“Inherently Bad, and Bad Only”

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

Volume 1

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

Marc Linder

Iowa City 2012
PART II

THE RISE AND FALL OF THE STATEWIDE PROHIBITION OF SELLING CIGARETTES IN IOWA: 1880s-1921

Between 1870 and 1912 the anti-cigarette war was at its height. ... The result was legislation in every state—and increased cigarette smoking.¹

Cigarette prohibition never attained the notoriety of liquor prohibition...partly because the difficulties of enforcing anti-cigarette laws brought about their repeal within one or two legislative sessions of their enactment.²

By 1922, sixteen states had either banned or restricted the sale or promotion of cigarettes. But virtually all these laws proved short-lived. [T]hey were quickly repealed after brief periods of erratic and weak enforcement.³

¹“Consumption of Cigarettes Reaches 85 Billion Annually,” NYT, Aug. 14, 1927 (XX5).
National Trends in Banning Tobacco Sales to Minors, Scientific Temperance Instruction, the WCTU, the Legacy of Liquor Prohibition, and Iowa’s No-Tobacco-Sales-to-Under-16-Year-Olds Law of 1894

Whether the cigarette is the product of the dude or the dude of the cigarette is an open question. There has been a parallelism in their growth and the cigarette is as much an essential feature in the outfit of the dude as the silver-headed cane, toothpick shoes or cork-screw coat. While the cigarette is necessary to the dude, however, the dude is by no means essential to the cigarette. The latter has come within extremely extensive use within the last few years, and is smoked indiscriminately by boys and old men, merchants and clerks, bulls and bears and lambs, millionaires [sic] and laborers, and no inconsiderable part of the 640,000,000 cigarettes manufactured last year was consumed by the fair sex.1

Restricting Idiocy: School Boys’ Vicious Cigarettes Will Not Be Openly Sold to Senseless Youngsters.2

[A] dealer in cigarettes...said that he invariably noticed when he sold a boy, who was just acquiring the habit of smoking cigarettes, he was always sure of one more regular customer. There appears to be an opiate in the cigarette that is not found in other cigars, and this opiate, like a serpent, seizes its victim at once and encoils itself about him.3

By the beginning of 1894, one or the other chamber of numerous state legislatures over a period of five years had passed general cigarette sales bans and Washington State had actually enacted and begun enforcing one, which was, however, judicially invalidated.4 Other states had confined themselves to targeting the immediate occasion for this wave of intervention—namely, keeping children away from cigarettes by prohibiting sales only to them.

In addition to the states, a number of cities, animated by the perception that such partial bans failed to suppress accessibility to minors, had also adopted total sales bans. For example, the board of education in Emporia, Kansas (pop. ca. 8,000), turned to the city council after it had concluded that the “cigarette habit...has grown to such dimensions that it cannot be successfully controlled by ordinary school discipline, so long as cigarettes are openly and indiscriminately

---

3“Dangerous,” Newark Daily Advocate (Ohio), Jan. 16, 1893 (8:3).
4See above Part I and below ch. 11.
sold in the city." \(^5\) In response, the council passed an ordinance imposing a $500 license tax on cigarette seller (subject to a maximum $100 fine and imprisonment of 30 days), which the press deemed prohibitory. \(^6\) After the mayor, having undergone remedial tutoring by the Tobacco Trust, had vetoed the ordinance, \(^7\) council members felt that the town’s sentiment was so strongly opposed to cigarette sales that “they should do all in their power to prohibit or limit” their sale. \(^8\) Coinciding with the simultaneous action of the smaller town of Eureka about 40 miles away—which prohibited selling or giving away cigarettes to anyone and imposed a $25 to $50 fine on convicted violators—\(^9\)—the Emporia city council adopted, this time overriding the mayor’s veto, a total sales ban enforced by a fine of up to $100 and/or imprisonment up to 30 days. The council justified the interference with consumer sovereignty on the dual grounds that cigarette smoking had “become so prevalent among the young men and boys of this city as to be injurious to them, noxious to others and to impair the usefulness and impede the progress of the public schools” and that existing law (presumably the five-year-old state law prohibiting the sale of any form of tobacco to anyone under 16) had proved inadequate to protect the public. \(^10\) A month after the law had gone into effect on January 1, 1895, the local newspaper reported that cigarettes had become “a scarce article in Emporia,” and although “some few will walk the mile distance to the little haunt out side [sic] the city limits where they are still sold,...very few comparatively are being smoked and the act of the city council has created a strong sentiment against them.” \(^11\)

Iowa, having failed to pass even a no-sales-to-minors measure in 1890 or

---

\(^5\)“To Help the Boys,” *EDG*, Jan. 6, 1894 (4:3).

