance appeared to border on being a sham because, unlike Morris’s 1893 legislative bill, it would not have prohibited the sale of the mass of unspiked cigarettes, if the Trust’s cigarettes were, in fact, all manufactured with glycerine, they would have ceased to be marketable in Chicago. In support of his measure before the council, McGillen “denounced the facility which every drug store had of selling poison in different forms to children and adults,” adding the other urban myth, propagated by “[e]very daily paper,” of “a mind ruined or a life destroyed by the excessive use of cigarettes.” Then the council, 42 of whose 68 members were Republicans, on the same day that McGillen introduced it unanimously (63 to 0) passed the ordinance in spite of the personal letters that Charles H. Aldrich, “attorney for a cigaret firm, had sent to the members “begging them to

American Cigarettes,” Lancet 2:1607-1609 at 1609 (Dec. 9, 1899).

945 Later in 1894, after a proposed cigarette licensing ordinance with the same language banning the sale of cigarettes containing certain ingredients had become the subject of a bribery scandal, the accused chief boodler, Alderman John Powers, alleged that he had told the ATC official from whom he denied having solicited a bribe that he would vote for the ordinance and that “no class of goods is as injurious to the youth of this country as cigarettes which contain opium.”


947 E.g., CT, July 13, 1884 (8).

948 “Mayor Works in Vain,” DIO, May 29, 1894 (1:1, at 3:5).

949 “Composition of the New Council,” CT, Apr. 4, 1894 (8). On the outgoing council Republicans held 38 seats. “Gang Meets Defeat,” CT, Apr. 4, 1894 (1). See also “All Down But Nine,” CT, Apr. 6, 1892 (1); “New Members of the Council,” CT, Apr. 5, 1893 (1); “Pick the Chairmen,” CT, Apr. 9, 1893 (1); “Roll of the New Council,” CT, Apr. 18, 1893 (2).

950 Proceedings of the City Council of the City of Chicago 606 (May 28, 1894).
Sales Ban Bills in Other States Passed by One Chamber in the Late 1890s

... oppose” it. (In fact Aldrich, a prominent corporate lawyer who had been U.S. solicitor general in 1892-93, was ATC’s lawyer in Chicago and was representing it in the aforementioned state antitrust action.) The Chicago Evening Press construed the Trust’s sending out its agents to defeat the measure as a de facto guilty plea to “having poisoned countless thousands....”

Equanimity characterized the immediate reaction to the ordinance of downtown Chicago tobacco dealers with large cigarette sales, but for two diametrically opposed reasons: “A few say it will be resisted if enforced; others declare they will obey it.” As in many other localities facing prohibitions, some of the latter group welcomed the governmentally imposed collective action that substituted for competitors’ lack of capacity to stop selling on their own lest they lose customers of other, more profitable, types of tobacco not monopolized by the Trust: “‘If the down-town dealers had their wish the majority would fling cigarettes into the street.’” Even at this early stage there was already talk of dealers’ testing the ordinance, though, if such action were deemed necessary, “no doubt the cigaret trust would take care of the matter.”

Before enforcement became an issue a hitch developed when, at the next council meeting on June 4—at which one of the city’s leading non-aldermanic Democratic politicians ostentatiously smoked cigarettes—Democratic Mayor John Patrick Hopkins vetoed the ordinance. The meaning of the veto might be decoded easily enough inasmuch as Hopkins was a major boodler—during whose administration a “series of sensational grafting scandals” took place—but then again so were McGillen and the vast majority of Chicago aldermen. However, the Tribune reported a rumor in the lobby that the veto

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951”Cigaretts Must Go,” CT, May 29, 1894 (7).
953“The Poisoned Cigaret,” CT, June 6, 1894 (6) (reprinted from Evening Post (Chicago)).
954“Comment on Cigaret Ordinance,” CT, June 1, 1894 (9).
955“Cigarettes to Go,” Dio, June 5, 1894 (1:1). On Thomas Gahan, see “Thomas Gahan Dies Suddenly,” CT, May 1, 1905 (5). Another major Democratic politician, Frank Peabody, passed around a fresh box of cigarettes.
956Proceedings of the City Council of the City of Chicago 623 (June 4, 1894).
957“Not a Partisan Triumph,” NYT, Apr. 8, 1895 (1:1-2).
was “a mere perfunctory performance...to redeem a promise made to a delegation of cigaret dealers and their attorneys some days ago.” In his message Hopkins stressed that he sympathized with “‘any measure that will tend to drive from the market cigarettes containing poisonous or otherwise harmful substances, particularly in view of the fact that the smoking of cigarettes is so largely practiced by people of immature age....’” His animus was directed only at the prohibition of glycerine and sugar, which “‘the highest chemical authorities’” had advised him were “‘entirely harmless.’” Hopkins was willing to sign the ordinance if the two ingredients were removed from the ban, but he refused to sign one that was based on an unlawful exercise of the police power “under the pretense of health regulations to prohibit the admixture of harmless substances into articles of merchandise,” which would ultimately subject it to successful judicial challenge. The council was unmoved. In support of his motion to pass the ordinance over the mayor’s veto, McGillen declared that last year’s cigarette nuisance would probably become a “‘curse’” in 1894. Not bothering to key his allegations to the two disputed substances, he insisted that the cigarette “‘kills off more youths than the smallpox. I don’t think we ought to palter with it.’” McGillen was amenable to amending his measure if it were improved, but he feared that if it were referred to a committee, it would not soon return. Other aldermen agreed, one observing that cigarettes’ victims encompassed adults: “even Mayors...sometimes suffered from the use of cigarettes.” As for glycerine and sugar, another alderman charged that the combination made a “deadly poison which when inhaled or swallowed resulted injuriously.” One of the city’s leading Republican politicians, Martin Madden, a businessman and later 12-term congressman, supported the ordinance because there were “‘too many lisping dudes in our midst who [we]re becoming imbecile from cigarette smoking.’” Although it is unclear that any youths were killed by cigarette smoking, whereas the Chicago health commissioner reported


960“‘Cannot Sell Weeds,’ CT, June 5, 1894 (5). The authorities were John H. Long, a chemistry professor at Northwestern University and the aforementioned Prof. Walter Haines. Hopkins attached their communications to his veto message, but they were not included in the newspaper account. The Inter Ocean stated that he quoted them to “substantiate his conclusions,” but did not report those remarks. “‘Cigarettes to Go,’ DIO, June 5, 1894 (1:1). According to the Illinois Regional Archives Depository, in which the Chicago City Council’s documents are located, the City Council Proceeding Files for June 4, 1894 do “no[t] include any outside resources.” Glenn Brammeier to Marc Linder (Sept. 21, 2010). Haines and Long had reported that cigarettes sold in Chicago were not adulterated with opium or other “deleterious drugs.” “‘Cigarettes Not Loaded with Opium. CT, Mar. 11, 1894 (12).

961“‘Cigarettes to Go,’ DIO, June 5, 1894 (1:1).
that alone in May 1894 a renewed outbreak of smallpox had killed 253 people in the city,\textsuperscript{962} the council by a massive 60 to 2 majority overrode Hopkins’ veto.\textsuperscript{963}

The \textit{Tribune} interpreted Hopkins’ veto as the result of having been “imposed upon and deceived by hired lawyers” and attributed the huge override vote largely to information gathered by Board of Education President Alfred Samuel Trude, whose attention had been drawn to “the evils of cigaret smoking a dozen times daily by parents.”\textsuperscript{964} By 1893 Trude (1846-1933), who had become “the greatest criminal lawyer in the history of Chicago[,]...amassed a fortune, gave up criminal practice and secured a fine civil clientele,”\textsuperscript{965} defending the \textit{Tribune} (and other newspapers) in numerous libel cases and railroads,\textsuperscript{966} averred that he knew better than that glycerine and sugar were harmless constituents: “I knew just what I was doing when I drew that ordinance. I did not put sugar and glycerine in unadvisedly.” Without bothering to explain the underlying chemical, let alone physiological or disease-etiological, processes, Trude, who was Cook County Democrats’ strategist,\textsuperscript{967} declared: “Glycerine used as...applied to sore throats is
healing. Sugar put on tapioca pudding and put into the stomach is gratifying and decidedly pleasant, but when you mix the vapors of glycerine and sugar with the nicotine...contained in the smoke of the tobacco of the cigaret, you have a poison, and a poison that kills. It is the inhalation of this mixture of stuff that makes it so deadly. The three vapors mix, pass through the bronchial tubes into the lungs, and by degrees get into the blood, and there they stay. The worst condition short of death—and perhaps that’s no worse—created by this cigaret smoking is diabetic epilepsy. This is not uncommon among boys who have acquired the cigaret habit.’’ The ordinance appears to have been a substitute for the prevention method preferred by many parents—having teachers ‘‘search the boys’ pockets for cigarets’’—which Trude turned down because only parents possessed such a right. Although he correctly (and in conformity with the medical-scientific learning of the day) pointed out that ‘‘without adulteration’’ cigarettes were ‘‘bad enough because they are inhaled,’’ he vastly exaggerated the adulterants’ impact by claiming that they made the ‘‘arrainment...ten-fold stronger....’’ If Trude’s insistence on inclusion of glycerine and sugar in the ban was based on his knowledge that it would be tantamount to a prohibition of cigarette sales in Chicago—one Chicago newspaper opined that the ordinance was ‘‘meant to’’ prohibit cigarettes because ‘‘nearly every cigaret on the market contains one or more of these substances’’—he at least consistently formulated a justification for depriving adult men of cigarettes that was rarely ever discussed in any anti-cigarette campaign during this period: ‘‘A child is worth more than all the cigaret factories in the United States.’’ Sensing perhaps the potential difficulties of enforcing the glycerine/sugar ban, some council members immediately determined to make use of financial deterrence to achieve the same end. On the same day as the council meeting, ‘‘a score of well known and influential aldermen, both Democrats and Republicans,’’ held an ‘‘informal conference’’ at which, proceeding from a discussion of McGillen’s ordinance, they all ‘‘denounced the sale of tobacco in that form, and set about to devise some means of making the present ordinance more sweeping’’ and ‘‘all said they had no patience with cigarettes or dudes, or anything pertaining to either.’’ Making explicit the limits of their tobacco control agenda in a manner

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*and Hinky Dink* 30 (1943).

**968**‘‘When It Is Poison,’’ *CT*, June 6, 1894 (6). Bryce Plapp, professor of biochemistry at the University of Iowa, ‘‘doubt[ed] that glycerin and glucose together make anything toxic, more than separately.’’ Email from Bryce Plapp to Marc Linder (Sept. 8, 2010).

**969**‘‘The Poisoned Cigaret,’’ *CT*, June 6, 1894 (6) (reprinted from *Evening Post* (Chicago)).

**970**‘‘When It Is Poison,’’ *CT*, June 6, 1894 (6).
atypical for most legislative reformers of the period, they also “declared for good tobacco, either chewing or smoking, just so it was not enclosed in paper wrappers.” Since they were “all...agreed that cigarettes must go,” they decided on a $500 annual license for selling cigarettes. Since tobacco dealers purportedly deemed the amount too high to pay, the press predicted that it would “probably kill the Chicago traffic for good.” That forecast would turn out to be as overly optimistic as the claim that the measure would be passed at the next council meeting.\footnote{“Cigarettes Must Go,” \textit{DIO}, June 2, 1894 (6:7); “Cigarettes Must Go,” \textit{BDWC}, June 5, 1894 (4:3).} Why the aldermen devised this roundabout procedure instead of prohibiting the sale of cigarettes outright is unclear, but on June 11 Democrat John J. Coughlin presented the $500 license measure, which was referred to the Committee on License\footnote{\textit{Proceedings of the City Council of the City of Chicago} 699 (June 11, 1894); “Park by the Lake,” \textit{CT}, June 12, 1894 (5).} (which would keep it bottled up for almost half a year).

The possibility that “Bathhouse John,” who was in the third year of a surpassingly corrupt aldermanic career that lasted until his death in 1938,\footnote{Lloyd Wendt and Herman Kogan, \textit{Lords of the Levee: The Story of Bathhouse John and Hinky Dink} (1943).} might have been personally acting in the interest of public health seems remote (although six years later \textit{The New York Times} noted that “Coughlin has often astounded his constituents and the general public by the excellence of his ideas contained in some of the legislation he proposes”).\footnote{“Chicago Ward Politics,” \textit{NYT}, Apr. 1, 1900 (8). Cartoons frequently depicted Coughlin smoking a cigar. Lloyd Wendt and Herman Kogan, \textit{Lords of the Levee: The Story of Bathhouse John and Hinky Dink} n.p. [cartoons opposite 52 and 104] (1943). A recent web-based historical novel about Chicago in 1893 has Coughlin’s “eyes...swimming and itching in the stale cigar smoke. He detested smoking, this coming from his early days in athletics.” Gloria McMillan, \textit{Waking the Dead}, ch. 15: The Boodlers and the Boodled, on http://www.neleth.com/gloria/Chapter_Fifteen.htm (1997). According to Lloyd Wendt and Herman Kogan, \textit{Lords of the Levee: The Story of Bathhouse John and Hinky Dink} 13-14 (1943), Coughlin was not athletic in his youth. When asked whether she had a source for her claim, the author replied: “He did abhor smoking. ... I think the biography on the two men found in one of my bibliography sources--standard histories of Chicago--said that John Coughlin did not smoke and discouraged the habit.” Email from Gloria McMillan to Marc Linder (Sept. 26, 2010). When told that her novel lacked a bibliography and asked to furnish the title, she failed to respond. Email from Marc Linder to Gloria McMillan (Sept. 26, 2010). A month before introducing the cigarette measure Coughlin announced that he would introduce... an ordinance fixing a $100 fine for keeping an opium den and confiscating the pipes and opium; he declared that dens would have to leave his}
ordinance later became enmeshed in a bribery scandal, Republican Alderman Edward Marrenner stated that he “‘would like to know what business a man like Coughlin has to introduce such an ordinance,’” while his partymate Eli Smith declared that one of the reasons he opposed it was that Coughlin was “‘a regular clown.’”975 However, contemporaneous editorial judgment that sandbagging (the Cigarette Trust) was its sole purpose because it could not be defended on “general principles”976 was patently false. Even if Coughlin was motivated by the prospect of exorting a bribe from ATC for eventually killing the ordinance—and/or by the receipt of one from his large downtown tobacco store constituents for increasing their sales at the expense of small dealers whose profits could not justify buying a license—the fact remained, as a “well-known Chicago politician” put it, that the ordinance’s substantive “object is not to stop the sale of cigarettes, but to prevent their sale in candy stores near schools, where boys of eight and ten years of age buy them, often stealing the money for the purpose.”977 (Significantly, precisely such complaints by public school teachers about “cigaret-smoking...encouraged by petty hucksters who had established themselves adjacent to the school-houses”978 had prompted the legislature in 1887 to enact a bill that prohibited selling, buying for, or furnishing any cigars, cigarettes, or tobacco to any minor under 16 and imposed a $20 penalty for each offense.)979 In any event, Coughlin, “[e]ternally a Democrat,” did not intend the ordinance as run-of-the-mill sumptuary legislation is clear from his pre-election canvasses: “‘A Republican is a man who wants you t’ go t’ church every Sunday. A Democrat says if a man wants t’ have a glass of beer on Sunday, he can have it. Be Democrats, unless you want t’ be tied t’ a church, a schoolhouse, or a Sunday school.’”980 The Tribune’s remark that the “possibility of cigarets as a subject for municipal legislation seems not to have been before considered by the aldermen” and that the ordinance regulating their sale “appears to have opened the eyes of Ald.
Coughlin to the possibilities of further action" must be understood as a reference to an as yet unexplored field for sandbagging and/or boodle. After all, in March the newspaper derided Coughlin—who, interestingly, “owed much for political teachings” to Trude—as having “supported every bad measure presented” in the council during his term, and charged both that there was “no good in him” and that everything that was bad had been said of him. Moreover, he had achieved his reelection on April 3 by means of “the most outrageous...terrorism” perpetrated by “thugs” which soon led to a special grand jury indictment.

Nevertheless, even if the Chicago ordinances had been the only historically documented example of the sandbagging that the manufacturers pretended universally underlay legislative efforts to regulate cigarettes (beyond banning sales to children), they would still have hardly fit the model that one of the oligopolists later limned this way: “[T]he tobacco industry, for many years, was the object of most ‘strike legislation’ proposed by impeccuous or avaricious politicians and reformers. We were continually being called upon to resist this sort of thing, and in every case the procedure was identical: A bill would be introduced in a legislature to prohibit the manufacture or sale of cigarettes; it would be referred to a committee, and our people would have to get busy and pay somebody to see that it died.” Like numerous state statutes, however, the Chicago ordinances did not die in committee, and the fact that the city government battled on for many years to uphold the legality of a license fee suggests that whatever the boodlers may have intended, their legislative measures took on a life of their own that aimed at enforcement and not graft.

Coughlin’s proposed ordinance conditioned receipt of a license on furnishing
evidence of good character and securing a $500 bond subject to compliance with all cigarette and tobacco sales ordinances; licenses did not apply to the sale of any cigarettes containing the aforementioned prohibited substances such as glycerine and sugar (§ 1). The license, a precondition for receiving which was a $500 annual payment (§§ 2-3), was revocable by the mayor whenever he was satisfied that the licensee violated any provision of the ordinance or any condition of the bond (§ 4). The proposal also imposed a maximum $50 fine for failure to comply with the requirement to post the license in a conspicuous place (§§ 5-6). Finally, the ordinance imposed a $50 to $100 fine for every violation on anyone selling cigarettes without a license plus a $25 daily fine for every day that the seller persisted in selling cigarettes after a first conviction (§ 7).999

The momentum generated by the smashing victory over the Tobacco Trust marked by the council’s passage of the ordinance galvanized an intensified and ramifying commitment to the cause. The Central WCTU in Chicago—which, since it believed that “nearly all cigarettes now on the market were drugged with opium or some other deadly poison,” regarded enforcement of the ordinance as “practical prohibition of the sale of the noxious things”—adopted a resolution endorsing Trude’s part in the “crusade” against cigarettes. It also urged “the annihilation of the poisonous cigarette as an article of commerce” so that “our men may be saved for noblest uses of life and country.”999 Less than a week after the council’s action the National Anti-Cigarette Association was formed in Chicago to be under the aegis of the National Missionary Evangelical Association. With ambitions of becoming a “more aggressive enemy” of cigarettes than the ordinance and a “world-wide institution,” its incorporators had acted so precipitously that they were not even certain whether such an organization did not already exist (if so, they would merge with it). While endorsing the ordinance’s ban on “drugged” cigarettes, the new group protested that the manufacture of cigarettes, all of which were poisonous, should be suppressed. The Association also urged the WCTU, YMCA, church youth organizations such as Sunday schools, the Epworth League and Christian Endeavor to “join the crusade....”991

Intriguingly, the president of the National Anti-Cigarette Association was Catherine Van Valkenburg Waite (1829-1913), a fascinating feminist figure, who not only had apparently no previous involvement in the anti-tobacco movement, but had retired in 1890 to devote herself to her children and grandchildren.992

990“Loaded with Death,” CT, June 8, 1894 (2).
991“Form an Anti-Cigaret League,” CT, June 11, 1894 (8). See also Alton Weekly Telegraph, June 14, 1894 (4:4) (untitled).
992Jody Scott, “Catherine Van Valkenburg Waite” at 32 (n.d.), on
One of the earliest female college graduates (Oberlin 1853), she moved to Utah during the Civil War with her husband, Charles Burlingame Waite—who had been appointed to the territorial supreme court there by President Lincoln, a former legal colleague in Illinois—thus gaining the experience and knowledge to write a critical book about Mormonism. On returning to Chicago she resumed her leadership of a girl’s school and became a well-known suffragist. In her mid-50s she attended and was graduated from law school, founded the Chicago Law Times, and became president of the International Woman’s Bar Association. The National Anti-Cigarette Association’s intimate links to Christian church groups appears odd in light of her and her husband’s high-profile agnosticism. That Waite was a neophyte in the anti-cigarette movement was, ironically, underscored just moments after leaving the group’s founding meeting. As she explained the next day: “[S]he had no plans for the future. Her only hope was to arouse public sentiment and do anything she could to enforce the anti-cigaret ordinance. She said she needed education herself.” The enlightenment that she had in mind was her discovery, on returning from that meeting, that “cigaretts were sold in the office of the Hotel Holland, of which she is at present both the owner and proprietor. She lost no time in heaving the entire stick into the fire.”\(^994\) (She also lost no time in selling the hotel a few days later\(^995\)—she was also a successful financier with extensive holdings of real estate and buildings.)\(^996\)

Though “not overconfident of success,” Waite felt that she had to do what she could to “abate the evil.”\(^997\) A few weeks later the organization reported that it was “constantly growing,”\(^998\) and unsurprisingly, the Illinois WCTU did “heartily
endorse...the Anti-Cigaret League,“ which had issued a pledge to work for the enactment of municipal and state laws, backed by effective penalties, to “prevent the manufacture and sale of this mind-destroying and death-dealing curse....”  Swept up in and saluting the rush to establish anti-cigarette leagues, the Tribune’s editorialist admonished the city prosecuting attorney to insure that whoever was chosen to prosecute sellers of “‘coffin nails’” not use them himself because “nobody could expect” the requisite uncompromising and vigorous action by a cigarette smoker.

Not until November 26, 1894, in the midst of this invigorated movement, did the city council’s Committee on License (composed of nine Republicans and four Democrats) finally take any (public) action on Coughlin’s proposed ordinance. To be sure, the critically jaundiced Republican Tribune presumed that during the interval between June and November the proposal’s “possibilities as a ‘sandbag’ began to dawn upon the intelligences of such Aldermen as are supposed to be looking for an opportunity to increase their personal revenues.”

In the event, the committee recommended a substitute that differed from Coughlin’s in a number of respects. Unlike Coughlin’s ordinance, the substitute empowered the mayor to revoke a license if the licensee violated any state law relating to cigarettes (§ 4). The most important change required and empowered the health commissioner, “from time to time, to inspect and examine all places where cigarettes are licensed to be sold” in order to determine whether they were complying with state laws and city ordinances relating to cigarettes, the vigorous enforcement of which it was now on the commissioner’s duty to cause. Moreover, all licensees were required, on the commissioner’s demand, to furnish the latter with samples of the all the cigarettes they sold, which he was then required to analyze, his analysis then becoming a public record (§ 7). Finally, the substitute doubled the penalty both for failing to post to $100 (§ 6) and for selling

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Association’s and Waite’s later activity appears to have focused on educational campaigns in schools featuring the inculcation of the traditional primitive claims that cigarettes were filled with cigar stumps that sick people had thrown in the gutter. In the same vein, the group’s chief organizer, Mrs. M. E. D. Gilmore, instructed girls that chewing gum led to lockjaw. “To Fight the Cigaret,” CT, Mar. 31, 1896 (3). See also “Open War on Cigaretets,” CT, Mar. 31, 1896 (3).
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without a license to $100-$200 (§ 8).\textsuperscript{1005}

The *Tribune* outlined the impact of the changes as strengthening the latter’s legality by placing it under the health commissioner’s jurisdiction and by “hedging about the penalties....” The newspaper’s claim that other deletions and additions tended to “make it more of a terror to” cigarette manufacturers\textsuperscript{1006} appears to have been hyperbolic.

At the request of chairman John Larson of the License Committee, Chicago corporation counsel John Palmer submitted an opinion on November 26 on Coughlin’s proposed ordinance stressing that in order to bolster its legality as an exercise of the council’s power to promote health and suppress disease, “the cigarets should be sold only under the supervision and subject to the inspection of the Health Department.” To this end he made some amendments to the draft that Larson had given him\textsuperscript{1007} that were presumably embodied in the aforementioned committee substitute.

The proposal mobilized collective action by the city’s leading wholesale grocers and wholesale tobacconists, whose representatives met and approved a sharp protest petition on the grounds—adduced by dealers in other cities and states as well—that the pending ordinance would “give a monopoly of the cigaret trade to a few large wealthy dealers.” Correlatively, they complained, the “un-American” trade prohibition would “drive out of the trade a large number of store-keepers, newsdealers, tobacconists, druggists, and others, whose entire profits from such business are less than the amount of the license fee, but to whom a loss of such profits will be very serious and oppressive.” Sensing that they were at risk of entrapping themselves in self-contradictory rhetoric, the wholesalers, without revealing how marginal a sideline cigarettes were for their retail customers, harped on how the licensee fee would “in many cases...take away trade that goes far towards paying rent or buying the necessities of life.” Avoiding the issue of cigarettes’ health impacts, but pouring on the pathos, the petition bemoaned the “[m]any poor or disabled people” who would “be deprived of the means of subsistence at the beginning of a hard winter.”\textsuperscript{1008}

At the council meeting on December 10 Coughlin moved to make the substitute ordinance and committee report a special order for the December 17 meeting. At the same meeting the protest by 500 wholesale (and retail) cigarette dealers—which, it later came to light, ATC had organized—was presented by six

\textsuperscript{1005} Proceedings of the City Council of the City of Chicago 1916-18 (Nov. 26, 1894); “Story of the Cigaret Legislation,” *CT*, Dec. 23, 1894 (4).

\textsuperscript{1006} “Story of the Cigaret Legislation,” *CT*, Dec. 23, 1894 (4).

\textsuperscript{1007} “Story of the Cigaret Legislation,” *CT*, Dec. 23, 1894 (4).

\textsuperscript{1008} “Object to the Cigaret Ordinance,” *CT*, Dec. 9, 1894 (4).
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Republican and two Democratic aldermen, and the council decided to take up both related matters on the latter date, but then postponed the discussion until December 27.\textsuperscript{1009} Several days before then, however, the controversy over the ordinance exploded amidst revelations of an involuted, convoluted, byzantine, and opaque intrigue featuring contradictory accusatory tales told by (wannabe) boodling aldermen and the bribing (or sandbagged) Tobacco Trust, two partners or adversaries who richly deserved each other’s choreographed mendacities.

The “sensational”\textsuperscript{1010} bribery story that was published in the (independent) Democratic\textsuperscript{1011} Chicago Herald on December 22 initially focused on Democratic Alderman John Powers, a saloon owner known as the “‘Prince of Boodlers,’” who was traction magnate Yerkes’ chief instrument on the council.\textsuperscript{1012} (Powers, as he told the Tobacco Trust’s man in Chicago when he offered the alderman a cigar, did not smoke.)\textsuperscript{1013} Although the scoop was immediately picked up on front pages all over the country, including that of The New York Times, the press, which generally referred only to a “morning paper” without identifying the Herald,\textsuperscript{1014} omitted mention of the fact that the trap had been carefully prepared, long ahead of time, by the Trust in conjunction with the newspaper.\textsuperscript{1015} In November 1894, Neil McCoull, ATC’s resident agent in Chicago, as the Herald laid out in its five-column front-page splash, had discovered that “there was something mysterious in the handling of the anti-cigarette ordinance,” although during the years that he had spent in the “retirement” of the “not...conspicuous” building in which ATC’s Chicago headquarters were located, “[h]e had never seen an alderman, had never

\begin{itemize}
\item \textsuperscript{1009} “Story of the Cigaret Legislation,” CT, Dec. 23, 1894 (4). In fact, every alderman had been provided with a petition from tobacconists in his ward. “Message on Taxes,” DIO, Dec. 11, 1894 (5:1-3 at 2). “Meets with a Veto,” CT, Dec. 11, 1894 (7), incorrectly stated that the council took no action on the petition at the Dec. 10 meeting.
\item \textsuperscript{1010} “Serious Charge of Bribery,” NYT, Dec. 23, 1894 (1:4).
\item \textsuperscript{1013} Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:3-7, at 2:1).
\item \textsuperscript{1014} E.g., “Serious Charge of Bribery,” NYT, Dec. 23, 1894 (1:4).
\item \textsuperscript{1015} It is unclear why ATC chose the Herald, which at this time did not publish cigarette ads.
\end{itemize}
visited the council....

McCoull, who had been born in Richmond, Virginia in 1853, as early as 1880 worked for that city’s Allen & Ginter, one of the largest cigarette manufacturers and later a constituent entity of the Trust. That year, the Chicago Tribune published a brief piece—ostensibly noting “the arrival of people of prominence,” but in reality free advertising, which would later be paid back with straight advertising—based on an interview with McCoull, who was visiting Chicago in the company’s interests. The newspaper had no better use for its space than relating that he was there to introduce a brand of cigarettes by having an elegant, gold-painted and -lettered carriage driven around the business district by a man dressed in a Continental costume handing out thousands of free cigarettes, which the Tribune was not ashamed to report having tried and found “a delightfully pleasant smoke.” An equal opportunity briber of the press, by the beginning of the following year McCoull gave the Chicago Daily Inter Ocean a souvenir sample case of cigarettes, for which that office’s smokers thanked him. By October 1881, with Chicago, 10 years after the great fire, having become the general supplier of the Southwest and West, Allen & Ginter had established a permanent agency in the city under McCoull’s management. And by the time of the scandal, McCoull qualified as one of the city’s “prominent residents,” being listed no fewer than three times in the Chicago Blue Book, albeit without mention of his occupation or employer.

In 1894, McCoull had specifically noticed that the “10,000 or 12,000 small dealers” who would have been covered by the proposed ordinance had begun writing to “the head office to make an effort to defeat the measure. The keepers of small bakeries and confectionery shops and news stations called in person to insist the size of the fee would be a hardship and deprive them of an income of

1016 “Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:3-4).
1017 Return of a Birth, County Clerk’s Office, Cook County, IL, No. 10628 (Apr. 18, 1891) (like-named son’s birth certificate), on http://beta.familysearch.org; 1920 Census of Population (HeritageQuest) (67-year-old tobacco business jobber living in Manhattan) According to the 1905 New York State Census, the 50-year-old McCoull was living in Yonkers, employed in tobacco manufacturing. http://beta.familysearch.org
1018 “A New Arrival,” CT, Oct. 3, 1880 (8).
1019 “Around Town,” DIO, Jan. 5, 1881 (8:4).
1020 “Tobacco and Cigaretts,” CT, Oct. 9, 1881 (20:1). By 1884, numerous Allen & Ginter ads were appearing in the Tribune prominently displaying McCoull’s name in large print and mentioning the office address. E.g., CT, July 13, 1884 (8).
1021 The Chicago Blue Book of Selected Names of Chicago and Suburban Towns: For the Year Ending 1895, at 434, 617, 790 (1894).
$25 and upward.” (This huge number of cigarette sellers and their proliferation in retail branches remote from the tobacco trade underscored the severe problem that reformers faced in trying to block or at least blunt cigarettes’ availability to children.) McCoull was not insensitive to these complaints, “but from experiences with such measures in other cities he did not suppose it would pass” and in any event doubted its constitutionality. Why, given this typical Tobacco Trust legal hubris, he nevertheless “finally concluded it was time to investigate the motive of the aldermanic activity” is unclear, but he personally visited some of the larger dealers to suggest that they try to convince their aldermen that Coughlin’s proposal would be unjust to “little merchants.” What possible material incentive they might have had to plead on behalf of their competitors, whose market share the ordinance would, it was almost universally predicted, redistribute to them as quasi-monopolistic beneficiaries, McCoull failed to reveal.\textsuperscript{1022}

Parallel to, but independently of, McCoull’s reconnoitering, the members of the aldermanic “gang” were also “busy discussing cigarettes with the corner grocers and their constituent sellers,” but their ulterior motive for these “debates” was a concluding “cautious query as to the local head of the cigarette company.” The reason for this roundabout inquiry was the aldermen’s alleged failure, over several months, to ascertain the whereabouts of the headquarters of one of the country’s largest corporations atop the building at 60 Wabash Avenue.\textsuperscript{1023}

\footnote{1022}{“Demands a $25,000 Bribe,” \textit{CH}, Dec. 22, 1894 (1:3-4).}
\footnote{1023}{“Demands a $25,000 Bribe,” \textit{CH}, Dec. 22, 1894 (1:3-5).} Since McCoull had, with some prominence, been working for cigarette manufacturers in Chicago for 15 years, it seems odd that aldermen (who must, after all, have had privileged access to city government bureaucrats who would have maintained the relevant records) would have had difficulty identifying and locating him. In a telegram manifestly prepared for public consumption, the \textit{Herald} owner stated that “McCoull’s reputation as a businessman” had (together with the latter’s “manly way of standing on the interview”) been “all that is necessary” to persuade “[e]verybody” that Powers was “lying...” “Denies Negotiations with Powers,” \textit{CT}, Dec. 24, 1894 (8). Whether, because of the Tobacco Trust’s notoriety, ATC was intentionally seeking to keep a low profile is unclear, but there was no entry for the American Tobacco Company in the alphabetical listings of the Chicago City Directory for 1893, 1894, or 1895, or in the classified business section (under tobacco, cigarettes, cigars, or smoking) of the same publication for 1894. Email from research librarians at Newberry Library and Chicago Public Library (Sept. 28, 2010). McCoull was listed as a salesman whose business address was 60 Wabash Avenue, room 604. \textit{The Lakeside Annual Directory of the City of Chicago: 1894}, at 1074 (1894). Exactly the same address and room were listed for the National Tobacco Works, whose representative was Robert W. Rollins. Three other tobacco businesses were also listed as
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hearing about these efforts to locate him, McCoull finally decided “it was time to see exactly what was in the wind and...to let The Herald into his confidence.” Since he had already heard “directly that the council wanted money from the company,” he took upon himself the noble civic duty of giving “Chicago an unquestionable proof of the dishonesty in this branch of the city government.” Consequently, the next time that an unidentified Alderman “Minus” played detective with an unidentified dealer “Mr. Blank,” an “especially good friend” of McCoull who “realized but $1,200 a year on cigarettes,” Blank directed Minus to McCoull. On December 18 Alderman Minus showed up unannounced in McCoull’s office, eventually mentioning both his suspicion that ATC would “prefer to have the anticigarette ordinance put out of the way” and some “straight figures.” McCoull (who must have been enjoying his playacting) argued with the alderman, in particular expressing “the greatest indifference as to the fate of the ordinance,” assuring Minus that “the cigarette was not as bad as it was painted and the opposition to it was due to prejudice and ignorance,” and trotting out the (aforementioned) studies by Haines and Long as well as by Prof. Palmer at the University of Illinois that purportedly declared that smoking cigarettes caused less harm than the consumption of any other kind of tobacco (though all contained nicotine, which they acknowledged as a poison). McCoull deemed these findings “proof enough for an intelligent man that the cigarette is bound to win in the long run” and therefore assured Minus that ATC was in fact less interested in the ordinance than the council might have believed. The “scientific” basis on which McCoull conducted their debate supposedly unnerved Minus, who insisted that “the boys in the council had to be satisfied”—otherwise the ordinance would pass and “the smaller shops frozen out by the big license fee.” McCoull countered—argued that the ordinance would merely create “local monopolies” (leaving total sales unaffected), but the alderman intoned the refrain that “the boys are not philanthropists” and insisted that they “get down to business.” Negotiations soon bogged down, however, because, although Minus purported to have authority to “act for the ‘boys,’” he was not “the real man in charge,” whom he would bring back in case there was a cash deal. McCoull, confirming that he had

having offices on the fifth and sixth floor of 60 Wabash. Id. at 1228, 2258. In The Lakeside Annual Business Directory of the City of Chicago, 1894, at 602 (1894), the entry for National Tobacco Works was 604, 60 Wabash Avenue, but there was no listing for ATC or McCoull. National Tobacco Works was a large Louisville plug tobacco producer that ATC had bought in 1891. “Chicago Agents Confirm the Sale,” CT, Feb. 28, 1891 (6); “The Tobacco Trust,” NYT, Mar. 5, 1891 (1). Neither ATC nor the National Tobacco Works was listed in the Chicago telephone directory for 1894 or 1895. Email from Chicago History Museum Research Center (Oct. 2, 2010).
no intention of dealing with anyone other than the “power back of it all,” then “incidentally wondered how much money was to be demanded.” Minus immediately named a price of $25,000 and, despite eliciting no assent, left, “very suavely alleging he would bring Alderman John Powers” the next day. In a nice journalistic touch that must have caused the Tobacco Trust’s agent in Chicago considerable contortions to utter with a straight face—if in fact he made the statement at all—the Herald reported that it “took Mr. McCoull several minutes to revive from the shock and effrontery of the man,” after which he “then and there resolved to have no more speech with aldermen, save in the presence of witnesses.”

In preparation for the “one-sided conference” on December 19, “The Herald man went an hour earlier and locked himself into the cup board, which was smaller by several feet than his coffin will be.” However, when the “torture” reached the point of “suffocation...at the very moment” that Minus and Powers were scheduled to arrive, McCoull had to intervene to “unlock the door and release the witness.” Luckily for ATC, although Minus arrived on time at 3 o’clock, he apologized for Powers’ absence and asked for a postponement until 5 o’clock, during which interval McCoull secured a carpenter, who hurriedly pulled down the door on the side of the room right behind McCoull’s desk, chiseled out the center panel, put the door back into place, and moved the desk “to leave an abundant sight-hole for the witness.” Minus and Powers then appeared punctually, the former quickly leaving to stand in the hall (where he could monitor anyone who might try to enter and “prevent any undesirable listeners”), and the 20-minute “production, which was half and half comedy and tragedy,” began, of which the reporter made a stenographic verbatim report. As a unique document of a private discussion between an agent of the Tobacco Trust and a knowledgeable (albeit corrupt) supporter of (non-universal) sales

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1025 “Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:5-6). Thus, but for the fortuity of Powers’ lateness, McCoull would, apparently, have been unable to secrete the reporter. The large drawing in the Herald depicting the scene in the office, including the desk and door, did not show the sight-hole. The question as to why Powers would have been unaware of someone’s presence in the adjoining room was raised rather than answered by the substantively and grammatically odd statement that the “room has no tenant regularly, but for thirty minutes before and after the visitation it will appear to the alderman now that it was far from empty.” Id.
regulation, it is well worth relating in some detail.

Following discussion of the weather, McCoull’s coy remark that “our folks are not so deeply interested” in the ordinance prompted Powers to assure him both that it would “interfere” with ATC’s business and that “the people,” including 90 percent of the parents of the boys smoking cigarettes, wanted it passed. Unable to shake Powers on that point, McCoull shifted the discussion to the question of whether the ordinance would put a stop to cigarette smoking. Here Powers realistically underscored that it was not intended to stop the sale of cigarettes in general, but in “those small places” because “[t]he great trouble” was that they were sold in candy stores and other little places near schools where 10- or 12-year-old boys who could steal two or three cents could buy them. Without even trying to quantify the reduction in total sales that the monopolization of the trade by large sellers would bring about, Powers was unable to construct an effective threat to “interfere” with the Trust’s business; rather, he merely confirmed that small dealers would have to stop selling them, but that “the ordinance won’t stop the manufacture of them by any means.” Instead of demanding quantification, McCoull went off on a lengthy tangent on how the ordinance would merely encourage boys and men to roll their own, but Powers—who revealed that he knew all about such substitution because he had been “in the business as a grocer for 15 years—.injected some realism into the discussion by pointing out that “a boy is not going to buy a package of tobacco and take it home with him so that he could roll his own cigarettes” and refuting McCoull’s interjection that a boy after all carried a package of cigarettes around: “Oh, no: he can buy them singly.... You can go into any of the small stores and buy a single cigarette for 1 cent.” And driving home the point once again, Powers observed that by doing away with small dealers the ordinance “to a large extent, keeps the boys from buying them.” Hopelessly out-argued by Powers on all fronts, McCoull once again shifted subjects, this time bravely boasting (unfortunately without adducing any figures or even identifying any jurisdictions): “We have had some experience with ordinances of this kind, and we find that our sales are just as much as they were before the ordinances were passed.” As good a bluffer as his adversary/partner, Powers conceded that “you fellows take your monthly accounts and don’t find much difference, but there are other cities in which such ordinances are enforced,” thus implying that level sales were possible only if small dealers sold cigarettes illegally without a license. Boxed in yet again and finally admitting the obvious, McCoull abandoned his initial cavalier position: “Of course we would rather not see the ordinance passed” (repeating the preference a few minutes later while adding, presumably as a bargaining chip, that nevertheless “we are not interested in it to a great
At this point the conversation turned practical. After Powers, in response to McCoull’s question as to what he supposed the council vote on the ordinance would be, had opined that at most 15 members would vote against it, while 40 to 50 would support it, the conversation moved in the direction of the price term. Powers allegedly began laying the groundwork for his demands by repeating what he had previously told dealer Blank. This message signaled that no policy principle was at stake for Powers, who was in the business of monetizing fungible votes: “[P]ersonally I did not care whether the ordinance passed or not. But...this cigarette trust, so-called, is a great big monopoly in the country; that some of the boys in the council felt that the trust was making a whole lot of money and that it might be a good time to see if we could not talk with some of these gentlemen and see if they would not do something for us.” Consequently, Powers spoke with “a good many of the boys and found out...times are a little hard with them just now, and...they would defeat the ordinance for a consideration.” Naming numbers, McCoull then asked what it would take to get the measure dropped, but when prodded by Powers to recall the figure that he had already heard from Minus, McCoull suddenly remembered the $25,000, but added that it was “a great deal of money.” Powers sought to contextualize the sum and make it more palatable by pointing out that it had to be divided among 40 to 50 men, a number that seemed inflated to McCoull since with 15 or 18 already poised to vote No anyway, only another 18 would have to be paid off. Seeking to disabuse him of his naivete, Powers gave him a quick tutorial in aldermanic vote buying. Not only would “we...have to satisfy those who would want to know why the ordinance was dropped,” but there was “no use in beating this ordinance or having it dropped unless there is a clear understanding because any one of the boys could bring in another ordinance. If you worked on that plan and some of the boys were not satisfied they could introduce another ordinance. They would not be satisfied because they were not considered in the original deal. They would bring the matter up before the committee and might succeed in getting the same ordinance up again.” A quick study, McCoull grasped that Power’s plan was to “satisfy as many of those people who want money as you can so as to avoid the possibility of another ordinance for this purpose coming up afterward.” In other words, if Powers paid off the bare minimum necessary to defeat the measure, “there would be still left a dissatisfied element who have not been taken into...money consideration, who would give us trouble afterward.” After Powers had at length assured a suspicious McCoull that, because “the boys without any exception [were] a very decent lot of fellows,” once they had been paid off they would not

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1026 Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:6-7, 2:1).
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double-cross ATC, McCoull resumed harping on the theme of how great a sum $25,000 was. Once again, Powers sought to fend off this assault by pleading poverty on behalf of some of his “not well off” colleagues—but not of himself. The pre-eminent boodler boasted: “Individually, I have as much of this world’s goods as I care for. I am worth quite a lot of money. I think I can safely say that I am worth $50,000. I have had a business which has netted me $5,000 to $10,000 a year. I am in the council just for the fun of being in politics.” A “great many” members, however, faced a different situation: not only did they have to spend $2,000 to $5,000 just to be elected, but some had “no visible means of support”; moreover, it was an “outrage” that aldermen received no salary whatsoever, but merely three dollars for each meeting they attended. This sad tale failed to tug at McCoull’s heartstrings: instead, he offered his own lament that it seemed “rather hard that men in legitimate businesses should have to pay their salaries.” Having reached impasse on this issue, McCoull tried another ambush: “I suppose they make a great deal of money out of their positions.” In what was arguably the most risible statement uttered by (or at least attributed to) Powers during the entire conversation, the boodler-in-chief denied the claim, insisting that during his two decades in Chicago politics he could “count on the fingers of one hand the men who have left the council with money.”

At this point McCoull agreed to telegraph ATC headquarters in New York to find out what it could do and to telephone Powers with the response, but if McCoull did not hear back before the next council meeting, Powers was willing not only to delay taking up the ordinance, but, in McCoull’s words, to “bring that ordinance up and down without anything beyond a promise to pay that money.” Indeed, because he was dealing with a “gentleman,” Powers would both “guarantee...that no other ordinance of this kind will pass the council between now and next election” and give back the $25,000 if he failed to “deliver the goods.” After their minds had met, they played dueling lawyers, McCoull informing his aldermanic interlocutor that “our people” believed that the ordinance was unconstitutional, while Powers retorted that the city’s corporation counsel—whose opinion he promised to mail McCoull—had not hesitated a moment in assuring the aldermen that they had the right to “license anything they

1027a “Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:3-7, at 2:1-2). Among the 15 or 18 aldermen who might have voted against the ordinance without having to be bribed may have been some who, like Republican Alderman W. P. Chapman, opposed Coughlin’s measure because they mistakenly believed that it contravened their principle that “I would not be a party to any legislation that might infringe on the right of grown people to eat and drink what they please.” “Guilt Is Evident,” Sunday Herald, Dec. 23, 1894 (1:7, 2:1-6 at 4).
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“Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:3-7, at 2:2-3). Coughlin’s explanation/excuse for having “failed” to bring the ordinance up at the meeting on Dec. 20 was that he was unfamiliar with various “parliamentary points”—in particular as to the permissibility of passing an ordinance on special order at an adjourned session. More importantly, he thought that it lacked the requisite number of votes for passage. “Guilt Is Evident,” Sunday Herald, Dec. 23, 1894 (1:7, at 2:1-6 at 3).

When confronted with the Herald’s account, Powers did not deny that he had met with McCoull, but swore that he had gone there to convince him that the ordinance should be adopted because “[t]he wives and mothers in my ward begged to have their boys protected by the removal of the things from the penny stores.” Coughlin, who had introduced the ordinance, opined that Powers had not propositioned McCoull because he had supported its passage “first, last and all the time,” not only because of cigarettes’ destructive health impact, but also because he was aware that packages included “obscene pictures, which furnished a bad object lesson for the boys and girls who purchased them.” Finally, like Coughlin, Powers, too, “realized...that the city was short in its funds to the extent of $1,500,000, and he believed that we could increase the revenue of the city from this source.”

Powers did deny having suggested a bribe or that he would accept one; moreover, he claimed that it had been McCoull who had contributed 90 percent of the conversation pertaining to bribery attributed to Powers. The credibility of Powers’ account of what was allegedly “very evident” to him as a “‘trap’” was undermined by his admission that his tête-à-tête with McCoull had not been his first with the Trust’s representatives: on December 15 an ATC salesman had called him to arrange a meeting with its advertising manager on December 17, at which the latter asked Powers why he was pushing for adoption of the ordinance. On hearing Powers’ answer (which the press omitted, but Powers

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1028.”Demands a $25,000 Bribe,” CH, Dec. 22, 1894 (1:3-7, at 2:2-3). Coughlin’s explanation/excuse for having “failed” to bring the ordinance up at the meeting on Dec. 20 was that he was unfamiliar with various “parliamentary points”—in particular as to the permissibility of passing an ordinance on special order at an adjourned session. More importantly, he thought that it lacked the requisite number of votes for passage.


1032a.“Serious Charge of Bribery,” NYT, Dec. 23, 1894 (1:4).
told the press that he had informed McCoull that he had “‘always been a champion’” of the licensing ordinance because his constituents had repeatedly expressed the hope that something would be done to prevent school children from buying cigarettes), the manager hinted at “money consideration” and, after pulling out a large pocketbook, informed Powers that: “‘It matters not to our concern whether you support or oppose the ordinance, for I hold Mayor Hopkins and enough of the Aldermen in this pocketbook to defeat it without your assistance.’” Powers wanted the world to believe that he—the boodler-in-chief of a world-renowned corrupt municipal government—was so offended by this characterization that “‘hot words followed.’” Although Powers then resisted all of the advertising man’s propositions to oppose the ordinance, he nevertheless agreed to return the next day, when he had the aforementioned meeting with McCoull, who “‘intimated’” to Powers that “‘if it cost $25,000 he would defeat the ordinance,’” the “‘great trouble’” being that “‘he did not know who would be the proper party to handle the money.’” His moral rectitude blindingly resplendent, Powers informed the Trust’s agent that “‘no money consideration...could influence my course and that now, more than ever, I would work for the passage of the ordinance.’”

In evaluating this account it is important to note that in addition to trying to sell newspapers, the Herald also had an ax to grind in characterizing the incident as “so vile that its vileness cannot be exaggerated”: it editorially aligned itself with the Tobacco Trust by intensely opposing the ordinance as “contrary to public interest” and placing “restrictions on a traffic by which a very large number of well-to-do people obtain part of the means of a livelihood” without lessening the “cigarette nuisance and evil.” While insisting that “this boodle project was formed” in order to “prevent just and proper action”—a self-contradictory notion inasmuch as allegedly no action at all, just or otherwise, had existed to prevent other than the boodlers’ own “villainy”—the Herald saw the “conspiracy” in the larger context of a council lacking enough principled aldermen to “pass nor [sic] defeat an ordinance of any kind, good or bad. The boodle contingent, constituting a majority, must be paid or they will not vote for a measure that ought to pass, nor [sic] against a measure that ought not to pass.”

The Herald exposé left the Democratic Chicago Times, owned and edited by mayor-to-be Carter Harrison, Jr. (son of the recently assassinated mayor), blasé about its having made “a profound ado about overhearing” an alderman’s proposition to kill an ordinance objectionable to a trust for $25,000: “There is no

1034a “Serious Charge of Bribery,” NYT, Dec. 23, 1894 (1:4).
1035a “A Twenty-Five Thousand Dollar Deal,” CH, Dec. 22, 1894 (8:2) (edit.).
news in a statement of this kind. It has been known to a certainty any time these
twenty-five years that the common council of the city of Chicago has been
corrupt. There has not been a period, with the exception of some years when men
of honesty predominated in the council, that the votes necessary to pass an
ordinance over a mayoralty veto have not been at the service of persons who
would pay for them. [I]t is well known in this community that...not a grant of any
value has passed the common council that has not been corruptly obtained. [S]o
lax and inefficient have been the methods of those officers charged with the
prosecution of the law that not since 1872 has a single alderman been brought to
book for his corrupt practices....” Taxonomically distinguishing this type of
corruption by which “the alderman is bought to give to certain persons or
corporations municipal grants without adequate compensation to the city” from
the sandbagging of which Powers was accused, the editorial deemed the latter
“the exception”: “It is true that aldermen sometimes blackmail worthy persons by
offering in the council, as the trick is at Springfield, legislation that would prove
inimical to their interests and then proffer to kill such proposed legislation for a
consideration.”

Ironically, just three days later, in the course of issuing a fulsome apologia
for the Tobacco Trust, the Herald conflated these two analytically distinct
subcategories of bribery. In order to refute the claim that “abstractly the bribe
giver is as guilty as the bribe taker,” the editorialist argued that “[c]rimes
committed under duress have different status than those that are voluntary.”
Deploying the loaded term “duress” precisely to cover up the difference between
the two subtypes, the newspaper pointed out that “[b]ribe giving has for some
time been compulsory in this city upon citizens or corporations wanting privileges
to which they were legally entitled”—“to get free.” Bracketing here the issue of
whether, “[i]f a railroad wanted a spur track,” it was really entitled to it “free” in
the sense that aldermanic boodling entailed shifting (a part of) the compensation
that the corporation should have paid to the city to the aldermen, the Herald
enabled itself to jump to its favored conclusion only by eliding the crucial fact
that ATC was in no way “entitled” to kill an ordinance that it must have perceived
as both reducing its immediate profits and curtailing the expansion of its
monopoly commodity by interfering with the addiction of the next generation of
cigarette users. Cavalierly ignoring these fatal defects in its logic, the editorial
praised ATC for standing up to “a combination in the council that [generally] will

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1036c “Bribers and the Bribed,” Times (Chicago), Dec. 23, 1894 (12:3) (edit.). The
Herald did not deny that the council’s corruption had long been well known; it had merely
provided “[c]onclusive proof....” “A State Investigation Needed,” CH, Dec. 24, 1894 (6:2)
(edit.).
punish anybody who exposes solicitation of bribes.” In particular it celebrated the Trust’s sting operation: “Few men perform the admirable public service rendered by Neill McCoull in trapping the corrupt Powers and letting the community know precisely the circumstances under which that rascal undertook to ply the trade of himself and his bribe seeking associates.”

The diametrically conflicting stories, which variously cast Powers and McCoull as “hero” and “heavy villain” of an alleged bribery plot, also initially left unnamed a key actor, George Washington Turner—apparently the same person previously referred to as an ATC advertising manager—who had traveled from New York to Chicago “with the purpose of entrapping a Chicago Alderman in a compromising interview,” publication of which would help defeat the ordinance by tainting it as the product of bribery. Whether Powers and his allies would in fact execute their plan of turning the conspiracy against the Trust by insuring adoption of the measure remained to be seen. Coughlin, in any event, was laying that groundwork by standing by his on-again, off-again boodle buddy and “insist[ing] that people who are mean enough to make cigarettes are mean enough to attempt to bribe city officials.”

Turner’s real identity proved to be revelatory of the Tobacco Trust’s strategy in undoing the ordinance. Having become “disgruntled” as business manager of the New York World, in 1893 he became publisher of the New York Recorder, a Republican newspaper that the Dukes of ATC, with “plenty of money, millions to expend” on a large metropolitan daily paper, had launched in 1891 and that the World styled as “owned by the Cigarette Trust.” “One of the standing rules in that newspaper office,” which had turned into a financial “mill stone” around Duke’s neck, had “always been that no item injurious to the cigaret business should be printed in its columns, and this has been rigidly carried out, even under the control of Mr. Turner....” This profit-driven self-censorship had, in the wake of the bribery scandal, quickly given rise to the allegation that Turner was an “employé of the Tobacco Trust.” Turner’s credibility was embarrassingly on display in his Christmas-day denial of the aforementioned

statement that as editor of the *Recorder* he had “systematically suppressed and
manipulated news in the interests” of ATC: he insisted that the president and a
few others of the company were merely his “intimate friends, that his interest in
the welfare of the concern, which he refuses to call a trust, is not pecuniary, but
only of a friendly character.” Not only did he pretend that “‘I don’t know of the
existence of any trust in the tobacco industry,’” but he also asserted (as if being
deposed) that “‘to the best of my knowledge and belief not one share of the
Recorder stock is held by any member of the company.’” While admitting that he
had met Powers, he claimed that he had gone to Chicago “simply to see what the
newspapers of that city thought” of the proposed ordinance.1045 Turner’s travels
were, according to his ex-employer and enemy, the *World*,1046 considerably more
sinister: he was “extremely active in the interests of Tobacco Trust..., going
around the country endeavoring to suppress the news about the recent litigations
which are affecting the interests of this great monopoly. He first appeared
openly several months ago, when Miller & Co., of Newark, N.J., began suit in the
Court of Chancery of New Jersey to dissolve the Tobacco Trust. Turner went
around the New York newspapers with a request that they sign an agreement to
suppress all reference to the hearings. He urged that this suit had not been
brought in good faith, but was intended to blackmail the trust. ... The real truth
of the matter was that the Tobacco Company did not want its methods of doing
business exposed, fearing the result of such exposure in Wall street. ... Aided by
the United Press, Turner succeeded in muzzling most of the papers in the East”
and, after he had performed a similar mission in Indianapolis in mid-December,
it was “believed in Chicago that Turner’s success as a manipulator in the East
induced his employers of the Tobacco Trust to send him on to Chicago,” where
his task was to “trap the Aldermen” in order to prevent the ordinance’s passage
pursuant to the Trust’s belief that “if the Aldermen were shown to be corrupt
public indignation would kill the ordinance.”1047

1046 Moses Koenigsberg, *King News* 367 (1972 [1941]).
1047 “The Mayor in His Wallet,” *World* (New York), Dec. 25, 1894 (3:1-2). It is
unclear whether Turner’s departure from the *World* biased this report. Coughlin’s
understanding was that Turner was “a heavy stockholder in the cigarette trust.”
“Aldermanic Faith,” *Daily Journal* (Logansport, IN), Dec. 25, 1894 (1:4-5 at 5). ATC’s
local Chicago lawyer, Charles Aldrich, claimed that “‘Turner is a relative of one of the
officers of the company and that is his only connection with it.’” “Bunkoed or Not?” *CT*,
Jan. 2, 1895 (9). The New Jersey attorney general’s action to restrain ATC from doing
business in that state (in which it was incorporated) on the grounds that, inter alia, it
refused to deal with jobbers who sold competitors’ cigarettes was ultimately dismissed.
The plot thickened when the Tribune found out that on his arrival in Chicago Turner had been introduced by William F. (Buffalo Bill) Cody to a legendary Pony Express rider, Robert H. (“Pony Bob”) Haslam, a cigarette dealer and a “messenger from the cigarette trust,” to whom he confided that he wanted to meet Powers and other aldermen, and that Haslam arranged for Powers—who later admitted that Haslam had revealed that the subject of Turner’s interest was the cigarette ordinance—and Coughlin to meet him. During two hours of whisky drinking in a hotel cafe, Powers claimed, Turner beseeched him to defeat the ordinance, “while he was protesting that his duty to his constituents and his innate horror of cigarettes would not allow him to harbor the thought for an instant.” Coughlin, for his part, while drinking with Turner at eleven in the morning, was asked why he wanted to pass the ordinance. He supposedly replied that the existing ordinance was unenforceable and his was “the only way to reach the cigarette evil....” Turning more personal, he added that “cigarettes had killed a first cousin of mine and that I was against them.” Hawking a lethal commodity apparently failed to faze Turner, who protested: “Well, look at the small stores you are driving out of business.” Unflinchingly, the righteous alderman shot right back: “Yes, but look at the small families that you wreck.” An uncomprehending Turner then received this hybrid scientific-urban legendary explication: “These young boys and girls around school houses who buy two cigarettes for a penny inhale the smoke, go into quick consumption, and it does not take many years for that disease to take them away.” The now thoroughly enlightened Trust agent implausibly acknowledged that Coughlin had gotten “the best of the argument,” but nevertheless “dared” him to do the pointless and vote for an ordinance that the mayor, “who is with us,” would veto—an action
that “‘we have enough...votes to sustain.’”

Once Turner had failed to persuade Powers that newspaper stories and scientific reports that cigarettes were injurious were untrue, and they had discussed the finer points of the ordinance’s constitutionality and the council’s police power, the former’s persistence in urging the latter to “‘name a price for my influence’” left Powers increasingly frustrated because, “‘[b]ut for his being Bob’s friend I would have smashed him.’” However, Powers’ bathetic “indignation” reached new heights when, after Turner, pointing to his “little red-leather pocket-book,” had bragged that “‘I’ve got your mayor and forty of your aldermen in here and they’ll kill the license,’” Powers called him “‘a __ liar and a __ fool.’” (Impressive was the self-discipline that the reigning boodler champion presumably had to summon to tell a reporter with a straight face that “‘[s]uch an imputation on [sic] Chicago’s chief executive and the City Council...could not go unquestioned’”)

Yet another version of the genesis of “negotiations for the defeat of the cigarette license ordinance” proffered by McCoull involved a peddler whose $1,200 annual profits (alone) from cigarettes would have been jeopardized by the proposed ordinance and who therefore complained to his Republican alderman that its passage “‘would take the bread and butter out of his mouth.’” Having learned from the peddler that McCoull was the person “‘in authority’” (“‘if anybody was’”), the alderman (and three colleagues in his “‘gang’”) delegated the peddler to approach McCoull, who told him that “‘he knew very well that I would not spend one dollar with these fellows,’” but nevertheless agreed to hear whatever the aldermen might wish to say to him. Within half an hour the peddler’s alderman showed up in McCoull’s office, but they were soon at loggerheads because McCoull, too, not wanting “‘to be made a child of,’” insisted on talking to “‘somebody who was in authority.’” That person turned out to be Powers. Having told this tale to a Tribune reporter, McCoull submitted to several questions, which he initially answered falsely or evasively. Thus, after having denied that ATC had done anything at all to defeat the ordinance, he was pushed

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1051“Guilt Is Evident,” Sunday Herald, Dec. 23, 1894 (1:7, at 2:1-6 at 3). In an alternative apologia given to another newspaper, Coughlin had more pithily described his support of the ordinance as “‘[f]or revenue and humanity.’” “What the Aldermen Say of It All,” CT, Dec. 23, 1894 (4). Haslam stated that he did “not remember hearing the cigarette ordinance discussed at all.” “Demands an Inquiry,” Chicago Record, Dec. 24, 1894 (3:3-4 at 4).


to admit that the company’s agents had canvassed various wards by distributing to tobacco dealers a petition (against the ordinance) to the city council. As to why he had not reported the solicitation of bribery to the state’s attorney McCoull lamely excused himself on the grounds that it was for the Civic Federation to take up such a matter.

In any event, Powers concluded that what he characterized before the council as “one of...the most infamous plots ever instituted in this city” would boomerang because “if the aldermen don’t vote for it [Coughlin’s ordinance] who voted for McGillen’s ordinance people will suspect them.” The New York World agreed that, contrary to the Trust’s supposition that the story would kill the ordinance, it would in fact have the reverse effect.

At its December 27 meeting the city council afforded Powers and Coughlin the opportunity to rehearse their versions of the bribery escapade. The proceedings’ solemnity was adequately captured by the need for the sergeant-at-arms to evict a Democratic alderman from the council chamber for drunkenness. In contrast, with impunity Coughlin was able to claim that it was “cruel and unjust through the press that he [Turner] has accused the Common Council of Chicago as [sic] a pack of thieves....” To be sure, the Tobacco Trust’s monopoly did not extend to mentioning that fact; indeed, just three days earlier the Chicago Herald had shared a naked emperor moment with its readers by printing Republican Alderman James Mann’s cri de coeur that “sandbagging” on the council had been “so open...that there have been times in which I have been tempted to rise in my seat in the Council Chamber and cry out to these men: “You are a pack of thieves.” Coughlin then “consoled” Powers by confiding to the council that he, too, had been “approached with corrupt and felonious advances on the part of the agents of the American Tobacco Company...which he

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1055.“Mr. M’Coull Reiterates His Charges,” CT, Dec. 23, 1894 (4).
1057.“Mr. M’Coull Reiterates His Charges,” CT, Dec. 23, 1894 (4).
1058.“Powers Has His Day,” CT, Dec. 28, 1894 (2).
had virtuously spurned.”\textsuperscript{1063} In response to Powers’ demand for the “fullest investigation” of the charges, the chair appointed a special five-member committee.\textsuperscript{1064} In advance the \textit{Herald} had made the most of the delicious irony of the “impudent absurdity” of Powers’ demanding an investigation precisely from “his unspeakable associates and partners in corruption.” Unsurprisingly, this “league of aldermanic booblers assembled to inquire into the acts of the boodler in chief”\textsuperscript{1065} did expeditiously exonerate him.\textsuperscript{1066} In the end, despite taunts by a Republican alderman, Coughlin did not call up his ordinance at the December 27 meeting, purportedly because he feared that he lacked the requisite number of votes for passage; instead, he decided to postpone availing himself of the advantage to which the special order procedure entitled him,\textsuperscript{1067} thus refuting the \textit{Herald}’s prediction that the “gang aldermen, having failed...to wrest $25,000 from the American Tobacco Company, will now move heaven and earth in an attempt to revenge themselves upon the corporation by passing the ordinance.”\textsuperscript{1068} Coughlin did, however, make it clear that “‘[j]ust as soon as’” he thought that he had a majority, he would bring it up: “‘I know that none of the friends of the measure has seen the officers of the trust to promise that they would vote against the measure if the prosecution against Powers was dropped. They are still for the ordinance, but they were afraid to say so, in view of the stand taken by the newspapers and the charges which had been preferred against the members of the council.’”\textsuperscript{1069} In the event, four months would pass before Coughlin pressed it again.

In a bizarre turn of events, a week into the scandal Alfred Trude launched a tale of a byzantine double-cross involving “Lew” Howard, a confidence man who had cleverly intercepted Turner, convinced him that he was a successful lobbyist (who had helped Trude get the first ordinance passed), and, since Turner allegedly had not wanted to deal with aldermen directly, was permitted to approach the latter without informing Turner that he was in fact impersonating him. The confidence man’s purpose, which was totally unrelated to the Trust’s objectives, was to carry out a (partly implemented) bunko game designed to fool


\textsuperscript{1064}It was composed of four Republicans (Mahony, Keats, Hepburn, and Howell) and one Democrat (Brachtendorf). \textit{Proceedings of the City Council of the City of Chicago} 2053 (Dec. 27, 1894).

\textsuperscript{1065}The Gang to Investigate the Gang Leader,” \textit{CH}, Dec. 25, 1894 (6:3) (edit.)

\textsuperscript{1066}See below this ch.


\textsuperscript{1068}"Will Ask Indictment,” \textit{CH}, Dec. 25, 1894 (2:3).

\textsuperscript{1069}"Victory for Powers,” \textit{CH}, Dec. 31, 1894 (6:1).
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aldermen into giving him cash for (worthless) drafts for large amounts that were allegedly intended as the bribes for their votes. Remarkably, the punch line of Trude’s convoluted story served to whitewash the Trust: not only did he, like Charles Aldrich, “‘Turner’s lawyer here,’” “firmly believe” that the aldermen had never met with Turner, but he had “‘an idea Turner gave Howard some money for his alleged services in persuading Aldermen not to oppose the cigarette trust, but it was not large, as Mr. Turner had only a few hundred dollars for his campaign with the Council. I am absolutely certain the positive order from the trust was to spend no money in bribing Aldermen, and only a small fund for lobbying purposes was provided.’’’

Trude’s tale was not only wholly implausible—Haslam refuted it—but raised the (then unposed and unanswered) question as to how and why this anti-cigarette campaigner had become privy to ATC’s internal and secret strategies. Indeed, Aldrich, the Trust’s lawyer, who “back[ed] up his story as far as his information goes,” claimed that Trude knew more about the matter than Aldrich—except that the former was unintentionally mistaken in stating that the latter was Turner’s lawyer. But Aldrich went on to exonerate his client by asserting that, although he had had “‘nothing to do with Turner when he was in Chicago,’” he did “‘know...that Mr. Turner was not here on any such mission as some of the Aldermen would have the public believe. He was not here to look after any legislation in the Chicago City Council or anywhere else; neither was he authorized to attend to any such business. It is impossible that he should have done any of the acts the Aldermen allege or that he should have met Ald. Powers in the Leland Hotel barroom in the manner stated. ... Mr. Turner is not the kind of a [sic] man who would make such an exhibition of himself. Besides this, I know the American Tobacco Company has no intention, nor did it ever have any intention, of paying any money, no matter what the sum, to defeat this ordinance or any similar legislation. It has “millions for defense but not a cent for tribute.’’’ In response to the Tribune’s question as to the meaning of this statement, Aldrich capped off his highly compensated obfuscation and mendacity with the declaration: “‘That it will fight the ordinance, if it is passed, in the courts and beat it. It is willing to pay lawyers but not Aldermen.’”

Almost immediately the grand jury set the “alleged attempt to negotiate a bribe” for a hearing, but it swiftly and unanimously exonerated Powers on the basis of the testimony of McCoull, who stated under oath that Powers had not

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1071“Bunkoed or Not?” CT, Jan. 2, 1895 (9).
1072“Kern’s Case Is Next,” CT, Dec. 28, 1894 (8).
solicited a bribe or mentioned any sum of money regarding the ordinance. The remainder of McCoull’s replies to grand jurors’ questions were nonsensical, incoherent, or self-incriminating. After replying that he did not know why he had sent for Powers, he admitted that it was he himself who had made the proposals, whereas Powers had merely told him how many aldermen would have been required to defeat the measure. Finally, he claimed: “He did not know just why Turner had come to Chicago nor [sic] whether it was in the interests of the company he himself represents.”  1074 Despite his vindication, Powers swore that he would “‘get even’” with the Herald. 1075

In the light of McCoull’s bizarre testimony, the grand jury’s failure to investigate, let alone indict, McCoull for attempting to negotiate bribing the council is a mystery, but the Tribune was more interested in why it had “decorated Powers with a coat of whitewash.” To this end it developed an “hypothesis” that was bottomed on the at best dubious assumptions that Coughlin’s ordinance, unlike McGillen’s, “was designed for the benefit of the Aldermen and not of the community” and that “the motive of the great majority of those who posed as friends of the ordinance...was blackmail. They were confident that either the dealers or the company...would pay liberally to block this legislation.” However, once the boodling aldermen discovered that the grand jury investigation might “get some of them into extremely hot water,” they decided to compromise: since (the adverse publicity meant that) they no longer could “make any money out of” the ordinance and all ATC wanted was its defeat, they could simply abandon it “in return for the failure to press the prosecution.” Being informed that the matter had been compromised and that neither side wanted to press it, the grand jury would then drop it. The Tribune saw partial corroboration of the hypothesis in the council’s failure to pass the ordinance, 1076 but ignored the overwhelmingly inconsistent fact that it was not the Trust that reported the solicitation of a bribe, but the newly formed Civic Federation, whose executive committee had resolved that “the charges should be subjected to the most searching investigation” and whose lawyers would “push the case in the courts.” 1077 Indeed, the Federation proposed to use the stenographic report “as the

1074a “No Bill for Powers,” CT, Dec. 30, 1894 (6).
entering wedge for an investigation of the city council....”

Unsurprisingly, from the outset the proceedings of the special aldermanic committee “appointed,” from the Tribune’s jaded perspective, “to remove the stain of alleged bribery from” Powers, made it clear that its inquiry would be “more or less perfunctory....” By mid-January 1895, when no witnesses—including McCoull—showed up at its second meeting and the committee adjourned, it was “thought the committee will make no further efforts toward an investigation,” thus confirming the newspaper’s prediction that the city council would add a “thicker coat [of whitewash]....” So much for the Herald’s boast the day after it had broken the story that the “sensational exposure of the council methods raised a wave of public indignation...which insures the speedy visitation of the severest penalty under the statute. This punishment is now at hand for the convicted alderman, save for the formality of an indictment and a trial.” And so much, too, for the perspective that Lyman Gage, the Civic Federation’s president, had limned that same day—namely, that it would “‘doubtless go far to relieve the city of its present political degradation’” by exposing “‘the immensity of the conspiracy contained in the city council’” and by doing “‘more to rouse the people from their political apathy than anything that has been exposed in many years.”

A final dousing of whitewash cum hogwash was bestowed on Turner by the newly installed governor of New York, Levi P. Morton, Benjamin Harrison’s vice president until 1893. The day after publication of the first news reports about Turner’s role in the bribery scandal—which the World’s subheads burnished as “George W. Turner Creates a Stir in Chicago as a Tobacco Trust Go-Between” and “Some Trouble in Store for Turner”—and a week before Morton’s swearing

president was Lyman Gage, Chicago’s leading banker and soon to be U.S. treasury secretary, see William Stead, If Christ Came to Chicago! 452-58 (quote at 453) (1894); Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 92-93 (1943).

1080u “No Investigation for Ald. Powers,” CT, Jan. 16, 1895 (12).
1082u “Guilt Is Evident,” Sunday Herald, Dec. 23, 1894 (1:7). The statute imposed a maximum $5,000 fine on the bribe-offeror/giver and the bribe-proposer/recipient. The newspaper did not try to explain the deterrent power of such a fine on Powers, who allegedly on the very day of the revelations had arrived at his place of business wearing “one of the biggest diamonds on earth in his checkered shirt front....” “Id.
in, his private secretary informed the press that if the story were true, Morton would “‘unquestionably revoke his appointment.’” In his testimony before the grand jury on December 29, McCoull did not go out of his way to provide cover for his Trust co-conspirator. Asked whether it was not true that “‘Turner learned that he could not handle Powers by threats and that he then gave the report to the papers,’” he merely replied that he did not know; likewise, in response to a question as to why, if Turner was so eager to expose Powers, he had kept the stenographer’s notes for four days instead of giving them to the press immediately, a tight-lipped McCoull had nothing more to say than that he supposed Turner could have acted more swiftly. The World, ever ready to light upon and publish dirt on its quondam business manager, quoted a former Chicago corporation counsel citing unnamed others as believing that “‘Turner first attempted to tamper with Alderman Powers, but finding himself on dangerous ground, determined to make it appear to the public that Powers was after a bribe, and, with McCoull, put up the job by which Powers was inveigled into McCoull’s office.’” To this broadside the World appended a brief waffling statement by Governor-elect Morton that he did not know whether he would appoint Turner: because he could not base his judgment “‘entirely’” on press reports, he had launched his own inquiry. The paper shed some light on Morton’s indecisiveness by noting that according to his friends, he had never met Turner before appointing him as a result of “‘pressure by Turner’s political friends.’”

In the event, one of those friends was at that very moment busily urging Morton to finalize the deal. On January 12, 1895, the new governor issued a statement that in early December he had chosen Turner as an aide de camp on his military staff, but that in the latter part of December “certain statements, emanating from Chicago, were published in a single newspaper concerning Mr. Turner’s communications with members of the City Council of that city. Mr. Turner thereupon requested the Governor to hold his commission until proofs of the facts concerning such allegations should be formally submitted.” Morton then appended this preposterous, multi-layered prevarication to manufacture a happy end to his appointment interruptus: “Such proofs having been submitted, the Governor to-day announces that they show conclusively that the allegations are entirely unfounded, and that it also appears, not only from the editorial utterances of the Chicago papers, regardless of party, but by statements from citizens of Chicago of the highest standing, among whom are prominent members of the opposite political party, that Mr. Turner’s conduct in the matter was in aid of

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In fact, the only “proofs” that purported to exonerate Turner emanated from his employer, ATC President James B. Duke, who was also his co-conspirator in the Chicago city council caper. Twice on December 19 Duke had written to Turner at the Richelieu Hotel in Chicago, once to tell him to “Stay in Chicago as long as necessary,” and a second time adding: “Omitted to answer your question regarding McCoull. He is entitled to all confidence.” On the last day of 1894, referring to the aforementioned World article, Duke self-servingly and mendaciously wrote Morton:

> In view of the publication of an article yesterday in one of the New York papers, I deem it due to Mr. George W. Turner to make the following statement. Mr. Turner went to Chicago simply as my friend to tell the newspapers of the injustice of the proposed ordinance to hundreds of small dealers in tobacco in that city who are customers of this Company. He was not authorized to offer one cent to anybody nor would we have asked him or anybody to undertake such a mission. Every report of attempted bribery by Mr. Turner or anyone representing the Company of which I am President, is absolutely untrue.

Duke not only did his sojourning adlatus a favor by helping to concoct a

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1087Although Turner was registered at the Leland Hotel, Powers stated that he found Turner at the Richelieu Hotel “in conference with Ald. Coughlin” (on December 18) “What the Aldermen Say of it All,” CT, Dec. 23, 1894 (4). A few days later Powers’ investigation discovered that Turner had registered on Nov. 30 at the Leland Hotel as Martin, but received all his mail and telegrams at the Richelieu under his real name. “Now Looks Like a Trap,” World (New York), Dec. 30, 1894 (2:1-2 at 2).

1088J. B. Duke to Geo. W. Turner, Dec. 19, 1894, in Letterbooks at 28, JBDP, RBMSCL. The two very short notes to Turner are copies; though written in telegraphese and sent in a context apparently requiring urgent delivery, the texts do not state that they were sent as telegrams.

1089J. B. Duke to Geo. W. Turner, Dec. 19, 1894, in Letterbooks at 42, JBDP, RBMSCL, Duke University. Although this communication replied to a previous one from Turner, J. B. Duke’s papers include no such. Email from Elizabeth Dunn, Research Services Librarian, to Marc Linder (Sept. 17, 2010).

threadbare basis for saving Turner’s new position with Morton,\footnote{Cassandra Tate, *Cigarette Wars: The Triumph of “The Little White Slaver”* 34 (1999), over- and misinterpreted Duke’s statement to Morton: “Stung by the critical reports in New York newspapers (and no doubt concerned about their effect on the financial community), Duke enlisted the help of Morton.... He asked Morton to issue a statement—as a supposedly disinterested public official—to reiterate that ‘[e]very report of attempted bribery by Mr. Turner or anyone representing the Company of which I am President, is absolutely untrue.’” In fact, nothing in Morton’s statement (which Tate did not cite) even alluded to ATC; moreover, Duke’s statement, which is quoted in full in the text above and was manifestly written for public consumption, did not ask Morton to do anything.} but he (and Turner and McCoull) succeeded in killing the ordinance, albeit only in the short run. Although it was about to enter into hibernation, remarkably on January 5, 1895, Coughlin visited the offices of the Civic Federation to “enlist cooperation for his anti-cigarette crusade” and to argue that it was “a very commendable reform for the Federation to engage in.” Although the press, unfortunately, did not preserve for posterity the facial expressions, let alone substantive reactions, of the city’s leading reformers to such lecturing by the likes of that grotesque paragon of municipal government corruption—who, after all, found it advisable to explain that his efforts were in earnest even though some people seemed to think the ordinance a joke—it did record Coughlin’s boast that he was “‘in the fight to the finish’” and would “‘not let up until the cigaret traffic at every street corner has been curtailed and the deadly articles have been put out of the reach of the city’s youths.’”\footnote{A Chicago Anti-Cigarette Crusade,” *Sun* (New York), Jan. 6, 1895 (5:5) (reprinted from Chicago *Times*). The chairman of the Federation’s Municipal Committee which happened to be in session when Coughlin arrived, invited him to address the committee. At the time University of Chicago Professor Edward Bemis, a nationally prominent advocate of municipalization of utilities, was chairman. “Will Air the Jobs,” *CT*, Mar. 1, 1895 (6). Two months after his visit Coughlin was one of 38 aldermen excoriated at a huge Civic Federation mass meeting opposing the latest examples of aldermanic corruption in the form of two municipal utility ordinances. “Clamor for a Veto,” *CT*, Mar. 4, 1895 (1).} After months of languishing, Coughlin’s measure was finally debated by the city council on April 22, 1895, three weeks after the aldermanic elections had produced a council composed of 50 Republicans and only 18 Democrats as well as Republican Mayor George Swift.\footnote{“Makeup of the New City Council,” *CT*, Apr. 4, 1895 (2). Although the newspaper gave the totals as 50 and 18, the party designations of the individual aldermen added up to 49 and 19.} Although headlines screamed “Boodlers...
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Out[1094] and such prominent practitioners as McGillen had been defeated, “[n]o sooner was the new council sworn in than the boodling resumed. ... The public soon discovered that however indignantly Mayor Swift might protest, the Republican-dominated council was fully as bad as its predecessors. When there was money in sight the new councilmen forgot partisan differences and eagerly accepted the leadership of Powers and Coughlin.” Indeed, with “the bulk of the boodling interests centered[1095] in Coughlin’s first ward—which was thought to be “the richest political division in the world[1096]—his power (and wealth) increased, and the alliance of the two “created a tight ring of veteran conspirators able to control the Republican majority almost at will by merely loosening the purse strings.” As his graft-based control of the council tightened, Coughlin delighted in “making himself obnoxious” to the mayor, for whom he had nurtured a “petulant dislike” during Swift’s period as a reform alderman. In particular, it “became commonplace for Coughlin, in a single session, to sponsor a blatant boodle law and with rare whimsy to produce unquestionably useful reform measures designed to irk the mayor.”[1097]

Whether Coughlin was acting out that scenario at the April 22 session is unclear,[1098] but he did come very close to securing passage of his “suspicious and peculiar” licensing ordinance. The unrestrained sarcasm that the headline and subheads of the front page lead article in the Daily Inter Ocean unstintingly ladled out represented one widespread jaundiced view of the illegitimacy that irreparably tainted any pseudo-reform associated with The Bath House: “B. H. JOHN AS A LEADER: Coughlin Engineers the Powers Cigarette Ordinance: ...
Famous Boodle Measure Lacks One Vote of Adoption.” Interestlively, the *Tribune’s* less editorially freighted front page report held out the prospect of longer-term success embedded in immediate failure: “COFFIN NAILS TO GO: Indications That Mayor Swift Will Fight Cigaretts.” Republican opposition to the license measure ignited, at least superficially, on the question of its relationship to the McGillen ordinance, which had “been a dead letter” because, as the *Inter Ocean* put it, former “Mayor Hopkins [had] boldly announced his intent of disregarding it, and the gang never protested against his declaration.” The *Tribune*’s judgment that “[w]ar will be waged against cigarets in Chicago” was based on Mayor Swift’s statement at the council meeting that “he would examine the ordinance prohibiting their sale and it is evidently his intention to enforce it” after Republican attacks on the license proposal called his attention to the already existing ordinance. This confidence in Swift’s will to enforce may in part have been rooted in the order that he had issued, just three days after his inauguration, prohibiting smoking in city hall, which the press praised as partial “performance of his contract with the people of Chicago to purify the City Hall....” Demands for such action antedated his election. (As far back as 1892 Republican Mayor Hempstead Washburne had prohibited city employees from smoking while on duty.) In February the *Inter Ocean* pleaded for relief from the exacerbation of the already existing “unavoidable evils of faulty ventilation and of uncleanly personages...by the density of smoke. The foulest pipes and the rankest cigars pollute the already bad air.... In the elevators the thoughtless or the untutored puff their smoke into the faces of delicate women and girls and of cleanly men.” It was even “more improper,” as far as the editorialist was concerned, that

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1100 “Coffin Nails to Go,” *CT*, Apr. 23, 1895 (1:1).
1102 “Coffin Nails to Go,” *CT*, Apr. 23, 1895 (1:1).
1103 Republican Alderman Madden was also “satisfied that the present mayor would enforce” the ordinance. “B. H. John as a Leader,” *DIO*, Apr. 23, 1895 (1:7, at 2:4).
1104 *CT*, Apr. 12, 1895 (6) (untitled edit.). See also “One of the Mayor’s Reforms,” *DIO*, Apr. 12, 1895 (6:3) (edit.). A women’s group also enthusiastically endorsed the ban. “Pleased with the Anti-Smoking Order,” *DIO*, Apr. 19, 1895 (8:3).
1105 When office doors at city hall closed at 4 o’clock “corn cob pipes were flashed from desks, neglected cigars were abstracted from vest pockets, and nervous, yellow stained fingers rolled cigarette after cigarette until the enforced abstinence was fully paid for.” The ban did not apply to visitors. “Deprived of Their Labor’s Solace,” *CT*, May 14, 1892 (1).
smoking was permitted in city hall than in theaters because whereas people visited the latter voluntarily, they went to pay their taxes "by compulsion."\textsuperscript{1106}

When Coughlin called up his measure, which had been made a special order, his speech in his wonted buffoonish style "evoked rounds of laughter": "I have been sent to the City Council to do my duty. The election is over, but it is not yet too late to do good." After stressing "the evil effects of cigarette smoking," Coughlin "concluded by remarking that the Civic Federation had better be looking after the indecent pictures in cigarette packages rather than prosecuting the vendors of obscene literature." Lawyer and Republican Alderman Isaiah Greenacre then offered an amendment to reduce the license fee from $500 to $25.\textsuperscript{1107} Republican Alderman Madden criticized Coughlin's measure on the grounds that its passage "would indicate to the people that the Aldermen do not believe in the efficacy of the other ordinance" that the council had adopted the previous year: "If we were right on the former occasion we are wrong now...." To be sure, the posited inconsistency between the ordinances would have been plausible only if McGillen's in effect eliminated cigarette sales because of its glycerine/sugar ban; otherwise, Coughlin's could have been viewed as supplementary. Madden also insisted that the council should not devote its time to such an "infamous" measure. At this point Madden moved to put the proposal "on file," that is, to delay its consideration, but his motion lost by a vote of 23 to 40, not a single one of the 23 Yeas being cast by a Democrat (while 15 Democrats and 25 Republicans voted Nay). Yet another Republican opposed the license on the grounds that it would produce a monopoly. Although purporting to oppose sales under any circumstances, he argued that they should be unimpeded if the business were legitimate and stamped out if not. After Greenacre's motion to amend by prohibiting cigarette sales within 1,000 feet of any schoolhouse and a Democrat-sponsored amendment to increase the license to $1,000 had both been defeated, the council voted 34 to 27 in favor of the ordinance, but because passage required a majority of all 68 aldermen, it failed by one vote. Not a single Democrat voted against Coughlin's ordinance, while 19 Republicans and 15 Democrats voted for it.\textsuperscript{1108} The \textit{Inter Ocean} predicted that the ordinance would probably be introduced again because "the Coughlin following seemed

\textsuperscript{1106}A City Hall Nuisance," \textit{DIO}, Feb. 20, 1895 (6:4) (edit.).


\textsuperscript{1108}Coffin Nails to Go," \textit{CT}, Apr. 23, 1895 (1:1). Of the 40 Nays, Democrats cast 15 and Republicans 25. The various votes are taken from \textit{Proceedings of the City Council of the City of Chicago, for the Municipal Year 1895 and 1896, Being from April 8th, 1895, to April 10th, 1896, Inclusive 77-78} (Apr. 22, 1895) and party affiliation from \textit{id.} at LV-LVI.
determined not to let the matter drop,”1109 but in fact Coughlin waited almost a year and a half to press it again.

The Inter Ocean did not lament the killing of what it saw as a pure and simple boodle ordinance designed to “sandbag the cigarette trust,” whose shrewd agent had been able to frighten the “robbers” into abandoning “the attack upon its coffers....” To be sure, the newspaper did not believe that the ordinance’s backers had revived it “in hope of securing plunder for the aldermanic gang”; rather, its resurrection was designed to “punish the contumacy of the trust.” While acknowledging that some non-gang aldermen also voted with the majority, because they fallaciously believed that the ordinance might prevent cigarette sales to boys, the editorial advised that enforcement of the existing ordinance would achieve the same end.1110 (The Inter Ocean did not put its mouth, out of both sides of which it spoke, where its money was: while inveighing editorially against obscene buttons given with cigarette packages,1111 it profited from publishing ads for ATC cigarette packages with buttons.)1112 Displaying its contempt unabashedly, ATC opined that “the ordinance was a farce and could not be enforced.” Conflict between the monopolist and its dealers surfaced here inasmuch as some cigarette sellers, as was often the case throughout the country, would “not much care” even if cigarette sales were stopped because, as one downtown retailer put it, the result would be an increase in cigar and tobacco sales. To be sure, dealers expressed skepticism of the complete enforceability of the crucial glycerine/sugar ban in McGillen’s ordinance “because the costly services of a chemist would be necessary to determine whether proscribed ingredients were present” and the fact that one was identified in one box of one brand of cigarettes could not qualify as evidence against another.1113

At the same April 22 session the Rules Committee submitted its report on the council’s new rules, Rule 10 of which provided: “Smoking shall be, and is, strictly prohibited in the Council Chamber, during the session of the City Council, and this rule shall not be suspended except by unanimous consent.”1114 (At a council meeting on April 24, 1893, Mayor Harrison had declared that “smoking

1110A Boodle Measure Killed,” DIO, Apr. 24, 1895 (6:4) (edit.).
1112E.g., DIO, Dec. 4, 1896 (10:6) (Sweet Caporal).
1113Points on the Cigaret Ordinance,” CT, Apr. 24, 1895 (3).
1114Proceedings of the City Council of the City of Chicago, for the Municipal Year 1895 and 1896, Being from April 8th, 1895, to April 10th, 1896, Inclusive 72 (Apr. 22, 1895). See also “B. H. John as a Leader,” DIO, Apr. 23, 1895 (1:7, at 2:1).
would not be tolerated hereafter in the council chamber...”\textsuperscript{1115} At the next session a week later, when the council took up the rules individually in sequence, Alderman Frank Lawler “got the rule prohibiting smoking stricken out...”\textsuperscript{1116} That Lawler, a one-time Illinois trade union leader and author of the state’s eight-hour law, who as a Republican and then a Democrat on the city council in the 1870s and 1880s (before serving three terms as a congressman)\textsuperscript{1117} “Was Always Laborers’ Friend,”\textsuperscript{1118} spearheaded this repeal is noteworthy. A member of the Hull House Men’s Club, Lawler was, with Jane Addams’ encouragement, its (independent) candidate at the April 1895 elections in the nineteenth ward, in an effort to undermine Powers’ rule and create the sanitary conditions there that his corrupt crony regime made impossible.\textsuperscript{1119} However, “the Hull House victory was short-lived,...for the successful candidate was unable to resist the attractive inducements put before him by his colleague from the nineteenth ward. Within a matter of months, Frank Lawler was Johnny Powers’s [sic] most loyal supporter.”\textsuperscript{1120}

Whatever Lawler’s reasons for leading the forces seeking to get rid of the proposed no-smoking rule, proponents outnumbered opponents by 43 to 20.\textsuperscript{1121}

\textsuperscript{1115}“Begins Its Work,” DIO, Apr. 25, 1893 (2:5).
\textsuperscript{1116}“Downey at the Helm,” CT, Apr. 30, 1895 (5).
\textsuperscript{1118}“Was Always Laborers’ Friend,” CT, Jan. 18, 1896 (4). See also “They Pass the ‘Lie,’” CT, Apr. 16, 1895 (1) (Lawler’s introduction of ordinance to raise city laborers’ wages).
\textsuperscript{1119}Allen Davis, Spearheads for Reform: The Social Settlements and the Progressive Movement 1890-1914, at 152-53 (1984 [1967]); “Lawler Out as an Independent Candidate,” CT, Mar. 2, 1895 (2). In the wake of the 1894 ATC scandal some of Powers’ constituents, led by the president of the nineteenth ward council of the Civic Federation, who had become “disgusted” with Powers’ aldermanic activities, undertook both to “bring him to justice” and to remove him from the council, but he remained until 1927. “Kern Files Charges,” CH, Dec. 27, 1894 (2:5). See also “One Ward Aroused,” CH, Dec. 28, 1894 (6:4) (edit.).
\textsuperscript{1120}Allen Davis, Spearheads for Reform: The Social Settlements and the Progressive Movement 1890-1914, at 152-54 (quote at 154) (1984 [1967]). Powers was not up for reelection that year, but one of his nineteenth ward Democratic cronies was.
\textsuperscript{1121}Proceedings of the City Council of the City of Chicago, for the Municipal Year 1895 and 1896, Being from April 8th, 1895, to April 10th, 1896, Inclusive 107 (Apr. 29,
A comparison of this vote with that on Coughlin’s proposed ordinance the previous week may shed light on the extent of the anti-cigarette commitment among those who backed the latter. Of the 34 aldermen who had voted for the $500 license ordinance a week earlier 32 voted on eliminating the proposed no-smoking rule, of whom an impressive 29 (including Coughlin, Powers, and Lawler) voted Yea and only 3 Nay.\(^\text{1122}\) This near unanimity is consistent with Coughlin’s repeated assurance that he had been induced to introduce the ordinance in the first place “‘[f]or the purpose of increasing the city’s revenue and to confine the sale of cigarettes to the down-town districts, where children attending the public schools cannot buy them’” and that it had taken the form of a sales license “‘[b]ecause the McGillen ordinance covered every other point.’”\(^\text{1123}\) If his child-centered objective was shared by the other aldermen who voted with him on both ordinances, they nurtured no far-reaching plan to curb smoking (of any kind of tobacco) by adult men. Typical of such council members may have been Republican James Keats, an English-born representative of large British and U.S. insurance companies,\(^\text{1124}\) who confided to the press: “‘I am liberal in my ideas and I have no objection to men smoking cigarettes if they want to, but I do want to stop the sale of them to school boys. I have been waited on by many small dealers in my ward, who have urged me to vote against the ordinance because its passage would hurt their business. They said I could not be re-elected if I voted for it. I told them I didn’t care; that I was opposed to the sale of cigarettes to children and I would vote for the ordinance.’”\(^\text{1125}\)

To be sure, whether the aldermanic advocates of their right to smoke on the job had prevailed or not,\(^\text{1126}\) the overlapping group of boodlers were determined to thwart adoption of the rules altogether. The proposed rules, reported by a five-member committee all of whom were Republicans,\(^\text{1127}\) were highly contentious.