\(^6\)“Five Hundred Dollars,” *EDG*, Jan. 16, 1894 (4:4).

\(^7\)“Since the passage of the ordinance the cigarette trust has sent its western agent here to lay its side of the case before the mayor and has also supplied the mayor with a liberal assortment of printed documents in favor of cigarettes.” “A Veto Probable,” *EDG*, Feb. 3, 1894 (4:3).

\(^8\)“Still Unsettled,” *EDG*, Feb. 6, 1894 (1:1).


\(^10\)“Over a Veto,” *EDG*, Mar. 6, 1894 (4:4). For the state law, see 1889 Kansas Laws ch. 256 at 388. The ordinance’s effective date was Jan. 1, 1895. In 1895 other Kansas towns followed suit. E.g., “Cigarettes Barred from Lawrence,” *Emporia Gazette*, Mar. 14, 1895 (1:1); “Against Cigarettes,” *Daily Northwestern* (Oshkosh), July 19, 1895 (6:1) (Russell).

\(^11\)“One Vice Lessened,” *EDG*, Feb. 4, 1895 (1:1). It is unclear whether the fact that “very seldom” were “young boys...seen handling them” meant that the law had merely prompted them to conceal their cigarette smoking.
1892, “must,” as a British lawyer observed in pointing out that by 1894 22 states had already passed such measures, “not be regarded as leaders in the crusade against smoking by youths.” This chapter embeds the state’s enactment of such legislation in 1894 in the national trend and the interrelationship between the movement’s leader, the National Woman’s Christian Temperance Union, and its Iowa state unit. It also sets the stage for understanding prohibitory cigarette sales legislation by exploring the rich context of Iowa’s extensive history of liquor prohibition.

**Nationwide Developments in Prohibiting the Sale of Tobacco to Minors**

The war between the two great tobacco companies has reached such a stage that government interference is not only advisable, but almost imperative. So bitter has the feud become that the price of cigarettes has been reduced to twenty for 5 cents. These are the approved brands...containing every one of the deleterious adulterations popular with consumers of these ready-made implements of gradual suicide, and the great reduction in price will...place gradual decline and ultimate death within the reach of every small boy in the nation.

And the anti-cigarette law is another good thing. Tobacco’s all right; it never hurt anyone. But cigarettes are poison. We’ve either got to have anti-cigarette laws or more acreage for asylums for juvenile degenerates.

When the Iowa legislature in 1894 made it a misdemeanor (subject to a fine of $5 to $100) for anyone to sell or give cigars, cigarettes, or tobacco in any form to a minor under 16 years old, “except upon the written order of his parent or guardian,” it was hardly acting as a pioneer in tobacco control. As early as 1883 New Jersey had enacted the first such prohibition, and by 1890, according to the

---

14 Thomas Edison, “‘As Yet We Know Nothing,’” *NYT*, Jan. 12, 1908, Sunday Magazine at 8.
15 1894 Iowa Acts ch. 61, at 63. A document apparently prepared for tobacco litigation at the end of the twentieth century erroneously stated that Iowa’s law dated back to 1897 and that Illinois had been the first state to act in 1887. “Historical Developments Regarding Minimum Age Laws Governing the Sale or Use of Tobacco Products” (Jan. 28, 1998), Bates No. 2072554892.
16 1883 N.J. Laws ch. 96, at 112. To be sure, the enforcibility of this law was severely
Banning Tobacco Sales to Minors