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\(^1\)In contrast, of the 27 (Republican) aldermen who opposed Coughlin’s measure, 26 voted on striking Rule 10, of whom 15 opposed and 11 supported the deletion.


\(^\text{1123}\) Powers Strikes Back,” \textit{Times} (Chicago), Dec. 23, 1894 (1:1, at 7:3).


\(^\text{1125}\) As later adopted Rule 10 read: “Smoking shall be strictly prohibited in the Council Chamber during the session of the Council.” \textit{Chicago City Manual: 1908}, at 57 (Francis Parkman prep. 1908); \textit{Chicago City Manual: 1909}, at 68 (Francis Parkman prep. 1909).

\(^\text{1126}\) \textit{Proceedings of the City Council of the City of Chicago, for the Municipal Year 1895 and 1896, Being from April 8th, 1895, to April 10th, 1896, Inclusive LVIII; “Inauguration of Mayor Swift,” DIO, Apr. 9, 1895 (2:1-5 at 5) (Butler, Mann, Madden, O’Neill, and Noble).
because, as the Tribune explained, they contained a number of provisions that “would make it impossible to put through boodle ordinances... in the manner in which they” were customarily passed by virtue of making the legislative process more deliberative and transparent. And although the rules would not have “converted” boodling aldermen and “caused them to give up their evil practices they would have strengthened the honest Aldermen greatly by adding to their ability to resist the passage of unfit measures. They would have been given time in which to appeal through the press to the people.” Consequently, the Coughlin-Powers boodlers mobilized to euthanize the new rules.

While the year 1895 witnessed city councils in numerous smaller towns in Illinois and elsewhere passing ordinances prohibiting the sale of cigarettes altogether, Chicago’s was still confining itself to consideration of a licensing system that no one claimed was prohibitory. During the first part of 1896, the Chicago board of education and Waite’s NACA intensified public awareness of what they regarded as the grave dangers of cigarette smoking by school children and the need to staunch the sale of cigarettes to them. In the midst of this renewed vigorous assault, “[r]epresentative retail cigar and tobacco dealers [w]ere almost a unit in denouncing cigarettes, and sa[id] they would welcome the day when there was no sale for them.” To be sure, this position was in large part rooted in the traditional complaint by sellers that there was “‘no money’” in the business, but also reflected tobaccoists’ carefully nurtured animus against adult cigarette customers, who were “‘nervous and fidgety....’” These characteristics they attributed to an unbreakable addiction, which, in turn, “[n]early all dealers agree[d],” resulted from the presence of “a drug of some kind, presumably opium, for in no other way, they say, is it possible to account for the tenacious hold which the habit has upon those who have once fallen victim to their use.” Side by side with this disinformation dealers also recognized inhaling as “‘the greatest

1129Proceedings of the City Council of the City of Chicago, for the Municipal Year 1895 and 1896, Being from April 8th, 1895, to April 10th, 1896, Inclusive 189-90 (May 6, 1895) (recommitted to committee); “Beale for the Law,” CT, May 7, 1895 (2); “Raps with His Gavel,” DIO, May 7, 1895 (2:1). On Coughlin’s leadership of a “new gang” in the council, see “Gang Stopped Short,” DIO, May 14, 1895 (1:7).
1130E.g., “Kansas Dudes Are Bereaved,” DIO, Mar. 30, 1895 (1:6) (Lawrence); “Bad Odor Killed at Paw Paw,” DIO, May 21, 1895 (1:6); “City Council of Walnut Prohibits the Sale of Cigarettes,” DIO, June 18, 1895 (2:2); “No More Cigarets in Eureka,” CT, Nov. 20, 1895 (7).
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evil’” because it was “simply taking so much poison into the system.” As far as children were concerned, downtown stores placed the blame on “the small outlying news and cigar stores” chiefly because they broke packages and sold cigarettes singly for one cent.  

Coughlin, it turned out, was either a very patient sandbagger or a very persistent protector of children’s health: not until the end of September 1896 did he introduce a new cigarette licensing ordinance, which was very much like the December 1894 committee substitute for his measure, except that this time, however, he proposed radically reducing the license fee to $100, which was doubtless designed to undermine resistance by dealers and aldermen and preempt arguments that the measure would foster monopoly; at the same time, however, this low license policy would necessarily dilute the effort to shut off boys’ easy access to cigarettes. (In contrast, unanimous passage in July 1896 by the city council of Fond du Lac, Wisconsin, of an ordinance imposing a $200 cigarette license may have exerted a disproportionate impact in a town with a population less than one hundredth of Chicago’s.) Coughlin accompanied this new initiative with a most peculiar confession, consistent with the aforementioned dealer stance, designed, no doubt, to shore up his credibility. The first part was largely an efflorescence of scientific and empirical nonsense—except for the reference to inhalation:

You think it rather funny, do you, to hear a man who deals in cigarettes say that they are harmful? Well, I don’t know how funny it is, but I know it’s true.

1132“All Score the Cigaret,” CT, Mar. 24, 1896 (5).
1133Interestingly, Coughlin was the chosen conduit for presenting to the council “a communication from the various reform societies advocating the passage of a State law controlling the sale of cigarettes...” Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897, at 1731 (Mar. 8, 1897).
1135As inadequate as the amount was, in December Republican Alderman Greenacre, who had voted against Coughlin’s ordinance on Apr. 22, 1895, introduced a $30 cigarette sales license ordinance (which also prohibited the sale of cigarettes containing opium, morphine, jimson, belladonna, glycerine or sugar). “Four Cents a Ride,” CT, Dec. 15, 1896 (1); “Four-Cent Fare a Go,” DIO, Dec. 15, 1896 (1:1, at 4:5-6 at 6); Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897, at 1224 (Dec. 14, 1896) (n.d.). The only action taken was placing it on file. Id. at 1803 (Mar. 15, 1897).
1136“Fond Dulac Attacks the Cigaret,” CT, July 29, 1896 (2).
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Everybody knows the cigaret is an evil, but they won't all own it. I think it is one of the greatest evils that boys and young men of the present day have to meet.

In the first place, no one smokes a cigaret without inhaling the smoke. That's just where they think they get the good of it, but that's just where they get the harm of it.

The nicotine works into the system, little by little, till by and by there is a big lump of it there, sometimes of the size of your fist. It gets in round the heart, and then the victim is done for.

Another danger is in the paper with which the cigaret is wrapped. Paper is made of rags. The rags may have come from places where there has been diphtheria or small-pox, or worse, and yet there are hundreds of thousands of men and boys sucking cigarets all the while.  

In the second part Coughlin's focused on the dilemma of being a retail sales prisoner of the Trust and his ordinance's efficacy:

I sell cigarettes because I have to. My next door neighbor sells them, and if I want to keep my custom I must do the same, but you look in my showcases and you will see that I sell no cigarettes that are manufactured by the trust. If I must sell cigarettes, I won't help the trust.

If there was a $100 cigaret license I wouldn't sell them, and I wish there was. I don't want to sell them, and I wish nobody in Chicago did.

If there are a few big firms who are willing to pay a big license let them do it, but that would leave out the nickel-in-the-slot cigarets and the many little shops out near the public schools, and where the boys and girls, too, can get at them.

... The city gets something out of the liquor business but not out of cigarets, and the treasury needs the money more than the dudes need the cigarets.  

While the prohibitory initiatives were still making their way through the Illinois state legislature during the early months of 1897, Coughlin pressed forward with his licensing ordinance, which the council finally took up on

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1138“Ald. Coughlin Blasts Cigaretts, Cigaret Smokers, and Dealers,” CT, Sept. 30, 1896 (7).  Coughlin presumably sold them in his saloon and/or bath houses. On his being a saloonkeeper, see “Chicago Ward Politics,” NYT, Apr. 1, 1900 (8).

1139On December 21, the License Committee reported Coughlin’s ordinance, recommending that it be passed. Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897, at 1263-65 (Dec. 21, 1896) (n.d.) (including proposed ordinance text).  On Jan. 4 Coughlin had the measure made a special order of business for Jan. 14, although it was not taken up at that meeting. Proceedings of the City Council of
March 1. That “Republican-dominated council,” as his biographers remarked, “was fully as bad as its predecessors. When there was money in sight the new councilmen forgot partisan differences and eagerly accepted the leadership of Coughlin and Powers.” Even Coughlin’s biographers were unsure as to his motives “in sponsoring such an obvious reform ordinance,” though they speculated that muting “temporarily some of the violent criticism” of him played a part. But in addition to being “really only a sop to the anti-cigarette crusaders” it was also “part of The Bath’s general scheme for annoying Powers,” with whom he had broken at the end of 1895 when he became “enraged by his exclusion from inner council deliberations,” especially regarding various boodle ordinances, in particular those spawned by Yerkes. The Inter Ocean amused itself presenting an “eloquent” Coughlin as having “blossomed forth in an entirely new role, that of champion for the mothers of Chicago,” who had fought for the ordinance ever since introducing it “with all the powers of oratory that are in him.” Claiming that he could find no other interpretation of the ordinance than freezing out small dealers and conferring a monopoly on large ones, and hyperbolically charging that the measure “made it absolutely impossible for any one [sic], except a monopoly, to deal in this product,” Republican Alderman Madden demanded to know whether a trust lurked behind the ordinance. Coughlin furnished an explanation easily enough by repeating what he (and others) had been advancing on its behalf for several years, but effectively packaged in such oratory as would, in the Inter Ocean’s sarcastic phrase, have made Powers weep had he been present: “This cigarette has been circulating through the city of Chicago in and around schoolhouse and such places and mothers of young babies has [sic] petitioned to the board of education to have it stopped. There is not one of them [sic] little stores which is surrounded [sic] a schoolhouse which you all know well which [sic] cannot afford to pay $100. ... In behalf of the mothers of Chicago, preserve and rescue the little babies growing up around the schoolhouses from the death-dealing cigarettes that inhabits [sic]

the City of Chicago for the Municipal Year 1896-1897, at 1320 (Jan. 4, 1897), 1365-1416 (Jan. 14) (n.d.); “Proceedings of Council,” CT, Jan. 5, 1897 (5).

1140Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 126 (1943).

1141Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 158-59 (1943).

1142Lloyd Wendt and Herman Kogan, Lords of the Levee: The Story of Bathhouse John and Hinky Dink 136 (1943).

1143“Coffin Nails Are Hit,” DIO, Mar. 2, 1897 (1:3-4).

1144 “Proceedings of Council,” CT, Mar. 2, 1897 (7).
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Coughlin accepted two amendments: one by Thomas Gallagher—a leading Cook County Democrat who would shortly become a member of the board of education—and then sit in Congress for six terms—outright prohibited the issuance of a license for the sale of cigarettes within 200 feet of any schoolhouse, and the other by Democrat Charles Gunther, a wealthy German candy manufacturer supported by the Civic Federation, to lower the fine for a first violation from $100 to $50. Republican John O’Neill, who had voted against Coughlin’s ordinance in 1895 when it imposed a $500 license, offered a bill-killing amendment to hike the license to $1,000 based on the argument that it would do even more good than $100, but it was opposed on the grounds that the courts would hold it exorbitant and tabled pursuant to Coughlin’s motion. Thus amended, Coughlin’s ordinance passed unanimously by a vote of 60 to 0.

The Inter Ocean exaggerated mightily in claiming that the license ordinance as passed limited, “as far as it is possible to limit, the sale of cigarettes in the city,” but its editorialist doubtless had his tongue elsewhere than in his cheek when he certified that “Coughlin has cultivated at least one flower that may bloom upon his grave.” Even if it were true, as the paper stated, that the $100 license would “act prohibitively against stores that trade exclusively or mainly with school children, or with the callow youth of the city,” the continued sale to adults that the newspaper supported—“If a man be foolish enough to smoke cigarettes no law-making body has just power to say ‘nay;’ [sic] the era of sumptuary enactments has passed”—would insure that children would “become purchasers and ultimately habitual users of the most dangerous preparation of

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1145 “Coffin Nails Are Hit,” DIO, Mar. 2, 1897 (1:3-4). Madden asserted that everyone knew that a year earlier the council had, at the urging of a Chicago newspaper, passed a similar ordinance; ATC had sued that paper for libel and settled amicably after passage of the ordinance, which the council then, again, at the paper’s request, repealed. Id. None of these assertions has been corroborated.


1148 “Coffin Nails Are Hit,” DIO, Mar. 2, 1897 (1:3-4).


1150 “Coffin Nails Are Hit,” DIO, Mar. 2, 1897 (1:3-4).
Believing that licensure could accomplish more than prohibition, Mayor Swift signed the ordinance into law the next day. The secretary of the health department promised that his department, backed up the police, who would be asked to report licenseless sellers just as they were required to do regarding saloons, would “make the most stringent efforts to enforce the ordinance” and those caught would “be shown no mercy.” In addition, the department would also “regularly inspect” the cigarettes sold, just as it did concerning meat and milk: “If deleterious substances are found in them the dealers will be prosecuted.” Dealers opined that if enforcement were thorough, the $100 fee would force many to cease selling because “the profits allowed retail dealers...by the trust” were so small that that sum would “more than extinguish profits,” which amounted to 1.2 cents on a five-cent pack of 10 or 12 cigarettes; the 8,333 packages a year (or 22.8 per day) that a dealer would have to sell generate enough profit just to pay the tax and avoid an “actual loss” exceeded the sales of the “average retail shopkeeper or tobacco merchant,” who would therefore “probably refuse to carry cigarettes in his stock.” To be sure, few dealers interviewed by the Tribune believed that any serious effort would be made to enforce compliance. For example, one downtown dealer, who already made “practically no profit” on cigarettes, would have readily given up selling them “without a fight,” but viewed the ordinance as “merely a sandbagging scheme against the American Tobacco company [which] will amount to a dead letter....” Another seller agreed that the ordinance would not (and was never intended to) be enforced, but speculated that if it were, sales would be confined to “a few large and reputable dealers, who could be easily controlled and supervised” by the health department. More cynical was the city’s largest cigarette dealer and ATC agent, G. F. Gall, who, sounding like his principal, pontificated that the “Council might just as well license the sale of sausages for all the good that this ordinance will do. There will be a thousand ways to evade it.”

1151 "The Cigarette Ordinance," DIO, Mar. 3, 1897 (6:3) (edit.).
1152 "Cigaret Measure a Law," CT, Mar. 3, 1897 (8). The somewhat later statement by the health department secretary that a dealer would have to sell 40 packages a day all year round to generate enough profit to pay the fee was at odds with the figure mentioned in the text. “Prepares to Enforce Cigaret Law,” CT, Mar. 6, 1897 (8). “Cigarette Ordinance,” RMN, Mar. 3, 1897 (6:4), stated that a dealer would have had to sell 20,000 packages in order to earn the license fee, but offered no source. It also reported without attribution that 20,000,000 cigarette packages were sent annually to Chicago. If a package contained 10 cigarettes, the total of 200,000,000 cigarettes divided among 513,260 males 15 years of age and older would have mean per capita annual consumption of 390 or little more than
to the council, the Cigar and Tobacco Jobbers Association, which presumably had premonitions of a sales decline, presented a “protest...against the passage of the cigarette ordinance...”\footnote{Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897, at 1719 (Mar. 8, 1897).}

One of those ways was to give cigarettes away to customers while selling them as a permanent quasi-loss leader (as which, ironically, many tobacco dealers had, since the Trust’s formation, been complaining that they had been forced to treat them). As one dealer smugly confided to the \textit{Tribune}: “‘Boys who smoke and have the money to buy the cigarettes will come pretty near getting them if the dealer can sell apples and other fruit at enough profit to enable him to throw in cigarettes for good measure.’” In addition, unlike ordinances in some other cities, Coughlin’s did not regulate the separate selling of packaged tobacco or cigarette papers needed for roll-your-own cigarettes. The secretary of the health department admitted these defects, but nevertheless viewed the measure as “a step in the right direction,” whereas an assistant corporation counsel denied that it would be lawful for an unlicensed dealer to give away cigarettes in the manner suggested. The secretary also expressed the belief that at most 25 percent of Chicago’s cigarette dealers would be willing to pay the $100 license fee; to be sure, he granted that every dealer who dropped out would increase his competitors’ sales, but apparently not on a one-to-one basis, with the result that he presumed that enough business would remain to permit those 25 percent to operate profitably.\footnote{“To Dodge Cigaret law,” \textit{CT}, Mar. 5, 1897 (8). Shortly thereafter the health department secretary indicated his agreement with the corporation counsel’s view and characterized the continued sale of papers as a “minor objection.” He did, however, concede that if the ban on sales were extended to a distance of three blocks from a school “‘it might do some good.’” “Prepares to Enforce Cigaret law,” \textit{CT}, Mar. 6, 1897 (8). A dealer located across the street from a school agreed that boys went about 500 feet from their schools to buy cigarettes. “Will Test Cigaret law,” \textit{CT}, Mar. 14, 1897 (5).}

As the ordinance’s effective date of March 15—after which, snickered the \textit{Inter Ocean}, “[g]raveyards w[ould] be robbed of some of their prey”\footnote{“Few Puffs Are Left,” \textit{DIO}, Mar. 4, 1897 (4:1).}—approached, the cigarette industry’s intent to contest its validity became clearer. At the city council’s meeting on March 8 the Cigar and Tobacco
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Jobbers’ Association submitted a protest grounded on the novel claim that “if cigaret smoking is injurious to the public health the ordinance does not prohibit or diminish to any great extent the smoking of cigarrets” (as well as on the less controversial argument that the ordinance would tend to “centralize business in the hands of a few, chiefly the department stores”). The amusing implication of the jobbers’ attack—namely, that the measure was not stringent enough to achieve its objective—could not withstand scrutiny because there was no evidence that its actual purpose of reducing children’s cigarette smoking was not achievable by the contemplated means of making it logistically much more burdensome for children to buy cigarettes.

By that date (March 8) sellers had still held off applying for licenses because they were “waiting to see what action” ATC would take. Downtown dealers and saloon, cafe, and drug store owners with a cigarette business “worth mentioning” were still expected to take out so-called bridge-over licenses until May 1, when the annual licenses kicked in. During that six-week interval they expected that the Tobacco Trust would either get the ordinance overturned or do something that would “enable the middleman to carry the burden of the license easily”; in contrast, owners of small candy, stationery, and school stores as well as of hallway cigar stores would give up selling cigarettes. The dealers (including large department stores) who began applying for licenses on March 10 not only corroborated suspicions that the ordinance would practically restrict sales to the downtown area, but created expectations that the city’s revenues would increase by upwards of $10,000.

Two days before the ordinance’s effective date a downtown dealer wrote “under protest” across his license application and announced that he would contest the measure’s validity on the grounds that Chicago lacked the power to license a business not specifically mentioned in its charter; coyly he would not deny that ATC was behind his suit, while one of its agents was calling on numerous dealers to determine whether they were going to take out licenses. At this point the number of applications on file totaled 233 compared to an estimated 2,000 who had been selling cigarettes. As was commonly the case in

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1156See Proceedings of Council,” CT, Mar. 9, 1897 (2).
1157This litigation strategy is reminiscent of an argument used 80 years later by a restaurant owner to attack an early anti-secondhand smoke ordinance requiring a restaurant to designate at least one table as non-smoking on the grounds that this means was not reasonably suited to achieving the legislative goal of protecting non-smokers from toxic smoke. Alford v City of Newport News, 220 Va. 584 (1979).
1158See Badenoch Warns Cigaret Dealers,” CT, Mar. 9, 1897 (8).
1159See Cigaret Dealers Rush for Licenses,” CT, Mar. 11, 1897 (12).
jurisdictions banning cigarette sales, some dealers purported to welcome enforcement that would drive cigarettes out of the local tobacco market. One downtown dealer foresaw that outcome as a result of the ban on the sale of cigarettes containing glycerine: “I do not know of a single brand of cigarettes made in this country that does not contain this substance,” which was used to keep the tobacco moist so that it would “not shake out of the wrappers.” Reflecting a commonly held view, he charged that glycerine “constitute[d] the most dangerous element in cigarette smoke,” since its combustion generated a poison. Even dealers who may not have shared his market death wish hoped for a speedy ruling by the health department as to which brands could be lawfully sold; the requisite test sampling for which the agency was to begin the day before the ordinance went into effect. Dealers who had already taken out licenses were “deeply concerned” that the analysis to be performed by city chemist Cass L. Kennicott would lead to the virtual prohibition of cigarette sales. After all, Kennicott, having already been told by tobacco dealers that U.S. cigarette manufacturers used glycerine, in turn informed the press that burning that substance produced acrolein, which viciously attacked the mucous membrane, while the health commissioner added that as soon as he received the chemist’s report he would “enforce the ordinance to the letter.” On the day the ordinance went into effect 285 sellers (of 300 applicants) had been issued licenses, prompting small dealers to grumble that the fee should have been either low enough to permit all sellers to pay it or entirely prohibitory.

In a sudden turn of events, inspired by the Trust, the ordinance was, almost as soon as it went into effect, suspended by order of the police chief. As a result, “the agents of the cigaret trust are again at work selling their goods to all whom they can induce to buy.” This dismantlement was initiated by a communication that the police chief received on March 17 from the city collector stating that

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1161. “Licensed Cigaret Dealers Worried,” CT, Mar. 15, 1897 (4). Kennicott had been appointed city chemist in 1892 at the age of 21, a position at the Municipal Laboratory that he held for five years. The Municipal Herald of Chicago...1895-96, at 104 (1896); Who’s Who in America: 1899-1900, at 399 (John Leonard ed.).
1162. “Cigaret Law in Force,” CT, Mar. 16, 1897 (12). This article included the vastly discrepant figure of 23,000 places at which cigarettes had been sold before the ordinance went into effect. It is unclear whether the press statement that the city collector had “a complete list of the cigarette dealers” referred to the newly licensed or the larger universe. “Approval of the Bill,” DIO, Mar. 16, 1897 (8:5). An out-of-state newspaper (mis)reported that 100 places had been licensed out of a total 5,000 that had been selling cigarettes. MO, Mar. 27, 1897 (4:4) (untitled).
because the corporation counsel wanted to test the ordinance in court, until a judicial decision was handed down, “the Police Chief was instructed to make no arrests of persons selling cigarettes without a license.” Almost as quickly as city officials, the Trust’s agents became aware of the order and sent out salesmen all over the city “bearing the news to dealers that they need not fear arrest if they violated the law....” Amusingly, “[d]ealers, as a rule, were slow in accepting the word of the trust emissaries” even in those instances in which salesmen promised that ATC “would stand for any penalty that might be inflicted.” Rather than such importunings, dealers trusted the cop on the beat, who said that the “‘Chief says we can’t touch you....’” It turned out that although, after the ordinance’s passage, Corporation Counsel William Beale had “deemed it best to make a test of the law before proceeding far, and advised Collector [Philip] Maas to get in as much money as possible without arresting the violators...[f]or some reasons Mr. Maas went so far as to instruct Chief [John] Badenoch to keep ‘hands off.’” In the immediate wake of the public revelation of this de facto suspension, Beale claimed that it had not been his idea “to have the Collector tie the hands of the police”; rather, the impression that he had wished to convey was that “there might be a possibility of the law not standing a test”; consequently, he had thought that for the time being the ordinance could be implemented “without resorting to arrests.” Despite having retained his faith in the ordinance’s validity and his regret that matters had taken the course that they had, not only did Beale evince no intention of correcting that course, but he made it clear that he was also in no hurry to test that validity: all he offered was to “try” to do so “as soon as the business of his office” would permit, but getting the matter settled might possibly take a few months. Police Chief Badenoch sought to lay the blame on Collector Maas (“‘who instructs me in the premises’”): because the ordinance, which was for revenue, did not make it a crime to sell cigarettes without a license but only a violation of the municipal code, Badenoch professed that “‘I am powerless to do anything while the present order is in existence,’” while regretting that the latter had “‘become public, as it will tend to make dealers bold....’”

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1163“Cigaret Law Made Null,” CT, Apr. 1, 1897 (1). Since the ordinance (§ 8) provided only for a fine and not for imprisonment, it is unclear why the corporation counsel believed that arrests would have been possible in any event. That arrests were nevertheless carried out was demonstrated by Gundling v City of Chicago; see below this ch. The then current Chicago Code did empower the police to arrest people for violating ordinances (including the cigarette sales license ordinance) that imposed only a monetary fine and no imprisonment; specifically it provided that the police “shall have the power to arrest all persons in the city found in the act of violating any law or ordinance....” The Revised Code of Chicago § 1509 at 1:314 (William Beale rev. and comp. 1897). It is not
On April 1, the day following press disclosure of the de facto suspension of enforcement, the mayor and the health commissioner lambasted the city collector, corporation counsel, and police chief. While Mayor Swift rhetorically wondered whether the law was supposed to be null and void during the two years the litigation would last, Commissioner Kerr wanted to “‘know what right a ministerial officer like Collector Maas has to give orders to the police, anyhow,’” since enforcement was vested in his department. After Badenoch had passed the buck to Beale and Maas explained that he had supposed that Beale had had the mayor’s backing, the corporation counsel came forward with a manifestly self-inculpatory justification for his March 17 letter that only dug a deeper political hole for himself. He had, he informed the press, asked for arrests to be suspended “‘because some lawyers came to me after the ordinance was passed saying they were going to fight it. They represented cigaret dealers and said they thought it would be a good thing to have a decision as early as possible from some higher authority than a police court. ... I expected a test case would be arranged in a few days, but the lawyer that saw me about it left the city and isn’t back yet.’” Beale then added that he in fact had no opinion about the validity of the ordinance, which he had not even read until April 1, and that he hoped to leave office within 10 days, bequeathing the whole matter to someone else. The same day Dr. Kerr both informed Mass that the health department lacked the discretion to suspend his duty to enforce and asked the police chief to resume enforcement, but, while professing eagerness in that direction, Badenoch nevertheless begged off until he had consulted with Beale. But by the end of the day the mayor directed the police chief to enforce the ordinance rigidly, creating an expectation that the next day Badenoch would rescind his two-week-old suspension order.1164 Mysteriously, however, Swift, Kerr, and Beale instead agreed to “‘let matters rest as they [we]re, until a test case’” could be brought, although Beale still did not know when such a case would be heard. And despite retention of the no-enforcement order, the corporation counsel bizarrely insisted that it was “‘not to be understood’” that people were “‘at liberty to violate the ordinance’”—a bubble that the Tribune pricked by pointing out that dealers were in fact still at liberty to sell cigarettes without a license.1165

That newspaper accompanied the report with a highly sarcastic editorial

1164aSwift Calls Maas Down,” CT, Apr. 2, 1897 (5).
1165aFree Rein for Cigaretts,” CT, Apr. 3, 1897 (14).
excoriating Beale for his “subservience” to ATC on the grounds that, by his own account, “all that was required to frighten him into official paralysis was the vague suggestion of a cigaret trust attorney that he would like to have the law tested in some court of record before it was enforced.” To be sure, a week later the Tribune backtracked after the mayor had presented to the city council a new opinion by the corporation counsel that the ordinance did not require payment of the $100 license before May 1, 1897, when the “municipal year” began. Swift motivated the need for the opinion by the appearance of “some misapprehension in the community respecting a present necessity for licenses....” Beale, who apparently had finally gotten around to studying the ordinance, which had not been “drawn in my office” and the identity of whose drafter was unknown to him, argued that the ordinance did not expressly require licenses to be taken out before May 1, though he admitted that “the language is somewhat peculiar.” Constrained to deal with the unoverlookable fact that “the ordinance is to-day actually in force,” Beale could come up with nothing better than the lame claim that “[t]his is true, but it means no more than that the ordinance is an established ordinance, a fixed by-law of the city, already determined upon.” Even if Beale had been correct in his belief that the ordinance had been “purposely framed so as not to require licenses until” May 1, it is unclear that the legal consequence of the six-week delay between the date on which the ordinance, by its own terms (§ 9), went into force and the date on which the licensing year began should not have been that cigarettes could not be lawfully sold during that interim. As far as the $12.50 that 375 dealers had voluntarily paid as the pro-rated license fee for those six weeks, he (and the mayor) suggested that the council pass an order providing that that money be applied to the licenses beginning May 1—a recommendation that the council unanimously adopted. More interesting was Beale’s revelation that he had considered and abandoned a plan to initiate judicial proceedings to determine whether licenses had to be taken out before May 1 as well as to “test some other questions...in order to shut off a flood of habeas corpus petitions after” that date.

1166“The Cigaret Ordinance,” CT, Apr. 3, 1897 (12) (edit.)
1167“The Cigaret Ordinance,” CT, Apr. 10, 1897 (12) (edit.); Ordinance Regulating the Sale of Cigarettes § 3 (Mar. 1, 1897), in Biennial Report of the Department of Health of the City of Chicago for the Years 1897 and 1898, at 201-203 at 202 (n.d.). Three weeks later the Tribune’s editorialist, apparently forgetting his previous stance, faulted the Swift administration for not having enforced the ordinance. “Cigaret Ordinance to Be Enforced,” CT, May 1, 1897 (12) (edit.).
1168Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897, at 1947 (Apr. 8, 1897).
because he had obtained the views of two judges of the circuit and superior courts. Beale concluded from these odd secret, ex parte, anticipatory quasi-advisory opinions that: “As there can plainly be no actual violation of the ordinance before May first, the courts would doubtless decline to pass upon other questions presented in a case made up by arrangement with a dealer who should consent to be regarded as a violator solely for the purpose of enabling the Law Department to secure an advance decision upon such questions.”**1169** In the event, the habeas corpus petition would result, as it did almost everywhere the Tobacco Trust contested anti-cigarette legislation, “by arrangement with a dealer who should consent to be regarded as a violator solely for the purpose of enabling” ATC to secure its judicial invalidation.

Despite this contretemps, with the advent of the municipal year, the new Democratic administration’s corporation counsel and collector agreed that the ordinance would immediately be enforced strictly.**1170** Charles Thornton, the corporation counsel,**1171** “refused absolutely” to come to terms with ATC, which was “fighting for a postponement” of enforcement until a test suit attacking the ordinance’s validity was tried: “‘If any suit is to be brought it must be by the other fellows, and we will fight them. This ordinance will be enforced until the Supreme Court declares it invalid, and I do not think it is likely to do that. I would not be surprised if the tobacco people should appeal the first fine we impose on a violator of this law, but that will not stop us from going ahead and having all subsequent violators arrested and fined.’”**1172**

In the event, ATC was apparently in no hurry to file its judicial challenge to the ordinance’s validity. Although the grounds for the months-long delay are not clear, one possible reason was the outbreak of a dispute between it and dealers over prices and profits, which had been stewing for years in Chicago and elsewhere. The Trust may have been wary of initiating litigation, which, after all, required securing the cooperation of a dealer to play the part of the (straw man) defendant, until relations with retailers had settled down again. In August, the 250-member strong Chicago Wholesale and Retail Tobacco Dealers’ Association, reportedly with the “assurance that the American cigaret trust w[ould] stand back

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1169*Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-1897*, at 1947-48 (Apr. 8, 1897).

1170“Cigaret Ordinance to Be Enforced,” *CT*, May 1, 1897 (12).


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of them,” met to adopt a schedule of higher prices on all cigarettes, which they intended to implement as soon as their membership, expanded by a few hundred more retailers, was large enough to insure control of the market. The basis for this attempt at collective action was their “faith” in customers’ addiction, that is, “the appetite of the cigaret fiend and its power to relax his purse strings.” The object of the higher price level was to elevate the cigarette “from its present ignominious position as a thorn in the flesh of the trade” by making it “dignified and acceptable as a profitable object of trade.” This “movement for greater profit” foresaw, inter alia, doubling the price of a 10-cigarette package of ATC’s market-leading Sweet Caporal from five to ten cents. Once the new price structure was in place, the next step would be concerted action to induce the city council to repeal the cigarette ordinance in order to “add[ ] another $100 per annum to the profits” of each dealer. In contrast, the meeting tabled a motion that the Association secure either compliance with the ordinance or repeal. The fault lines of competitors’ collective action became impossible to overlook when, in response to retailers’ claim that the problem would disappear if jobbers simply refused to sell to unlicensed dealers, “jobbers boldly retorted they were selling to this class of dealers by the hundred, and knew it, but would not stop for fear of losing their trade in other lines of goods.” Indeed, they refused as well to identify such dealers to the city collector. Stymied by this lack of cooperation, the Association decided to employ a detective to acquire the evidence to enable the city collector to prosecute offenders.\footnote{1173}

Five days before the scheduled price rise on September 15, all of the Association’s calculations were upset when ATC telegraphed two large Chicago wholesalers that it had lowered the price of Sweet Caporal from $4.10 to $3.57 per 1,000 (applicable only to Chicago) and agents fanned out through the city soliciting orders at the “cut rates.” The Trust did not explain its action, but the press reported that the move represented ATC’s inauguration of a “war on the Chicago association of dealers,” which immediately called an executive meeting to discuss the announcement by one of those wholesalers, Best, Russell & Co., one of the largest wholesale tobacco merchants in the West, that it was withdrawing from the association. Since the price reduction was manifestly inconsistent with the “tacit understanding” that ATC was its “strongest supporter,” the association quickly realized that if the Trust’s agents had been able to secure “any considerable number of large orders” at the lower price, introduction of its own new scale was endangered.\footnote{1174} The very next day,
however, the Association purportedly “won its first victory...over the American Tobacco company, or cigaret trust,” though the result suspiciously appeared merely to restore the status quo ante because in exchange for the Trust’s rolling back its price reduction, the Association (“for the present, at least”) called off its price increase. The reason that the dealers regarded the result as a “concession[ ]” by ATC was that it signaled that “the trust had concluded it would be wise for it not to attempt to saddle any part of the Dingley tariff duty upon the retail dealer,” which amounted to 50 cents per 1,000. “The trust had added 30 cents of this to the wholesale price, raising it from $3.80 to $4.10. But from this [day?] on the price will go back to $3.80.” Dealers had complained about the small profit before the price increase, but “since then it ha[d] not been sufficient to pay” for the license. Changing its political-economic strategy, the Association, frustrated by the city collector’s alleged failure even to try to apprehend, now began pushing for non-discriminatory enforcement of ordinance.1175

Ten days after relative repose had been restored among dealers, the Tobacco Trust publicly bruited plans for finally launching the long threatened judicial attack on the ordinance’s validity. To be sure, the strategy for this litigation departed sharply from that deployed by ATC in contesting anti-cigarette legislation in other states. Whereas there a local lawyer not otherwise associated with the Trust, was paired up with some straw man plaintiff of a local dealer, whose violation of the law, refusal to pay the fine, arrest, and imprisonment the company choreographed as the run-up to a federal habeas corpus petition, in Chicago Charles Aldrich, who was indisputably the Trust’s lawyer in that city, announced that he would be filing the action to challenge the ordinance and to secure the return of all license fees that dealers had paid—“provided” that Aldrich’s law firm could “induce members of the Chicago Tobacco Dealers’ association to sign contracts giving the attorneys all money which may be recovered from the city.” The deal, in other words, was an extreme version of a contingent fee: Aldrich would get 100 percent of any reimbursement of the license payments ordered by the court but nothing else; thus the risks were apportioned such that, if the court invalidated the ordinance but did not order reimbursement, Aldrich would get nothing; conversely, if the ordinance were upheld but the court ordered reimbursement of the license fees for the period March 15 to April 30, 1897, the plaintiffs would gain nothing. However, these risk assessments presupposed that the dealers actually wanted the ordinance

of 1871 Until 1885, at 581 (1886). The other company that ATC notified was Sprague, Warner & Co., one of the country’s leading wholesale grocers (whose trade included tobacco products). Mason Warner, Sprague Warner & Company, Incorporated (1912).  

1175 Score on the Cigaret Trust,” CT, Sept. 12, 1897 (5).
struck down (and that the Trust was not paying Aldrich regardless of the outcome). In fact, according to the Tribune, most of the 300 licensed cigarette dealers who had paid $30,000 to the city—and definitely wanted a voice in its distribution—“say the ordinance is a good thing, but make complaint that it is not being enforced, and that they get no protection from illicit shops.” In contrast, it was “to the interest of the American Tobacco company to have a free and unrestricted sale of its products”; little wonder, then, that a report had been circulating the previous day that ATC had “instructed Attorney Aldrich to make a legal fight against the ordinance.” The latter, unsurprisingly, while admitting that he was the company’s lawyer and that he might represent the dealers depending on how much money was in sight, claimed that “no word of any kind in connection with this subject has been given me.”

“\textit{It looks to me like a move on the part of the American Tobacco company to make the dealers pull its chestnuts out of the fire. Nobody else, so far as I know, is interested in getting the ordinance annulled, and it is a peculiar thing that the matter is brought to our attention by the trust’s attorney, who, by the way, will be the sole financial beneficiary. Lately we have ample reason to think the law is not being enforced and it looks as if there was some hidden influence at work. The trust doesn’t give a rap whether we have to pay a big license fee or not, so long as it can sell its cigarettes, but experience has shown it the sale of the chapter sorts such as are used by school boys is materially affected and it wants a free market.}

“If this can be secured by inducing the licensed dealers to fight for a decision against the ordinance it would be a big thing for the trust. We—that is, the dealers who are now paying licenses—would lose a big part of our profitable trade, and the only direct benefit would come from a relief from payment of license fees in the future. We would not get back the money already paid, and the money would go into the pockets of the trust attorney. It strikes me as a pretty good thing—for the trust and its attorney.”

\textit{Intriguingly, these preparations for litigation coincided with yet another of the Trust’s propaganda coups. Despite the absolutely crucial role that glycerine played in the cigarette ordinance—its presence in cigarettes, which was universally admitted to be quasi-universal, meant that their sale was not authorized—it disappeared from public discussion. This hole was not caused by the health commissioner’s failure to comply with his inspection and...}
enforcement duties\textsuperscript{179}. In fact, in 1897 the city chemist carried out, within the framework of the Municipal Laboratory, 15 chemical analyses in March and one each in May and November, followed by 27 more during the first three months of 1898.\textsuperscript{180} The subject appears not to have reemerged in public discussion until October 12, 1897, when “a Chicago despatch to the New York papers announce[d] the result of an investigation by the Health Department of that city into the purity of cigarettes on sales there.”\textsuperscript{181} The source of this dispatch/announcement was a mystery; as the advertisers’ magazine \textit{Printer’s Ink} admiringly noted of one of its manifestations: “In \textit{Life} of October 28th is an article, or rather advertisement, taking up almost an entire page, headed: ‘Some Delusions About Cigarette Smoking.’ Nothing about the announcement shows from whom it emanates. It combats with much skill all the bad things usually said of the cigarette, and is, altogether, an interesting piece of advertising.”\textsuperscript{182} In the New York magazine \textit{Life} the dispatch/announcement was only the last part of the longer article/advertisement and bore the heading, “Official Confirmation.” What it allegedly confirmed was that various “popular superstition[s]” about cigarette smoking were “delusions” such as the “‘snipe’ tobacco,” opium, nicotine, and

\textsuperscript{179}The ordinance “authorized and empowered” the health commissioner to “inspect and examine all places where cigarettes licenses are to be sold...with a view of ascertaining” whether all state laws and city ordinances relating to cigarette sales were being complied with, which laws and ordinances “it shall be his duty to cause...to be rigorously enforced; and it shall be the duty of all persons, firms or corporations licensed to sell cigarettes within the City of Chicago, upon demand of the Commissioner of Health to furnish to said Commissioner, for his inspection, samples of all cigarettes sold or offered for sale by them, which samples...shall be analyzed by or under the direction of said Commissioner..., and a record of such inspection shall be made and kept in his office for the inspection of the public.” Ordinance Regulating the Sale of Cigarettes, § 7 (Mar. 1, 1897), in \textit{Biennial Report of the Department of Health of the City of Chicago for the Years 1897 and 1898}, at 201-203 at 202-203 (n.d.).

\textsuperscript{180}\textit{Biennial Report of the Department of Health of the City of Chicago for the Years 1897 and 1898}, at 147 (n.d.). The rubric under which the analyses were carried out was “Cigars and Cigarettes,” although it is unclear whether any related to cigars and if they did under what authority. The number of analyses may have represented the number of individual brands.

\textsuperscript{181}“Some Delusions About Cigarette Smoking,” \textit{Life} 30(774):[359] (Oct. 28, 1897). Why the dispatch was sent to New York is as unclear as why it appears not to have been published in Chicago. Neither the \textit{Chicago Tribune} nor the \textit{Chicago Times-Herald} nor the \textit{Daily Inter Ocean} carried a report on it.

\textsuperscript{182}\textit{Printer’s Ink}, 21(5):36 (Nov. 3, 1897) (untitled).
“cigarette fiend” delusions.\textsuperscript{1183}

Since this version of the dispatch/announcement was abbreviated, the longer version that appeared without the “delusions” advertisement already on October 13 in the New York \textit{World} offers a better sense of what its mysterious purveyor was seeking to accomplish.\textsuperscript{1184} (That actor was presumably the Tobacco Trust since five years later a Canadian medical journal published in its advertising pages the same “delusions” cum dispatch/announcement” piece that had appeared in Life, this time prefaced with the revelation that “[t]he American Tobacco Co., Limited, of Montreal, furnished us with the following statement as to cigarette smoking.”)\textsuperscript{1185} Under the headline “The Cigarette Vindicated” and datelined the previous day in Chicago, the newspaper failed to make transparent the provenience of the content, while strongly suggesting that it must have been the health department itself, although the editorial comment about the self-destructing anti’s is as utterly unimaginable as stemming from the commissioner as the narrating “I” is impenetrably opaque:

Dr. Frank W. Reilly, Commissioner of Health, assisted by Dr. Gehrmann and Prof. [sic] Kennicott, has just announced the results of the analysis of fourteen brands of cigarettes purchased in the open market, the analysis being made in accordance with a city ordinance. The result is that the anti-cigarette agitation out here has suffered an ignominious collapse, and I fancy we shall hear less of it hereafter.

\textbf{NO IMPURITIES ARE FOUND}

Dr. Frank Reilly said yesterday: “The Health Department has analyzed the various of cigarettes sold by Chicago dealers, as provided by the ordinance, with entirely satisfactory results. No impurities were found in any of the fourteen brands examined by the Department experts, Dr. Gehrmann and Prof. [sic] Kennicott. Exhaustive analyses were made of every brand of cigarette found for sale in the city. All have been found to be entirely free from opium, morphine, jimson weed, belladonna, atropine, hyoscyamine or other substance foreign to pure tobacco. Neither was there any lead or arsenic found in the paper wrappers.

“As a matter of fact, there is nothing in any of the fourteen brands of cigarettes on the Chicago market that the smoker need be afraid of. The tobacco used is the best ‘bright

\textsuperscript{1183}\textsuperscript{a}Some Delusions About Cigarette Smoking,” \textit{Life} 30(774):[359] (Oct. 28, 1897).

\textsuperscript{1184}\textsuperscript{a}Yet another version, intermediate in length, appeared in Dr. J. C. Pomeroy, “The Evolution of the American Cigarette,” \textit{Illustrated American} 22(17):554 (Oct. 23, 1897), who concluded that “there are no spectres in the cigarette.... The old bogies are gone.” Excerpts from the announcement or the alleged report (from an unidentified source) also appeared in a suspiciously pro-cigarette lecture the following month. W. H. Garrison, “A Brief for the Cigarette,” \textit{Medico-Legal Journal} 15:280-91 at 283-84 (Dec. 1897).

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Virginia,' and contains only about one-fourth as much nicotine as is found in cigars. The less nicotine in the tobacco the less likelihood of ill effect upon the nervous system. There is a four-fold greater per cent. of nicotine in the average smoking tobacco sold by the Chicago tobacconists or in a cigar than in any of the cigarettes sold.” Dr. Reilly declares that the cigarette-smoker may possess his soul in peace.”

That the health commissioner, at a time when Chicago (like many other cities) was convulsed over the health impact of child smoking and demands for blocking minors’ access to cigarettes, would have given a clean bill of health to cigarettes, assuring, in a completely undifferentiated fashion, “the smoker” that there was absolutely nothing—not even the tobacco itself—to “be afraid of” appears wholly implausible, especially in view of Alderman Coughlin’s and the city council’s express motivation for unanimously passing the ordinance. Yet the statement stands there—unlike the even more preposterous closing flourish—in quotation marks, raising the issue as to whether even the Tobacco Trust would have risked a libel action. To be sure, not all newspapers that ran some version of the dispatch/announcement were uncritical. For example, the Morning Oregonian, which merely printed a very condensed version without direct quotations, concisely formulated the punch line as: “Therefore cigarette-smokers may go on.” Then, however, it added what multitudes of laypeople already knew and Health Commissioner Reilly must have known: “But those who know understand very well that the real subtle danger of cigarette smoking is not from the nicotine or any possible poisons, but from the practice which is prevalent among those addicted to cigarettes of inhaling the smoke. This brings the poison—for nicotine is a poison as truly as opium or stramonium or hyoscyamine—in contact with the delicate organism of the lungs, and the practice makes the cigarette danger.”

A further mystery lay buried in the absence of any mention of glycerine, which was, after all, the central issue of the chemical analysis, not only because no serious critic should have expected that manufacturers actually laced cigarettes with opium or morphine, but because the confirmation of the ubiquity of glycerine would, as everyone recognized, have led to shutting down sales in the country’s second largest city.

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1187 “Various Topics,” MO, Oct. 21, 1897 (8:3-4 at 4).
1188 “Various Topics,” MO, Oct. 21, 1897 (8:3-4 at 4).
1189 By 1899, not only had mention of glycerine and sugar had been removed from the ordinance and strychnia and cocaine added to the ingredients that made cigarettes containing them unauthorized for sale, but an anti-adulteration provision had been inserted.
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No light appears to have been shed on any of the foregoing developments until the beginning of 1898, when Mrs. E. B. Ingalls, the national superintendent of the WCTU’s anti-narcotics department, after having taken notice of the statement that had been “going the rounds of the press to the effect that the Chicago board of health examined fourteen brands of cigarettes and found them free from all injurious drugs except nicotine,” on January 3 wrote to Kennicott as the alleged “authority for the statement.” A month later, Union Signal, the WCTU’s national weekly, published his brief dementi: “the interviews credited to me in the daily papers are not authorized, and are, I believe, published to advertise.” Remarkably, Kennicott, failed to take issue with the substance of the whitewash attributed to his report. In turn, the WCTU, whose Union Signal had never mentioned the ordinance or the possibility that the glycerine ban might transform licensing into a sales ban, did not now raise the issue of the report in order to promote enforcement; rather, Ingalls warned “all anti-narcotic workers to beware of newspaper statements” because of their potential adverse impact on the WCTU drive to secure congressional enactment of the Terry Interstate Commerce bill, which was designed to create a legislative fix to eliminate the basis for inclusion of cigarettes within the scope of the judicially devised original package doctrine, which had been the Tobacco Trust’s favored weapon for attacking the constitutionality of anti-cigarette legislation.1190 Because William Terry was a congressman from Arkansas, that state’s press took a particular interest in the “[s]trong opposition” to his bill by “the cigarette manufacturers,” which the Arkansas Democrat charged with having “sent out a circular letter with the statement” to which Kennicott’s name had been appended.1191 Whatever cigarette analysis (if any) the Chicago Health Department issued

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1190 “Official Communications: Anti-Narcotics,” US 24(5):12 (Feb. 3, 1898). On the Terry bill, see below ch. 11. Two weeks later, after the weekly had received numerous inquiries about the press statement, the editors reprinted Kennicott’s reply on the front page. “Notes and Comments,” US 24(7):1 (Feb. 17, 1898). Almost four decades later, the cigarette oligopoly’s trade association mendaciously or ignorantly listed Kennicott “among the distinguished scientific and medical authorities who have found the moderate use of tobacco harmless...” Tobacco Merchants Association of the United States, Supplement to Tobacco Manual 8 (4th rev. ed. 1936), Bates No. T107601531.

1191 AD, Feb. 8, 1898 (2:2) (untitled) (republishing Kennicott’s reply to Ingalls).
in October 1897 is apparently no longer extant,\textsuperscript{1192} but the department’s 1897-98 Biennial Report did include three pages on “Inspection of Cigarettes,” which were largely devoted to a technical account of the procedures and methodologies used for the chemical analyses, but did not, oddly, disclose any of the findings. The only substantive comment was as surprising as it was revelatory: “The objection to sugar and glycerine in cigarettes is not readily seen. It is claimed that sugar, or saccharine substances, and glycerine are used in dilute solutions to moisten the fine cut tobacco in order to make the particles adherent before rolling, and that this is done always in the machine-rolled cigarettes.”\textsuperscript{1193} Astonishingly, then, Kennicott (or his successor) had done a complete about-face since March 1897, when he stated not only that dealers had told him that the use of glycerine was quasi-universal, but that its combustion produced acrolein, which viciously attacked the mucous membrane: now that the department no longer even knew what the problem was, it also failed to disclose whether its tests had even detected any glycerine. To be sure, it was legally irrelevant whether the city chemist—who was not ex cathedra an expert on inhalation risks—opined that glycerine’s combustion products were harmful or not since the ordinance (§ 1) did not, without any exceptions, authorize the sale of cigarettes containing it.

In the welter of the Trust’s propaganda onslaught against the ordinance, on October 20, 1897, a committee appointed by the Chicago Cigar and Tobacco Dealers’ Association informed the membership that it had completed arrangements for litigation that would be “the first round in a fight to the finish” and requested that all members back the decision. The reason for this reversal was, apparently at least in part, the negotiation of a marginally less lopsided contingent fee deal pursuant to which the lawyers would “reap[ ] the somewhat fat reward” of $33.33 from each member who had paid the $100 license fee. Some dealers, however, remained skeptical of ATC’s motives and designs. One large downtown dealer, for example, “confessed frankly that back of the committee and back of the association stands the American Tobacco company, the members of which saw in the passage of the Chicago ordinance a falling off in its income and a precedent which they feared other cities and towns might follow.” As rational profit-seekers, sellers might have been expected to share these Trust priorities, but in fact “[t]he dealers say that the main objection to the ordinance lies in the fact that it is not enforced impartially.” Thus, rather than

\textsuperscript{1192}Telephone interviews and emails with Glenn Brammeier, Illinois Regional Archive Depository, and Lyle Benedict, Chicago Public Library, Municipal Reference Collection (Oct. 8, 2010).

\textsuperscript{1193}Biennial Report of the Department of Health of the City of Chicago for the Years 1897 and 1898, at 198-200, at 200 (n.d.).
either acting out of touching humanitarian solicitude for children’s health or reflecting the quasi-ubiquitous lament about the ATC-monopoly’s depressing effect on profits, the larger, license-paying dealers merely resented that they were not securing the oligopoly profits that they had expected from licensure because there was “scarcely a score of stores in the city where cigarettes cannot be obtained, even though the keepers have never paid a cent into the treasury for the privilege of selling.” As a result, with “nearly every so-called ‘school store’ and other small shop” still selling cigarettes surreptitiously, the license-paying dealers’ profits were being “sapped, while the other fellows’ tills are as full as ever.”

The Trust’s staging of the requisite preliminaries for triggering judicial invalidation of the ordinance was delayed during the closing months of 1897 on account of misplaced hopes that the governor’s aforementioned call for a special legislative session would mention cigarette legislation. When the curtain finally rose on the performance “on or about the 31st day of December, A. D. 1897,” it was not even clear that the defendant-dealer from ATC’s central casting had actually even sold a cigarette. The actor selected for the starring role, Harry Gundling, a 31-year-old German-born druggist, was the manager of the drug store on the corner of Dearborn and Monroe Streets, which the Colbert Chemical Company—of which he was secretary-treasurer—had opened in 1894. An outspoken businessman, Gundling had recently been

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1194 “To Combat Cigaret Tax,” CT, Oct. 21, 1897 (12).
1195 “Cigaret Hopes and Fears,” CT, Nov. 3, 1897 (1); “Will Test Cigaret Ordinance,” CT, Dec. 7, 1897 (4).
1196 Transcript of Record 10, Gundling v City of Chicago, 177 US 183 (1900).
1197 Bizarrely, although the ordinance dealt with granting licenses authorizing the “sale” of cigarettes (§ 1), did not authorize “the sale of cigarettes with containing opium” etc. (§ 1), authorized licensees to “expose for sale, sell or offer for sale cigarettes” (§ 2), required licensees to post their licenses conspicuously “where cigarettes are sold, or exposed for sale” (§ 5), made it the health commissioner’s duty to “inspect and examine all places where cigarettes are licensed to be sold” (§ 7), and made it the “duty of all persons...licensed to sell cigarettes” to provide the commissioner with “samples of all cigarettes sold or offered for sale by them” (§ 7), the penalty clause did not expressly apply to unlicensed people who sold cigarettes, but only to those who “have or keep for sale or expose for sale or offer to sell” them” (§ 8).
1198 1910 Census of Population (HeritageQuest). Gundling immigrated to the U.S. in 1876.
1200 “Driven from Its Haunt,” CT, June 18, 1896 (8).
complaining that assessments, tax, and insurance rates “in many cases practically amount to confiscation of a man’s business.”

Though “backed by the cigarette trust,” Gundling was purportedly using the ATC-financed litigation to pursue his own business agenda, which was directed at the competitive threat posed to drug stores by department stores: “If the Chicago Common Council has the right to license and regulate the sale of cigarettes it can also regulate the sale of drugs by department stores. The struggle in regard to the cigarette measure has attracted little attention among Chicago druggists, but Mr. Gundling asserts it is only the entering wedge in his fight against the department stores, which he intends to push without asking for assistance from other druggists. ... Mr. Gundling says that as far as cigarettes are concerned it is immaterial to him how the matter is decided,” though he claimed that downtown cigarette dealers (whose association was supporting the litigation) paid the license, whereas those elsewhere in the city did not.

Whatever his motives, on that last day of 1897 Gundling, the parties agreed, “did have, keep, and expose for sale, and offered to sell, cigarettes...without having first procured a license....” Ten days later, Gundling was, pursuant to a warrant, based on a written complaint under oath, issued by a justice of the peace, arrested for violating the ordinance, brought into court, and—having waived a jury trial—on January 26 found guilty by Justice of the Peace George Foster and fined $50. Following the ATC script that had been performed elsewhere, Gundling refused to pay, preferring to be remanded to jail so that he could contest the ordinance’s constitutionality by means of a motion for a writ of habeas corpus to the Illinois Supreme Court. That court, however, quickly denied his application for the writ as well as for reconsideration. Gundling then

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1202 “Against a Higher Rate,” CT, June 28, 1896 (10).
1203 “Will Test the Cigaret Law,” CT, Feb. 2, 1898 (5).
1205 Transcript of Record 4, 10, Gundling v City of Chicago, 177 US 183 (1900). The case was called on Jan. 11, but was continued twice until Jan. 26.
1206 “Will Test the Cigaret Law,” CT, Feb. 2, 1898 (5); “Blow for Cigaret Sponsors,” CT, Feb. 4, 1898 (2).
1207 “Blow for Cigaret Sponsors,” CT, Feb. 4, 1898 (2). The denial of the writ was not reported in the Illinois Reports, but according to a drug trade magazine: “In denying the writ Chief Justice Phillips held that the case was one of appeal and not habeas corpus; that the magistrate who tried the case originally was the proper person to determine if the ordinance was valid.... The decision by the bench was divided as to granting the writ, but under the rules the court determines habeas corpus petitions instead of individual
appealed to the Criminal Court of Cook County, which (the defendant once again having waived a jury trial), heard the case on March 5, finding him guilty, fining him $50, and overruling his motions for a new trial and arrest of judgment.\textsuperscript{1209} The Tobacco Trust made and Superior Court Judge William Ewing rejected the legal arguments that: (1) the Chicago city council lacked the power to enact the cigarette licensing ordinance; (2) the ordinance was illegal and void; (3) the ordinance deprived persons of liberty and property without due process of law in violation of the U.S. and Illinois constitutions; and (4) the ordinance violated the provision of the U.S. Constitution providing that “"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law....”\textsuperscript{1210} Gundling then appealed to the Illinois Supreme Court, requesting that it reverse the Cook County Criminal Court on all these points.\textsuperscript{1211}

During the half-year interim until the state supreme court handed down its decision in late October 1898, the cigarette industry launched a party-political campaign to pressure Mayor Harrison and the Democratic city administration to repeal the ordinance or face mass defections on election day. This effort should be viewed in the context of the legislative flux that suggested that the current version of the controversial ordinance was still subject to such intensely conflicting economic, social, political, and public education and health tensions that its ultimate regulatory configuration could easily be regarded as unsettled. As early as December 1897, Bavarian-born Republican Alderman Conrad Kahler had presented an amendment quintupling the license fee to $500 and extending members.” “Illinois: The Sale of Cigarettes by Druggists,” \textit{American Druggist and Pharmaceutical Record} 32(3):87 (Feb. 10, 1898). According to the Illinois State Archives, the \textit{Gundling} case file contains no documents relating to a habeas corpus petition. Email from records archivist Ryan Prehn to Marc Linder (Oct. 26, 2010). According to the Illinois Supreme Court Clerk’s Office, a second (undated) card in its file filed under Gundling’s name reads in its entirety: “Matter of Application. Harry Gundling v. Writ of Habeas Corpus. Remark: Missing.” Telephone interview with Bill Allen (Springfield), Oct. 26, 2010.

\textsuperscript{1209}Gundling Must Pay His Fine,” \textit{CT}, Feb. 9, 1898 (4).

\textsuperscript{1209}Transcript of Record 5-7, Gundling v City of Chicago, 177 US 183 (1900); “Cigarett Ordinance Upheld,” \textit{CT}, Mar. 15, 1898 (8).

\textsuperscript{1211}Transcript of Record 11, Gundling v City of Chicago, 177 US 183 (1900).

\textsuperscript{1211}Transcript of Record 12-14, Gundling v City of Chicago, 177 US 183 (1900).
the no-selling cordon sanitaire around school houses from 200 to 500 feet. At the outset of 1898, Judiciary Committee Chairman Charles Walker, a Democrat, lawyer and personal friend of Mayor Harrison, who would soon become Chicago’s corporation counsel (in which capacity he would represent the city in the Gundling case before the U.S. Supreme Court), reported that the committee recommended that the ordinance be passed, but a week later he did an about-face, offering a motion that the ordinance be recommitted to his committee, which prevailed.

Following the April aldermanic elections—although Democrats with 40 seats gained a clear majority over Republicans on the council, bolters from the former, inspired by the election successes of the Municipal Voters’ League, which aspired to constitute the council on a non-partisan basis, made organizing the body and appointing committees difficult but, in the end, not impossible for Powers—the cigarette industry launched its own initiative in May 1898, when Democratic Alderman William J. O’Brien, Powers’ “political henchman” and saloon co-owner, presented a petition, purportedly signed by 7,000 dealers for repeal, which was referred to the License Committee. Intriguingly, the Federation of Labor immediately “denounced” repeal and instead called for

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1212 Proceedings of the City Council of the City of Chicago, for the Municipal Year 1897 and 1898, at 1128 (Dec. 13, 1897) (1898); “Take $1,500 a Year,” CT, Dec. 14, 1897 (1, at 7). Kahler, who had run the Tribune’s printing operations for more than three decades, later entered the real estate business. “Death of Conrad Kahler,” CT, June 12, 1903 (12); “Conrad Kahler—Chicago,” Deutsch-Amerikanische Geschichtsblätter 3(3):63 (July 1903).
1213 Proceedings of the City Council of the City of Chicago for the Municipal Year 1898 and 1899, at 134 (May 9, 1898) (1898), the petition was presented by Democrat Peter Biewer, who was a German-born day laborer. 1900 Census of Population (HeritageQuest).
increasing the tax, “basing its opposition on the results of the physical examination of the troops [in connection with the Spanish-American War] at Springfield, which proved, it was claimed, the injurious effects resulting from constant cigaret smoking.” The crucial point here was, reportedly, that fewer men had been rejected in regiments composed mostly of laborers, who “probably smoked pipes,” than in the regiment consisting largely of clerks (who were presumed to smoke cigarettes). A pro-cigarette push swiftly came from Democratic Alderman Frank McCarthy (a coal dealer who later left a million-dollar estate), who, based on the aforementioned petition, which aimed at starting a “movement,” introduced an ordinance to reduce the license fee to $10, which was referred to the License Committee, which in turn sent it to a subcommittee. Shortly thereafter the Judiciary Committee recommended passage of Kahler’s new $500 proposal, but it quickly stalled when Walker succeeded in having it recommitted to the Judiciary Committee. In order to make the (nominal) $10 fee more palatable to the city council, the Cigar and Tobacco Merchants’ Association adopted a resolution promising to agree to imposition of a $50 fine for selling to minors and not to sell cigarettes within 500 feet of schools. Preemptively the Chicago Federation of Labor informed the city council directly that it was “unalterably opposed to the repeal of the present Cigarette Ordinance, as we believe it to [sic] the best interest of the young generation, now growing up, that the sale of the harmful and noxious articles be restricted as much as possible.”

By the end of July, the Association, which expected to augment its “army to 12,000 or 15,000 before election day,” had become so alienated by the Democratic city administration’s refusal to lower the licensee fee to $10 “so that

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1220 “For Higher Tax on Cigaretts,” CT, May 16, 1898 (10).
1221 “Mrs. Garrett’s Estate Listed at $6,000,000,” CT, June 5, 1927 (8).
1222 Proceedings of the City Council of the City of Chicago for the Municipal Year 1898 and 1899, at 184 (May 16, 1898) (1899); “Mayor Wins the Day,” CT, May 17, 1898 (12); “May Drop Inquiry,” CT, May 24, 1898 (12); “Cigar Men Will Fight,” CT, July 30, 1898 (5). (quote).
1223 “City’s Big Tug Bill,” CT, June 6, 1898 (12).
1224 “Old Scheme Bobs Up,” CT, June 18, 1898 (4).
1225 “Low License for Cigaretts,” CT, July 12, 1898 (2). The Tribune text stated that the offer was for a $5 fine, but this sum seems so trivial as to amount to self-ridicule; an article later in the month stating that it was $50 seems more plausible. “Cigar Men Will Fight,” CT, July 30, 1898 (5).
1226 Proceedings of the City Council of the City of Chicago for the Municipal Year 1898 and 1899, at 532 (July 11, 1898) (1899).
every dealer could afford to pay it...without hardship” that it “declared war on the Democratic ticket.” This decision had been prompted by the cigarette sellers’ dissatisfaction with what they perceived as the “rather shabby treatment” they had received when they appeared before the License Committee in mid-June to plead for their proposed $10 license. Their pique was intensified by Mayor Harrison’s rebuff of their request that he suspend collection of the fee during the pendency of the Gundling case on the “arbitrar[y]” grounds that because a decision in that case “did not effect [sic] the present operation of the law...he would insist upon its strict enforcement.” The Association also purported to take umbrage at the rejection by the mayor and city council of its package deal ($10 fee/500-foot no selling zone/$50 fine), which offered “greater protection upon a highly moral ground than the present ordinance.” Finally, the cigarette dealers, vowing that they were engaged in a “fight...to the bitter end,” formally expressed their resentment in a resolution opposing the mayor’s alleged plan to play them off against ATC:

The Mayor informed us that he was against the $10 ordinance because the trust and not the dealers wanted it, and said an agent of the trust had interviewed him on the subject. This means that the ordinance was conceived for the purpose of sandbagging, and is winked at by a Democratic administration. The ordinance is not enforced and was never intended to be. Only legitimate and larger dealers are bothered, because the boodlers believe they are in a position to force the trust to settle with them. We purpose to organize the entire trade against this so-called Democratic reform measure and secure its defeat or our relief if possible.

That the Cigar and Tobacco Merchants’ Association at its meeting on August 1 decided to solicit the cooperation of tobacco-selling barbers, druggists, and saloon-keepers would have surprised no one, but its assertion that it “already has assurances that the Woman’s Christian Temperance Union will aid in defeating the Democratic ticket at the next city election on account of the obnoxious license” must have struck contemporaries as a hoax. The Association’s secretary purported to have “reasons to believe that it would lend support on account of its bitter opposition to licensing cigarets or anything else,” but prominent WCTU members declared that it would have “nothing to do with the tobacco sellers” even though it did oppose the ordinance. Matilda Carse, president of the Chicago Central WCTU from 1878 to 1913, unambiguously rebuffed any such cooperation on the grounds that her organization “‘never would associate itself with the

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1227 “Cigar Men Will Fight,” CT, July 30, 1898 (5).
1228 “Cigar Men Will Fight,” CT, July 30, 1898 (5).
tobacco sellers or liquor sellers for any purpose.... The union does not believe in licensing any evil, but it would not try to further its belief in that way. We believe the sale of cigarettes should be suppressed, and,” she added archly, “I understand the tobacco merchants are working for a quite different object.” With or without the WCTU’s help, the Association, nurturing the vision that the ordinance, which it regarded as a “holdup,” was just a “bluff” that would be given up in a week or two, and that it would not be necessary to pay the $100 if they hold out,” visited the mayor to disabuse him of his belief that “it was the tobacco trust and not the dealers that opposed the ordinance.” A bare four days later a Tribune headline blared the outcome of the confab: “Yield to the Tobacco Men: Mayor and His Administration Promise to Kill the Cigaret Ordinance.” Framed in contractual terms, the deal provided that the city administration was “pledged to compel the City Council to repeal the cigarette ordinance when it meets next month, and the Mayor...promised not to veto the repeal ordinance. These pledges have been given in consideration of an agreement on the part of the cigar and tobacco dealers not to oppose the Democratic county ticket at the fall election.”

That the Democratic politicians acquiesced in these demands strongly suggested that they were “not as cock-sure of carrying the city this fall as they pretend to be.” During an earlier phase of the negotiations, the city’s prosecuting attorney, Howard S. Taylor, an intimate of the mayor, met with Samuel H. Harris—the English-born anti-union president of a newly incorporated Turkish cigarette manufacturing company in Chicago who was also an anti-Populist Democrat who had long sought the party’s nomination for a congressional seat—to inform him that (in addition to the aforementioned quid

1229. “Tobacco Dealers Ask Woman Temperance Union’s Help,” CT, Aug. 2, 1898 (2:7). The remaining letters of the word beginning with “b” were missing and have been guessed at. On Carre, see Notable American Women: A Biographical Dictionary 292-94 (Edw. Jones ed. 1971). The Cigar and Tobacco Merchants’ Association may not have been identical with the aforementioned Chicago Cigar and Tobacco Dealers’ Association since the former had reportedly been formed the previous week; according to the Tribune’s garbled account, it had 7,000 members, but after 700 had joined during that first week, it had 1,200. “Tobacco Dealers Ask Woman Temperance Union’s Help,” CT, Aug. 2, 1898 (2:7).

1230. “Yield to the Tobacco Men,” CT, Aug. 6, 1898 (7).

1231. “Offering Legislation for Votes,” CT, Aug. 7, 1898 (26) (edit.).

pro quo) during the period before the ordinance was repealed “it would not be enforced in a manner which would give the tobacco dealers unnecessary annoyance.” To Harris’s suggestion that it would be just as well to secure repeal before the election, Taylor replied that it would be accomplished in October. The sleaziness of Taylor’s involvement in these dealings with Harris—whose commitment to the pro-cigarette cause was signaled in 1907 when, years after his company had moved to New York City, he returned as an activist in the National Tobacco Dealers Protective League to lead the campaign to “take individual cases of dealers into court and make test cases” against the just enacted Illinois statewide ban on selling cigarettes—to undo a public health ordinance takes on a different hue when it is kept in mind that at this very time he was representing the city before the Illinois Supreme Court in the Gundling challenge to the validity of the ordinance, in prevailing in which the dealers had so little confidence that they decided to subject the plaintiff to a hefty dose of extra-judicial pressure. His fraternization with the cigarette industry also stood in grotesque contrast to his position as the head of Populist party in Cook County: in 1896 the Cook County Populist convention, in requesting its delegates to support Taylor as the vice-presidential nominee at the national convention, adopted a resolution fulsomely praising Taylor (the convention chairman), who two years later would covertly accommodate the Tobacco Trust, as an “undaunted advocate of the interest of the masses as against the classes, and a defender of a people’s government in fact as well as in name,” a foe of “all forms of monopoly which rob the people of the earnings of their toil,” and an “uncompromising opponent of every form of plutocracy which in combination is so rapidly overshadowing the republic of the fathers.” Moreover, Taylor was chairman of the Populist County Central Committee in 1897, before being booted out as a Democratic officeholder in Harrison’s administration, but was nevertheless

1233u“Yield to the Tobacco Men,” CT, Aug. 6, 1898 (7).
1234u“Court Legalizes Sale of Cigarettes,” CT, June 29, 1907 (6).
1235u“Fight on Anti-Cigaret Law Planned by Manufacturer,” CT, June 24, 1907 (2).
1236See vol. 2.
1237u“Offering Legislation for Votes,” CT, Aug. 7, 1898 (26) (edit.).
1239Dr. Taylor Keeps His Place,” CT, Sept. 5, 1897 (5). Taylor was often publicly referred to by this honorific, the basis of which is unclear (unless it resulted from his wife’s having been a physician). On Taylor, who was prosecuting attorney from 1897 to 1907, see Illinois Political Directory: 1899, at 121.
1240u“Kicked Out of Camp,” CT, Oct. 29, 1897 (3). Taylor was a fusionist as opposed to the so-called middle-of-the-roaders, who wanted to protect the Populist Party’s
in 1900 once again put up as candidate for vice president by the state Populist Party, which instructed its national delegates to secure his nomination.\textsuperscript{1241} Despite Harrison’s and Taylor’s efforts, the dealers, though “pleased with the proof that the city administration ha[d] taken fright enough at their threats to even promise to repeal the ordinance,” were not yet convinced that it would be fulfilled—and with good reason, as far as the \textit{Tribune} was concerned, because it was doubtful that the mayor could mobilize a council majority: few reform aldermen could be “used for any such purpose” and the majority was not expected to produce many votes either. Representative was the indignant determination of Alderman O’Brien not to vote for repeal on account of the reputational loss that “‘any Alderman with any respect for himself’” would suffer in the wake of a circular that dealers had recently spread all over Chicago (in addition to distributing to each council member) stating that “‘the cigaret ordinance was a blackmailing affair and the Aldermen wanted “boodle” to repeal it.’”\textsuperscript{1242} The aldermen’s hurt feelings, as the \textit{Tribune} pointed out, may have been intensified by the possibility that the charge was true.\textsuperscript{1243}

Press revelations of this deal, unsurprisingly, prompted an outraged WCTU to retract “all the nice things” that it had voiced about Harrison’s “‘clean administration.’” Instead, members of the Chicago Central union declared that he would “‘go down in history as one of Chicago’s worst smoke nuisances’” and never be elected governor “‘on a cigaret platform.’” Because the WCTU had since May been working against the $10 license ordinance in the hope that, if the council passed it, the mayor would veto it, the national organization’s treasurer was “‘shocked and grieved...that an American citizen and a father would lend his aid in placing cigarets within easy reach of our boys.’” Of the correlative embarrassment over the negotiations there was none among the dealers, who insisted that it was a matter of utter indifference to them whether the license cost $100 or $10 so long as enforcement were universal, “‘which it never has been.’”\textsuperscript{1244} (This claim was manifestly a distortion based on the profit calculations of the large sellers: their small competitors, who had expressly complained that the $100 fee would have more than wiped out their profits, were precisely the dealers whose sales, largely to boys, the school authorities and their reformer allies wanted to shut down altogether.) On the contrary, Secretary S. H. Harris of the Cigar and Tobacco Merchants’ Association preferred to combine

\textsuperscript{1241}“To Run Taylor with Bryan,” \textit{CT}, May 1, 1900 (6).
\textsuperscript{1242}“Yield to the Tobacco Men,” \textit{CT}, Aug. 6, 1898 (7).
\textsuperscript{1243}“Offering Legislation for Votes,” \textit{CT}, Aug. 7, 1898 (26) (edit.).
\textsuperscript{1244}“Object to Cigaret Deal,” \textit{CT}, Aug. 7, 1898 (11).
caricaturization of the ordinance as the product of Powers’ spiteful efforts to save face after being outfoxed by ATC and brazen disclosure of the cigarette industry’s plans to wield as much bribe-fueled local political power as the alcohol capitalists:

“The present ordinance, we believe, was the outcome of a failure on the part of a certain Alderman to hold up the tobacco trust.

“In the nation, the distillers of liquor and the beer interests are well taken care of, so are they in local affairs, and the tobacco men will illustrate to Alderman O’Brien that the tobacco dealers of Chicago will look well after the Aldermen next spring [when city council elections would be held], as they propose to look after the Democratic party this fall. We...do not want to have to pay a tribute to the city for the sale of an article absolute necessary for us to carry in our business for the purpose of being weapons to get even with a corporation doing business in New York.”

Before the Illinois Supreme Court former U.S. Solicitor General Aldrich achieved nothing on behalf of his client (whoever that was) with his arguments that the City of Chicago lacked the power to enact the ordinance or that the latter was unconstitutional, whereas the city prosecutor’s alternative (implied power) argument that the city’s express authority to “provide for and regulate the inspection” of tobacco, taken together with its power to “pass and enforce all necessary police ordinances” and to “make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease” validated the ordinance carried the day. Emphasizing that the power to regulate an article’s sale included that to license its sale, the Illinois Supreme Court rejected the defendant’s argument that the city council had no right to single out a particular form of manufactured tobacco for regulation: “It being well known that young persons of weak and immature minds are more liable to use tobacco in the form of cigarettes than in any other form, a legislative body may properly provide for the regulation and sale of that article in the form in which it is likely to be most deleterious and injurious, and may restrict the sales of that particular

1245“Object to Cigaret Deal,” CT, Aug. 7, 1898 (11). Harris’s claim of “absolute necessity” may have been illustrated by a State Street drug store owner who claimed that “in his location it was practically impossible for him to handle cigars without selling the cigarettes.” “Windy City,” CREG, Aug. 16, 1898 (5:3-4 at 4). He ordered 25,000 five-cent boxes of cigarettes every two weeks (or about 6.5 million cigarettes a year). That a profit of 1.2 cents per box on 650,000 boxes would have netted him $7,800 annually demonstrates just how far from prohibitive the $100 annual license fee was for high-volume sellers, who could have paid several thousand dollars and still been profiting handsomely from the trade.
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form of tobacco.” 1246 Worse yet from the perspective of the cigarette industry, the court recognized an expansive framework for municipal health-related police powers:

When the city council considers some occupation or thing dangerous to the health of the community, and in the exercise of its discretion passes an ordinance to prevent such a danger, it is the policy of the law to favor such legislation as being humane and essential to the preservation and protection of the community. Municipalities are allowed a greater degree of liberty of legislation in this direction than any other. The necessity for action is often more urgent and the consequences of neglect are more detrimental to the public good in this than in any other form of local evil. It being clear that the public health and welfare of a large class in the community would be subserved and protected by ordinances regulating the sale of tobacco in one of its manufactured forms, an ordinance directed to the protection of the health or welfare of that particular class of the community would be a police regulation within the power of a city to enact under the power expressly granted by paragraphs 66 and 78. An ordinance of this character is not in conflict with any principle of the common law or with any public or general statute, and infringes no private right not necessarily infringed in the interests of good government. It subserves the public welfare, protects the health of the community, and is included within the express powers granted the city council. The ordinance was not void. 1247

Consequently, the ordinance also did not violate any constitutional principle. 1248

Despite the manifestly untenable legal positions that the cigarette industry was urging, the Chicago Pharmaceutical Association and the Chicago Cigar and Tobacco Association immediately declared that they would take their case to the U.S. Supreme Court, before which the main issue would be whether the city council could “prohibit the sale of a commodity recognized as such by custom.” 1249 Moreover, both organizations also announced that the Illinois Supreme Court’s decision would not affect dealers’ efforts to make the ordinance an issue against Democrats during the fall election campaign or the following spring’s municipal elections. The president of the tobacco organization noted that its 8,000 members “regarded the ordinance as a vicious measure” because the city administration had failed to collect more than 300 license fees. The 5,200

1246 Gundling v City of Chicago, 176 Ill. 340, 346-48 (1898).
1247 Gundling v City of Chicago, 176 Ill. 340, 349 (1898).
1248 Gundling v City of Chicago, 176 Ill. 340, 350 (1898). Only one justice dissented.
1249 “Will Fight to the Finish,” CT, Oct. 27, 1898 (8).
members of the Pharmaceutical Association, who “sell cigarettes and cigars in connection with their drug business,” were making common cause with “the tobacco men.”  Without offering any explanation as to why the city government, which had been “scolding about the lack of revenue,” had failed to enforce an ordinance that would have brought in considerable amounts, the Tribune merely hoped that the court ruling would prompt immediate enforcement.

The city administration had still not fulfilled its promise by the time the Illinois Supreme Court decided Gundling against the industry in late October, after which two weeks remained until election day. During that time the Cigar and Tobacco Merchants’ Association, backed by the Pharmaceutical Association, once again sent out Harris’s circular from the summer and resumed its campaign against Democrats, calling on members to vote against that party on the grounds that Republicans’ success in November “would mean an annihilation of the Democratic boodlers next spring,” while insisting that with regard to the “youthful population” its legislative proposal would offer “a thousandfold better protection than that under which they are now levying a blackmail upon a few dealers.”

Literally on election eve the Association adopted its political committee’s report to support Republican candidates to punish Democrats for their refusal to enforce the ordinance, and Republicans did achieve a major victory in the Cook County elections, but analysts, who ascribed the Democrats’ defeat in large part to Mayor Harrison, did not point to the cigarette ordinance as one of his cardinal errors.

Despite the electoral warning, the city council seemingly remained obdurately committed to poking its finger in ATC’s eye: in early December the License Committee, on the motion of Democrat John J. Brennan, boss of the Eighteenth Ward who would later be sent to jail for vote buying, recommended

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1250. “Cigaret Still in Politics,” CT, Oct. 26, 1898 (3). By the end of the year the city had collected $25,675.24 in fees for 292 cigarette sales licenses. “Chicago Loses Many Saloons,” CT, Dec. 31, 1898 (12); Department of Finance, Forty-Second Annual Statement of the Finances of the City of Chicago 48 (1898).


1254. “Cook County Won by the Republicans,” CT, Nov. 9, 1898 (1).

1255. “Blame Mayor for Defeat,” CT, Nov. 20, 1898 (2) (edit.).

1256. “Guilty of Election Frauds,” NYT, Nov. 30, 1903 (7); “Cell Waits for Brennan,”
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quintupling the license fee to $500 “with the idea of showing to the tobacco trust, which is seeking a reduction in the amount of the license fee, that the City Council will not accede to its wishes.” To be sure, this move could also have been interpreted as sending exactly the opposite message to ATC: although the Illinois Supreme Court had upheld the $100 license, “the tobacco dealers sa[id]” that a $500 license would undoubtedly be litigated on the grounds this time that it was “practically prohibitive, and the trust would have a good chance of winning its case.”

During the opening months of 1899 the council continued to be stalemated, with the License Committee appointing a three-member subcommittee (including Brennan) to study dealers’ request to lower the license fee. But a month later, at the Association’s second annual dinner, Harris—who chided Mayor Harrison for being “afraid of the moral influence of the Y.M.C.A. and the W.C.T.U.”—repeating all of the dealers’ old complaints, conceded that “nothing has been accomplished.”

The Association’s threats notwithstanding, in April Harrison was re-elected and the council, despite Democrats’ nominal majority of 35 of the 68
was organized on a non-partisan basis by a vote of 44 to 19 (with Coughlin and Powers in the minority). By the end of June aldermen were once again proposing revisions to the ordinance. One, presented by Democrat Edward F. Cullerton (aka “Smooth Eddy” and “Foxy Ed”) an aide of John Powers, would have quintupled the license fee to $500. Alderman William Schlake, a brick manufacturer who had been backed by the Municipal Voters’ League and the Civic Federation in 1896, introduced the other amended ordinance that drastically lowered the license fee from $100 to $25. At the council session on July 6, Schlake, challenged as to the rationale for paring back the fee, merely mentioned that dealers had refused to pay the higher amount. (The Tribune reported that whereas in the ordinance’s first two years of operation

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1262a“Hitch in Caucus Plans,” CT, Apr. 9, 1899 (4); “Non-Partisan Plan Wins,” CT, Apr. 11, 1899 (4).

1262bCity Under Earth,” CT-H, June 27, 1899 (2:3-4); “Asks for Big Subway Grant,” CT, June 27, 1899 (2).


1264Proceedings of the City Council of the City of Chicago for the Municipal Year 1899-1900, at 801-802 (June 26, 1899) (1900). The preamble included the same “WHEREAS” clauses that had already been presented in December. The motion to concur in the report of the Judiciary Committee, to which the ordinance was referred, recommending that the ordinance be placed on file prevailed. *Proceedings of the City Council of the City of Chicago for the Municipal Year 1899-1900*, at 983 (July 6, 1899) (1900).

1265“Ald. Schlake Warmly Indorsed,” CT, Mar. 7, 1896 (4); 1900 Census of Population (HeritageQuest). In April Schlake had voted for the non-partisan organization of the council.

1266Proceedings of the City Council of the City of Chicago for the Municipal Year 1899-1900, at 818-820 (June 26, 1899) (1900).

1267Council Blocks a Big Scheme,” CT, July 7, 1899 (3). The Judiciary Committee, to which the ordinance had been referred, recommended on June 30 that the ordinance as presented by Schlake (including the lower fee) be passed. *Proceedings of the City Council of the City of Chicago for the Municipal Year 1899-1900*, at 979-81 (July 6, 1899) (1900).
430 and 292 of 8,000 dealers took out licenses, by 1899 “applications have ceased altogether and the ordinance today is a dead letter.”)\textsuperscript{1269} Although proponents of the reduction had believed that objections would be “overbalanced” by the ban on sales to minors, debate quickly proved otherwise. Chief among opponents who “rose on the wings of oratory” was Coughlin, whom the \textit{Times-Herald} portrayed as “pathetic on ‘the mothers of Chicago’ and on the little tots put to picking cigar stubs from the gutters to supply the cigarette factories.”\textsuperscript{1270} Republican Edward Connor, a former plumbers union president\textsuperscript{1271} who in 1891 had been a speaker on behalf of Thomas Morgan’s Socialist Labor Party mayoral candidacy\textsuperscript{1272} before running for Congress as a Republican-Populist in 1892\textsuperscript{1273} and gaining a reputation as opposing granting municipal franchises to corporations,\textsuperscript{1274} insisted that blame for non-enforcement lay not with the ordinance, but the police and city administration. After the council had passed his motion to restore the $100 fee, it unanimously (66 to 0) adopted the amended ordinance, of which the mayor undertook to secure enforcement.\textsuperscript{1275} Sponsors of the $25 license ominously predicted that because of retention of the $100 license the amended license would be “almost as inoperative as the old one,” under which 342 dealers had taken out licenses during the previous year while almost 3,000 nevertheless sold cigarettes “‘on the sneak.’” Indeed, the \textit{Times-Herald} opined that the old ordinance had “practically been permitted to lapse in expectation of a new one that could be strictly enforced.” Moreover, City Prosecutor Taylor (erroneously) advised the Judiciary Committee that “the old ordinance now in the

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\textsuperscript{1269}“Restricting Cigaret Selling,” \textit{CT}, July 6, 1899 (6) (edit.).
\textsuperscript{1270}“Mayor’s Slate Goes Through,” \textit{CT-H}, July 7, 1899 (1:7, at 2:1).
\textsuperscript{1271}“E. D. Connor, Labor Head, Dies,” \textit{CT}, Apr. 6, 1913 (2).
\textsuperscript{1272}“Where Morgan Can Be Found,” \textit{CT}, Apr. 4, 1891 (9) (also stating that Connor was a “boss plumber”).
\textsuperscript{1273}“Congress Their Aim,” \textit{CT}, Nov. 5, 1892 (9).
\textsuperscript{1274}“Men to Vote For,” \textit{CT}, Apr. 4, 1896 (9). Oddly, in April 1899 he was one of only two Republicans voting against organizing the council on non-partisan lines.
\textsuperscript{1275}“Council Blocks a Big Scheme,” \textit{CT}, July 7, 1899 (3); \textit{Proceedings of the City Council of the City of Chicago, for the Municipal Year 1889 and 1900}, at 937 (July 6, 1899) (1900). Nevertheless, “Harrison says that he favors a $50 fee and it is possible he may veto the ordinance...with a recommendation that the change be made. The trouble is, however, that cannot be done until Sept. 18 and in the meantime no licenses will be taken out.” “Mayor on a Vacation,” \textit{CT}, July 8, 1899 (14). The \textit{Inter Ocean} did not even cover the July 6 council meeting, although it did publish an article on the previous session, devoting a paragraph to Schlake’s proposal. “The City Council,” \textit{DIO}, June 27, 1899 (2:1-2).
The amended ordinance included three significant changes only one of which strengthened the law—namely, the prohibition, supported by a minimum $25 fine, of selling or offering to sell cigarettes to anyone under 21.\textsuperscript{1277} This partial extension of the statewide ban\textsuperscript{1278} may have been promoted by reports that had surfaced in April that “advertising distributors” were handing out free sample packages of a new brand of chewing and smoking tobacco to boys as they left school buildings in Chicago who then used the tobacco to make cigarettes. This type of tobacco, sold in five-cent packages was, according to a downtown dealers, “‘really meant to provide a means for boys to secure a cigaret. Any place that formerly kept cigarettes can keep this kind of tobacco and sell it under a low license.’”\textsuperscript{1279} The city council also reduced the ordinance’s deterrent force by halving the minimum fine for selling without a license from $50 to $25.\textsuperscript{1280} Finally, although the insertion of a provision forbidding the sale of cigarettes containing certain named ingredients “or any other deleterious or poisonous drug” and imposing a $25 to $100 fine for a first violation and a $25 daily fine for violations after a first conviction might, on the surface, have seemed to strengthen the law, the only ingredients that the amendment covered (including the newly added strychnia and cocaine) were, as already discussed, not used in the manufacture of cigarettes, whereas the two that the council removed from the original version of the ordinance (glycerine and sugar)\textsuperscript{1281} were universally used.