Woman’s Christian Temperance Union (WCTU), which was proudly and excitedly keeping track of these enactments, more than half of the states, in all sections of the country, had already passed such legislation.17 (The WCTU took full credit for passage of all these laws. As Frances Willard pumped up her audience about no-sales-to-minors laws in her 1891 president’s address: “All this work was done by whom? The W. C. T. U.; that goes without saying; every law was gained by them, and enforcement is secured almost wholly through their weakened by confining the prohibition to those who “knowingly” sold tobacco to minors under 16. Id. at § 1. Later that year Washington State enacted a prohibition without the scienter requirement. 1883 Wash. Laws, at 67, 68, § 2. Contrary to R. Alton Lee, “The ‘Little White Slaver’ in Kansas: A Century-Long Struggle Against Cigarettes,” Kansas History 22(4):258-67 at 261 (Winter 1999-2000), Kansas’s 1889 law did not place it “in the vanguard of this movement.” Likewise, John Burnham, Bad Habits: Drinking, Smoking, Taking Drugs, Gambling, Sexual Misbehavior, and Swearing in American History 91 (1993), was wrong in stating that “[t]he first anti-cigarette laws began to appear in the 1890s.” As late as 1885 a newspaper in Iowa that was alarmed by boys’ smoking cigarettes—as a result of inhaling “a large amount of nicotine lodges in the throat and lungs”—was unaware of such laws: “In some states they are talking of passing laws prohibiting the sale of cigarettes to boys under eighteen years of age.” “The Cigarette Curse,” Davenport Democrat, July 20, 1885 (1:5) (copy furnished by Merle Davis). As early as 1880 the Vermont House of Representatives passed (by a vote of 95 to 79) a bill prohibiting the sale of cigars, cigarettes, and chewing tobacco to anyone under 15, but the Senate refused it a third reading. Journal of the House of Representatives of Vermont, Biennial Session, 1882, at 123, 130-31 (Oct. 25), 290 (1883).

17Minutes of the National Woman’s Christian Temperance Union, at the Sixteenth Annual Meeting, Chicago, Illinois, November 8 to 13, 1889, at cxlvii (1889) (19 states); Minutes of the National Woman’s Christian Temperance Union, at the Seventeenth Annual Meeting, Atlanta, Georgia, November 14th to 18th, 1890, at 180 (1890) (23 states: Arkansas, Connecticut, Georgia, Illinois, Indiana, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, South Carolina, South Dakota, Vermont, Washington). In addition, some cities (including Los Angeles) in states lacking such laws had enacted ordinances forbidding sale of tobacco to minors. Id. Cyclopedia of American Government 3:538 (Andrew McLaughlin and Albert Hart ed. 1914) erroneously stated that such laws did not begin to be enacted until 1891. Without a source or a list, Jack Gottsegen, Tobacco: A Study of Its Consumption in the United States 155 (1940), stated that by 1890 26 states had enacted such laws. By 1895, only Louisiana, Missouri, Montana, and Texas lacked these laws. Minutes of the National Woman’s Christian Temperance Union, at the Twenty-Second Annual Meeting, Held in Music Hall, Baltimore, Maryland, October 18-23, 1895, at 240 (1895).
Banning Tobacco Sales to Minors

In January 1891, when S. 4560 was introduced in the United States Senate to prohibit in the District of Columbia both the sale or giving of tobacco to anyone under 16 and the smoking or use of tobacco in a public place by anyone under 16, that chamber published a document summarizing the laws in 29 states that had already banned sales to youths.  

Shortly after the New Jersey legislature’s action, the New-York Daily Tribune, editorially put its finger on the self-contradictory social policy inherent in restricting cigarette sales bans to minors without being able to reason its way toward a rational conclusion that would avoid the inter-generational emulation effect spawned by an age-bifurcated sales law:

There is no diversity of opinion among persons of mature years as to the deleterious effects of the tobacco habit upon the young. Elderly gentlemen often maintain that to those who have reached or passed the most vigorous period of life the weed is more than a luxury—resting the weary, tranquilizing irritated nerves, promoting the digestive processes and arresting the undue waste of vital force. But these same persons are convinced that the fumes and juices which soothe and sustain the adult will stupefy the growing boy, blunt all his faculties, unstring his nerves, debilitate his muscles, set his heart a-flutter, disorganize his digestive functions, and demoralize his entire mental and physical economy. It is only fair to say that the boy holds a totally different theory. He is quite positive that the surreptitious or defiant cigarette makes a man of him at once. ... He doesn’t know much about his heart or liver, but so far as he is aware those organs behave with propriety. At all events he cannot understand why saturation with nicotine should be beneficial to the “old man” and fatal to him.