\textsuperscript{1276}“Mayor’s Slate Goes Through,” \textit{CT-H}, July 7, 1899 (1:7, at 2:1).

\textsuperscript{1277}\textit{Proceedings of the City Council of the City of Chicago, for the Municipal Year 1899 and 1900}, at 937-39 at 938, 939 (July 6, 1899) (1900) (§§ 3, 11).

\textsuperscript{1278}See above this ch.

\textsuperscript{1279}“Tobacco for Children,” \textit{CT}, Apr. 22, 1899 (16). To be sure, the aforementioned amendment to the ordinance would not have covered cigarette tobacco, but the state law did, at least for under-16-year-olds.

\textsuperscript{1280}\textit{Proceedings of the City Council of the City of Chicago, for the Municipal Year 1899 and 1900}, at 937-39 at 938 (July 6, 1899) (1900) (§ 9).

\textsuperscript{1281}\textit{Proceedings of the City Council of the City of Chicago, for the Municipal Year 1899 and 1900}, at 937-39 at 938 (July 6, 1899) (1900) (§ 10). Strychnia and cocaine were also added to and glycerine and sugar deleted from § 2, which had merely stated that nothing in the ordinance “shall be held to authorize the sale of cigarettes containing” certain named ingredients. \textit{Id.} at 937. To be sure, one puzzle remains: in 1897 an official \textit{Revised Code of Chicago} was published, which contained a version of the recently passed cigarette license ordinance including a final section that had not been contained in the version passed by the council on March 1. Headed “Sale of adulterated cigarettes,” it prohibited exposing for sale, selling, or offering for sale any cigarettes containing opium,
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so that their retention would have virtually barred cigarette sales in Chicago. The press was grossly negligent in failing to cover this aspect of the amendingatory process.1282

Four days after the council had acted, the police chief, based on the city

morphine, glycerine, jimson weed, belladonna, or sugar, and imposing a fine of $50 to $100 and a further penalty of $25 for every day that the seller persisted in such violation after a conviction for the first offense. The Revised Code of Chicago 1:192 (William Beale rev. and codified 1897) (§ 883). The index to the City Council Proceedings for 1897 includes no entry for any action dealing with such a provision. A possible explanation is that the council in its ordinance providing for revising and consolidating the general ordinances declared that “[i]t is necessary that...omissions should be supplied and defects corrected....” The Revised Code of Chicago 1:192 (William Beale rev. and codified 1897) The Revised Code of Chicago 1:1 (William Beale rev. and codif. 1897). But in his letter to the council explaining what he and his supervisee had done Beale stressed that “[t]he main work has been to...consolidate ordinances and their amendments, and to correct minor errors observed, such as grammatical errors and inconsistencies.” Proceedings of the City Council of the City of Chicago, for the Municipal Year 1896-1897, at 1973 (Apr. 8, 1897) (n.d.). Although such changes could not plausibly include insertion of new substantive provisions, according to the long-time Chicago Public Library Municipal Reference Collection librarian: “This is sometimes a way of slipping stuff in, and sometimes a way of making minor corrections. There are a couple of examples of fairly major things that got slipped in this way.” Email from Lyle Benedict to Marc Linder (Oct. 30, 2010). Even if Corporation Counsel and code reviser Beale did add the provision in this manner, it is still puzzling that the text of the ordinance published by the health department in its 1897-98 biennial report did not include the provision even though the department was (or would have been) responsible for enforcing it. That the commissioner must have been aware of the provision is demonstrated by the fact that the report states that the “ordinance prohibits the sale of cigarettes containing opium, morphine, jimson weed, belladonna, glycerine and sugar,” although section 1 of the ordinance passed on March 1, 1897 merely provided that “nothing herein contained shall be held to authorize” their sale. Biennial Report of the Department of Health of the City of Chicago for the Years 1897 and 1898, at 198 (n.d.); Proceedings of the City Council of the City of Chicago for the Municipal Year 1896-97, at 1714 (Mar. 1, 1897) (1897). Moreover, the report contained a reponse by the corporation counsel to a letter from the health commissioner who had posed a question about the definition of “cigarette” that cited the numbered sections of the Revised Code of Chicago, 1897, rather than those of the ordinance. Biennial Report of the Department of Health of the City of Chicago for the Years 1897 and 1898, at 200 (n.d.)

The Tribune’s editorial on the eve of the council’s consideration of the proposal uncritically deemed the new adulteration provision to be more important than the proposed 75 percent reduction of the license fee. “Restricting Cigaret Selling,” CT, July 6, 1899 (6) (edit.).

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collector’s letter, ordered policemen on patrol to help license officers enforce the ordinance. At the same time, a stationery store owner, pursuant to a warrant taken out by Lucy Page Gaston, superintendent of the Anti-Cigarette League, was arrested for violating the ordinance.\textsuperscript{1283} Gaston’s focus, however, was on the sale of cigarettes to minors, in adjudicating which Police Magistrate and Justice of the Peace George W. Underwood was “adopting the policy of letting the violators of the law off easy on condition of their future observance of the law.” His approach, based on the belief that few sellers violated the ordinance intentionally, effectively endorsed and instilled a spirit of belittlement and mockery of and non-compliance with the law: “‘Most of the merchants brought in are respectable business-men...to whom a nickel or two would not be an inducement to violate the law and risk arrest and prosecution. I think that admonition is about all that is necessary in most of the cases.’”\textsuperscript{1284}

Panicking over passage of the new ordinance and incipient noises about enforcement, the Cigar and Tobacco Merchants’ Association held an emergency meeting less than a week after the aldermen had acted at which they adopted a resolution authorizing the immediate hiring of a lawyer—the cost of which would be borne by an assessment on all members—who had advised the group to seek an injunction against the city barring it from arresting dealers who refused to pay the license fee.\textsuperscript{1285} That lawyer was the politically very well-connected Republican Lorin C. Collins, a former Illinois House Speaker (1883), Cook County Circuit Court judge (1884-93), law partner of Clarence Darrow (1893-95), and future Panama Canal Zone Supreme Court justice.\textsuperscript{1286} That just nine months earlier the Illinois Supreme Court had upheld the ordinance’s validity did not deter Collins—who had resigned his judgeship because he deemed the salary “inadequate”\textsuperscript{1287}—from redistributing to himself part of the dealers’ tobacco-based profits: already on July 19, on behalf of 250 tobacco-dealing complainants, he sought an injunction in circuit court to prevent their arrest and prosecution for selling cigarettes without a license. The petitioners complained both that the city had acted beyond its authority in passing the ordinance because Chicago lacked the power, under its charter or the state constitution, to collect that particular

\textsuperscript{1283}“To Lay Tracks July 21,” \textit{CT}, July 11, 1899 (12). For additional arrests of dealers, see “Will Fight the Cigaret Law,” \textit{CT}, July 13, 1899 (4).
\textsuperscript{1284}“Lenient with Cigar Dealers,” \textit{CT}, July 15, 1899 (4).
\textsuperscript{1285}“Will Fight the Cigaret Law,” \textit{CT}, July 13, 1899 (4).
\textsuperscript{1287}“Collins to Step Out,” \textit{CT}, Sept. 30, 1893 (4).
revenue and that the $100 license fee was excessive. It did not take Circuit Judge Charles Neely—who after leaving the bench taught law school and adult bible classes at a Presbyterian church—long to prick Collins’s frivolous litigational balloon. On July 28, relying unsurprisingly on the state supreme court’s decision in Gundling, he denied the request for an injunction. With regard to Collins’s main argument—that the Supreme Court had not dealt with the precise issue of the fee’s unreasonableness—Neely again denied the motion for the injunction because the Illinois courts had decided that the license was not a tax and rejected the view that an ordinance authorizing a license that created revenue was invalid. Despite this virtually inevitable outcome, the petitioners made it clear that they would take the case to the Supreme Court.

By the time the state intermediate appeals court issued its ruling in late 1900, the U.S. Supreme Court had already decided Gundling; in the meantime, however, the battle over enforcement continued. Two weeks after Neely had issued his ruling and in the absence of council passage of the “compromise ordinance” on which dealers had been pinning their hopes, the city collector announced that he could wait no longer: without further notice he would begin prosecuting dealers who sold cigarettes without a license. By the next day, it was reported, more than $5,000 had been paid for licenses, bringing the total to $8,000 since the last court decision. (For the entire year 1900, gross receipts from cigarette licenses totaled $30,216.81.) Officials repeated this mantra.

1288“To Defeat Cigaret Law,” CT, July 20, 1899 (10). The cigarette sellers also asserted that the mayor had neither approved the ordinance nor returned it to the council with his objections and that it had also not been published; the petition further requested that the mayor be restrained from signing and approving the ordinance. The complaint’s frivolousness in the wake of Gundling was heightened by the fact that dealers were challenging the old ordinance, not the new one (which had purportedly not yet become law). According to “Stands by Cigaret Law,” CT, July 29, 1899 (14), the number of complainants was 280.

1289Judge C. G. Neely, Ex-Chicagano, Dies After Crash,” CT, Oct. 18, 1930 (24). He taught at Chicago Kent Law School and Pomona College.

1290Andrew Stevenson, Chicago: Pre-Eminently a Presbyterian City 32 (1909).

1291“Stands by Cigaret Law,” CT, July 29, 1899 (14).

1292“Hopes to Check Smoke,” CT, Aug. 11, 1899 (10).

1293“Put Under Merit Law,” CT, Aug. 12, 1900 (12). See also “Finds for Guard Lyons,” CT, Aug. 13, 1900 (12) (118 licenses had been taken out for the year).

1294Department of Finance, Forty-Fourth Annual Statement: Finances of the City of Chicago: January 1, 1900 to December 31, 1900, at 139 (n.d.). In 1901 the amount rose modestly to $32,183.67: Department of Finance, Forty-Fifth Annual Statement: Finances of the City of Chicago: January 1, 1901 to December 31, 1901, at 105 (n.d.).
without serious enforcement or embarrassment for some time;[1295] nevertheless, by the beginning of the new century, the members of the Cigar and Tobacco Merchants’ Association decided that instead of paying the $100 license they would take the issue to court (although the group’s attack on the ordinance was already pending in court). Potentially more troubling for the cigarette industry, especially for the long run, were proliferating employer bans in Chicago on cigarette smoking: while the Board of Education’s in its offices was based on the odor, Montgomery Ward “refused to employ boys addicted to cigaret smoking,” and other companies insisted that cigarette smoking undermined productivity and discipline.[1296] With startling prolepsis, one manufacturer took a stand that more than a century later employers (such as the Cleveland Clinic)[1297] are just beginning to be bold enough to implement: “The time has come when business-men should stop paying salaries to men whose health is impaired by cigaret smoking.”[1298]

Ominously for the Tobacco Trust, this comment appeared in the press on the very day on which the U.S. Supreme Court issued its decision in Gundling, upholding the ordinance and thus clearing the way for other cities to restrict cigarette sales by making it unprofitable for multitudes of small-volume sellers to dot the urban landscape with conveniently situated supply stations whose ubiquity also mightily manufactured an image of the commodity’s normality. The Supreme Court’s brief opinion, from which no justice dissented, scarcely concealed the dismissive attitude of the author—Rufus Peckham, whose infamous Lochner v. New York four years later conferred a name on an era of judicial invalidation of economic regulation—toward Aldrich’s and the cigarette industry’s unserious claims. (Although the Court did not engage it, the lowest point in Aldrich’s brief was the last two sentences, which gratuitously commended nicotine addiction and suppressed the ordinance’s objective of making cigarettes less accessible to school boys: “Tobacco used in a moderate degree is found a valuable and useful stimulant, and should not be made the subject of unreasonable and unjust requirements. Nor should the thousands of merchants in the outlying districts, where the sale of cigarettes is limited, be

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[1295] E.g., “Charge Plot to Extort,” CT, Oct. 24, 1899 (2) (city will prosecute 50 dealers).
[1296] “Shut Out the Cigaret,” CT, Mar. 27, 1899 (16).
[1298] “Put a Ban on Cigarets,” CT, Apr. 9, 1900 (2) (Pres. E. Heath of Heath & Milligan Mfg. Co.).
deprived of the right to sell the same on account of a prohibitive license fee.”

The first charged that the ordinance ran afoul of the Fourteenth Amendment by virtue of delegating to the mayor the arbitrary power to grant and revoke licenses, while the second asserted that the $100 fee was an unreasonable exercise of the police power because the amount exceeded the expense of issuing the license and providing for regulation, thus depriving dealers of their liberty and property by means of an interference with their rights that was not necessary to protect the public’s health. After expressing doubt whether Gundling even had standing to raise the first issue because he never applied for and the mayor never denied him a license, Peckham nevertheless gave him his day in court before concluding that the ordinance did not violate Fourteenth Amendment’s due process or equal protection clauses because, while the law called for the exercise of a judicial-type of discretion by the mayor, the record neither charged nor proved that the mayor had ever discriminated against any applicant or abused his discretion. The Court then set forth this expansive framework for state and local control over business licensing and exercise of police powers free from federal intervention:

Whether dealing in and selling cigarettes is that kind of a business which ought to be licensed is, we think, considering the character of the article to be sold, a question for the State, and through it for the city to determine for itself, and that an ordinance providing reasonable conditions upon the performance of which a license may be granted to sell such article does not violate any provision of the Federal Constitution.

Regulations respecting the pursuit of a lawful trade or business are of very frequent occurrence in the various cities of the country, and what such regulations shall be and to what particular trade, business or occupation they shall apply, are questions for the State to determine, and their determination comes within the proper exercise of the police power by the State, and unless the regulations are so utterly unreasonable and extravagant in their nature and purpose that the property and personal rights of the citizen are unnecessarily, and in a manner wholly arbitrary, interfered with or destroyed without due process of law, they do not extend beyond the power of the State to pass, and they form no subject for Federal interference.

Peckham disposed of the objection to the size of the license fee—which Aldrich, insinuating that the City of Chicago had sought to fleece his real client, ATC, had asserted in his brief was so “altogether unreasonable...as to justify the assumption that the members of the common council fully realized at the time of

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1299 Brief for Plaintiff in Error at 29, Gundling v City of Chicago, 177 US 183 (1900).
1300 Gundling v City of Chicago, 177 US 183, 185 (1900).
1301 Gundling v City of Chicago, 177 US 183, 186, 187 (1900).
the passage of the ordinance that the cigarette business of this country was mostly in the hands of large tobacco corporations which controlled vast wealth"—just as summarily:

The amount of the fee is fixed by the common council for the privilege of doing business, and the text of the ordinance and the amount of the fee therein named would seem to indicate that it is both a means adopted for the easier regulation of the business, and a tax in the nature of an excise imposed upon the privilege of doing it. In either case the State has power to make the exaction, and its exercise by the city under state authority violates no provision of the Federal Constitution.

... It is not a valid objection to the ordinance that it partakes of both the character of a regulation and also that of an excise or privilege tax. The business is more easily subjected to the operation of the power to regulate, where a license is imposed for following the same, while the revenue obtained on account of the license is none the less legal because the ordinance which authorized it fulfils [sic] the two functions, one a regulating and the other a revenue function. So long as the state law authorizes both regulation and taxation, it is enough, and the enforcement of the ordinance violates no provision of the Federal Constitution.

The vice president of the Cigar and Tobacco Dealers’ Association was immediately constrained to acknowledge that it looked as if the decision “would be far reaching in its effect, and any city in the country would be empowered to impose a license for the sale of cigarets.” The Tribune noted that the Court had “end[ed] all hope of the members of the Tobacco Dealers’ association to evade the requirements of the ordinance,” but its editorial comment that the case had established the “right to impose a high license upon cigarets...as a matter of public health and morals” was exaggerated since the payment of $100 in a populous city, as shown above, barely interfered with the profitability of large-volume sellers. Its report that the ruling meant more than $50,000 in revenue to the city suggested that only about 500 dealers—not significantly more than the peak number who had ever paid for a license in the past—would be selling cigarettes; in light of the estimates of thousands who had been selling, the

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1303. Brief for Plaintiff in Error at 25, 27-28, Gundling v City of Chicago, 177 US 183 (1900). Without a source, Aldrich claimed that over 4,000 persons sold cigarettes in Chicago. Id. at 27.

1304. Gundling v City of Chicago, 177 US 183, 188-89 (1900).

1305. Will Press Cigaret War,” CT, Apr. 11, 1900 (5).

1306. Cigaret Ordinance Is Upheld,” CT, Apr. 10, 1900 (6).

1307. Cigaret Ordinance Valid,” CT, Apr. 11, 1900 (12) (edit.).
implication was that this larger group would in fact stop selling illegally. Consequently, it was only to be expected both that victorious Corporation Counsel Walker, repeating the aforementioned mantra, declared that the city collector would "now begin the strict enforcement of the law" and the vanquished Cigar and Tobacco Merchants' Association yet again complained that some dealers were selling "without molestation from the city authorities..."

In fact, the U.S. Supreme Court decision did not even prompt the cigarette industry or Collins to dismiss the appeal in the other litigation that had been frivolous even before the federal Gundling opinion was handed down. The eponymous plaintiff of that latter case, Albert Breitung, the German-born president of the Association, was still denying the city right to impose the "excessive" $100 license fee. But in its opinion in November 1900 perfecting the cigarette sellers' record of defeats in attacking the ordinance, the First District Illinois Court of Appeals was even more curtly critical than the Supreme Court had been:

Substantially every point presented by plaintiffs in error has been passed upon in Gundling v. City of Chicago...which was affirmed by the Supreme Court of the United States in an opinion handed down April 9, 1900. ...

In the Gundling case the validity of the ordinance as to the questions here complained of and its enforcement were involved. It is therefore deemed hardly necessary to do more than to refer to the opinions of the two courts in that case. It is perhaps due to counsel to say that the opinion of the Supreme Court of the United States in that case was not handed down until the very day that the original printed argument of counsel for plaintiffs in error in the case at bar was filed in this court. In their reply argument, however, counsel seek to show that neither of the reviewing courts passed upon the question here presented upon the averment in the bill that a license fee of $100 amounts to a prohibition or suppression of the sale of cigarettes, and that said ordinance is therefore unconstitutional and void.

... As before stated, the Gundling case in effect disposes of all the questions here presented. True, the Supreme Court does not specifically refer to one or two points here urged, but all the provisions of the ordinance now complained of were before that court.

It is not for us to question the correctness of the decisions referred to, even if we desired so to do. The decision of the Circuit Court is affirmed.
In the flurry of official hosannas that greeted the U.S. Supreme Court ruling authorities in Chicago, a declaration of “Cigaret War,” reflexively “promise[d] that the cigaret license law shall be strictly enforced.” The city council added its voice to the chorus when it was reported that the chairman of its License Committee would “insist that the law be enforced rigorously” so that all dealers who failed to pay the license fee would be prosecuted, a declaration echoed by the deputy city collector’s that he would “see to it that every effort possible is made to exact the license fee....” The police chief, too, chimed in that he would give “every assistance in my power,” which turned out to be the assignment of a dozen of his officers to search for license dodgers. To be sure, Walker, while remarking that the Court left “no loopholes for escape for dodging dealers,” created his own for dodging enforcers by opining merely that “the law will be more closely followed than heretofore.” By the time the city’s new license year began on May 1, the city collector was “determined to stop this license-dodging by cigaret sellers once and for all” by hauling “[e]very” licenseless seller into court and keeping up the prosecution “until he complies with the law.” Among the majority of small storekeepers who comprised the majority of violators, in particular candy store and saloon owners were put on a watch-list of suspects. The first fruits of the campaign were celebrated in mid-May when the one-day record for number of licenses taken out (47) was reached, bringing the total to 108. Yet again the authorities announced to what must by this time have been a very skeptical public that “beginning this morning all dealers found selling cigarettes without licenses will be prosecuted.” The targeted sellers themselves—of whom the collector surprisingly estimated there were only 200 or even 150 who had failed to pay—might have been forgiven their own skepticism when the new mantra was repeated on July 1 that, the “time limit” having expired, prosecutions would begin the next day. That this time perhaps some modicum of bite backed up the bark might have been detected in the report 10 days later that 252 licenses had been taken out, while 52 licenseless sellers

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1312“Will Press Cigaret War,” CT, Apr. 11, 1900 (5). A year later the city council passed an order demanding strict enforcement of the ordinance. “Must Obey Cigaret Law,” CT, May 29, 1901 (1).
1313“Kipley in Print Again,” CT, Apr. 18, 1900 (7).
1314“Will Press Cigaret War,” CT, Apr. 11, 1900 (5).
1315“Will Start License War,” CT, May 1, 1900 (13).
1316“Move for True City Accounts,” CT, May 16, 1900 (5).
1317“Says Funds Are Misused,” CT, July 1, 1900 (14) (quote); “Getting Facts to Down Noise,” CT, July 3, 1900 (16) (150).
were being prosecuted.” Through the rest of the year more licenses were taken out and a series of unlicensed sellers arrested and/or fined.

Nevertheless, in 1901 the Cigar and Tobacco Merchants’ Association continued to complain that the city had hardly made a dent in what the group persisted in insisting was a mass of 8,000 cigarette sellers only 350 of whom had paid for a license. Early that year the Association added a new twist to its indictment (which, though tacit, always amounted to larger dealers’ disappointment that, despite paying $100 a year, they were still not enjoying the oligopolistic profits that the ordinance had held out to them in the form of suppressing the small-volume sellers). Now, it (plausibly) claimed that it had “reliable information showing that certain ward politicians have been protecting dealers who refused to pay the license,” while others either received a cut rate or paid “tribute to certain ‘go-betweens’ for the benefit of various individuals with a ‘pull.’” In contrast, dealers’ assertion that the city was losing $750,000 annually as a result of not enforcing the license law was manifestly hyperbolic since a very large proportion of the purported thousands of non-paying small-volume sellers would, if the ordinance had been strictly enforced, have stopped selling cigarettes. City Collector Frank Brandecker, who was sure that there was not “anything like” 8,000 cigarette dealers in Chicago, shot back that he had done all that he could to enforce the law (including 75 prosecutions). While concurring in his fellow bureaucrat’s self-judgment, Comptroller William Kerfoot put it in a considerably different light by revealing that when detectives had been detailed to locate delinquent dealers, “their expenses were paid out of the contingent fund. The city has no money available for the prosecution of this class of work....” That its aggregate license revenue estimate was exaggerated the Association de facto admitted when it called for reducing the fee from $100 to

1318"Still Able to Gather Garbage,” CT, July 11, 1900 (12).
1319"Fined for Selling Cigarets,” CT, Sept. 21, 1900 (7) (including fines for selling to minors); “Cigaret Dealers Arrested,” CT, Oct. 27, 1900 (16) (reporting a police captain as having been informed that “there were numerous violators of the ordinance in the Ghetto” and listing among the arrested dealers with typically Jewish names such as Silverstein); “Cigaret Dealers Are Fined,” CT, Nov. 14, 1900 (2) (including Khedivial Tobacco Co.).
1320Evade Cigaret Law by ‘Pull,’” CT, Feb. 17, 1901 (4).
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$25 on the grounds that 7,000 dealers would pay it, thus generating $175,000 in city revenue compared to the $25,000 that 250 dealers were currently paying. To be sure, this municipal coffers perspective demonstrated to contemporaries—if by this point they still needed evidence—that the organized sellers were working at cross-purposes with the ordinance, which was designed to “discourage the sale of cigarets” in the sense that “all the small places where cigarets [w]ere sold, especially those near the schoolhouses, would be unable to pay $100, and would stop selling the obnoxious article.”1322 The cigarette industry continued to lobby the council for this revision; in 1903, for example, 20 dealers, including Breitung and the president of the National Association of Cigar Dealers, appeared before the aldermen to plead on behalf of the $25 license, but the council voted unanimously against it. The spectrum of negative opinion was amusingly broad, ranging from advocacy of a $500 license and a penalty of a year in the penitentiary to “educat[ing] people up to smoking cigars, and not cigarets....” But Republican Charles Woodward’s judgment was most relevant in limning the ultimately narrow scope of the council’s regulatory agenda on cigarettes: “‘The city has no interest in the fight against the trust.... The ordinance is to prevent sales of cigarets to minors. If the smaller dealers have licenses they will openly display and push the sale of cigarets near schools. They dare not do that now.’”1323

By 1904, the city had issued 560 licenses, which brought in $56,334 in revenue.1324 Such numbers prompted one contemporaneous investigator to opine that there was “good reason to believe that many possible license fees are never collected”1325—an opinion that he might well not have modified even when the number of licenses rose to 803 and 890, respectively, in 1907 and 1908.1326

1322“The Cigarette Ordinance,” CT, Apr. 21, 1901 (40) (edit.). The council’s focus on school children was again highlighted when it adopted an ordinance prohibiting the sale of cigarette papers (which could be filled with loose tobacco the sale of which was not regulated) within 600 feet of schoolhouses. “Want Uniform Price of Light,” CT, May 28, 1901 (3).

1323“Kill Ordinance Providing for $25 Cigaret License,” CT, May 14, 1903 (3). The first two views were presented by Republican John Scully and Democrat John Minwegen, respectively.


1326Chicago City Manual: 1908, at 226, 228 (Francis Parkman prep. 1909). For later data, see Malcolm Parsons, The Use of the Licensing Power by the City of Chicago 167, 596
At this point in the opening years of the century the controversy over Chicago’s modest licensing ordinance was overtaken by efforts in the state legislature to pass a more radical statewide ban on the manufacture and sale of cigarettes in sync with similar enactments in neighboring Wisconsin and Indiana in 1905. In 1906-1907 anti-cigarette militants, led by Lucy Page Gaston, women’s clubs, the public education authorities, and physicians, tried, unsuccessfully, to persuade the city council both that banning sales to everyone was the only way to prevent children from gaining access to cigarettes and that only the Tobacco Trust opposed such an approach since independent dealers were left with no profit after paying for their licenses. Whether it was decisive or not, the suggestion by Republican Alderman John P. Stewart, owner of a downtown cigar and tobacco store, that a state law would be superior because a municipal sales ban would merely “cause hundreds of little stores to spring up on the outskirts of the city whose entire business would consist of selling cigarettes [and] then would get the cigar business and Chicago business men would suffer” objectively carried the day. When the Illinois legislature finally passed such a bill in 1907—which was judicially held invalid before it went into effect—some observers of its impact focused on the revenue loss (amounting to $75,000) to Chicago once the city collector announced that the city would cease to license the sale of cigarettes as a result of the state enactment.

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tab. 6 at 177 (1952) (revenues exceeded $514,000 by 1922).

1327See below vol. 2.


1329See above this ch. and vol. 2.

1330"Stop Smoking,” CT, June 18, 1907 (6). The Tribune editorialist, who fancied that “Chicago without cigarette smokers, is unimaginable,” stated that because the revenue loss “is going to be felt...the outcry against the new statute among smokers is echoed in the City Law Department,” while admitting that “the violence of the opposition has greatly strengthened the anti-tobacco party.” Id.

1331"City Big Loser by Cigaret Law,” CT, June 10, 1907 (6). The article’s statement that the loss of revenue would amount to $10,000 (the equivalent of 100 licenses) was inconsistent with the aforementioned data.
Even the Leading Cigarette Tobacco Producing (and the
Dukes’ Home) State Had to Debate Banning the
Manufacture and Sale of “that nefarious little stinker”:
North Carolina 1893-1905

We view with alarm the degree to which the tobacco habit has fastened itself upon the
generation, enslaving men of every calling in life. The deadly cigarette in the hands of the
boy is but the childish effort to imitate the folly of the fathers.¹

Although the North Carolina legislature failed to enact a general anti-cigarette
law between 1897 and 1903, the vigorous and repeated efforts to do so even in the
state that was the country’s biggest producer of cigarette tobacco,² second biggest
producer of all kinds of tobacco (after Kentucky),³ second-biggest cigarette
manufacturer (after New York),⁴ and the home of the head of the Tobacco Trust
are a phenomenon worth studying. The window of opportunity for undertaking
this initiative was partly opened by Populist-Republican Fusion, which captured
both houses of the legislature for the 1895 session and the governorship at the
1896 election, enabling it to control all branches of government during the 1897
session.⁵ This framework for legislative innovation was shattered in 1898 when

¹Report of the Twenty-Third Annual Session of the Woman’s Christian Temperance
Union of North Carolina 30-31 (1905).

²“By far the largest part of North Carolina tobacco crop goes for cigarettes. This is
not true of any [other] state except Virginia.” “Cigarettes by the Million,” Syracuse Daily
Standard, Mar. 12, 1896 (5:6-7) (reprinted from Sun (New York)).

³In 1899 North Carolina produced 127,503,400 lbs of tobacco or 14.7 percent of the
national total. U.S. Census Office, Twelfth Census of the United States, Taken in the Year
1900: Census Reports, Vol. VI: Agriculture, Part II: Crops and Irrigation, tab. 1 at 526
(1902).

⁴In calendar year 1898, factories in North Carolina manufactured 1,030,061,400
cigarettes or almost one-fourth of the total national output; New York produced
1,234,998,550. Annual Report of the Commissioner of Internal Revenue for the Fiscal
Year Ended June 30, 1899, tab. 3 at 46 (56th Cong., 1st Sess., H. Doc. No. 11, 1899). See
generally, “Our Factories, They Extend from the Cloudland to the Coast,” N&O, Apr. 5,
1896 at 33 (Tobacco ed.).

⁵To be sure, whereas the Populists had been able to achieve many of their legislative
objectives during the 1895 session, in 1897 they failed to enact any of their campaign
planks, while many enacted Republican bills did not conform to the ideology of the
Populists, who did not expand their representation at the 1896 elections, leaving
Democrats, through law, fraud, and violence, regained power based on a white-supremacist electoral regime. The sharp restriction of suffrage after 1900 pushed both parties to the right so that even the Republicans, having abandoned the disfranchised blacks “as a lost and damaging cause,” sought to remain competitive by staking out a “lily-white” position that cast Democrats as anti-business and pro-black.

Unlike neighboring Tennessee, North Carolina in the late nineteenth and early twentieth century lacked a successful temperance movement that could have made prohibition of liquor and the saloon a perennially central and divisive issue of electoral politics and lent support to concurrent anti-cigarette campaigns. Following the overwhelming defeat of a prohibitionist constitutional amendment in 1881, the split in the Democratic party on the question opportunistically prompted Republicans to join the anti-prohibition elements, but the ploy miscarried, and, if for no other reason, the all-encompassing ‘Negro question’ meant that the issue failed to ignite the kind of dominating party-political conflict that Iowa witnessed— at least until white supremacists succeeded in excluding blacks from political participation in 1900.


*See above ch. 5.*

*The amendment lost by a vote of 48,370 to 166,325, winning tiny majorities in only a very few small Republican counties in western North Carolina. *A Manual of North Carolina Issued by the North Carolina Historical Commission for the Use of the General Assembly Session 1913*, at 1019-20 (R. Connor ed. 1913).*

*Helen Edmonds, The Negro and Fusion Politics in North Carolina, 1894-1901, at 13 (1951).*

*See below ch. 9.*

North Carolina first regulated the sale of cigarettes in 1891, when the legislature—110 of whose 170 seats were occupied by members of the Farmers’ Alliance elected at the 1890 elections—made it a misdemeanor to sell or give away cigarettes or tobacco in any form that could be used or intended to be used as a substitute for cigarettes to a minor under the age of 17, and left the imposition of a fine or imprisonment to the discretion of the courts. Some contemporaneous evidence suggests that it was “doubtless frequently violated”—at least in the town of Statesville.

That anti-Tobacco Trust sentiment ran strong in North Carolina already in the early 1890s, barely three years after its formation, was visibly on display in an article published in the *Southern Tobacco Journal* in Winston and reprinted in the Statesville *Landmark*, a Democratic newspaper:

> It is now hinted that as soon as the whiskey trust, which is about to get control of the whiskey business in the country, is perfected,...the two corporations will combine, making the largest money corporation in the world. Such a corporation would simply mean ruin to the balance of the tobacco trade in this country. The combined value of the two enterprises would be nearly $100,000,000, enough it is said to influence legislation in every state in the Union.

In its own complementary editorial the *Landmark*, referring to “this rapacious and remorseless trust,” predicted that after “having disposed of competition” and depressed the price of the tobacco grade used for cigarettes, the Trust would “depress the prices of other grades of tobacco” and bankrupt or drive tobacco growers out of business. In the end it would “require an effort to keep grass from growing in the streets of our tobacco towns.” That the American Tobacco Company might have pressed some farmers hard enough to cause them to wish to bring down the cigarette empire is suggested by the *Landmark*’s claim that with the Trust’s having “fixed” cigarette grade tobacco for several years, “and the growers of this grade of tobacco having practically no other customers, [they]

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14. 1891 N.C. Sess. Laws ch. 276, § 1, at 228. The same treatment was accorded anyone who aided or abetted a minor child in obtaining possession of cigarettes or substitutes. *Id.* § 2.
15. “August Court,” *Landmark* (Statesville), Aug. 9, 1894 (3:2).
have been compelled to accept whatever price the trust in its generosity named. It has thus cost the farmers hundreds of thousands of dollars, appropriating to itself what it has taken from them.”

Nevertheless, any Populist, let alone Fusionist, effort to dismantle ATC’s power in North Carolina had to confront the inescapable fundamental local economic facts that in Durham the company, which was “the largest concern of any kind in North Carolina,” operated “the largest smoking tobacco and cigarette factories in the world,” producing 10,000 tons of the former and three million cigarettes a day.

**Charlotte and Greensboro Adopt and Repeal $200 License Taxes**

Even before the state legislature took up the cause of banning cigarettes in North Carolina, local action supervened. By the 1890s, the widespread sentiment in a number of states that cigarette smoking by boys was an evil that should be suppressed prompted many local governments to pass ordinances “to drive them [cigarettes] out.” On December 15, 1893 the aldermen of the city of Charlotte—the state’s second-largest city—adopted a motion to add a section to the revenue ordinance for that term imposing a $200 tax on cigarette retailers (and $50 on wholesalers/jobbers) to go into effect on April 1, 1894. The press reported that “those who sell the little poisoners are kicking like mountain steers but it does no good. They say they make only $5.35 on the thousand cigarettes

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22. “What the Wisconsin Legislature Is Doing,” *MS*, Mar. 12, 1897 (6:1-3 at 2) (Assemblyman Hurd in support of his bill to impose a license fee of $500 on cigarette dealers and prohibit sales to minors).
23. 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 286-95 (1901). The population for 1893 was estimated based on the assumption that population increased proportionately each year between 1890 and 1900 in Charlotte and Raleigh.
24. City of Charlotte, Minute Book 7, Dec. 15, 1893, at 269; “Cigarette Retailers,” *DCO*, Dec. 16, 1893 (4:2). Brenda Freeze, the current City Clerk of Charlotte, and three co-workers, Jeanne Peek, Angela Davis, and Stephanie Kelly, generously read through the minute books for the years 1891 through 1894 and provided the texts of the relevant entries.
and they can’t afford the tax. It is said on the other hand that the aldermen nearly all have boys of their own, therefore can sympathize with the mothers of the land and dare to put the evil down.” The Raleigh paper supported the same action there “if it would decrease the unparalleled nuisance of cigarette smoking.”

(To be sure, at the supposed profit margin, dealers would have to have sold only about 100 cigarettes a day to break even on the tax, thus rendering it unprofitable only for merchants who sold them as a minor, peripheral, and occasional commodity.)

Before the ordinance went into effect, the board of aldermen at its meeting on February 5, 1894, on the motion of the same alderman (Hall) who had moved the adoption of the tax in December, repealed the license tax and then adopted a substitute amending the original so as to make the tax $200 on cigarette retailers, wholesalers, and on the sale of paper and paper tablets used in the manufacture of cigarettes, still to take effect on April 1.

One Kansas newspaper interpreted the action as showing that “the days of the cigarette in the land are numbered.” On March 5, two “gentlemen,” John Scott and R. A. Dunn, appeared before the board seeking a modification of the cigarette tax. Although they did not wish to sell cigarettes in Charlotte itself, “a large percentage of their orders from merchants outside of the City included an item for cigarettes, which article formed part of regular wholesale druggists’ stock. They desired only to sell packages to parties outside of this City as Jobbers.” On Alderman Hall’s motion, the board referred the matter to the Committee on Ordinances, instructing it to confer with the city attorneys, and to report back to the board on whether the concession requested was lawful and proper.

With the approach of the April 1, 1894 effective date of the ordinance, the press predicted that it would stop the sale of cigarettes inasmuch as the tax was prohibitory. Dealers hired a lawyer to test its constitutionality, although public sentiment favored the tax.

25“Cigarettes Doomed in Charlotte,” News-Observer-Chronicle, Dec. 22, 1893 (1:6). An Iowa newspaper added that dealers’ protest was “in vain, as the sentiment of the people is evidently in favor of it.” “Cigarette Legislation,” CREG, Jan. 6, 1894 (4:2).

26If the $200 tax amounted to 37,383 times the $5.35 profit per 1,000 cigarettes, dealers would have had to sell 37,383 cigarettes annually or 102 per day.

27“Meeting of the Aldermen,” DCO, Feb. 6, 1894 (4:3). The Charlotte City Clerk did not report any such entry for Feb. 5, 1894.


30Landmark (Statesville), Mar. 22, 1894 (3:7) (untitled).

31Personal and General Notes,” DP, Jan. 18, 1894 (4:6).
The tax did in fact go into effect on April 1, causing, in the words of the *Daily Charlotte Observer*, “[t]he cigarette fiend who did not display forethought and lay in a supply of his beloved weed” to be “reduced to sponging on his more thoughtful friends” and “[m]any deep muttered curses” to be “heaped on the heads of the well-meaning aldermen.” However, on the very day (April 2) that the *Observer* published that report, the aldermen, under suspension of the rules moved by Hall, read three times, passed, and adopted the police ordinance presented by the aforementioned committee ordaining that “from and after April 3, 1894, no person shall be allowed to sell cigarettes within the jurisdiction of the City of Charlotte without having first obtained a license therefor from the Board of Aldermen, and for every license to sell cigarettes for the term of one year, the applicant shall pay to the City, the sum of Ten Dollars. Any person violating this ordinance shall be subject to a penalty of Fifty Dollars for every such violation.”

That the aldermen, despite the conversion of the prohibitory tax into a more typical license fee, were still serious about controlling cigarettes, was on display not only in the hefty penalty (which the original ordinance had apparently lacked) but also in their having rejected a proposed amendment “that all ordinances on the subject of selling cigarettes be repealed, and that the sale of the same be declared free to all persons.” That animus remained palpable in 1896, when a merchant advertised in the local paper for a boy who did not drink, play cards, or smoke cigarettes. The newspaper commented editorially that, though plenty of boys would like the job, “the cigarette clause will bar most of them.” It advised boys to consider that such a policy “sets the pace.”

Nor was Charlotte the only city in North Carolina to act locally against cigarettes. About the same time, on January 2, 1894, James Edmund Boyd of the Greensboro Board of Aldermen introduced a similar ordinance. Boyd (1845-1935) was an interesting political figure, whose post-ordinance career was even more prominent. A soldier in the Confederate army who in 1866-67 read law with Judge Thomas Ruffin (one of the slave South’s most renowned judges) and

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33.City of Charlotte, Minute Book 7 at 289. The text was also printed in “The Park Offered to the City,” *CO*, Apr. 3, 1894 (4:2).
34.City of Charlotte, Minute Book 7, Apr. 2, 1894, at 289.
35.”Or Smoke Cigarettes,” *N&O*, Aug. 30, 1896 (6:3) (reprinted from *Charlotte News*).
37.”Recalls a Great Romance,” *RMN*, Nov. 27, 1897 (4:5).
was the leader of the Ku Klux Klan in Alamance County in 1870. Boyd became well-known nationally in the Republican party, serving as U.S. District Attorney for the Western District of North Carolina (1880-1885), before entering private practice in Greensboro (1885-1897), during which time he was also elected alderman in 1893 and mayor in 1894. His loyalty to the McKinley administration secured him a post as Assistant U.S. Attorney General (1897-1900) and finally an appointment in 1900 as federal judge for the U.S. District Court for the Western District of North Carolina. It was in this position that he achieved his greatest fame and notoriety for his fossilized laissez-faire constitutionalism and antediluvian pro-capitalism in invalidating two federal child labor laws four times (twice without even bothering to write an opinion) between 1917 and 1921, in part based on his finding that prohibiting a child below a certain age from working deprived his father of his income and thus of freedom of contract (even though the child was an at-will employee, who could be fired for any reason). In a delicious historical irony, one of the corporate lawyers plotting the challenge to the child labor law and identifying Boyd as the most reliable anti-progressive judge to hear all the cases was none other than ATC’s former associate and general counsel Junius Parker. It remains unclear what motivated this railroad lawyer to antagonize the Tobacco Trust.


40. For hefty doses of Democratic sarcasm directed at Boyd’s having forgotten his past as a Democrat and “Ku Kluxian” at the Republican state convention, see “The Dark Duke Downed,” N&O, Aug. 31, 1894 (1:3).

41. Boyd defeated two Democratic candidates for mayor, receiving only 16 more votes than the runner-up. The press reported that “[t]he colored vote rallied to the support of Boyd.” “A Republican Mayor,” GP, May 9, 1894 (3:3).

42. Stephen Wood, Constitutional Politics in the Progressive Era: Child Labor and the Law 81-110, 226-31, 260-68 (1968). The cases were: Dagenhart v. Hammer (W.D.N.C. 1917); Johnston v. Atherton Mills (W.D.N.C. 1919); George v. Bailey, 274 F. 639 (W.D.N.C. 1921); and Drexel Furniture Co. v. Bailey, 276 F. 452 (W.D.N.C. 1921). The historian of these cases characterized the two opinions that Boyd did write as “put together from timeworn constitutional stuff and cotton mill propaganda.” Boyd’s issuance of an injunction in the child labor tax case restraining the collection of the tax a “flagrantly improper act” since “it went directly counter to the statutory provision that no suit for restraining the collection of federal taxes could be maintained by any court.” Stephen Wood, Constitutional Politics in the Progressive Era: Child Labor and the Law 266 (1968). A lengthy editorial-obituary declared that “Judge Boyd brought over into generations which less and less sensed them...more of the bitterness of the reconstruction era than did any of his contemporaries.” “James E. Boyd,” Greensboro Daily News, Aug. 22, 1935 (6:3).
however, created for itself a reputation as a temperance leader when the board of aldermen, presided over by the new Mayor Boyd, in May 1894 passed a “rigid” ordinance requiring saloons to close by nine p.m. Boyd’s ordinance provided:

1. That no person, firm, or corporation shall carry on the business of wholesale or retail dealer in cigarettes in the City of Greensboro without paying the tax on said business and obtaining a license therefor as herein provided.

2. That the tax per annum for the privilege of selling cigarettes in the city of Greensboro shall be two hundred dollars, and the tax for carrying on the business of wholesale dealer shall be five hundred dollars per annum, and under the head of wholesale dealer in cigarettes shall be classed all persons who sell cigarettes in the original manufacturing lots and packages whether such persons be located in the City or is [sic] a travelling salesman.

... 5. Any person or persons, firm or corporation who shall carry on within the City of Greensboro the business of dealer in cigarettes without the license provided for in this act shall for each and every sale made be guilty of a misdemeanor and on conviction shall pay a fine not exceeding fifty dollars or be imprisoned not exceeding thirty days in the discretion of the court.

6. That this ordinance shall be in force and take effect on and after February 1st 1894.

After voting down 6 to 3 a motion to defer consideration of the ordinance to the next meeting, the aldermen adopted the ordinance by a vote of 7 to 2, Alderman H. W. Cobb (the Tobacco Trust’s local buyer) having been excused from voting.

To contemporaries the ordinance was manifestly “framed for the express purpose of prohibiting the sale of cigarettes” in the city, which “stirred up a bitter war among tobacconists against the law.” On January 5, 1894, they held a mass meeting to discuss securing its repeal and appointed a committee to meet with the board. The Tobacco Association of Greensboro sought repeal on the grounds...
that the ordinance “will injure the tobacco interests of this place.” Passage of the prohibitory ordinance, “[c]oming as it did, from the heart of the tobacco belt,...attained prominence all over the country,” in addition to provoking more comment in Greensboro than any other aldermanic measure in years. Even the weekly Greensboro Patriot, which emphatically opposed the action, conceded that “condemnation of the cigarette is almost universal,” and added that there was “no more potent evil in existence today....” It was even willing to admit that “not one dealer in a thousand will venture the assertion that they are not maliciously harmful both to old and young.” What motivated Boyd—who, as his federal judicial career would make unambiguously clear, held anachronistically pro-capitalist views—to attack the interests of the Tobacco Trust in a major tobacco market and tobacco manufacturing center remains unclear.

Repeal was not long in coming. The Greensboro Tobacco Association repeal petition was read to the board and supported by a large delegation of members at its meeting on January 12. Aldermen James D. Glenn, who had opposed the ordinance, offered a resolution calling for repeal on the grounds that the board had no authority to levy the tax. In addition, expressing the board’s desire that cigarette sales to minors be prohibited, the resolution also instructed the police chief to “use every effort to carry out the provisions” of the aforementioned 1891 no-sales-to-minors statute and to prosecute all violations “to the fullest extent....” In response, Alderman Boyd offered as a substitute resolution that consideration of the proposal be adjourned to the Board’s next meeting, at which “parties who desire may be heard pro and con....” Boyd’s substitute lost by a vote of 4 to 8, and the Board then voted to repeal the ordinance by another 8 to 4 vote.

Supposedly the aldermen repealed the ordinance on the formal procedural grounds that the ordinance had been brought before the board and passed at a called meeting without satisfying the charter’s due notice requirement and

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47. “Notes About Town,” News-Observer-Chronicle (Raleigh), Jan. 9, 1894 (4:1). This article was based on one in the Greensboro Daily Record, of which, apparently, no copy survives in any library for Dec. 1893-Jan. 1894.

48. The Cigarette Ordinance,” GP, Jan. 17, 1894 (2:2)


50. Guilford County, City of Greensboro, Council Minutes, Vol. 2: 1893-1898 at 113-14, M. 249. 10001 (Jan. 12, 1894) (NCSA). Glenn was, according to the 1900 population census, a law agent for the Southern R.R. Most of the aldermen were, based on information in the census and Jas. Albright, Greensboro: 1808-1904: Facts, Figures, Traditions and Reminiscences 41, 84-102 (1904), merchants and manufacturers. One of the three aldermen who voted against repeal was a dentist (John W. Griffith).
without granting time for considering it. The *Patriot* identified the cause for repeal in “a revolution in the minds of some of the men who voted for the ordinance,” but who in the meantime “remembered that their obligations to the community and the state were paramount to private conviction and have had the courage to... openly admit that they were too hasty.” The more plausible reason for the repeal, however, can be found in the *Patriot’s* “doth-protest-too-much” denials of the Trust’s role:

As for the connection of the American Tobacco company with the repeal, it is only necessary to say that it cut no figure whatever. The company holds no mortgages on the lives of any of the board. It is a fact that that company’s buyer here, Mr. Cobb, is a member of the board, but there is not a man, woman or child in Greensboro who could be induced to believe that Mr. Cobb’s connection with the company has deprived him of any of the sterling integrity and principles which have always characterized his actions. He voted to repeal the ordinance not alone through sympathy for the American Tobacco company, but in the exercise of a function which has been vested in him and which is controlled by his better judgment.

...  
It was stated by some of the tobacconists that they feared the withdrawal of the company’s buyer from the market. Don’t give yourselves any uneasiness on that score, gentlemen. The American Tobacco company would continue to buy tobacco here if a tax of $200 was legally imposed. There is no danger of them leaving one of the best markets in the state on account of an insignificant retail tax, prohibitory or non-prohibitory. So long as the tobacco raisers bring their products to this market, just so long will they find the American Tobacco company represented here. Tobacco will not have to be hauled from here to Oshkosh to find a market.... Greensboro will continue to be a tobacco town as long as it is on the map.

To be sure, even the *Patriot* was constrained to concede that others took strong exception to its appraisal of the Tobacco Trust’s disinterestedness. Reprinted in the adjoining column was a brief excerpt from the Salisbury *Herald*, which cited the Greensboro *Record* as having written of the repeal that “the American Tobacco Company made a kick and the back bone of the aldermen disappeared.” The *Patriot* lamented the “wrong impression” under which the *Herald*, “like a number of other good newspapers,” was laboring. As far as it was concerned, ATC “has not fractured any back bones and it is not likely to”—speculation that seemed superfluous after the aldermen had repealed the

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offending ordinance.
Finally, arguing in the alternative, the Patriot claimed that, even if implemented, the ordinance would have been feckless since several dealers had announced their intent to pay the tax: driving smaller dealers out would not have reduced the consumption of cigarettes, which “would be just as injurious if purchased from a man who pays [a] $200 a year license as one who pays $5.” The newspaper resisted the argument that concentration of the trade would improve police enforcement on the grounds that existing state law, which had “practically become a dead letter,” could also be enforced if an order to do so were simply issued.54

Half a year later the aldermen—Boyd had in the meantime become mayor—adopted by a 5 to 4 vote a much watered-down ordinance that imposed on cigarette retailers and wholesalers a $10 and $25 annual license, respectively; each violation was subject to a $10 fine.55

**Populist-Republican Fusion in the State Legislature Fails to Overcome the Tobacco Trust**

Wherever there are great capitalists, the name of J. B. Duke is familiar.56

Whether local license fees or fines acted as deterrents is unknown, in part because all such local anti-cigarette initiatives were preempted in 1895 when the state legislature—controlled now, as a result of the 1894 election, by the Populist-Republican Fusionists57—for the first time, inserted into its biennial Revenue Act

55. Guilford County, City of Greensboro, Council Minutes, Vol. 2: 1893-1898 at 184, M. 249. 10001 (July 13, 1894) (NCSA). Toward the end of 1894, a Judge Hoke in Greensboro held unconstitutional a special tax of $25 on wholesale dealers of cigarettes that the board of aldermen had imposed “some time ago.” The wholesale dealers had contested the tax on the grounds that they had already been paying a tax. “Cigarette Tax Unconstitutional,” N&O, Dec. 14, 1894 (1:4).
57. As the legislative session opened, the state’s leading newspaper published a “complete and accurate” list of members and their party affiliation stating that the Senate was composed of 25 Populists, 17 Republicans, and 8 Democrats and the House of 32 Populists, 42 Republicans, and 46 Democrats. “The General Assembly,” N&O, Jan. 6, 1895 (5:4-5). In contrast, another paper insisted that the “best calculations that can now be made indicate” that the Senate would be composed of 26 Populists, 15 Republicans, and
North Carolina 1893-1905

In the House, it was “more difficult to tell exactly the comparative strength of the Populists and Republicans. It is very hard to ascertain the names of the Fusion candidates who have been elected in some of the counties, and even when this is done, their politics is, in many instances, an unknown quantity.” It reckoned that there would be 33 Populists, 36 Republicans, 46 Democrats, and 1 Prohibitionist. “The General Assembly,” FO, Jan. 10, 1895 (4:2-3). Two months into the session, the same paper listed members and party affiliations that added up to 17 Republicans, 25 Populists, and 8 Democrats in the Senate, and 39 Republicans, 36 Populists, and 45 Democrats in the House. “The General Assembly,” FO, Mar. 7, 1895 (5:2). According to a latter-day historian, to the House had been elected 42 Populists, 35 Republicans, and 42 Democrats, while the Senate was composed of 24 Populists, 18 Republicans, and 8 Democrats. James Beeby, Revolt of the Tar Heels: The North Carolina Populist Movement, 1890-1901, at 81 (2008). In North Carolina “‘fusion’ suggests a more thorough cohesion than actually took place; the arrangements are better thought of as trade agreements among competitors, or wary truces by combatants against a common enemy.” Edward Ayers, The Promise of the New South: Life After Reconstruction 291 (1993 [1992]).

The legislative history of this intervention is instructive. The bill originally imposed a 10-cent tax but in the House—which earlier in the session had amended its rules to prohibit smoking in the Hall—an amendment was offered by Republican R. P. Williams to reduce it to five cents as well as to add a proviso that “nothing in this section shall be construed to apply to manufacturers of cigars and cigarettes, and no county, city or town shall be allowed to impose any tax, license, or other fee on such dealers.” In support of Williams’ amendment Democrat (and merchant) James L. Nelson claimed that 10 cents was the equivalent of a 2-percent tax on cigarettes, whereas that on cigars was only 0.1 percent. While admitting that the “provision as a prohibitory one might be

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9 Democrats. In the House, it was “more difficult to tell exactly the comparative strength of the Populists and Republicans. It is very hard to ascertain the names of the Fusion candidates who have been elected in some of the counties, and even when this is done, their politics is, in many instances, an unknown quantity.” It reckoned that there would be 33 Populists, 36 Republicans, 46 Democrats, and 1 Prohibitionist. “The General Assembly,” FO, Jan. 10, 1895 (4:2-3). Two months into the session, the same paper listed members and party affiliations that added up to 17 Republicans, 25 Populists, and 8 Democrats in the Senate, and 39 Republicans, 36 Populists, and 45 Democrats in the House. “The General Assembly,” FO, Mar. 7, 1895 (5:2). According to a latter-day historian, to the House had been elected 42 Populists, 35 Republicans, and 42 Democrats, while the Senate was composed of 24 Populists, 18 Republicans, and 8 Democrats. James Beeby, Revolt of the Tar Heels: The North Carolina Populist Movement, 1890-1901, at 81 (2008). In North Carolina “‘fusion’ suggests a more thorough cohesion than actually took place; the arrangements are better thought of as trade agreements among competitors, or wary truces by combatants against a common enemy.” Edward Ayers, The Promise of the New South: Life After Reconstruction 291 (1993 [1992]).

58 1895 N.C. Sess. Laws ch. 116, § 20, at 113, 117. A tax was also imposed on dealers in other kinds of tobacco. A dozen years later the legislature permitted cities and towns (but not counties) to levy cigarette license or privilege taxes not to exceed $10 per year. 1907 N.C. Sess. Laws ch. 256, § 71, at 291, 316.

59 “The Revenue Act,” Landmark (Statesville), Mar. 21, 1895 (1:7).


effective,” he argued that as a revenue tax it should be lowered, but it lost.\footnote{At the Pie Counter,” \textit{N&O}, Mar. 7, 1895 (2:1-5 at 4). H.B. No. 1198 passed by a vote of 63 to 6. \textit{Journal of the House of Representatives of the General Assembly of the State of North Carolina, at Its Session of 1895}, at 821 (Mar. 6) (1895). A 10-cent tax on 1,000 cigarettes was the equivalent of a 0.1-cent tax on a package of 10 cigarettes or 2 percent of the 5-cent price. On Nelson’s biography, see Collins and Goodwin, \textit{Biographical Sketches of the Members of the General Assembly of North Carolina, 1895}, at 29 (1895).} That night, “[r]epresentatives of Winston’s Cigarette manufacturing firms left...for Raleigh to appear before the Legislature and enter their protest against the passage of the bill placing a tax of ten cents per thousand on cigarettes.”\footnote{The Coffey Murder Trial,” \textit{Times} (Richmond), Mar. 7, 1895 (2:3).} In the Senate, sitting as the Committee of the Whole, an amendment was offered to create a new section of the Revenue Act levying on manufacturers of plug and smoking tobacco a tax of 0.5 percent per pound, on cigars of 5 cents per 100, and on cigarettes of 10 cents per 1,000.\footnote{And This Is Reform,” \textit{N&O}, Mar. 9, 1895 (2:1-6 at 5:1).} But Senator James M. Mewborne, a Populist who was state president of the Farmers Alliance from 1893 to 1895,\footnote{Collins and Goodwin, \textit{Biographical Sketches of the Members of the General Assembly of North Carolina, 1895}, at 29 (1895) (spelling name “Mewboorne”).} insisted that 10 cents was “too great a tax on cigarettes” because it was “unjust and would tend to drive enterprises from the State,” and the amendment was withdrawn.\footnote{Collins and Goodwin, \textit{Biographical Sketches of the Members of the General Assembly of North Carolina, 1895}, at 12 (1895). Dalby had taken a course in medicine at the Medical College of Richmond, Virginia.} The next day, the amendment offered by Dr. A. J. Dalby—who had engaged in the manufacturing of tobacco right after the Civil War and was one of the organizers of the Populist Party in North Carolina\footnote{Proceedings of the Legislature,” \textit{Caucasian} (Raleigh), Mar. 14, 1895 (1:1 at 2:5).}—to reduce the cigarette tax on dealers from 10 to 5 cents per 1,000 was adopted by the Committee of the Whole.\footnote{Not Ready to Adjourn,” \textit{N&O}, Mar. 10, 1895 (2:1). Presumably one of the amendments that the Senate adopted restored (with some variations) Williams’ aforementioned amendment concerning non-applicability to manufacturers and prohibiting local governments from imposing license taxes, but unfortunately the North Carolina} After the full Senate’s passage of the bill on third reading by a vote of 30 to 5,\footnote{And This Is Reform,” \textit{N&O}, Mar. 9, 1895 (2:1-6 at 5:1).} its return to the House prompted one of the chamber’s Democratic
leaders, lawyer J. Frank Ray, to “want[ ] to know who was benefited” by the Senate’s reduction of the cigarette tax from 10 to 5 cents and “why and at whose instance” that chamber had acted, but the Fusionists stonewalled, and the chamber ultimately concurred in the Senate amendments by a vote of 59 to 25.

At the low rate set in 1895 (which amounted to less than one percent of the aforementioned profit margin), virtually no merchant in North Carolina would have sold the four million cigarettes a year (or 11,000 cigarettes a day) the profits on which would have been the equivalent of a $200 annual tax. And even at the 15 cents per 1,000 cigarettes at which the Fusionist legislature set the tax in 1897 and which the Democratic legislature retained in 1899 very few if any merchants would have sold the 3,652 cigarettes per day that would have equated to a $200 tax. Finally, when the legislature converted the tax to a $5 annual retail license in 1901, it became merely nominal.

One possible explanation for this accommodating stance is the deal that the head of the state Populist party, Marion Butler (who was also a high-profile national Populist leader and U.S. senator from 1895 to 1901), made in early 1895 with Benjamin N. Duke—the son of the founder of W. Duke, Sons & Co. managing director of the Durham branch of the American Tobacco Company, who was “said to be the largest individual tax-payer in the State.” (To be sure,
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as soon as the November 1894 election results had been tallied, Benjamin Duke wrote his brother James B. Duke at ATC headquarters in New York that North Carolina Republican Congressman Thomas Settle had told him that “if the Legislature had a majority of Republicans and Populists, as he now thinks they have, we would...be protected....”)²⁶  Needing investors in order to finance an expansion of his Populist newspaper (The Caucasian), which Butler regarded as crucial for mobilizing support for and strengthening the party, in addition to recently elected members of his own party, he approached Republicans to subscribe to stock. The Dukes (and ATC) were not only Republicans, ⁷⁷ but deeply involved in staffing and running the party organization in Durham County⁷⁸ as well as financing the state party’s election campaigns—a fact that the Democratic party press sarcastically and demagogically highlighted. In reporting, for example, that Washington Duke, the founder of the company that eventually became ATC, had contributed $10,000 to the state Republican campaign fund, one Democratic paper asserted that: “The Dukes have no use for [Populist] Mr. [Tom] Watson or the Democratic party. Both are opposed to trusts, of which the American Tobacco Company is one of the most gigantic. Ten thousand dollars is a small consideration compared with the large sums which the Tobacco Trust has taken from the tobacco raisers by reason of this combine against the product of their labor.”⁷⁹  In 1898, the state’s leading Democratic and largest circulation newspaper, the Raleigh News and Observer, delighted in suggesting that the Durham County Republican Party and ATC were “one and the same,” headlining and subheading its article on the Durham County Republican convention: “A.T.C. Convention.  The Tobacco Trust Selects Republican Delegates. ... B. L. Duke Served as Chairman and Employees of the American Tobacco Company Made

²⁶B. N. Duke to J. B. Duke (Nov. 10, 1894), in BNDP, Box 65, RBMSCL. Settle, as leader of the Republican Party in North Carolina, one of the strongest in the South, had formed the fusion agreement with Butler. Edward Ayers, The Promise of the New South: Life After Reconstruction 290 (1993 [1992]).

²⁷The Dukes, according to James Hunt, Marion Butler and American Populism 75 (2003), were attracted to the Republican Party “by its high tariff stand and conservative financial program.” To be sure, Washington Duke, the founder of the company and father of James B. and Benjamin N. Duke, had joined the Republican Party in 1868 long before he “succeeded in becoming the head of the greatest cigarette factory the sun shines on,” http://library.duke.edu/digitalcollections/rbmscl/dukew/inv/; “Durham, the Magic Queen of the Golden Belt,” N&O, Apr. 5, 1896 (9:1) (quote).


Delegates.\textsuperscript{80}

The quid pro quo for Duke’s channeling some of ATC’s monopoly profits to the Populist \textit{Caucasian}\textsuperscript{81} was, in the words of Butler’s biographer, his desire for “a genial relationship between his business interests and those in power.”\textsuperscript{82} As the 1895 legislative session got underway,

Duke exercised some influence. His lobbyist, James E. Stagg, pressured legislators not to pass any labor bills, such as those which might limit hours or child labor. Although such bills had not been contemplated by the Populist platform, none were passed. Duke also wanted no new taxes. The evidence that Butler helped Duke on this issue is uncertain. The legislature did not raise tax rates on banks, which the Dukes owned. On the other hand, it enacted a graduated tax on the capital stock of corporations besides banks, railroads, and insurance companies. It is doubtful this bill could have passed without Butler’s knowledge or support. Duke also opposed a new antitrust law, and here Butler’s role is clearest. Duke...thought it made any partnership or corporation illegal and would “utterly destroy business.” In fact Duke believed the motivation for the bill was not antimonopoly reform but intercorporate warfare sponsored by rival tobacco magnate R. J. Reynolds.... Duke met with Butler about the problem.... Butler advised a quiet fight against the...bill, which never came to a vote.\textsuperscript{83}


\textsuperscript{81}In April 1896, after Republicans and Populists’ failure to reach agreement had prompted Settle to conclude that “[e]lectoral fusion is [as] dead as Julius Caesar,” he urged Benjamin Duke not to “put any more money in the Caucasian” because its policy would become “more hostile to the Republican party than it has been.” Thomas Settle to B. N. Duke (Apr. 18, 1896), in BNDP, Box 7, RBMSCL.

\textsuperscript{82}James Hunt, \textit{Marion Butler and American Populism} 80 (2003).

\textsuperscript{83}James Hunt, \textit{Marion Butler and American Populism} 80 (2003). Stagg “impressed” on William Worth, a Populist leader and state treasurer, that Duke’s cotton mills were “working only eleven hours and not employing any children under 12 years of age,” and that no legislation was needed “inasmuch as the employees had not made any complaint and were well satisfied with their treatment....” In rebuttal of Worth’s argument that legislation was needed because some mills worked much longer hours, Stagg insisted that the labor market knew best: “in the course of time and through natural processes the mills...would have to come to what you [Benjamin Duke] and the majority were doing, as it would be necessary to hold their labor, and it would be better to reach the results in this way than by legislation, even the agitation of which is always damaging to a State.” J. E. Stagg to Ben [N. Duke] at 1-2 (Feb. 1, 1895), in BNDP, Box 5, RBMSCL. Duke, in other words, feared the possible consequences of opening the Pandora’s box of hours regulation
The especially insidious aspect of the relationship between Butler and Duke that suggested that the Populist upsurge might not augur strict state scrutiny of the Tobacco Trust and its cigarettes was not so much the outright bribery, but that the “maneuvers” with Duke represented the “most dramatic application” of “Butler’s efforts to advance a ‘cautious’ reform image....” Symptomatically, other Populist leaders agreed with the substance of at least some of Duke’s legislative desiderata. As a result, it was unclear whether Populist rhetoric during the 1894 campaign about ending industrialists’ power was sufficiently close to legislative implementation that Duke really had to devote resources to sparing ATC such reforms.

Such an account of Fusionists’ fecklessness during the 1895 session was consistent with the partisan Democratic editorial in the *News and Observer* attacking the legislature for having killed numerous (largely Democratic) antitrust bills:

There was perhaps never a Legislature more subservient to trusts and monopolists than was that which just adjourned. And the chief spokesman and defender of all forms of trust was [Populist] Senator Mewborne, the president of the State Farmers’ Alliance.

During the campaign two years ago Mr. D. H. Gill, the Populist clerk of court of Vance county, very intemperately and very wickedly said that he would like to head a company to march to Durham and hang every member of the American Tobacco Company. It has to be observed, however, that Mr. Gill has made no such statement since the Legislature met, and now, if he should organize his company to march anywhere, and it were composed of Fusionists, they would be marching under the banner of the trusts and not against them. ...

Early in the session...Mr Hileman, Chairman of the Finance Committee and the Populist leader on the floor of the House, said he was going to reduce taxation on the people and put it on the rich corporations and trusts, and to that end he would incorporate in the Revenue Act a tax of ten cents a thousand and a tax on other manufactured tobaccos. The bill with these taxes passed the House, but when it reached the Senate, [Populist] Mr. Mewborne, that great and distinguished champion of the “plebeians,”...protested against the heavy tax. ... He plead [sic] for the manufacturers almost with tears in his eyes. His plea was in great contrast to his campaign utterances, but his argument prevailed with his fellow Fusionists and the tax was reduced one-half.

When the bill came up in the House again for concurrence in the Senate amendment,

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Mr. Hileman moved to concur.\footnote{86}

Even more directly relevant to the present context than the cigarette tax measure was another bill that Stagg—whose father was Washington Duke’s nephew and who was married to Benjamin N. Duke and James B. Duke’s sister\footnote{87}—was also trying to kill. On January 28, in the Senate—whose rules prohibited smoking in the chamber during sessions\footnote{88}—Senator James Montraville Moody, a “leading Republican,”\footnote{89} introduced S.B. 201, which was modestly “to be entitled an act to regulate the sale of cigarettes in the State of North Carolina,”\footnote{90} but in reality was designed to prevent their sale.\footnote{91} Section 1 made it unlawful for any firm or individual “directly or indirectly to keep for sale, offer for sale, barter or give away...the article manufactured from tobacco and paper, known and commonly called Cigarettes, either in package, singly, or in any other manner, whatever to dispose of the same.” Section 2 made it the duty of every solicitor, county or city attorney, on proper information that the act had been violated, to prosecute the offender, who, on conviction, was required to pay a fine ranging between $200 and $500 (and between $500 and $1,000 for subsequent offenses), or to be imprisoned, in the court’s discretion, or both.\footnote{92}
Moody (1858-1903) was a lawyer who had been elected mayor of his county seat in 1884 and to a state solicitorship in 1886 and had run unsuccessfully as the Republican candidate for lieutenant general in 1892 before being elected to the state senate in 1894. In his lobbying report to Benjamin Duke written on February 1, three days after Moody had filed the cigarette bill, Stagg—who was in his own right a “wealthy and prominent Durham citizen,” whom Benjamin Duke called “[m]y private secretary and confidential friend”—devoted considerable attention to Moody’s lack of commitment to his own bill on working hours in cotton factories, which the Senate Judiciary Committee had discussed and reported unfavorably on February 1: “You will note that Moody himself voted in the Committee to report his own bill unfavorably, and I am satisfied he will act in the same way towards the cigarette bill. I was present at the Committee meeting this afternoon, and watched with deep interest Moody’s action in relation to his own bill, ‘The Employment of Labor,’ and I am clearly of the opinion that he stands ready to undo anything that anybody has requested him to do.” In order to take advantage of Moody’s chameleonizing, Stagg related that: “Upon Col. [Alexander Boyd] Andrews’ return to-morrow, Miller will interest him in the cigarette bill matter and get him to see Moody, and further, to tell Moody not to consider it necessary to introduce every bill that is brought to him with a request. [in handwriting] This Private.”

96 Stagg had read Moody

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93 Memorial Addressed on the Life and Character of James M. Moody (Late a Representative from North Carolina), Delivered in the House of Representatives and Senate 43, 53 (57th Cong., 2d Sess. 1903); W. C. Allen, Centennial of Haywood County and Its County Seat, Waynesville, N.C. 71-72 (1908). Moody died during his first term as a congressman.

94 From 1893 until 1895 Stagg was private secretary to his cousin Benjamin Duke of the American Tobacco Company fame. In 1895 Stagg became involved with the Durham and Southern Railway, serving as vice-president and general manager. Stagg’s other business activities in Durham included directorships of the Erwin Cotton Mill, the Pearl Cotton Mill, the Fidelity Bank, and the Union Station Company.” http://www.waymarking.com/waymarks/WM928 (visited Mar. 26, 2010). In light of Stagg’s familial position, the fact that W. W. Fuller, ATC’s in-house lawyer in New York City, addressed the company’s lobbyist in North Carolina as if he were an errand boy hints at Fuller’s power. E.g., W. W. Fuller to J. E. Stagg, Jan. 8, 1895, in BNDP, Box 5 (RBMSCL, Duke University).

95 Letter from B. N. Duke to Marion Butler (Feb. 14, 1895), in BNDP, Box 65 (Letterbook), RBMSCL, Duke University.

96 J. E. Stagg to Ben [N. Duke] at 2-3 (Feb. 1, 1895), in BNDP, Box 5, RBMSCL, Duke University. Unfortunately, Stagg did not identify who had made the request to Moody. Andrews was a leading railroad executive, on whose Southern Railway Co.
accurately: a month later, on behalf of the Senate Judiciary Committee, Moody unfavorably reported his own cigarette bill (“This bill is recommended to not pass”), which the full Senate then tabled.97

The Tobacco Trust may have handily gotten rid of the cigarette sales ban bill in 1895 by surreptitiously persuading its author to double-cross its requester by aborting it, but on January 11 of the 1897 legislative session, a radical bill (H.B. 52) was introduced in the House—which the Republicans and Populists controlled with 54 and 39 seats, respectively, against 26 Democrats and 1 Silverite98—titled, “An Act to prohibit the manufacture and sale of Cigarettes in North Carolina.” It read as follows:

97S.B. 201 (handwritten and signed annotation in bill file), A Bill to Be Entitled “An act to regulate the sale of cigarettes in the State of North Carolina,” §§ 1-2, in General Assembly, Session Records, Jan-Mar 1895, Senate Bill 201, Box 13 (NCSA); Journal of the Senate of the General Assembly of the State of North Carolina at Its Session of 1895, at 475, 502 (Mar. 6) (1895). To judge by his position on a bill to regulate the sale of liquor, Moody was an anti-prohibitionist, who did “not believe sobriety could be secured by legislation. He believed that as long as the appetite of man was the same as it is now, man was going to drink. ... He said he was not a sentimentalist. He wanted only practical legislation. He said the question was a financial one as well as a social one, and that the revenue from the whiskey traffic to the city of Asheville was $21,000 a year, and that city could not afford to cut off this income.” “The Tablers Tied,” N&O, Feb. 20, 1895 (2:2-6 at 2).

98D. Mangum, Biographical Sketches of the Members of the Legislature of North Carolina, Session, 1897, at 12-14 (1897).
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Section, 1-That from and after the ratification of this Act, it shall be unlawful for any person, firm or corporation, to manufacture, sell or give away, any cigarettes of any kind or character whatsoever called, in any cover, whether paper or otherwise, or any thing as a substitute therefor, in any form, in the State of North Carolina, or for any person corporation or firm, to sell or give away the same, in this State, whether manufactured in this state or elsewhere.

Section, 2-That any person firm or corporation, who shall violate the provisions of this act, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined or imprisoned, or both in the discretion of the court.

Section, 3-That this act shall be in force from and after its ratification.99

Republican Representative Thomas H. Sutton (1845-1913), a lawyer from Fayetteville representing Cumberland County,100 introduced H.B. 52, which was apparently identical to S.B. 996.101 Sutton may have revealed his direct motivation on the House floor for advocating a ban when “[h]e grew pathetic as he told of the death of his own son from cigarette smoking.”102 But interest in prohibiting cigarette sales and manufacture may have been part of a more extensive prohibitory agenda since he also presented to the House a petition for relief from whiskey, morphine, and other narcotics.103 H.B. 52 was initially referred to the Judiciary Committee (of which Sutton was a member),104 which recommended that it not pass.105 It was then transferred to the Health


100Sutton was a member of the legislature in 1889, 1891, and 1897. A Manual of North Carolina Issued by the North Carolina Historical Commission for the Use of the General Assembly Session 1913, at 579 (R. Connor ed. 1913). In 1900 the census of population returned Sutton as living with his wife, children and two black servants.

101It is unclear who introduced S.B. 996 and when it was introduced because the bill is missing from the North Carolina State Archives. Earl Ijames, Archivist, N.C. Dept. of Cultural Resources, Office of Archives and History to Marc Linder (July 2006). On the preprinted bill sleeve, with lines for a House and a Senate bill, S.B. 996 was entered next to H.B. 52.


103Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 481 (1897) (Feb. 13). That Sutton was no reactionary is suggested by his motion to amend a bill (H.B. 141) to protect female clerks by requiring owners to furnish fans. Id. at 167 (Jan. 26).


105The House Journal appears to lack this reference. Written by hand on the bill
Committee\textsuperscript{106} (of which Sutton was also a member)\textsuperscript{107} On February 5 the Health Committee chairman, Republican Dr. Abner Alexander, reported favorably on the bill “to prohibit the manufacture and sale of cigarettes in this State” as amended by the committee\textsuperscript{108} . The committee’s action, according to a handwritten notation on the bill sleeve signed by Alexander, was to: “Amend by striking out out [sic] the word Manufacture in second line and Report favorably.”\textsuperscript{109} In other words, though the Trust’s large in-state industrial capital investment was saved, the universal ban on in-state sales survived. The same day, Populist and farmer\textsuperscript{110} Young C. Morton, introduced a joint resolution “in regard to the sale of cigarettes,”\textsuperscript{111} which the Raleigh News and Observer deemed the work of a “humorist”:

That it is expedient that some method be devised for the protection of the youth of our land against the blighting influence of the deadly cigarette and its trust.

Therefore the Judiciary committee of this House be instructed to prepare and present a bill establishing a general dispensary system for the State somewhat on the lines of the Waynesville Dispensary Act, though more intelligibly constructed, regulating the cigarette traffic and consumption imposing fines and penalties such penalties to the State [sic] such fines to Trinity College and absolutely prohibiting the sale of cigarettes to any male or female under two years old and the exposure of obscene pictures in cigarette packages.\textsuperscript{112}

\textsuperscript{106} The reason for this transfer, which also appears not to have been recorded in the Journal, is unclear. An undated notation of the transfer appears on the bill sleeve signed by the House Clerk.

\textsuperscript{107} Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 1232 (1897).

\textsuperscript{108} Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 333 (1897) (Feb. 5).

\textsuperscript{109} H.B. 52, Jan. 11, 1897 (typescript), in NCSA, General Assembly, Session Records, 1897 Box 1, Folder HB 26-53.

\textsuperscript{110} Twelfth Census of the United States, Schedule No. 1—Population, Series T623, Roll 1213, Page 132 (1900).

\textsuperscript{111} Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 341 (1897) (Feb. 5) (H.J. Res 698, by Young C. Morton, of Rockingham, Richmond County).

\textsuperscript{112} “For a Cigarette Dispensary,” N&O, Feb. 6, 1897 (1:3). The Waynesville Dispensary was an experiment in local government liquor monopoly begun in 1895.
A week later he introduced a bill “to regulate the sale of cigarettes in North Carolina,” though since no copy has been preserved at the North Carolina State Archives, its wording is unknown, though the press reported that it proposed to tax cigarettes at 15 cents a package—presumably a prohibitory amount since the price of a package of 10 cigarettes generally was only five cents.

On February 20, the House took up H.B. 52 by special order. A rather extensive report of the debate in the Democratic and virulently anti-black News and Observer has preserved an unusually detailed account of the substance of the partisans’ arguments. Sutton himself “spoke forcibly and with intense earnestness in support of the bill, and said the committee had stricken out the part forbidding the manufacture; that this was a compromise, the best that could be done....” Sutton went on to read aloud a letter from a doctor in Raleigh “showing the frightful effects of cigarette smoking and said this terrible vice cost the lives of 200 persons in North Carolina annually”; he cited another doctor who had told him about people whom cigarette smoking had “made insane....” He then offered the aforementioned personal remarks about his own son. Republican Spencer Blackburn, a lawyer, opposed to any prohibiting legislation, argued that the bill would hurt tobacco growers, while another Republican, post office worker Robert Hancock, offered an amendment to prohibit the manufacture of smoking tobacco and cigarette paper, thus in effect restoring Sutton’s original bill.

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113 Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 483 (1897) (Feb. 13) (H.B. 971, by Young C. Morton, of Rockingham, Richmond County).
114 Earl Ijames, Archivist, N.C. Dept. of Cultural Resources, Office of Archives and History to Marc Linder (July 2006).
116 While the legislature was in session in 1895, one Raleigh wholesale/retail grocer repeatedly advertised a close-out sale of 500 for 50 cents. E.g., N&O, Jan. 15, 1895 (8:5). Another store thoughtfully made a “specialty” of selling 20 cigarettes for five cents “for the benefit of the present Legislature.” “Legislature, Take Notice,” N&O, Jan. 12, 1895 (2:4). In the latter part of 1895 ATC sold a great many packages of 20 at five cents, purportedly “to meet the competition of other manufacturers....” “The Dukes Behind on Orders,” N&O, Oct. 6, 1895 (6:2).
lawyer Virgil Lusk of Asheville—U.S. Attorney for the Western District of North Carolina in the 1870s and mayor of Asheville in 1880s.\textsuperscript{119} Lusk had antagonized Stagg and Duke in 1895 by introducing an hours bill identical to Moody’s\textsuperscript{120}—then offered the crucial diluting transformation in the form of a substitute for the bill which converted the latter into a no-sales-to-minors measure. Edgar Eddins, a teacher and Democrat, after revealing that “the cigarette interest had a lobby here working against this bill,” voiced support for Sutton’s original bill, “earnestly” conceptualizing the question in a manner that would still be valid a century later: “which are worth more to the State—her boys or her cigarette manufacturers[?]” Sutton then called the previous question, bringing Lusk’s substitute up for a vote.\textsuperscript{121} Numerous members explained their votes. Democrat A. Duffy would vote No because he “did not believe the State had a right to enact such a law.” Another Democrat, T. Parker, said that “the ineffective pleadings of his wife to their son to stop the use of cigarettes moved him” to vote Yes. Populist J. Randolph was greeted with applause when he declared that as a tobacco raiser he was “willing and desirous” to vote Yes, just as he would support a ban on the sale of opium and whiskey. Republican J. McCrary confessed that the fact that smoking cigarettes had “nearly ruined him” prompted his Yes vote. Democrat Walter Murphy and Populist C. Johnson opposed the bill “as interfering with manufacturers and the farming interests.”\textsuperscript{122} The watered down Sutton-Lusk bill then passed its second reading by a vote of 48 to 34.\textsuperscript{123}

In proceeding immediately to the third and final reading, representatives again shed light on their reasons for voting. The owner of a “large and successful mercantile business,”\textsuperscript{124} Democrat John Cunningham, “in opposing the bill, said that while he favored the protection of the youth and also opposed trusts, yet he could not favor prohibiting legislation or strike of [sic; should be at?] the

\textsuperscript{119}Collins and Goodwin, Biographical Sketches of the Members of the General Assembly of North Carolina, 1895, at 28 (1895).
\textsuperscript{120}J. E. Stagg to Ben [N. Duke] at 2-3 (Feb. 1, 1895), in BNDP, Box 5, RBMSCL.
\textsuperscript{121}“Fellow Servant Law,” N&O, Feb. 21, 1897 (6:1-5 at 2). See also “Minors Cannot Smoke,” FO, Feb. 22, 1897 (3:2).
\textsuperscript{122}“Fellow Servant Law,” N&O, Feb. 21, 1897 (6:1-5 at 2). Nevertheless, Johnson voted for the bill on second and third reading.
\textsuperscript{123}Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 658-59 (1897) (Feb. 20).
\textsuperscript{124}D. Mangum, Biographical Sketches of the Members of the Legislature of North Carolina, Session, 1897, at 22 (1897).
manufacturing or farming interests.” Hancock, who switched his vote from Yes to No, regarded the bill as “a strike at one of the most important industries of North Carolina....” Lusk insisted that prohibiting the manufacturer or anyone else from selling to minors was not a strike at manufacture. Republican J. Bryan, who switched his vote from No to Yes, reported that a nine-year-old girl in his county had died from cigarette smoking: with cigarette use filling up the insane asylums, the interests of humanity required this evil to be stopped. Democrat A. Walters explained parents’ requests as causing him to vote No. McCrory took the floor again to proclaim that “all the christian people of the State would endorse” passage of a bill that would put an end to the beclouding of boys’ minds and belittling of their bodies. Populist Dr. J. Person bluntly charged that “any manufacturing interest whose existence depended upon the making of idiots should go out of existence.”

After this “considerable discussion” and “quite a wrangle,” Sutton’s amended bill passed its third reading by a vote of 66 to 28. The votes revealed a remarkable pattern. On second reading a significant majority of Republicans (23 to 16) voted against the bill, whereas Populists (18 to 4) and Democrats (13 to 7) voted strongly in favor. A similar configuration marked the third reading: lopsided majorities among Populists (23 to 4) and Democrats (18 to 4), but only a slim majority among Republicans (24 to 20). To be sure, it might be argued that the vote was not an accurate reflection of anti-cigarette sentiment because some Republican No-votes may have represented a protest against the dilution of the original bill, while, conversely, some Democrats may have voted Yes in order to insure the defeat of that more radical bill. However, without gainsaying the validity of the latter claim, the fact that Sutton and Eddins both voted Yes twice, while Blackburn, the principled opponent, twice voted No, suggests that a rift

125“Fellow Servant Law,” N&O, Feb. 21, 1897 (6:1-5 at 3). Curiously, Cunningham then switched his vote from No to Yes from the second to third reading.
127“The Legislature,” Landmark (Statesville), Feb. 23, 1897 (2:3-4 at 4).
129On third reading, all three blacks in the House, Republicans William Crews, John Howe, and James Young, voted for the bill; on the second reading, Young had voted against, while Howe had not voted. On the identification of the black members, see Helen Edmonds, The Negro and Fusion Politics in North Carolina, 1894-1901, at 59, 65 n.64 (1951).
130Journal of the House of Representatives of the General Assembly of the State of North Carolina at Its Session of 1897, at 658-60 (1897) (Feb.20). The one Silverite voted Yes both times.
ran through the Republican party between cigarette prohibitionists and tobacco industry advocates.

The substitute read as follows:

Section 1  That after the ratification of this act, it shall be unlawful for any one to sell, or give to any minor any cigarettes; and it shall be unlawful for any minor to use or smoke cigarettes; and any minor found so smoking cigarettes shall be a competent witness to prove from whom he received such cigarettes, and the evidence so given shall not be used against such minor in any prosecution against such minor for violation of this act. 131

The bill then made it a misdemeanor to sell or give cigarettes to a minor or for a minor to smoke, the punishment being a maximum $10 fine or 30-day imprisonment. 132 Why the House decided to downgrade the general anti-cigarette sales bill into a merely somewhat stronger version of the six-year-old no-sales-to-minors law and why Sutton acquiesced in this transformation are unclear.

The next day the bill was sent to the Senate 133—the which the Populists (25) and Republicans (18) controlled against 7 Democrats 134—where it was referred to the Judiciary Committee, which reported it together with its pair, S.B. 996, unfavorably a few days later. 135 Already on January 14, Republican lawyer George H. Smathers introduced S.B. 75 to amend the aforementioned 1891 no-sales-to-minors act by expanding the prohibition to encompass chewing tobacco and all tobacco in any form. 136 Following an unfavorable report by the Judiciary Committee, 137 the Senate took up the bill on January 23. Republican Senator W. T. McCarthy made what was perhaps a unique race- and class-based contribution

131 H.B. 52, §2 (undated), in NCSA, General Assembly, Session Records, 1897 Box 1, Folder HB 26-53. The State Archives has two handwritten versions one of which appears to be a draft. An almost identical version appeared in “The Legislature,” Landmark (Statesville), Feb. 23, 1897 (2:3-4 at 4).

132 H.B. 52, § 2 (undated), in NCSA, General Assembly, Session Records, 1897 Box 1, Folder HB 26-53.


134 D. Mangum, Biographical Sketches of the Members of the Legislature of North Carolina, Session, 1897, at 11-12 (1897).


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to state legislative debates on tobacco control by urging that “colored boys in Eastern Northern Carolina could by using tobacco do without dinner, and tobacco had become a necessity.” In response to a question from another Republican senator as to whether he thought the law could be enforced, Smathers conceded that “[n]o such laws could be fully enforced,” but insisted that it would do good and was a step in the right direction. The colleague appeared unpersuaded, informing the Senate that “people sent their children to stores with baskets of eggs to be swapped off for snuff and tobacco, and the bill would work a hardship to [sic] them.” Populist Senator Abram Moye’s interjection that passing a law that could not be enforced did harm in its own right prompted Smathers to express his willingness to strike out chewing tobacco from the bill. After a motion to table the bill had lost by a vote of 22 to 15, Democrat J. Frank Ray, who had seen little boys on the street smoking cigarettes, offered a substitute repealing the 1891 statute on the grounds that it had not, so far as he knew, been enforced. Smathers replied that it had been enforced in Durham, adding that the trouble was that boys did not buy cigarettes, but, rather, smoking tobacco and made their own, but Ray correctly pointed out that the existing law already prohibited the sale of tobacco from which cigarettes could be made. Having painted himself into a legal corner, Smathers had recourse instead to pseudo-science, recounting that he “knew of many boys who had lost their minds by smoking cigarettes.” After Moye had moved to amend by striking out snuff, chewing tobacco, and cigars, the Senate referred the bill, substitute, and amendment to the Judiciary Committee, which once again reported the bill unfavorably. On the motion of its sponsor, Smathers, the Senate then tabled S.B. 75.

In the meantime, on February 1 yet another bill was introduced in the Senate, by request, to prohibit the sale of cigarettes; at the same time the same senator also introduced by request a bill to prohibit the manufacture and sale of liquor. This anti-cigarette bill soon received an unfavorable committee report; likewise, the Senate voted to table H.B. 52/S. B. 996 on March 6, thus ending

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139 *Journal of the Senate of the General Assembly of the State of North Carolina at Its Session of 1897*, at 324 (1897) (Feb. 15).
141 *Journal of the Senate of the General Assembly of the State of North Carolina at Its Session of 1897*, at 302 (1897) (Feb. 13); S.B. 293 also received an unfavorable report. *Id.* at 299.
142 *Journal of the Senate of the General Assembly of the State of North Carolina at Its*
the first major initiative to prohibit cigarettes deep in the heart of Duke-land.