When the legislature, “not being composed of boys, took the adult view of the question,” the newspaper, unsure as to whether enough “stern virtue” underlay the law to insure enforcement, regarded it as evidence that the legislature, in viewing cigarette smoking by youth as “an evil of serious magnitude,” had appropriated the conclusion of “all competent physicians” that it was a “pernicious practice....” Indeed, the editorial did not distance itself from those “cautious

---

18 Minutes of the National Woman’s Christian Temperance Union at the Eighteenth Annual Meeting: Boston, Mass., November 13th to 18th, 1891, at 120 (1891).
20 Anti-Cigarette Laws,” N-YDT, Apr. 22, 1883 (6:4) (edit.).
Banning Tobacco Sales to Minors

observers” who held that “the quality of American manhood...is involved to a considerable extent in the treatment of this problem.” At all events, the Daily Tribune welcomed any contribution the law might make to rescuing “the coming Jerseyman from the temptation to narcotism....” To be sure, two days after the New Jersey law had gone into effect, when the first arrest was made for selling a cigarette to a minor in Morrisville, New Jersey, The New York Times conjectured: “The law does not prohibit young boys in the town from getting older ones to buy the desired cigarette for them, and it is possible that despite the arrest and punishment of Hartz the small boys of Morrisville will smoke as many cigarettes as before the law went into effect.”

The Times was caustically skeptical of such intervention. The following year, in connection with the unsuccessful introduction of a similar bill in the New York State legislature, the paper, in suggesting that the bill should have prohibited the sale of cigarettes to those over 17, editorially expressed a common cultural animus:

The cigarette is designed for boys and women. The small-boy who wishes to commit the crime of secret smoking, but whose stomach is not stout enough for a cigar or a pipe, naturally smokes a cigarette, and thus enjoys the consciousness of guilt without the remorse of stomach. A grown man has no possible excuse for imitating the small-boy. He can smoke a cigar without fear of a subsequent interview with an avenging father in the woodshed.... The decadence of Spain began when the Spaniards adopted cigarettes, and if this pernicious practice obtains among adult Americans the ruin of the Republic is close at hand.

In 1888, in connection with an earlier bill introduced in the United States

---


23 Not until 1889 did the legislature amend the penal code to make it a misdemeanor to sell, pay for, or furnish cigarettes, cigars, or any kind of tobacco to any child actually or apparently under 16. 1889 N.Y. Laws ch. 170, at 201, 202. Six years later Charles Hubbell, the New York City school commissioner, declaring that law and another prohibiting youth smoking to be “dead letters,” promoted the formation of an Anti-Cigarette League for pupils. “The Anti-Cigarette League,” N-YDT, Jan. 6, 1895 (10:6).
24 “Cigarettes,” NYT, Jan. 29, 1884 (4) (edit.). Five years earlier the newspaper had editorialized that cigarettes had “done more to demoralize and vitiate youth than all the dram-shops of the land.” “Tobacco for Boys,” NYT, Jan. 11, 1879 (4) (edit.).
Banning Tobacco Sales to Minors

Senate to prohibit selling or giving tobacco to minors under the age of 16 in the District of Columbia and supported by a petition of 257 physicians in that city, Senator Alexander Stewart (Republican of Wisconsin) expressed his belief that “cigarettes are destroying more youth than any other one thing that is affecting the prosperity of the country.” His colleague, Rhode Island Republican Jonathan Chace, a cotton manufacturer, agreed that the “use of cigarettes is undermining the health of the whole community by destroying the physical constitutions of the youth of this country.” In an editorial on the debate, the *New-York Daily Tribune* asserted that there “seems to be no cessation in the rate of deaths from cigarette smoking. Every few days the newspapers report a new victim.” It also referred to unquestioned estimates by physicians that at least 5,000 cases of impaired health in New York City could be traced to cigarette smoking. More interesting was the newspaper’s focus on the impact of price, advertising, and accessibility on smoking by children:

In many of our cities cigarettes are sold two for a cent at small groceries and in the stores where school supplies are on sale, so that boys are tempted to buy them instead of the traditional school-boy dainties. The result is that many boys are able to smoke without their parents’ knowledge. There never was a time, as every passenger on the elevated roads can certify, when the sale of cigarettes was being pushed so hard by showy advertisements, pretty gift cards and the like, as now.

Nor, as will be seen shortly, were advertisements merely showy.