This setback in no way stilled the fury with which many in North Carolina reacted to the Tobacco Trust. An editorial in the Democratic Reidsville Weekly—a paper published in a town of whose economy tobacco was the mainstay and whose history was tightly interwoven with ATC’s—several months after the defeat of H.B. 52 revealed the depth of the loathing and abomination generated by the Trust and its cigarettes even and especially on their home ground:

In all the history of the trusts there has never been such a greedy, grasping, conscienceless combination as the American Tobacco Company. Its greed is insatiable. As a rule trusts are formed to prey upon the consumer, and if the Duke combination raised the price of cigarettes it would not be an unmixed evil, since the consumption of the deadly poison would be lessened and many of its victims might get a new hold on life as a result of their inability to buy cigarettes. The Duke trust differs from all others in not being content to rob the consumer, but in reaching out after the producer of its raw material. ... If the Dukes thought the sallow, sickly, half-dead smokers would use as many cigarettes at a higher price, they would not hesitate to raise it.

The Duke combination surpasses all others in hypocrisy. Its members make great pretensions to piety while sending thousands of boys to premature graves and robbing the farmers of the fruits of their labor. [W]ho, unless it be those who are feeding out of their hands, can have any respect for the sniveling hypocrites and driveling cowards who employ shrewd lawyers to draw up plans by which they may steal without getting in the penitentiary, and seek to quiet the public conscience by throwing a bone occasionally to churches, colleges, hospitals, etc.? 144

With regard to those feeding out of the hands of the Tobacco Trust, Walter Clark, a very unorthodox justice (and future longtime chief justice) of the North Carolina Supreme Court who was also a trustee of the college in question, stated in 1898 that “in spite of a resolution of the [Methodist] Western North Carolina Conference in 1897, which conference is a half owner of Trinity [College, predecessor to Duke University], condemning the manufacture, sale and use of cigarettes, the college is a partner in the cigarette business, having $130,000 (more than one half of its endowment) of the stock of the cigarette trust.” 145

Session of 1897, at 765 (1897) (Mar. 6).


144 “The Cigarette Trust the Worst of All,” Reidsville Weekly (reprinted in Landmark (Statesville), July 6, 1897 (4:2)).

145 “Judge Clark’s Side of It,” CO (reprinted in Landmark (Statesville), Sept. 6, 1898 (2:5)). See also “Judge Clark’s Speech,” N&O, Sept. 4, 1898 (1:5-6, 10:1-6); “A Modest
Ironically, several months later, “The Cigarettes Won” at the Methodist Conference when Trinity’s president, John Kilgo, a philosophy professor, announced that $100,000 of the college’s endowment, “which had been in cigarette stock, had been changed into ‘clean cash’ (that was an expressive term by Dr. Kilgo and many thought it might mean that cigarette stock was not clean).”

In addition, the Methodist Conference reversed the previous year’s resolution denouncing cigarettes, which had “never pleased the Dukes who thought it was aimed at them.” In spite of a warning that such a reversal “would put the Conference in the attitude of being bought off by large donations, thus shutting the mouths of the Methodist ministry,” the Conference voted 65 to 62 against the resolution, prompting one minister to proclaim: “‘This Conference...goes on record in favor of cigarettes.””

It is unclear what role, if any, the Woman’s Christian Temperance Union played in the legislative campaign to ban cigarettes. North Carolina was one of the last states in which a WCTU state organization was established (1883); its membership did not begin to grow rapidly until 1896, reaching 1,500 by 1898. An out-of-state newspaper reported that “the ‘white-ribboners’ of North Carolina can designate as ‘our bill’” the no-sales-to-minors measure that passed the House, but otherwise little evidence demonstrates an important or any role for the WCTU in lobbying for a general anti-cigarette law. To judge by the reports presented at its annual conventions, the organization was focused exclusively on legislation limited to young people. At its fourteenth annual convention in June 1896, the plan of work report of the WCTU of North Carolina recommended that the local groups “endeavor to strengthen public sentiment as regards the enforcement of the [existing no-sales-to-minors] cigarette law, using every means in their power to protect the youth of the land from the pernicious habit of cigarette smoking. As one means of accomplishing this object, we suggest that effort be made to organize ‘Cigarette Clubs’ in schools, thereby pledging the boys themselves to abstain from the ruinous habit.”

Legislative Campaign to Ban Cigarettes in North Carolina, 1893-1898

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148 “Maids and Matrons,” MJ, Mar. 17, 1897 (5:2-3 at 3). The article erroneously stated that the bill had passed the senate rather than the house.
149 Minutes of the Fourteenth Annual Convention of the Woman’s Christian Temperance Union, p. 395.
later, after the legislature had adjourned without having enacted any anti-cigarette bill, the state WCTU failed even to mention the battle over Sutton’s bill. In addition to a repetition of the aforementioned plan of work recommendation,\textsuperscript{150} the convention heard a president’s address that did not even allude to that legislative struggle, but merely stressed that “children must be preempted for total abstinence by sedulously observing that our Scientific Temperance and Cigarette Laws are enforced....”\textsuperscript{151} Most importantly, the two and a half page report on legislation, while conceding that the work had been a “failure” (in part because it “was not attended to as it should have been” by the WCTU), did not even allude to the cigarette bill among the welter of other failed bills favored by the WCTU on such subjects as a reformatory, liquor, and prostitution.\textsuperscript{152} At the convention of 1898—in between regular legislative sessions—the plan of work report modified its exhortation slightly to recommend that local groups “arouse the public conscience...to the necessity of strenuous enforcement of the state law forbidding the sale or gift of cigarettes to boys under 17....”\textsuperscript{153} Instead of recommending innovative legislation, President Mary Cartland merely mentioned that 42 states had already prohibited sales to minors. After declaring that “through the deadly narcotic found” in it, the cigarette was “[n]ot second to strong drinks itself,” she disseminated misinformation by asserting that “every other branch of the great tobacco business” was overshadowed by the “‘coffin nails,’” 750,000,000 of which were made annually (when in fact output was about six times greater).\textsuperscript{154} In her presidential address in 1899—a year in which no legislative struggle over cigarette regulation took place—Cartland at least corrected her factual gaffe (while committing another one) and attacked the Tobacco Trust:

The tobacco habit is fastening itself upon the youth of to-day with fearful rapidity. The love of lucre blinds the eye and destroys the sensibility of right in both manufacturer

\textit{Temperance Union of North Carolina} 83 (1896).
\textsuperscript{150}\textit{Minutes of the Fifteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina} 27 (1897).
\textsuperscript{151}\textit{Minutes of the Fifteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina} 34 (1897).
\textsuperscript{152}\textit{Minutes of the Fifteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina} 83, 84 (1897).
\textsuperscript{153}\textit{Minutes of the Sixteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina} 23 (1898).
\textsuperscript{154}\textit{Minutes of the Sixteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina} 37 (1898).
Rather than urging more far-reaching legislation, Cartland merely expressed her belief that the time was “approaching when Christian people will regard with abhorrence this wasteful [sic] and injurious habit.”

Precisely because the Republican-Populist Fusionists were able to enact “an impressive reform program” while they held a majority in the legislature, the capitalist class as represented by railroads, manufacturers, and bankers channeled considerable funds to the Democrats to help secure control of the next legislature. The Fusionists also contributed to their own defeat by permitting disagreements between their parties’ national programs to split them as well as by capitulating to some extent to Democrats’ white supremacist politics; the Populists’ attitude in particular was fundamentally anti-black. The Democrats’ electoral victory

155Minutes of the Seventeenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 35 (1899). In fact, the increase from 1892 to 1897 was only 50 percent.

156Minutes of the Seventeenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 35 (1899).


158Helen Edmonds, The Negro and Fusion Politics in North Carolina, 1894-1901, at 136, 143 (1951). The Populist State Platform adopted on Apr. 18, 1900 expressly stated that the “People’s Party is and has always been more distinctly than any other party in North Carolina a white man’s party” and proposed that the North Carolina constitution be amended to disqualify from officeholding “All negroes and all persons of negro descent to the third generation inclusive.” The News and Observer, The North Carolina Year Book: 1901, at 62, 63 (n.d.).
in 1898, powerfully reinforced by the white pogrom perpetrated in black-majority Wilmington two days after that election, the restrictive suffrage legislation that they passed in 1899, and the disenfranchisement of blacks effectuated by constitutional amendment in 1900 enabled the Democratic party to give the “capitalistic elements the bridle by which to check progressive legislation. ... Manufacturing, big business, and the railroad interests were safely in the saddle. . . .”

Yet, in spite of the recapture of the legislature by the party led by capitalist forces, the anti-cigarette movement undertook one more major initiative to enact a prohibitory law in 1901, when Democrats controlled both houses by huge majorities: in the Senate 39 Democrats stood against 8 Republicans and 3 Populists, while in the House, 101 Democrats faced only 17 Republicans and 2 Populists. In the event, the advocates and opponents of cigarette control, as far as the legislative journals and press accounts of the debates reveal, came exclusively from the ranks of the Democrats.

This time the bill (S.B. 91) was introduced in the Senate—which was operating under the rule that “No smoking shall be allowed within the Senate Chamber during the sessions”—on January 16, by Joseph Addison Brown, who was chairman of the Committee on Propositions and Grievances, to which it was referred. Although he self-described at the Census of Population of 1900 as a “lumberman” living in the small south central town of Chadbourn,
Brown’s business undertakings were more extensive in scope: “Strawberry culture began in Chadbourn in 1895 when Joseph Addison Brown, merchant farmer, and North Carolina State Senator, bought and/or developed thousands of acres of timber lands of the Chadbourn area for productive farm lands.” Between 1895 and 1905 “Chadbourn was the biggest strawberry market in the world.” After a lack of railway cars in 1905 caused the destruction of that year’s crop, farmers’ enthusiasm for the crop declined somewhat, and by the end of World War I tobacco became Columbus county’s leading crop. Brown (1862-1937), a Democrat—indeed, the chairman of his Democratic county committee—who served numerous terms in the North Carolina Senate between 1893 and the 1920s, was a member of the national executive committee of the Southern Cotton Association and, interestingly, during the Depression of the early 1930s “crusaded for the cause of the tobacco farmer and was a member of the tobacco advisory board of the southern tobacco growing states at the time of his death.” The only apparent biographical links to his anti-cigarette initiative are


*Columbus County North Carolina: Recollections and Records* 207-11 (Ann Little eds. 1980).


that Brown “was and ardent prohibitionist all his life” and that he taught Presbyterian church Sunday school to “two generations of young men.”

As introduced, Brown’s bill, which, according to the News and Observer, “caused a smile over the Senate,” read as follows:

Section 1. That it shall be a misdemeanor for any person, firm or corporation, to sell, offer to sell, or bring into the State for the purpose of selling, giving away or otherwise disposing of any cigaretts, cigaret paper or substitute for the same; and a violation of this Act shall be punishable by a fine or imprisonment or both, at the discretion of the Court.

Section 2. That this Act shall be in force from and after its ratification July 1st 1901.

Apart from the spelling of “cigarett,” the first clause was almost word for word identical with the statute enacted by the Tennessee legislature in 1897, upheld by the Tennessee and United States Supreme Court in 1898 and 1900, respectively, and reenacted by the Tennessee legislature a few days after he introduced his bill. Of special interest is that like the Tennessee law (but unlike Iowa’s), North Carolina’s did not ban cigarette manufacture, which was a central capital investment location for the Tobacco Trust. Two days after Brown had introduced it, his committee unanimously reported it with a favorable recommendation that it do pass. Brown himself expressed confidence that it would pass the Senate. The next day, the News and Observer reprinted a piece from a magazine published by a North Carolina Baptist Children’s Home.

174 “Joseph A. Brown Political Leader Died on Senator,” News Reporter (Whiteville, NC), July 1, 1937 (1:8, at 6:5-6).
176 NCSA, General Assembly, Session Records, Jan.-Mar. 1901, Box # 12, Folder Senate Bills 83-99. In the original typescript a line in ink is run through the words “its ratification” and the words “July 1st 1901” inserted by hand in ink (apparently in Brown’s handwriting). The bill file also includes a handwritten copy (apparently not in Brown’s handwriting) identical to the typescript except for the spelling “cigarette.”
177 See above ch. 5. The Tennessee law included only a maximum $50 fine. It was therefore inaccurate to call the bill a “copy” of the Tennessee law. “Anti-Cigarette Bill,” N&O, Jan. 18, 1901 (reprinted in Landmark (Statesville), Jan. 22, 1901 (1:5)).
179 “Against Cigarettes,” N&O, Jan. 18, 1901 (1:2).
organization taking a radical populist position (which also deviated from the WCTU’s in anathematizing cigarettes more than liquor):

We would rejoice with exceeding great joy if the Legislature would pass a law prohibiting the manufacture and sale of cigarettes in the State. It is too much to hope that such a law will be enacted. The business is so entrenched in North Carolina it will take a mighty, united effort to uproot it. But it can be done. True[,] the breaking up of the business would mean the loss of vast capital and the removal of some of our wealthiest citizens; but better this than the untimely death of a thousand boys. We have no doubt in the world that the evil effects of the cigarette habit are more to be dreaded and deplored than those which follow the drinking of liquor. And yet how softly we speak of the former, and how we berate and abuse the latter. Whiskey drinking is disreputable (as it deserves to be) and decent public sentiment is arrayed solidly against it; cigarette smoking is quite popular, and a young gent suffers no loss of social favor though he blow smoke through his nose in the finest parlor. It is high time we call a spade a spade. The pale face of many a bright boy tells the tale of the work of the monster that we have nourished in our bosom. Some day when the sacrifice is great enough our people will lift their voices against this deadly enemy as the voice of one man. But the hour has not yet come.¹⁸⁰

Brown’s optimism very soon turned out to be misplaced, because the bill, which was scheduled to come up in the Senate as a special order on second reading on January 23,¹⁸¹ instead was (re-)referred to the Judiciary Committee.¹⁸² The previous day, even before the debate had been called, the Landmark, portraying a situation eerily reminiscent of tobacco oligopoly lobbying a century later, editorially waxed pessimistic, predicting some dodging. We hope the measure will become a law but we do not expect it to. The cigarette trust, with its millions, will fight it, as will also the independent cigarette manufacturers in this State; and the beneficiaries of the cigarette trust—the representatives of the colleges, schools, churches, etc., who have received money from the Dukes and Geo. W. Watts—these will be in line against it. The anti cigarette law will have a hard road to travel.¹⁸³

¹⁸⁰“The Cigarette,” Charity and Children (reprinted in N & O), Jan. 19, 1901 (4:3) (also reprinted in Landmark (Statesville), Jan. 25, 1901 (1:3)).
¹⁸³Landmark (Statesville), Jan. 22, 1901 (2:3) (untitled edit.). Watts was on the ATC
On February 10, the *Chicago Tribune*, in a lengthy survey of pending anti-cigarette legislation in most if not all states, wrote of North Carolina: “There is considerable opposition to any bill prohibiting the sale of cigarettes absolutely. Some of this comes from the cigaret factories, of which there are two in this State, the argument being that a great industry will be broken up and many persons thrown out of employment.”\(^{184}\) Although it was self-explanatory that the Tobacco Trust would try to prevent passage of the bill on the general grounds that it would diminish sales, since the bill did not deal with manufacturing at all and the vast bulk of the factories’ output was exported to other states for sale—North Carolina and Virginia, as the New York *Sun* remarked in 1896, “make cigarettes for consumption elsewhere, not for home use,” whereas “New York state enjoys the distinction not only of making but of smoking more cigarettes than any other state”\(^{185}\)—the self-interested assertion that such a law would break up the industry was preposterous.

Doubtless grasping which way the political wind was blowing, on Feb. 11 Brown introduced a second bill (S.B. 638), this time merely “to regulate the sale of cigarettes...”\(^{186}\) The new bill was also referred to the committee he chaired, which two days later favorably recommended it.\(^{187}\) In watering down his own bill,\(^{188}\) Brown, replicating the fate of H.B. 52 in 1897, converted it into a no-
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sales-to-minors bill, the principal section of which read as follows: “That it shall be unlawful for any person, firm or corporation to sell, offer to sell, give, buy for or offer to buy for any person or persons under the age of twenty one years in this state, any cigarette, cigarette paper, or any substitute therefor.” The penalty remained as in S.B. 91. The same day that the committee reported the bill, the News and Observer, in an article that it reprinted from the New York World—but which sounded as though it had ultimately derived from the aforementioned Chicago Tribune article—incorrectly claimed that 11 states had already enacted prohibitions on the sale of cigarettes; in fact only one of them (Iowa) had. The Landmark, predicting that the new bill would probably pass, observed rather obscurely that: “The objections raised to the first bill were such as to affect manufacturing industries indirectly—not the so called ‘trusts’ which it is said it would reach, but the smaller home factories incorporated in this State.” The remark might have made some sense if the paper meant that the Tobacco Trust would not be directly affected because it sold the vast bulk of the cigarettes manufactured in its North Carolina factories in other states. The Landmark made it clear that Brown had not diluted his original bill enough to satisfy some critics, who opined that 18 or 19 should be the age limit rather than 21, “as most young men nowadays are thrown on their own resources and are their own masters before they reach the age of twenty-one.”

The Senate devoted a considerable amount of time to the second reading of S.B. 638 on February 16, discussing numerous amendments, and ultimately breaking off debate before it reached the third reading three days later. Four amendments (three of which manifestly were designed to weaken the bill and/or to make it unpassable) lost: to lower the maximum age from 21 to 17; to add cigars, tobacco, and coca-cola to the sales prohibition; and to require any party instituting an indictment under the law to be adjudged to pay the costs if the indictee was acquitted. Also defeated was an amendment to give the officer


189 S.B. 638, §§ 1 (quote) and 2, NCSA, General Assembly, Session Records, Jan.-Mar. 1901, Box # 14, Folder Senate Bills 612-658 (handwritten).


191 “Legislative Summary,” Landmark (Statesville), Feb. 15, 1901 (1:4).

192 “Legislative Summary,” Landmark (Statesville), Feb. 19, 1901 (2:2).

193 Journal of the Senate of the General Assembly of the State of North Carolina: Session 1901, at 377 (Feb. 16) (motions by Democrats John E. Woodard, George L. Morton, and James M. Gudger, Jr., respectively).
making an arrest under the law a $10 fee upon conviction. The Senate did adopt an amendment, taken verbatim from a pre-existing provision in the North Carolina Code giving parents, guardians, and employers the right to sue for damages resulting from the sale of liquor to minors: “the father or, if he be dead, the mother, guardian or employer of any minor, to whom a sale or gift shall be made in violation of this act, shall have a right of action in a civil suit against the person or persons so offending by such sale or gift, and upon proof of such sale or gift, shall recover from such party or parties so offending such exemplary damages as a jury may assess: Provided, that such assessment shall not be less than twenty-five dollars.” Also adopted was an amendment requiring each cigarette dealer to pay an annual state tax of at least $20 to go to the school fund and to be collected by the sheriff like the tax on cigar dealers under the state act to raise revenue. With these strengthening amendments S.B. 638 passed its second reading.

Fortunately, as in 1897, the detailed report of the floor debate that the News and Observer published under the title, “‘Coffin Tacks’ Hammered Hard,” makes it possible to gain a sense of the range of arguments that partisans deployed. Senator Brown himself emphasized that his bill was a “compromise,” with which he was not satisfied; although he had not insisted on his original general prohibitory bill, Democrat John Woodard’s amendment to lower the minimum age from 21 to 17 would “virtually kill” the measure. In turn, Woodard, professing an opposition to cigarettes, nevertheless argued that the existing no-sales-to-minors law sufficed. Understating the peak initiation age by about five years even a century later, he declared that: “If a boy at seventeen has not

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199 Among persons aged 30 to 39 in 1991 who had ever smoked daily, 89.0 percent had first tried a cigarette by age 18, 91.3 percent by age 20, and 98.4 percent by age 25; the corresponding figures for the age at which they had begun smoking daily were 71.2, 77.0, and 94.8 percent, respectively. U.S. Department of Health and Human Services,
begun the use of tobacco [sic] he is not likely to.” He then self-contradictorily contended that he was opposed to laws that “try vainly to legislate morals into [sic] the people”: the 1891 “amply strong statute” was a “dead letter,” under which he was unaware that any indictment had ever been brought. Both he and Democrats Ward and Burroughs ascribed whatever legitimacy minors laws possessed to their intent to help parents protect their own children.\textsuperscript{200}

Speaking again, Senator Brown remarked that he had consented to depart from his initial stringent bill “because he believed that a tax of $10 would be placed on all cigarette dealers and that would put the business in the hands of a few merchants in each town so the traffic could be easily controlled by the authorities.” Democratic Senator Sydenham Alexander defended his proposed amendment giving $10 to the arresting officer on the grounds that the current law had not been, and the proposed law would not be, enforced without “such an inducement....” Democrat James Madison Gudger, Jr. accused the chamber of trying to legislate morality and doing so backwards: the “great companies” were allowed to manufacture cigarettes, and the dealers to sell them, but boys were not permitted to make their own or to compete with the manufacturers. Though against all use of tobacco in any form, he opposed Alexander’s proposal because it “would put a premium on spies and accomplish only mischief.”\textsuperscript{201}

Democrat George Morton of Wilmington defended his amendment to prohibit all tobacco and coca-cola, too, on the libertarian grounds that “if the Legislature was going to legislate morals let’s include everything harmful. Co-cacola [sic] was said to contain a powerful narcotic which fastens its hold on victims. If legislation of this kind is in order, then let the Senate appoint a special committee to decide everything that is injurious to the people and include them all in a general prohibition bill.”\textsuperscript{202} His fellow Democrat, Needham Broughton of Raleigh—a prominent figure in religious circles and editor of a Baptist paper who had unsuccessfully run against the highest-profile black Republican House member in a judicially contested election in 1896—regretted Morton’s attitude, confessing that: “I cannot understand how any one [sic] can fail to feel a personal interest in a bill to check the destruction now being wrought by

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\item[200]\textit{Coffin Tacks’ Hammered Hard}, \textit{N&O}, Feb. 17, 1901 (sect. 2, 1:3-4).
\item[201]\textit{Coffin Tacks’ Hammered Hard}, \textit{N&O}, Feb. 17, 1901 (sect. 2, 1:3-4).
\end{enumerate}
\end{footnotesize}
cigarettes: so-called ‘coffin tacks.’ I come in contact with many boys daily and the injurious effect of cigarettes is apparent from a moral and physical standpoint.’’ Broughton then added an unusual proletarian-class dimension to turn-of-the-century anti-cigarette rhetoric: ‘‘The powerful influence is particularly evident among those who work in factories because of their sedentary lives. You can tell the victims by their sunken eyes, haggard looks, broken constitution, weakened lungs, stained fingers and almost stained souls. This bill should be adopted and I only wish it that it was stronger than it is.’’ On February 19 the Senate resumed debate on the bill now on its third reading. The chamber voted 23 to 17 to eliminate the tax amendment against Democratic Senator M. H. Justice’s motion to strike all the amendments and to leave the bill as it came from committee. The bill then passed its third reading. Once again, the News and Observer’s extensive coverage of the debate offered additional insight into the public rhetoric anchoring the protagonists’ positions. Senator Brown reiterated that he had “preferred an ironclad prohibitory bill but since that was objected to he resorted to” this no-sales-to-minors bill. The $20 dealer tax inserted during the second reading provoked considerable debate. Senator George Morton opposed it on the grounds that such exorbitant taxation would be “absolutely prohibitory to the small dealers,” whereas “[t]he Democratic idea of taxation for revenue only was his motto.” In contrast, Democrat I. W. Miller regarded the tax as “one of the best and most effective features of the bill, since it would put the dealing in cigarettes in the hands of responsible parties who could be made amenable to the laws and damages recovered for violation of the law.” A leading Democrat, Cameron Morrison, tried to distinguish between the constitutional outright prohibition of and unconstitutional use of the taxing power in order to destroy a business. In any event, he claimed that: “There is certainly very little money to be made in selling the cigarettes and this $20 tax will absolutely prohibit the sale of cigarettes anywhere in North Carolina, except possibly in the largest cities....” Senator Woodard, who insisted that “grown men...had a right to choose for themselves,” agreed that the $20 tax would absolutely prohibit sales in most places: “If a dealer sells 1,000 cigarettes a month for a year his profits will be just $15. Not many

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207“No Cigarettes in Minor’s Mouth,” N&O, Feb. 20, 1901 (6:2). Miller had introduced such a bill at the previous session. Id. No such bill was identified in the index to the 1899 Senate Journal.
small stores sell more than 1,000 a month yet this tax is...more than a year’s profits.” His analysis of the economic impact of an attack on the cigarette industry curiously omitted any reference to the predominant profit-appropriator, the Tobacco Trust: “The tobacco used in cigarettes is now raised in almost 85 [of 97] counties of the State and has brought prosperity and success to the farmers in many sections. The farmers are the ones who are benefitted by the sale of tobacco and not the small dealer, the farmers get the profits and it would be wrong to strike such a blow upon this great industry in which North Carolina is so vitally interested.” Senator Ward replied that withholding cigarettes from boys would not injure the production of tobacco, but if in fact the sale of the raw material had “to be curtailed in order to save the boys then let it be done.” In the same spirit he defended adoption of parents’ right of action from the liquor law: “A parent should have an action against a man who put a cigarette in his son’s mouth as much as if direct physical harm was done the boy.”

After passing the Senate, the bill was sent to the House, which never took it up, thus killing it together with many other bills that the Senate had passed. In the meantime, moreover, the Senate Judiciary Committee had recommended that Brown’s S.B. 91 not pass, which on February 23 the Senate voted to table. The Tobacco Trust thus prevailed in its home state. The Dukes’ victory may, however, have stopped short of total. The legislature did enact a statute to raise revenue, which included an annual tax on cigarette manufacturers (topping out at $1,000 for those whose output exceeded 500 million) and a five dollar annual license tax on cigarette retailers, which preempted any local taxation. Brown and his allies must have found some solace in the announcement that as of July 1 “the merchants” of at least one city, Mooresville in the Piedmont, “have discarded their stock of cigarettes and now that nefarious little stinker is not sold in town. All on account of the special tax imposed by the last Legislature.”

2131901 N.C. Sess. Laws ch. 9, § 81 at 116, 146. To be sure, the factory tax was minuscule in relation to the Trust’s business.
214“Cigarettes Not Sold in Mooresville,” Mooresville Enterprise (reprinted in Landmark (Statesville), July 12, 1901 (5:5).
Apparently unaware of the big picture as well as of the details of the legislature’s activities, in her 1901 North Carolina WCTU presidential address following the session Cartland erroneously asserted that “the Anti-Cigarette Law was strengthened.”\(^{215}\) The report that the convention heard from the legislation department omitted any mention of cigarette legislation.\(^{216}\)

The fact that the legislature would not even strengthen the no-sales-to-minors law—the existing law, according to the *Landmark*, was not “worth a row of pins. The law is ignored, the small boy gets all the cigarettes he wants and nobody is prosecuted”\(^{217}\)—let alone enact a general ban on sales hardly put the quietus on anti-cigarette or anti-Tobacco Trust sentiment in North Carolina. The next year the Baptist Children’s Home was still berating the product, the producer, and the charitable entities that welcomed the filthy lucre:

> Notwithstanding a good deal of cigarette money has gone into North Carolina education institutions, and a good deal more may go to the same institutions provided they behave themselves, the destructive work of these boy destroyers...gathers momentum with each passing day. ... It is appalling to see the evil that this pernicious habit is doing all about us. And yet we are strangely silent and the cigarette makers are eulogized and praised as benefactors of mankind because, forsooth, they shed a little of the money they have made from the blood of our boys, upon a college or two. Why are they a whit better than the saloon-keeper? Why are they so good? ... The manufacture and sale of cigarettes is the most deadly evil of the day. And if every dollar of the countless millions the traffic has made were turned into channels of benevolence it would be none the less an evil and a curse.\(^{218}\)

At the 1903 legislative session\(^{219}\) yet another bill was introduced by a Democrat to prohibit the sale of cigarettes;\(^{220}\) its mere introduction was

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\(^{215}\)Minutes of the Nineteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 31 (1901).

\(^{216}\)Minutes of the Nineteenth Annual Convention of the Woman’s Christian Temperance Union of North Carolina 79-80 (1901).

\(^{217}\)Landmark (Statesville), June 23, 1903 (2:1) (untitled edit.).

\(^{218}\)“Cigarettes Worse Than Whiskey,” Charity and Children (reprinted in Landmark (Statesville), July 25, 1902 (4:5).

\(^{219}\)In 1903 only five Republicans were elected to the Senate and 19 to the House. The News and Observer, The North Carolina Year Book and Business Directory: 1903, at 13, 15, 17 (n.d.).

\(^{220}\)Journal of the House of Representatives of the General Assembly of the State of North Carolina: Session 1903, at 693 (1903) (H.B. 1313, Feb. 23, by M. H. Kinsland). The bill’s wording is unknown because no copy is preserved at the North Carolina State
sufficiently newsworthy to gain a sub-head on the front page of the News and Observer’s article on the day’s proceedings in the House.221 It quickly won the approval of the House Health Committee, but then expired without any further action.222 The Landmark, while supporting passage, pessimistically predicted defeat, at least in part because apparently “Church people” were not lobbying for it.223

At its 1904 annual meeting the North Carolina WCTU in its brief resolution devoted to tobacco failed to go beyond urging enforcement of the no-sales-to-minors law.224 When yet another cigarette sales prohibition bill was introduced in 1905, the Landmark, while interested in seeing how much encouragement it would get, was resigned to the fact that charitable organizations that should have been working on its behalf, had been bought off by the Tobacco Trust:

The evil results of cigarette-smoking is [sic] generally admitted. But men who have made millions out of the sales of cigarettes, and who have depressed the price of leaf tobacco grown by the farmers and destroyed other men’s business to gain ascendancy in the tobacco trade—some of these men have contributed liberally to schools, churches, hospitals, theological seminaries and orphan asylums. Therefore reformers who are after other admitted evils are as silent as the tomb when cigarettes are mentioned: and Senator Turner’s bill will fail.225

Archives. For Kinsland’s party affiliation, see The North Carolina Year Book and Business Directory: 1903; at 15 (n.d.).

221“The Inheritance Tax is Adopted,” N&O, Feb. 24, 1903 (1:7). The sub-head read “To Prohibit Cigarettes,” while the minuscule reference in the body of the article both misspelled Kinsland’s name and incorrectly reported that the bill prohibited the sale (only) of cigarette paper.


223Landmark (Statesville), Feb. 27, 1903 (2:2) (untitled edit.).


In the area of buying off potential charitable opponents, too, Philip Morris thus had a worthy predecessor in the American Tobacco Company.\footnote{See, e.g., Morton Mintz, \textit{Allies: The ACLU and the Tobacco Industry} (July 1993), Bates No. 2023914331.}

Remarkably, however, the legislature in 1905 did pass a law making it unlawful for “any person, firm or corporation to sell or exchange any cigarettes or cigarette tobacco within the city limits of Wingate in Union County” subject to a fine of up to $50 and maximum imprisonment of 30 days.\footnote{1905 N.C. Priv. Laws ch. 395 at 1004. H.B. 1245 was introduced by Union county Representative R. B. Redwine. \textit{Journal of the House of Representatives of the General Assembly of the State of North Carolina: Session 1905}, at 711 (1905) (Feb. 20) (third reading).} A month earlier the legislature, in amending in various ways the charter of the town, which the legislature had incorporated in 1901,\footnote{1901 N.C. Priv. Laws ch. 55, at 110. H.B. No. 617, which was introduced by Representative C. N. Simpson of Union county, passed its second and third readings in the House 76 to 0 and 69 to 0, respectively. \textit{Journal of the House of Representatives of the General Assembly of the State of North Carolina: Session 1905}, at 362-63, 378-79 (1905) (Feb. 4 and 6). In the Senate the bill (S.B. 571) passed its second and third reading 34 to 0 and 32 to 0, respectively. \textit{Journal of the Senate of the General Assembly of the State of North Carolina: Session 1905}, at 322, 344 (1905).} had inserted “or cigarettes or cigarette tobacco”\footnote{1905 N.C. Priv. Laws ch. 84 at 254.} at the end of the pre-existing charter provision making it unlawful to “manufacture, sell or give away, or dispose of in any way, directly or indirectly, any vinous, spirituous or malt liquors, wine or cider, or intoxicating drink of any kind....”\footnote{1901 N.C. Priv. Laws ch. 55, § 8, at 111.}

Presumably\footnote{Speculation is unavoidable since even the local county seat weekly newspaper, \textit{Monroe Journal}, published nothing on the legislation in February-March 1905. Email from Patricia Poland, local history librarian, Union County Public Library (Sept. 13, 2006) (who read the microfilm copy of the paper, which was not available for interlibrary loan, but reported that the issue for Feb. 14 was lacking).} the motivating force behind this prohibition of cigarette selling in Wingate was the Union White Baptist Association, under whose auspices the legislature in 1897 incorporated a school (at a time when “there was no public school in the community”)\footnote{Hubert Hester, \textit{The Wingate College Story: An Epic of Vision, Faith, Work, and Achievement} 27 (1972).} within three miles of which it was unlawful to “manufacture, sell, give or dispose of” any intoxicating liquors,\footnote{1897 N.C. Priv. Laws ch. 31, §§ 1, 12, at 51, 52-53. On the Union Baptist Association’s drive in 1905 for total statewide abolition of this “‘monster evil,’” which was
whose control of the town generally was dominating. The anti-cigarette law may have been primarily designed to deny Wingate School students access to cigarettes. Perhaps the fact that tobacco production in Union County had peaked in 1870, plummeted to 120 pounds harvested on one single acre by 1890, and then became “nearly non-existent” for several decades might explain why it was politically feasible for the Baptists to ban the sale of cigarettes without unduly antagonizing local agricultural interests. Neither the town charter provision nor the statute was apparently ever directly repealed by the legislature, though Wingate residents with memories extending back to the 1930s can also not recall their ever having been enforced. And according to the

“more destructive of human life than the three great curses of war, pestilence and famine,” see Charles Black, J. Bivens, and M. Preslar, *History of the Brown Creek Union Baptist Association, 1854-1918*, at 184-85 (1953 [1919]).

Telephone interview with Patricia Poland, Local History Librarian, Union County Public Library, Monroe, NC (Sept. 8, 2006).


*Public-Local and Private Laws Index: North Carolina [Vol. 1:] 1900-1945*, at 548 (1946); *Public-Local and Private Laws Index: North Carolina, Vol. 2: 1947-1967*, at 533 (1971). Kim Hibbard of the North Carolina League of Municipalities speculated that “the town attorney might have advised that the provision was unenforceable at some point. ... A lot of our small towns have old charters that have never been revised and updated by subsequent act of the General Assembly. General statutes enacted over time (particularly in the 1960s and 1970s) superseded many of the provisions in those charters, particularly those dealing with finance, taxation, elections, alcoholic beverages, courts, and the powers of local governments. Towns that have never had a modern charter revision are faced with a document that is mostly obsolete. It would not surprise me if a town assumed that everything in its old charter was obsolete. For what it’s worth, the copy of the Wingate code of ordinances that we have in our library includes the town charter in the front. Both of the 1905 acts are set forth.” Email from Kim Hibbard (Sept. 13, 2006).

Walter Perry of Wingate, whose father owned a general store, personally saw many thousands of cigarettes sold there since the 1930s and sold many himself from the 1940s on subject to no enforcement. As a member of the town council in the 1940s he recalls that what he called an ordinance was still on the books but never enforced. Telephone interview with Walter Perry, Wingate (Sept. 13, 2006). Jerry Surratt, who a member of the town council from 1985 to 1995 recalled a “humorous discussion of Wingate’s cigarette ordinance—with the conclusion that it had probably never been repealed—and probably never enforced at all.” Email from Jerry Surratt (Sept. 13, 2006).
current Wingate town administrator. “To my knowledge, the Town has never enforced this provision in its charter. Honestly, I’m not even sure where one would search to see if this was enforced early on. As you can imagine, a small, fledgling town in the early 1900s did not keep very good records of its activities.”

239 Email from Dryw Blanchard (Sept. 18, 2006).
Florida: The Last of the Nineteenth-Century Cigarette Sales Bans Is Judicially Invalidated After 18 Days in 1899

It is intimated by a friend at our elbow that Frank Clark will soon introduce a bill in the lower house of the general assembly by regulating the rise and ebb of the tides in the St. Johns river.—Sunday Call.

Yes, and it will do just about as much good as his cigarette bill, his high hat bill (for theatre only), his press-gag bill, and others, and so forth and so on. One thing, it won’t create as much trouble and expense to put it in operation and keep it enforced.¹

The fight is on between the legislature and the tobacco trust....²

The cigarette [during the last third of the nineteenth century] was an unknown smoke in the backwoods, just about half of the men smoked pipes and nearly all chewed tobacco. About 1890 the writer remembers that Old Virginia cheroots at three for a nickel were favorites for men, who on special occasions smoked cigars. Snuff-dipping was almost, but not quite, as universal among women as tobacco chewing among men.³

The life span of the cigarette sales ban law that the Florida legislature passed in 1899 was so brief that its very existence has eluded other researchers.⁴ (Indeed, the five-page overview of the year’s anti-cigarette initiatives that the WCTU’s national anti-narcotics superintendent presented to the annual meeting later that year did not even mention the Florida act.)⁵ That session of the legislature was also distinguished, thanks to “registration, poll tax, eight-box, and secret ballot laws [that] simply exterminated the opposition” of Republicans and Populists,⁶ the first in the South in which both the Senate and House were

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¹ Chipley Banner, Apr. 29, 1899 (2:1) (untitled edit.).
² "Trust Will Fight Clark’s Bad Bill,” Morning Tribune (Tampa), Aug. 20, 1899 (1:5); Weekly Tribune (Tampa), Aug. 24, 1899 (1:2).
⁵ Report of the National Woman’s Christian Temperance Union: Twenty-Sixth Annual Meeting...1899, at 231-35 (1899).
⁶ J. Morgan Kousser, The Shaping of Southern Politics: Suffrage Restriction and the
composed exclusively of Democrats.\footnote{Establishment of the One-Party South, 1880-1910, at 92 (1975[ 1974]). These laws, enacted in the late 1880s, had already by the election of 1890 eliminated all but one non-Democrat. The process of disfranchisement of blacks...almost completely eliminated the Negro as an active participant in Florida politics.” Edward Williamson, Florida Politics in the Gilded Age, 1877-1893, at 160 (1976). On the end of Populism in Florida after 1896, see Kathryn Abbey, “Florida Versus the Principles of Populism 1896-1911,” Journal of Southern History 4(4):462-75 at 464-65 (Nov. 1938).}

Prior to the 1899 legislative session, Florida, whose WCTU membership numbered 464\footnote{Report National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting 182 (1897). Though small, this number was, in relation to the states’ populations, five times larger than neighboring Georgia’s 397.}, had, in 1891, made it unlawful for any store-keeper, saloon-keeper, merchant, or anyone else to sell, buy for, give to, or in any way dispose of to anyone under 18 years old cigarettes, smokettes, or cigarette paper. Those convicted of violating the law were subject to a maximum of 30 days in county jail or a maximum fine of $100, one-half of which was given to law enforcement officials, whose duty it was to secure a warrant and arrest violators.\footnote{1891 Florida Laws ch. 4024 [No. 15], at 54. On the somewhat less comprehensive amended version, see 1903 Florida Laws ch. 5149 (No. 44), at 86.} On April 14, 1899, one week after Representative Frank Clark had “bobbed up with his famous anti-cigarette bill,”\footnote{Pelot’s Peculiar Policy,” TMT, Apr. 8, 1899 (1:6).} House Bill No. 17, “an act to prohibit the manufacture, importation, sale or gift of cigarettes or cigarette paper in the State of Florida and to provide penalties for its violation,” which was referred to the Public Health Committee,\footnote{Journal of Proceedings of the House of Representatives of the Legislature of the State of Florida, Regular Session, 1899, at 190 (Apr. 14) (1899).} was unanimously passed by the full chamber by a vote of 50 to 0.\footnote{Henry Marks, Who Was Who in Florida 66 (1973).}

Clark (1860-1936)\footnote{Calculated according to U.S. Census Office, Census Reports, Vol. 1: Twelfth Census of the United States Taken in the Year 1900: Population, Part 1, tab. 19 at 532 (1901).} represented the northeastern coastal county of Duval (county seat: Jacksonville), more than 56 percent of whose population was black.\footnote{1903 Florida Laws ch. 5149 (No. 44), at 86.} In 1898 Clark “was elected to the Legislature... having accepted this commission largely for the purpose of aiding in the election of James P.
Taliaferro to the United States Senate, placing his name in nomination and rejoicing in his election."15 Taliaferro, a wealthy and conservative Bourbon Democrat,16 was one of the leaders of the “corporation” faction of the state Democratic Party, with whom and with which “more conservative element” Clark was “[m]ore or less close....”17 An Alabama-born lawyer who had been a city attorney in the mid-1880s before serving his first two terms in the Florida House of Representatives (1889-91), Clark became U.S. attorney for the Southern District of Florida (1893-97) and then returned to private practice. Immediately after his third term in the state legislature he became chairman of the State Democratic Executive Committee, a position he gave up when, in the wake of the 1901 conflagration in Jacksonville, he temporarily moved to Oklahoma, where he became a city council member in Shawnee; on his return to Florida he launched himself into a 20-year incumbency (1905-25) in Congress. Following his unsuccessful candidacy for renomination, he practiced law in Miami, was appointed by President Coolidge as a Democrat to the U.S. Tariff Commission (1928-30), and ended his career as a lawyer for the Bureau of Internal Revenue (1933-36).18

In his second term, Clark began voicing his white supremacist views on the House floor. In the context of his opposition to U.S. domination of the Philippines, which he feared might lead to its incorporation into the United States, he fired off this racist barrage in 1907:

Have gentlemen no pride of race? Are you willing to admit that the African, the Mongolian, and the Asiatic is your equal? Are you willing to assimilate with these people? With no pride of your race and with no love of your past, do you intend to attempt the alteration of the eternal decree of God Almighty in his placing the seal of superiority upon the white man? [Applause on the Democratic side.] If you do so intend, and you should be successful in carrying out your policy, what would you accomplish? You would only

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succeed in dragging the white man down to the level of the African, the Mongolian, and the Asiatic, and the future citizen of these United States would be a mongrel, not entitled to the respect of decent people anywhere.

I have no-patience, Mr. Speaker, with that class of my race who, for the enjoyment of a “little brief authority” secured by pandering to the whims of a few addle-brained fanatics and the impossible demands of inferior races, would consign their posterity to a status which the Creator never intended them to occupy. Two totally distinct races of people, the one the superior of the other, never have and never will live together under one government upon terms of perfect equality, either political or social.

Mr. Lincoln, I believe, said that “the Republic can not exist half slave and half free.” Neither can the Republic exist with one half of its citizenship composed of the proud Caucasian race and the other half composed of the African, Mongolian, and Asiatic races under laws seeking to compel absolute political or social equality. ... In order for this Republic to exist and go onward to the goal of its high destiny among the peoples of the earth the bars must be put up and none allowed to come to us from other lands to make their homes with us in this God-favored land, except those of the white race who can assimilate with us, thus giving us a homogenous population and insuring the preservation of the integrity of our civilization. ...

We have one race question already to solve, Mr. Speaker, and why will certain politicians insist on giving us another? Why not let us work out a just and proper solution of the one which is now with us, and which has challenged the best thought of our wisest statesmen for more than fifty years, before we fly to the Far East in search of another one? So far as I am concerned, I know that I have nothing but the kindliest feeling for the brown man of the Philippines and the black man of continental America; I know that my people wish them no harm, and would elevate rather than degrade them. ... We have done everything in our power to ameliorate their condition, except to sacrifice the integrity of our race by receiving them as our social equals, and, we might as well be plain, this we shall never do so long as the world shall stand. There is no power under the sun that can make us do that, because the time will never come when we, our children, and our children’s children, down to the latest generation, and to the time when the angel Gabriel shall announce to a listening world that time shall be no more, would not prefer death and complete extermination, rather than amalgamation with this inferior people. [Applause.]  