As early as 1890, the WCTU resolved to “memorialize Congress for a law against the manufacture of cigarettes.” On February 13, 1892, Representative William Stahlnecker (D-NY) introduced a bill to raise the internal revenue tax on cigarettes to $10 per thousand—a 20-fold increase. The same day the press across the country reported that the House Ways and Means Committee would be petitioned to “prepare a bill invoking the paternal condemnation of the

---

28 Minutes of the National Woman’s Christian Temperance Union, at the Seventeenth Annual Meeting, Atlanta, Georgia: November 14 to 18th, 1890, at 22 (1890).
30 The tax had been 50 cents since 1883: 22 U.S. Statutes at Large, Act of Mar. 3, 1883, ch. 121, § 4 at 488, 489.
government upon the cigarette habit.” The article revealed that Stahlnecker, together with his New York Democratic colleagues William Cockran and Amos Cummings, had in their possession bills that the petitioners had requested them to introduce providing for the suppression of cigarette manufacture by means of the aforementioned tax increase. According to a statement accompanying the petition:

“Clippings taken from papers throughout the United States show that during the past year there have been about 100 deaths of young men, mostly under 16 years of age, from the effects of smoking paper-wrapped cigarettes. In some cases there has been an analysis of the stomach, and in most instances there has been found acid, phosphorous and arsenic, which is largely used in the manufacture of cigarette paper. Also, the same clippings will show that about 100 men have been consigned to insane asylums from the same cause.”

The petitioners plausibly contended that the proposed tax increase would place cigarettes “at a price that children could not pay, and go further than any State legislation can do....” But appending the names and former addresses of the more than 200 people who had allegedly “died or grown hopelessly insane as the effect of their pernicious habit” did little to persuade the skeptical editorial writer of the Republican Milwaukee Sentinel, who did not doubt the assertion, but deemed it misleading until it was also known how many coffee-drinkers, flute-players, Ibsen-readers, pew-holders, or men over 34 who parted their hair on the right side had died or gone mad the previous year. In addition to wondering whether cigarette-smoking caused insanity or “a predisposition to feeblemindedness” caused smoking, he maintained that “a majority of the cigarette-smokers now alive are apparently sane,” while “the majority of the people who died or went mad during the past year did not smoke cigarettes.” The paper therefore concluded that since no one had “much real knowledge of the effect of cigarette-smoking on cigarette smokers,” the petitioners were no less ignorant than anyone else and had made no case for congressional intervention. The chief difference between this statistical skepticism in the early 1890s and

---

31. The Cigarette Habit, DIO, Feb. 13, 1892 (7:5). This version of the article is quoted here because it is more comprehensive than some others including that in The New York Times.

32. The Cigarette Habit, DIO, Feb. 13, 1892 (7:5). On the truth content of such morbidity and mortality claims, see above ch. 2.

33. The Cigarette Habit, DIO, Feb. 13, 1892 (7:5).

34. Cigarette Smoking and Insanity, MS, Feb. 16, 1892 (4:3-4) (edit.). In fact, the paper adopted a libertarian position on cigarette smoking. “Cigarettes,” MS, Feb. 10, 1893 (4:2).
cigarette company mendacity in the latter part of the twentieth century—exquisitely on display in a Philip Morris vice president’s befogging the fact that 90 percent of those with lung cancer smoked cigarettes with the untruth that “we don’t know and nobody knows” why “98% of smokers never get anything” or non-smokers get lung cancer—is the difference between no epidemiological data and a mountain of internationally and universally reproduced scientifically irrefutable data.

Lack of statistical credibility was not the only obstacle to recognition of the need for or legitimacy of federal legislation. Thus the *Morning Oregonian*, which was willing to believe that 1,200 young men, chiefly under 16, had died from cigarette smoking during the previous year in the United States, assigned breach of parental duty and discipline as the cause. Nevertheless, the brute fact of such extensive mortality and insanity failed to show how “a Federal law would be able to institute a personal supervision of the acts of the misguided creatures who allow themselves to become ‘victims’ of a habit at once so useless, unmanly and disgusting as that of puffing away at little rolls of vile tobacco wrapped in villainous paper.”

Under the leadership of Eliza B. Ingalls of St. Louis, the national superintendent of the organization’s (anti-)narcotics department, the WCTU orchestrated the inundation of Congress with petitions. At the end of March 1892, Ingalls sent out packages of petitions to the WCTU’s state superintendents and secretaries throughout the United States, to be followed a few days later by “a stirring appeal urging every member of the organization to go to work with might and main to secure signatures in their respective localities.” The department’s principal work during 1892, in Ingalls’ words, “met with a hearty response everywhere; more than twenty-five thousand names were sent to Congress and thousands of letters written.” In Iowa, for example, the nationally

---

35Mr. James C. Bowling, Vice President, Philip Morris Inc. being interviewed by Mr. Peter Taylor, Thames Broadcasting Company, London, at 22 (August 16, 1976), Bates No. 1002410318, on http://legacy.library.ucsf.edu

36“Parental Legislation,” *MO*, Feb. 28, 1892 (4:2) (edit.). The editor could tolerate “the laborer who puffs away at a corncob pipe” and “condone in a degree the selfishness of the business man who smokes his cigar in a public place; but for the namby-pamby creature who smokes cigarettes there is no sentiment but that of disgust, unless the smoker is a boy, whom it is in order to pity.”

37“War on the Cigarette,” *Sioux Valley News* (Correctionville, IA), Mar. 31, 1892 (4:3).

38Minutes of the National Woman’s Christian Temperance Union at the Nineteenth Annual Meeting, Denver, Col., October 28th to November 2d, 1892, at 94 (1892).
affiliated WCTU of the State of Iowa secured petitions with about 1,500 signatures “asking congress to enact a law forbidding the sale, manufacture and importation of cigarettes..., a violation...to be punishable by a heavy fine and imprisonment.” Clara B. Willis, M.D., the superintendent of the state group’s Hygiene, Heredity, and Narcotics Department, added that: “Teachers generally, and many physicians, seemed to deem it a privilege to sign the petition which means so much for the boys of our land.”

A very large volume of petitions was presented to Congress. On June 6 a discussion of the petitions unfolded on the Senate floor triggered by a question as to which committee—Finance, Education and Labor, or Epidemic Diseases—they should be referred to. Senator Daniel Voorhees (Dem. Ind.) urged referral to the last-named because:

The basis of the petition...is because of the use of the cigarette being injurious to the health of the young and rising generation.

I heartily concur in the object of the petitioner. I believe there is nothing more injurious to the youth of the country than smoking these miserable cigarettes. ... The Committee on Epidemic Diseases have power to call before them medical testimony....

Because it was obvious that the petitions were “in the same form” and on “printed blanks”—after all, they advised the petitioner to “Return as soon as possible to Mrs. E. B. Ingalls”—the presiding officer had the text read aloud:

Inasmuch as the cigarette is injuring, morally, mentally, and physically, a vast number of the youth of this nation, causing insanity and death to thousands without the least benefit to the consumer, we, the undersigned, parents, educators, and physicians, ask your most honorable body to enact a law forbidding the sale, manufacture, and importation of cigarettes in any form in the United States, a violation of this law to be punishable by heavy fine and imprisonment.

Orville Platt, Republican of Connecticut, agreed with Voorhees’ proposal because he hoped that the committee would find that Congress had the power to prohibit the manufacture, use, and sale of cigarettes; he would then request a similar prohibition of intoxicating liquor. Iowa Republican William Allison, a member
Banning Tobacco Sales to Minors

of the Finance Committee and together with Platt one of the four most powerful senators,\textsuperscript{44} while asserting that any congressional power to act had to be lodged under the right to tax, argued, without insisting on a referral to that committee, that cigarette use could hardly be classified as an epidemic disease such as smallpox or cholera. Amusingly, while the chairman of the Committee on Epidemic Diseases, Tennessee Democrat Isham Harris, who doubted whether the petitions “ought to be here at all,” denied that his own committee had any jurisdiction and regarded the Finance Committee as the only possibility, its ranking minority member, Voorhees, characterized such a referral as “absolutely ridiculous” and as sensible as one to the public parks committee. Only after Voorhees had disabused Harris of his odd misunderstanding that the petition requested the imposition of a tax on the production and sale of cigarettes did the Senate agree to the motion to refer it to the Committee on Epidemic Diseases.\textsuperscript{45}

Six weeks later the committee duly reported to the Senate that the petitioners’ claims were as accurate as the evils were beyond the constitutional power of Congress to remedy. Based on information that it had obtained from unnamed medical scientists and sanitarians, the committee opined that “the use of tobacco in any form is injurious to the physical condition of man, and cigarette-smoking is more injurious, especially to youths, than the use of tobacco in any other form...” Referring the petitioners to the state legislatures as alone possessing the requisite power to act, the committee “venture[d] to express the opinion and the hope” that, once the states had prohibited the manufacture and sale of cigarettes, Congress would prohibit the importation from foreign countries as well as the manufacture and sale in the District of Columbia and the territories, the only relevant congressional powers, “however injurious” cigarettes might be.\textsuperscript{46}