Exactly one year later Clark was, once again, expansively extolling white supremacy, this time in connection with his support of an segregationist amendment to a streetcar extension bill for Washington, D.C.:

If God Almighty had intended these two races to be equal, He would have so created them. He made the Caucasian of handsome figure, straight hair, regular features, high brow, and superior intellect. He created the negro, giving him a black skin, kinky hair, thick lips, flat nose, low brow, low order of intelligence, and repulsive features. I do not

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19CR 41:3653, 3654 (Feb. 22, 1907).
believe that these differences were the result of either accident or mistake on the part of the Creator. I believe He knew what He was doing, and, I believe He did just what He wanted to do.

We believe in God, and we are willing to accept His work just as it fell from His hands. But these people who profess to believe that “a white man may be as good as a negro if the white man behaves himself” are not satisfied with God’s work in this regard. They are quite sure that they can make a better job of it than did the Creator, hence we find them attempting to remove the black man from the menial sphere for which he was created, and where he may be useful, to a higher circle, for which he is entirely unfitted and where he is perfectly useless.\(^{20}\)

A week later Clark may have reached the height of his notoriety as a congressman in a Chicago Tribune headline referring to his zealous constituent service for the Florida turpentine industry in opposing federal investigation of its labor practices: “Peonage Has a New Defender.”\(^{21}\) This position may, in part, have been an instantiation of his states rights belief that “if the dreams of Socialism and other ‘isms’ were carried into effect, State lines would be blotted out, and the Republic itself destroyed.”\(^{22}\) As a congressman he proposed the following “solution of the negro problem”: “There are three methods...amalgamation, annihilation, or deportation. We won’t have amalgamation. We don’t want annihilation, and we are left to properly get rid of the whole colored problem by deportation.”\(^{23}\) Still on a racist roll in 1913, Clark introduced a bill “to prohibit the intermarriage of persons of the white and negro races within the District of Columbia, to declare such contracts of marriage null and void, to prescribe punishments for violations and attempts to violate its provisions,”\(^{24}\) which deemed “any person having one-eighth of negro blood” to be “negro” and punished violators by a fine of $1,000 to $5,000, imprisonment of one to five years, or both. Unable to conceive that any member of Congress could possibly object to the bill and mystified by why Congress had not enacted such a ban much earlier, Clark insisted that the “legislation [is] in the interest of


\(^{23}\) William Cash, History of the Democratic Party in Florida 157 (1936) (stating that “Clark used substantially the following language”).

\(^{24}\) CR 50:86 (Apr. 13, 1913) (H.R. 1710).
both of the races involved. If the negro has a future in the economy of the Universe, he ought to have it as a member of a distinctive race and not as a mongrel. So far as the white race is concerned, I believe the future of the world is dependent upon the preservation of its integrity.” In 1913, asserting that Japan was seeking to colonize the United States with hundreds of thousands of Japanese for the ultimate purpose of war, and declaring that “the negro problem had already taxed the energies of the state to the utmost” and that “we are in no frame of mind to have another race problem injected into our economic system,” Clark demanded that the governor of Florida call an extraordinary session of the legislature to enact a law that “will forever prohibit the Japanese and other like races from becoming landowners in the State of Florida. Five years later he also adopted a high-profile position in opposing the constitutional amendment establishing women’s suffrage. Clark the “conservative congressman” may have been a prohibitionist at the turn of the century, but by the 1930s he was a congressional lobbyist for American growers of Sumatra tobacco and, in the wake of the repeal of the Eighteenth Amendment, president of a national liquor dealers association.

By the time Clark introduced the cigarette sales ban bill he was already much talked about for “championing some unique measures” during the session such as prohibiting any circus from having more than one ring and theater-goers from wearing high hats. He incurred the special enmity of the press for his bill making it a felony to publish anonymous communications. Overall, then, Clark deviated from the pattern in most states in which the prominent advocates of

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26 “Says Japan Wants War,” LAT, Oct. 15, 1913 (1:3).
27 “Says Japs Want War,” LAT, Oct. 15, 1913 (1:3).
29 “Suffrage Wins,” CT, Jan. 11, 1918 (1).
30 On Clark’s voting record in support of restrictions on alcoholic beverages during the 1899 session, see Tom Cox, “Congressman Frank Clark of Florida” at 14 (ms., n.d. [1989?] (copy furnished by Manatee County Public Library). In 1907 he supported a push by local dry leaders “for total prohibition” of alcohol in Jacksonville. James Crooks, Jacksonville After the Fire, 1901-1919: A New South City 115 (1991).
33 Chipley Banner, Apr. 8, 1899 (2:1) (untitled). Many state legislatures considered high-hat bills in the 1890s; see above ch. 6 and “High-Hat Legislation,” NYT, Apr. 20, 1897 (4).
34 Chipley Banner, Apr. 22, 1899 (2:1) (untitled edit.).
cigarette sales bans generally represented progressive political positions.\(^{35}\)

Despite unanimity in the House, the bill’s progress through the Senate was considerably more tortuous. By April 21 the Judiciary Committee recommended that H. B. No. 17 not pass.\(^{36}\) On second reading three days later, after a motion by Senator W. Hunt Harris, a wealthy lawyer from Key West and one of the leaders of the Democratic Party’s “conservative faction,”\(^{37}\) who had previously been a cigar maker and later became Senate president (1907-1909),\(^{38}\) to table the bill indefinitely was tabled and then withdrawn,\(^{39}\) a series of weakening amendments was offered by 36-year-old Charles A. Carson, a grocer who had also supported Taliaferro for senator,\(^{40}\) headed several “important business enterprises,” and was also an ordained Baptist deacon who later was president of the Florida Baptist Convention for five years.\(^{41}\) His purpose was to make “less objectionable” the House’s “ironclad” bill, which also prohibited the importation and gift of cigarettes, by “trimming the prohibitory features down to manufacture and sale.”\(^{42}\) First, the prohibitions in the first section on importation and gifts of cigarettes were struck. Then the Senate agreed to strike the offense of “giv[ing] away or attempt[ing] to give away” cigarettes in the penalty section. The only

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\(^{35}\) The tentative and speculative assessment, based in large part on bills he introduced dealing with criminal procedure and making women eligible to be appointed notaries public, that “Clark’s early career in the Florida House of Representatives seemed to reveal a progressive, populist trend” suffered from a failure to analyze the bills’ substance or to embed them in the legislative landscape in order to compare them with other similar proposals. Tom Cox, “Congressman Frank Clark of Florida” at 13-14, [2] (ms., n.d. [1989?]) (copy furnished by Manatee County Public Library). The author, who was also unaware that Clark’s anti-cigarette bill had passed the Senate and gone into effect, shed no light on Clark’s motivations for introducing it. Id. at 13.


\(^{39}\) Alex Caemmerer, The House of Key West 70 (1992).

\(^{40}\) Senate Journal: A Journal of the Proceedings of the Senate of the Regular Session of the Legislature of the State of Florida 295 (Apr. 24) (1899). Harris withdrew his amendment because, under House rules, it would not have cut off the introduction of amendments or debate. “To Smoke or Not to Smoke,” FTUC, Apr. 25, 1899 (1:1).

\(^{41}\) 1900 Census of Population (HeritageQuest).

\(^{42}\) “Fun Begins!” TMT, Apr. 19, 1899 (1:3).

\(^{43}\) Baptist Biography 2:49-51 (B. Graham ed. 1920).

\(^{44}\) “To Smoke or Not to Smoke,” FTUC, Apr. 25, 1899 (1:1).
proposed weakening amendment (also offered by Harris) that the chamber rejected would have eliminated the prohibition of the manufacture of cigarettes. Rather than justifying depriving adults of cigarettes for the sake of keeping them away from minors, other senators briefly remarked on the injury that cigarette smoking inflicted on young boys’ nerves and constitutions and the shock that parents experienced on discovering their offspring’s use of cigarettes. Also rejected, by a vote of 1 to 23, was a killer amendment (by Harris) to ban as well “spirituous, vinous or malt liquors,” which prompted “[a]ll the dignified Senators” to laugh while Harris “plunged into a temperance discourse to make the most inveterate drinker pause in his mad and downward career and think of reform.” Much of the Senate debate focused on “the impossibility of stopping the cigarette smoking habit by legislation.” This skepticism was rooted in senators’ personal experiences: “[m]any confessed that they smoked when boys and that their boys were smoking now.” To them it was implausible that an anti-cigarette law would “prove more effective than the rod, which, one or two testified, had been a signal failure.” How, in contrast, boys would acquire cigarettes under a regime that actually prohibited sales altogether they appear not to have explained.

When the Senate resumed consideration of the bill on May 2, it agreed to Carson’s amendment to add to the penalty section as an offense to “offer as a premium, give or offer to give as an inducement or encouragement to trade.” The same section was then narrowed by adoption of a proviso, offered by lawyer Thomas Palmer, permitting the manufacture in Florida of “cigarettes, known as Cuban or Spanish cigarettes, when entirely filled with Cuban tobacco” so long as they were not sold in Florida and a further exception, proposed by real estate agent H. W. Fuller, for “the manufacture for shipment out of the State of cigarettes filled with Florida grown tobacco.” Harris, who once again moved

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45 Senate Journal: A Journal of the Proceedings of the Senate of the Regular Session of the Legislature of the State of Florida 295-96 (Apr. 24) (1899). If “importation” included purchase by individual adult consumers for their own personal use, the bill might have run afoul of the federal constitutional interstate commerce clause as interpreted by the Supreme Court’s original package doctrine.


47 “To Smoke or Not to Smoke,” FTUC, Apr. 25, 1899 (1:1). Opponents pointed out that the Florida Constitution left prohibition entirely to the counties.

48 “To Smoke or Not to Smoke,” FTUC, Apr. 25, 1899 (1:1).

to table the bill indefinitely, admitted that the object of H. B. No. 17 was laudable, but charged that it would be impossible for it to achieve its ends; moreover, if passed, it “would strike down a great industry in which hundreds of people are earning an honest livelihood.”50 In supporting the bill, Senator Benjamin E. McLin, a lawyer, former orange cultivator, crate manufacturer, and mill owner, and Florida Agriculture Commissioner from 1901 until his death in 1912,51 focused on the harm caused by constant cigarette consumption and providing an example to “prove that the cigarette habit was harder to break than that of any other.” Palmer—who represented Tampa—conditioned his Yea on excluding manufacture from the bill’s prohibitory reach on the grounds that “Tampa manufactured only the pure Havana cigarette that was not consumed by Florida boys. He told of how the cigar and cigarette manufacturing business had built up Tampa and other cities in the State, and hoped that the Legislature would not destroy it.”52 (The cigar industry was irrelevant since it was not covered by the bill, but the cigarette manufacturing industry in Florida was minuscule: in calendar year 1898 it produced only 6,224,920 cigarettes or 0.14 percent of total U.S. output.)53 Harris, who opined that it was the tobacco rather than the paper that was injurious, agreed with Palmer that Cuban cigarettes were not used in Florida except by foreigners, and asked for an amendment to prohibit the sale of manufactured tobacco, which would enable the bill’s supporters to achieve their objective. James E. Broome, a salesman and son of a former Florida governor, disagreed with Harris, insisting that it was the manufactured cigarette that did the harm (in contrast to the home-rolled). Turning Harris’s argument against him, he argued that if Floridians “did not use the cigarettes manufactured in Tampa, let the manufacturers go somewhere else and make them.”54 Thus amended, H. B. No. 17 was passed on third reading by a vote of 17 to 9.55 One of the latter sought to justify his Nay by reference to the aforementioned 1891 no-sales-to-under-18-year-olds law, under which he had heard of no prosecutions; based on the

53 Calculated according to Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1899, tab. 3 at 46 (H. Doc. No. 11, 56th Cong., 1st Sess. 1899).
assumption that the general sales ban would suffer the same fate, his vote was a protest against legislation that would not be enforced.56

The press predicted that the bill as amended by the Senate was so unlike the original House measure “that it would not be recognized” and the lower chamber would probably not concur in it, chiefly because it prevented only the sale of all cigarettes, while permitting the manufacture of certain kinds and the importation of any kind, but not for sale.57 In the event, after the House had refused to concur in the Senate amendments58 and the Senate, in turn, on Carson’s motion, insisted on its amendments, the conference committee,59 the House conferees to which were chaired by Clark himself,60 unanimously agreed to the Senate amendments to H. B. No. 17, in which the House concurred.61 At the time the press also predicted that the governor would not approve it because it was not believed to be constitutional inasmuch as it permitted the “manufacture of Cuban and American cigarettes made of Cuban and Florida tobacco to be shipped for sale outside the State,” while prohibiting the sale “of any kind of cigarettes in the State, although such goods can be imported, but not sold.”62

In the end, Governor William Bloxham did not sign the bill because he objected to certain provisions, especially in section 2 (containing the aforementioned exemption for the manufacture of cigarettes made of Cuban or Florida tobacco), which, after multiple amendments, not only “scarcely made sense,” but also rendered the law unconstitutional by impermissibly interfering with interstate commerce.63 He nevertheless allowed it to become law by not

63. Anti-Cigarette,” TMT, June 10, 1899 (2:1).
vetoing it within the constitutionally allotted time. Apart from that controversial section, H. B. No. 17 prohibited the manufacture or sale of cigarettes or cigarette paper in any form in Florida subject to a maximum $500 fine or imprisonment in county jail at hard labor not to exceed six months, or both at the court’s discretion. It defined cigarettes to include “any and all articles enclosed in a paper or other wrapper, and not composed entirely of tobacco in both filler and wrapper, and which are intended to be used for persons to smoke.”

The bill’s fate was, from the appreciative perspective of the conservative Tampa Morning News, typical of that of the session’s “more radical measures,” which had all “founded... The harmless remains of a few of them will probably get on the statute book, but there will not be substance enough left in them to consume much time of the courts, nor work and considerable annoyance to the people at whom the original bills were aimed.” Indeed, H. B. No. 17 was “[c]onspicuous among these emasculated bills” because, despite being “a good deal of a genius” and “with all his eloquence and influence,” Clark had “failed...to legislate the cigarette out of the State...” The fatal flaw was the Senate amendments exempting cigarettes made of Florida or Cuban tobacco, which had, “in plain English,” destroyed the bill’s effect: “Prosecuting attorneys would soon break down from overwork if they should attempt to test before a jury whether every cigarette sold or given away in the State contained only exempt tobacco.”

By June the press was predicting that, “with few exceptions,” cigarette dealers would “disregard the statute unless the courts sustain its validity”; and while “no arrangements ha[d] been yet made for bringing a test case,” it was nevertheless “expected that proceedings w[ould] be instituted in Jacksonville, when every effort w[ould] be made to sustain the law. The rest of the State w[ould] probably await action and abide the decision.” To be sure, the claim that the Jacksonville dealers had themselves “made up a purse to fight the law” was hopelessly naive in light of the Trust’s universal litigational modus operandi, but the Tampa Tribune at least did not withhold from its readers the existence of

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65. 1899 Florida Laws ch. 4732 [No. 71], § 1, at 121. The law included the aforementioned exceptions for Cuban cigarettes and manufacture of cigarettes filled with tobacco grown in Florida.
66. 1899 Florida Laws ch. 4732 [No. 71], § 2, at 121.
67. 1899 Florida Laws ch. 4732 [No. 71], § 3, at 121.
68. “More Radical Measures,” Morning Tribune (Tampa), May 17, 1899 (1:1). Oddly, the author erroneously believed that the bill was still in conference committee and that it might “never see the light of day.”
69. Anti-Cigarette,” Morning Tribune (Tampa), June 10, 1899 (2:1).
a phenomenon in Florida that was encountered throughout the United States—namely, that Tampa dealers were “not, apparently, so anxious to continue the sale. They claim that the profit is so small now that it is more trouble than benefit to handle them.”

However, as the ban’s effective date (August 3) approached, the press reversed course and indicated that it would be enforced and complied with. For example, the *Tribune* matter of factly predicted that from that date on “the cigarette dude will cease to be an institution in the State of Florida.” Efforts by some members of the “army of cigarette smokers” to stock up for an extended period were “problematical” inasmuch as “these paper-covered articles deteriorate rapidly in the summer temperature of Florida...for the tendency of a species of tobacco worm to infest the cigarette is well known to dealers, who manage to have no larger supply on hand than can be disposed of within comparatively short periods.” Others, who laid in considerable supplies of cigarette papers (sales of which were also banned), planned to buy tobacco and roll their own. Since the prohibition of importation (for personal use) had been struck from the bill, it was “anticipated that it will not be difficult to secure plentiful supplies of papers, as well as of manufactured cigarettes, from Savannah or other nearby cities in the future.”

Indeed, as soon as the law went into effect, a Savannah wholesale tobacconist—replicating the Tobacco Trust’s own strategy in 1893 when it shipped cigarettes from Portland, Oregon into Washington State after their sale had been prohibited there—began advertising in the Jacksonville *Florida Times-Union* that if a cigarette smoker sent $2.50 it would deliver, by express, to any part of Florida 500 (Tobacco Trust-manufactured) Dukes of Durham or Sweet Caporal cigarettes.

Florida dealers appeared to have acquiesced in the sales ban; one large seller, for example, anticipating a considerable increase in pipes’ popularity, planned to start marketing them. Moreover, since few retailers in Jacksonville, the state’s

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72. “The Smoker’s Disappointment,” *FTUC*, July 31, 1899 (5:1). In contrast, the *Tribune* reported that a difference of opinion existed on this point, with others believing that the law was “so broad as to prevent the importation of cigarettes into the State, and to make the carriers liable for the delivery....” “Weep for the Fated Weed,” *Morning Tribune* (Tampa), July 30, 1899 (8:2).
73. See below ch. 11.
74. *FUTC*, Aug. 4, 1899 (6:3). See also *FUTC*, Aug. 16, 1899 (6:5). The per cigarette price of half a cent was exactly the same as the standard price of 5 cents for a package of 10.
largest city, had any large quantities of cigarettes on hand, they would not lose anything by the ban’s enforcement, in anticipation of which saloon owners and smaller tobacco dealers had sold out their stocks earlier and not resupplied themselves, while the few sellers who still had small stocks slashed prices 50 percent to avoid being caught with contraband. Even the large wholesalers, who had been left with considerable stocks as retailers ordered less “since the prospective enactment of the law ha[d] become a certainty,” did not fear a loss because they believed that they would be able either to return them to the manufacturers or brokers or to dispose of them in other states. Overall, the Times-Union concluded that although neither Clark nor the legislature “could have contemplated that their act,” which applied to “all persons of whatever age, color or sex,” would wholly eradicate the smoking of cigarettes from the State, it will doubtless do much to lessen the practice in Florida, unlike the no-sales-to-minors law, which had “not been as strictly enforced as was the evident intention of its originators.”

To be sure, according to an alternative journalistic narrative advanced the day after the law went into effect, the Trust was also literally pursuing a different (coffin) tack. Whether this account was a disinformational ruse launched by ATC, garbled by an incompetent press, or really reflected a change in strategy, it claimed that the Trust, apparently without the services of a lobbyist or even legislative informant, had not heard about Clark’s bill until its “traveling representatives” had learned of it and immediately notified their bosses, who, after having “consulted well-known lawyers of national reputation,” decided to contest its constitutionality in court. Then ATC “abandoned” that plan in favor of “dodging” the new law by manufacturing cigarettes especially for the Florida market that were encased in tobacco instead of paper and sold in the same packages that differed only in being labeled “little smokers” instead of “cigarettes.” By August 3 this substitute was purportedly already on the market in Jacksonville, where it was readily being bought. The textual hook for creating the alleged “loophole” was section 3, which defined “cigarette” to include “not only what are commonly known as cigarettes, but any and all articles encased in a paper or other wrapper, and not composed entirely of tobacco in both filler and wrapper....

Clark himself quickly intervened to denounce the substitute wrapper evasion as illegal on the grounds that the statute “explicitly states that nothing but tobacco

75. The Smoker’s Disappointment,” FTUC, July 31, 1899 (5:1-2).
76. Substitute for Coffin Tacks,” Morning Tribune (Tampa), Aug. 4, 1899 (2:1). This development had been scooped by the Jacksonville Metropolis, no copies of which are extant for the relevant dates.
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shall go into the make-up of all these things.” Suggesting that he had foreseen this subterfuge, he boasted that “I had this in may [sic] mind when I framed the bill.” In particular, he had outsmarted the Trust “because it is a well known fact that cigarettes contain something besides tobacco. Some contain opium and others some drug equally as [sic] deleterious to the human system.” Because selling cigarettes that were “merely” encased in tobacco wrappers was illegal, he urged Duval County Solicitor Christie to examine their interior closely, “even if he has to employ a chemist for that purpose.” To be sure, a chemistry man was not needed to identify the stench: “any one [sic] who inhales the infernal things knows that tobacco forms only a part of them.” Consequently, regardless of how small the substitutes were, their sale was prohibited unless they were wrapped in tobacco and there was “positively...nothing on the inside but tobacco....” Thus, if cigarette smokers were “right in contending that the composition on the inside is the same as that formerly used,” “some wholesale arrests” might follow and Christie might have “several interesting cases....” If, on the other hand, cigarettes were not, as chemists elsewhere had determined, spiked with opium and similar narcotic substances, then Clark’s master counterstroke would fail. Nevertheless, if it was true, as the controversy surrounding the 1894 Chicago city ordinance had revealed, that ATC used glycerine as a humectant in the manufacture of all its cigarettes, then Clark would outfox the Trust after all. In the

77“Says Can Stop Substitute,” Morning Tribune (Tampa), Aug. 6, 1899 (2:1). Presumably, from Clark’s perspective, cigars, but for the absence of additions such as opium, would have satisfied the expanded definition of “cigarettes” and would have been prohibited as well (unless exempt by virtue of being entirely filled with Cuban or Florida tobacco). In fact, however, chemists had earlier reported that with regard to sugar, molasses, glycerine, licorice, and similar substances, cigarette tobacco was “probably much less frequently flavored and otherwise artificially treated than” that used in chewing or smoking tobacco or in cigar manufacturing. “Report on Cigarettes by Professor Willis G. Tucker of the Albany Medical College, Analyst of the New York State Board of Health—From the Ninth Annual Report of the New York State Board of Health” (Feb. 22, 1888), in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 10-11 (n.d. [1892]), Bates No. 950297842 (appeared originally in Ninth Annual Report of the State Board of Health of New York 516-18 (1889)). Vanilla and tonka beans were frequently used for flavoring cigar tobacco. Testimony of Professor James F. Babcock, in The Cigarette: What It Contains and What It Does Not Contain: On the Manufacture and Sale of Cigarettes before Joint Committee of Massachusetts Legislature on Public Health 20 (n.d. [1892]), Bates No. 950297842.

78See above ch. 3.

79See above ch. 6.
event, his trap for the unwary would never be sprung.

Not until the middle of August was it “given out” in the state capital that the American Tobacco Company would test the new law’s validity in court. To this end ATC’s counsel, Junius Parker of New York, had been in Tallahassee during the second week in August “looking up the Legislative record of the bill from its introduction to its final passage.” Its purported Achilles heel was that the enrolled bill showed that the Senate officers had signed it as a passed bill on May 2, whereas the journal showed that the conference committee had made its report on May 13. Unidentified persons familiar with the legislature had, according to the *Times-Union*, after examining the journals of the 1899 session, concluded that many measures that were published in the session laws would, if subjected to judicial scrutiny, be “declared null and void on account of irregularities in the journal.” To be sure, the two examples adduced by the newspaper—signing and certifying a bill to the governor even though it had not passed both houses and passing and certifying to the governor two identical bills—represented more than a mere technical flaw that might have attended the passage of H. B. No. 17. At this point, the newspaper ventured no opinion on the question, confining itself, instead, to calling for ferreting out and remedying the “cause for such glaring inefficiency,” which many attributed to “the incompetency of the clerical staff employed,” while others perceived a different (but unidentified) source.⁸⁰

In the event, the *Times-Union* had been “in full possession of this knowledge” that Parker had been preparing the Tobacco Trust’s test case since the law had gone into effect, but, at the request of Parker and ATC’s local Jacksonville counsel, Cooper & Cooper, had refrained from publishing anything about it, “although the members of the local staff ha[d] been in frequent consultation with them concerning the progress that ha[d] been made.” The paper was able to break the news on August 15 because by then the Trust had staged the same first act in its choreographed litigation that its cast had already performed in Washington State, Iowa, Montana, West Virginia, and Tennessee, by selecting someone to buy, in violation of the new law, a package of cigarettes from a dealer, and having that buyer immediately make a complaint with the local justice, who then issued a warrant for the seller’s arrest, which was served by a constable. At the hearing the justice required a $200 appearance bond, which the “voluntary prisoner” refused; at that point the habeas corpus writ, which ATC’s lawyer’s had already prepared, was submitted to Judge Rhydon Mays Call of the Fourth Judicial Circuit, the trial court in Jacksonville, who set the hearing for August 15, until which time the dealer remained in the sheriff’s nominal custody.⁸¹

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The habeas petition recited that no valid law prohibited selling cigarettes because the “alleged act” was unconstitutional and void and never regularly enacted or passed by the Florida legislature inasmuch as: (a) the vote on final passage in the House of Representatives was not taken by yeas and nays and entered in the House Journal; (b) the act as signed by the officers of both houses, transmitted to the governor, and filed with the secretary of state was never passed by either house; (c) was not approved by the governor and was authenticated only as to its alleged passage by the House by the statement of its officers that it had passed the House on April 14, whereas the Journal showed that it was still being considered and acted on long after that date; and (d) that the statute (which would appear in the session laws) entitled “An act to prohibit the manufacture or sale of cigarettes” was never enacted, whereas “the only statute upon the subject of prohibiting the sale of cigarettes in the State of Florida attempted or pretended to be enacted” was (the bill as introduced by Clark) “An act to prohibit the manufacture, importation, sale or gift of cigarettes,” which was “not a proper or constitutional title for the act purported to have been passed.” In addition to these alleged procedural failings, the Tobacco Trust claimed that: the law was “so confused, uncertain and conflicting and insensible...that it is unintelligible and incapable of intelligent observance or enforcement”; the law violated the U.S. Constitution by interfering with interstate commerce by virtue of permitting cigarettes filled with Florida- or Cuban-grown tobacco to be manufactured in Florida, while discriminating against cigarettes filled with tobacco grown in any other state; that because these unlawful, unconstitutional, and discriminatory provisions were “material and essential parts” of the law and “operated as inducements to its passage,” they invalidated the whole of the law; and that the law violated the U.S. and Florida constitutions by depriving citizens of Florida and the United States of “the benefit and exercise of their rights to acquire and dispose of property and deprives them of their property without due process of law.”

At the well-attended hearing before Judge Call on August 15, ATC was represented by Parker and its local counsel, Charles Merian Cooper, who had been Florida attorney general from 1885 to 1889 as well as a congressman from 1893 to 1897. After his unsuccessful attempt to halt the case and have it

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83Cooper (1856-1923) was also a member of the Florida House and Senate in the 1880s. History of Florida: Past and Present: Historical and Biographical 2:116 (1923);
transferred to criminal court, Duval County Solicitor J. B. Christie, “with violent
gestures,” attacked opposing counsel: “‘This is a most unheard-of thing in a court
of justice, a most disgraceful proceeding. ... It was all arranged who should sell
and who should buy the cigarettes, which the law prohibited. The State had no
knowledge of this case until last night, and I request your Honor to stop these
most unheard-of proceedings, which have been rushed through before the laws
have been published.’” Unmoved, Judge Call tersely informed the county solicitor
that the new law was on file where he could read it and then asked him how much
time he needed to prepare the State’s case. Replying that he was “the busiest man
in town” because the criminal court was in session, Christie asked for two weeks,
but when Call elicited from him the admission that that court would be through
the next day, the judge postponed the case only until August 18. The legal
assistance of which the county solicitor was manifestly in need and the
importance that Clark attached to the case were underscored by the fact that “the
father of the anti-cigarette bill” would be associated with Christie.\textsuperscript{84}

At the recessless four-and-a-half-hour hearing, which took place on Saturday,
August 19, the press, seeing the tables piled high with law books, was “unnerved
at the prospect of having to listen to long and tedious reports and dissertations pro
and con” as to whether it was unlawful to “sell the fascinating cigarette, under the
seductive influence of which Frank Clark claims the rising generation are
wrecking their health and morals.” In the event, or so it seemed to reporters,
“almost every law book published since Ben Franklin ran a hand press was quoted
from,” and so opaque was the back and forth that, if the foot-thick legal-looking
documents that both sided “waded through” had been divided up between “two
juries, who hadn’t seen...the other side of the case, [they] would promptly have
rendered a verdict for their respective pile of documents.” In his opening remarks
County Solicitor Christie was preoccupied with process, insisting both that
deciding a law’s constitutionality on the basis of writ of habeas corpus was
unprecedented—a manifestly incorrect claim in light of the virtually identical
litigation in Washington State and Iowa—and that the “arranged” nature of the
sale and arrest made the case “‘unfair to the State,’” which the court therefore
should not have heard. The Tobacco Trust’s Parker admitted the prearrangement,
but argued that it was the most expeditious way to test the law’s validity. He then
rehearsed the aforementioned legislative procedures that he claimed failed to
satisfy the Florida constitution’s requirements for a Yes or No vote before turning
to the law’s constitutionally impermissible interference with interstate commerce:

\textsuperscript{84} Cigarette Law Test,” \textit{FTUC}, Aug. 16, 1899 (6:1).
“if each State had the right to prohibit products from other States it would ruin trade. If each State were to build a wall around itself and use only such raw materials as were grown or excavated in its own territory, each producing State could raise its price and ruin manufactures.” Clark, who took over the state’s argument when Christie had to leave, eschewed any discussion of the law’s merits or benefits as inappropriate. Instead, he contended that the sales prohibition should not be affected by any doubts as to the validity of the manufacturing ban, especially because no legislator had objected to the former. (It is unclear why Clark would have imagined that such a claim, even if true, would bear any legal weight: after all, the legislative journals, which were not verbatim transcripts of the proceedings, would not have reflected any such objection unless it had been embodied in an amendment.)

Although Clark admitted that section 2 of the bill “was not as it should be, and that it was not the act as arranged by him,” but rather the product of senators from Hillsboro County and other manufacturing areas who had “attacked the bill to protect the manufacturer,” he sought, unpersuasively, to show that the alleged interference with interstate commerce never took place because by the time the cigarettes reached the seller, who was being prosecuted as a dealer in Florida and not as an agent of the American Tobacco Company, they were articles of domestic commerce.85

Over the weekend before Call decided the case it became clear that the Tobacco Trust, which “manufactures all the popular brands of cigarettes,” had not confined its litigation stage-management to Jacksonville. Ever since the law had gone into effect, ATC had “several of its attorneys in the various cities...investigating the matter, and the fight it was “back of,” the Tampa Tribune predicted, “promises to be as warm a one as capital, with the assistance of able legal talent[,] can make it.” During the pendency of the case “the trust...advised all its largest patrons” in Florida “to continue the sale of cigarettes without attention to the existence of the law, adding that the company would assume all liabilities and pay all damages accruing to the seller.” From the fact that two saloons had placed Duke-brand cigarettes on sale on August 18 and other dealers resumed open sales the next day, the Tribune concluded that ATC’s assurances

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85. "Legal Lore Galore," FTUC, Aug. 20, 1899 (6:3-4). Cooper’s argument appears to have duplicated Parker’s regarding the justification for the prearrangement; the only new element was the claim that because the journal showed no penalty, a prisoner could not be punished for violating such an act. If the press correctly reported this argument, it seems untenable because the Florida (like many other states’) legislative journals failed to print the full text of most bills. Clark, according to the article, urged the judge not to invalidate the law so that ATC could take the case to the Florida Supreme Court, but this account makes little sense since the state could also have appealed.
had undoubtedly reached Tampa, where the first arrest was made on August 19 of a bartender in a saloon, whose defense counsel was employed by ATC. Since “the company has unlimited capital, the dealers feel that they will be safe in continuing the sale.”[^86]

Judge Call (1858-1927), who was a state circuit court judge from 1893 to 1913 before being appointed federal district court judge for the Southern District of Florida, which he remained until his death,[^87] did not tarry long in reaching a decision. On Monday, August 21, following the Saturday hearing, Call declared “[t]he famous anti-cigarette bill, of which much has been written and more has been said,” to be “illegal and of no effect and force, at least in the Fourth Judicial Circuit....”[^88] Although the decision affected only that circuit’s six northeastern counties, the press assumed that it would “probably practically settle the question through the entire State.”[^89] After the bill had “created much comment throughout the United States,”[^90] many newspapers carried a wire-service report of Judge Call’s having held the law unconstitutional.[^91]

Call appears to have issued no written decision,[^92] but merely said, when “asked by the attorneys for the grounds on which he based his decision, for the information of their clients, that the fact presented in the petition for the writ of habeas corpus as to the alleged passage of the bill by the Legislature and the

[^86]: “Trust Will Fight Clark’s Bad Bill,” *Morning Tribune* (Tampa), Aug. 20, 1899 (1:5); *Weekly Tribune* (Tampa), Aug. 24, 1899 (1:2) (reprinted from Aug. 20 daily edit.).


[^89]: “Knocked Out by the Court,” *WNC*, Aug. 23, 1899 (1:6).


[^91]: The Fourth Judicial Circuit decision was final, according to several lawyers, because the State did not have a right of appeal. “Anti-Cigarette Law Is Illegal,” *FTUC*, Aug. 22, 1899 (6:1). The State, according to a different account, would make no appeal to the Florida Supreme Court. “Coffin-Tacks Win and Again on Sale,” *Morning Tribune* (Tampa), Aug. 23, 1899 (1:1); *Weekly Tribune* (Tampa), Aug. 24, 1899 (1:4).


[^93]: Unfortunately, no case files survived the huge fire of May 3, 1901, which destroyed thousands of buildings in Jacksonville, including the courthouse and all of the court’s records (at least of cases that arose in Duval County). Telephone interview with Sharon, Fourth Judicial Circuit clerk of court, Jacksonville (Sept. 15, 2006).
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claim of unconstitutionality were sufficient in his opinion to render the entire bill void.” Call’s judicial strategy of declaring a statute unconstitutional based on technical legislative errors alleged by the defendant’s lawyers rather than the latter’s substantive federal constitutional claims was not unprecedented. In 1896, in a nationally high-profile case involving an 1895 Florida law making it a penal offense to “conduct...any school of any grade, public, private or parochial wherein white persons and negroes shall be instructed or boarded within the same building, or taught in the same class, or at the same time by the same teachers,” lawyers for the defendant American Missionary Association school argued that the act should be voided both because its title was too narrow to cover its contents (the former applying to “White and Negro Youths,” the latter to all “white persons and negroes”) and because it violated the Fourteenth Amendment to the U.S. Constitution by being based solely on color. Ironically, the law, which The New York Times editorially denounced as “manifestly outrageous,” had passed both houses of the legislature unanimously and been amended by the Senate and returned to the House, which concurred in the amendments without a yea and nay vote, but since the school’s lawyers (apparently) failed to raise the issue, neither did Call sua sponte. Although he chose to strike down the segregationist law on narrow “technical” grounds without expressing an opinion as to whether the law would still be invalid if the legislature remedied the defect by bringing the title into conformity with the text, the following year James Weldon Johnson, who grew up in Jacksonville and became a multi-talented poet, novelist, educator,

93 1895 Florida Laws ch. 4335 [No. 14], § 1, at 96. Considerable light is shed on the Florida Democratic Party by its “hearty endorsement” of the law in its 1896 platform, which expressed “the hope that it may never be expunged from the statute books of the state, or the principle it embodies be torn from the hearts of our people.” The party convention further hoped that “the state will never relax its efforts in the cause of education until every child within its limits has had the opportunity of securing the rudiments of a sound knowledge of the English language and the principles of the English language, without any discrimination of race, color or previous condition, but always and at all times in separate buildings and with different leaders.” William Cash, History of the Democratic Party in Florida 173 (1936) (reprinting platforms).


95 NYT, Oct. 24, 1896 (4) (untitled edit.).


97 NYT, Oct. 24, 1896 (4) (untitled edit.).
diplomat, and civil rights activist, attested to Call’s being a “very fair man.” In 1897, Judge Call presided over his examination in open court for admission to the bar, the first time that any black had gone through this process in state court since Reconstruction. Without revealing any underlying details, 36 years later in his autobiography Johnson observed: “Negroes in the South have a simple and direct manner of estimating the moral worth of a white man. He is good or bad according to his attitude toward colored people. This test is not only a practical and logical one for Negroes to use, but the absolute truth of its results average [sic] pretty high. ... I myself have yet to know a Southern white man who is liberal in his attitude toward the Negro and on the race question and is not a man of moral worth. Judge Call, in the estimation of the colored people of Jacksonville, was a ‘good man,’ and he was a good man.”

Clark expansively shared his opinion of the decision with the press. With regard to the alleged legislative irregularities, he reiterated his and Christie’s

89 James Weldon Johnson, *Along this Way: The Autobiography of James Weldon Johnson* 142 (2000 [1933]). Call’s goodness and fairness must have been reinforced by the behavior of one of the three members of the examining committee whom Jacksonville blacks regarded as a “‘bad’ white man”: when, during a pause in the questioning, a lawyer in the courtroom who was not on the committee leaned over and asked him what he was going to do, W. B. Young blurted out in Johnson’s face words that “made their sizzling imprint” on his brain: “‘I can’t forget he’s a nigger; and I’ll be damned if I’ll stay here to see him admitted.’ With that he stalked from the courtroom.” *Id.* at 143. In 1905, Call held unconstitutional a Florida Jim Crow law that required streetcars to be segregated, but on the narrow grounds that it was class legislation because it exempted black nurses taking care of white children or sick white persons; in the words of the Florida Supreme Court affirming his judgment, the law “discriminately abridges the privileges and immunities of one class of citizens of the United States by giving to another class of such citizens privileges that are withheld from the class discriminated against. It gives to the Caucasian mistress the right to have her child attended in the Caucasian department of the car by its African nurse, and withholds the right from the African mistress the equal right to have her child attended in the African department of the car by its Caucasian nurse. It also discriminates between the races in that it gives to the invalid adult Caucasian, man or woman, the right to be attended in their department of the car by his or her colored nurse, and withholds from the African invalid the corresponding right to be attended in his or her department of the car by his or her white nurse. It also gives to the African nurse the right to space in either department of the car and withholds from the Caucasian nurse the same privilege, thereby discriminating between the races in favor of the African nurse as against the caucasian nurse belonging to the same occupational class of persons.” Florida v Patterson, 50 Fla. 127, 132-33 (1905). See also August Meier and Elliott Rudwick, “The Boycott Movement Against Jim Crow Streetcars in the South, 1900-1906,” *Journal of American History* 55(4):756-75 at 766-67 (Mar. 1969).
argument before the court that the Florida Constitution’s requirement that the yeas and nays be entered on a bill’s final passage did not apply to concurrence by the originating house in the other house’s amendments. On this very point they had cited to Call a decision issued by the Florida Supreme Court in 1895.\(^9\) Waxing practical, Clark remarked that if it was constitutionally required that the originating house vote by yea and nay on the motion to concur in the other chamber’s amendments, he did not believe that “‘a single act of the Florida Legislature originating in one house and amended in the other that has been passed within the last ten or twelve years is constitutional.’” By way of illustration he pointed out that a cursory examination of last session’s Senate Journal revealed that even the general appropriations bill would not pass muster under Call’s ruling and that, consequently, “‘every dollar now being paid out is being illegally paid....’”\(^{100}\)

The validity of the Senate amendments excepting the manufacture of cigarettes made of Cuban or Florida tobacco Clark did not even attempt to vindicate. On the contrary, he bluntly admitted that: “‘Unquestionably this portion of the act was unconstitutional and I know of no person who has ever contended that it was valid....’” Instead, he had argued to the court that, according to precedent, if one portion of an act was unconstitutional and the rest constitutional, and if the two were separable such that the constitutional part alone could be put into effect without reference to the unconstitutional part, then the former (namely the sales prohibition) should be upheld and enforced. Clark regretted that the act was “‘found in such condition that the court...had to declare it void’” because he had hoped that it would go into operation and that “‘the boys and young men of Florida would be saved from the awful condition into which the habitual user of cigarettes sooner or later finds himself.’” Perhaps with a view to legislative reenactment in compliance with Call’s ruling, he concluded by observing that the Supreme Court of Tennessee had upheld as constitutional that state’s (cigarette sales ban) law, which was “‘in active force....’”\(^{101}\)

As soon as Call had discharged the prisoner in Jacksonville, the press in Tampa, under the headline, “Coffin-Tacks Win and Again on Sale,” reported that

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\(^9\)“Anti-Cigarette Law Is Illegal,” *FTUC*, Aug. 22, 1899 (6:1). In State of Florida ex rel. Turner v Hocker, 36 Fla. 358, 371 (1895), the Supreme Court held: “Where one house of the Legislature passes a bill through its three constitutional readings, and reports it to the other house, and the latter passes the bill with amendments that it has made germane to its general subject, either to the body of the bill or to its title, it is not necessary in such a case to re-read the bill three times again in the house of its origin.”


ATC’s agent who had “been in the city watching the progress of the case since its beginning, wired the leading merchants that have been handling the Duke cigarettes at Tampa and other cities and towns throughout the state that they could proceed to sell cigarettes at once and that the American Tobacco Company would become responsible for any trouble or expense they might be put to on account of the Clark cigarette bill.” As a result of these assurances—which the Trust had also made in Iowa—because several more dealers had begun selling cigarettes, the *Tampa Tribune* assured its readers, “there is now no difficulty in buying what you want.”

The newspaper’s solicitude for the tobacco industry was the owner-publisher-editor’s policy: Wallace Fisher Stovall, the president, general manager, majority stockholder, and editor, had “been a consistent friend and supporter of the big Tampa cigar manufacturing industry, and his newspaper has always championed the interests of the manufacturers who [by 1909] have made Tampa the greatest cigar manufacturing center in the country,” an “immense industry” employing millions of capital and thousands of people.

Although the technical defects that the Trust attacked were all easily remediable, no bill dealing with cigarettes was introduced in the House in 1901. Since Clark in his post mortem had expressed the opinion that the bill’s opponents had been responsible for the amendments, it is possible that the Senate would not have been able to pass the bill without the (fatal) Cuban and Florida tobacco exemption. Indeed, it is hardly out of the question that these senatorial amendments were a component of the same “prearranged plan” by which ATC stage-managed dealers’ arrests in Jacksonville and Tampa. In 1905, however, the House did pass, by a vote of 35 to 11, a bill to prohibit the manufacture or sale of cigarettes or cigarette paper, which died in the Senate after the Judiciary Committee reported it without recommendation on the last day of the session.

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102 “Coffin-Tacks Win and Again on Sale,” *Morning Tribune* (Tampa), Aug. 23, 1899 (1:1); *Weekly Tribune* (Tampa), Aug. 24, 1899 (1:4). On ATC’s ultimately meaningless promises in Iowa, see above chs. 10-12.


104 *Journal of the House of Representatives of the Eighth Regular Session of the Legislature...State of Florida...1901*.


107 On the legal theater in Tampa, see “Trust Will Fight Clark’s Bad Bill,” *Morning Tribune* (Tampa), Aug. 20, 1899 (1:5); *Weekly Tribune* (Tampa), Aug. 24, 1899 (1:2).

108 *Journal of the House of Representatives of the Tenth Regular Session...1905*, at 469, 1025-26, 1531, 1620 (H. B. No. 298, by J. B. Johnston, Pasco Cty).
of the session. A senator did introduce a bill in 1913 to make it unlawful to sell, barter, exchange, or give cigarettes, cigarette tobacco, or cigarette paper, whose passage the Temperance Committee recommended with an amendment striking out cigarette tobacco. The bill died after the tobacco trade petitioned against it. During this battle the United States Tobacco Journal, which expressed the hope that the Florida legislature would see the fallacy of trying to legislate the public into so-called morality, deemed it entirely reasonable to presume that the Florida public would “take no more kindly nor consider” these enactments “more seriously than many other states which have passed such attempts at a re-constructive period.”

109*Journal of the Senate of the Tenth Regular Session of the Legislature...of Florida...1905, at 1916 (June 2). In 1907 the legislature made it unlawful not only to sell, barter, furnish, or give a cigarette to a minor, but also to persuade, advise, counsel, or compel one to smoke any cigarette. 1907 Florida Laws ch. 5716—(No. 121) at 229.


111*Journal of the State Senate of Florida of the Session of 1913, at 1215 (May 15).