Neither the process nor the outcome frustrated Ingalls in the least. Three months later she explained to the WCTU’s annual meeting that not only was she “very glad that Congress has classed the cigarette with dangerous diseases,” but she had also “felt sure that Congress would do no more than refer this question to the States...” Rather, the WCTU’s purpose in petitioning had been to create “a grand chance for education.” Accurately forecasting the next phase of national anti-cigarette agitation, Ingalls declared: “We will wake it up this winter and the question will probably be referred to the States. A similar bill was introduced in the last Massachusetts legislature.”\textsuperscript{47}

\textsuperscript{44}Leland Sage, \textit{A History of Iowa} 220 (1987 [1974]).
\textsuperscript{45}CR 23:5051 (June 6, 1892).
\textsuperscript{47}Minutes of the National Woman’s Christian Temperance Union at the Nineteenth
On October 17, 1894, a few months after the Ohio legislature had enacted a prohibition on the sale of photographs with cigarettes,\textsuperscript{48} Washington Duke informed his son James B. Duke, the president of the Tobacco Trust, that he had received a letter from a minister, and was very much impressed with the wisdom of his argument against circulating lascivious photographs with cigarettes, and have made up my mind to bring the matter to your attention in the interest of morality, and in the hope that you can invent a proper substitute for these pictures which will answer your requirements as an advertisement as well as an inducement to purchase. His views are so thoroughly and plainly stated that I do not know that I can add anything except to state that they accord with my own, and that I have always looked upon the distribution of this character of advertisement as wrong in its pernicious effects upon young men and womanhood, and therefore has [sic] not jingled with my religious impulses. Outside of the fact that we owe Christianity all the assistance we can lend it in any form, which is paramount to any other consideration, I am fully convinced that this mode of advertising will be used and greatly strengthen the arguments against cigarettes in the legislative halls of the States. I hope you will consider this carefully and appreciate my side of the question. It would please me very much to know that a change had been made.\textsuperscript{49}

Thus, just in case the religious and moral considerations were unable to deter his son from sullying Christianity, Duke urged him to ponder the intensely pragmatic issue of the total destruction of the cigarette industry by means of prohibitory legislation.

Under pressure from the National WCTU,\textsuperscript{50} the Dingley tariff bill of 1897 applied the legal compulsion to compensate for Duke’s and the Tobacco Trust’s

\textit{Annual Meeting, Denver, Col., October 28th to November 2d, 1892, at 94 (1892).} See above ch. 3.
\textsuperscript{48}\textit{1894 Ohio Laws v. 91, S.B. No. 313, § 7, 311, 313.}
\textsuperscript{49}\textit{Letter from Washington Duke to J. B. Duke (Oct. 17, 1894), in BNDP, Box 65, RBMSCL.}
\textsuperscript{50}\textit{The head of the WCTU’s anti-narcotics department reported to the 1897 annual convention that: “The most wonderful advance has been made in this line of work. Sentiment is strong against cigarettes. The tide is high, and our work seems to receive a response everywhere. The use of the cigarette is increasing, but the increase was less during the past year than for many years. The Dingley Bill prohibits pictures or any prizes being placed in the boxes. Everything points to the death of the little coffin nail, if you women will only continue faithful.” Report of the National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting, Held in Music Hall, Buffalo, New York, Oct. 29 to Nov. 3, 1897, at 343 (1897).}
Banning Tobacco Sales to Minors

lack of the requisite moral fortitude to forgo pornography:\footnote{51}:

“None of the packages of smoking tobacco and fine-cut chewing tobacco and cigarettes prescribed by law shall be permitted to have packed in, or attached to, or connected with, them, any article or thing whatsoever, other than the manufacturers’ wrappers and labels, the internal revenue stamp and the tobacco or cigarettes, respectively, put up there in, on which tax is required to be paid under the internal revenue laws....”\footnote{52}

\footnote{51}{A World War I-era, egregiously apologist book claimed that the picture inserts during the previous 30 or 40 years were “in many cases...of real educational value.” \textit{William Young, The Story of the Cigarette} \textit{97} (1916). A more recent apologist biography asserted that “J. B. Duke could hardly end the time-hallowed use of pictures of curvaceous women in cigarette advertising....” \textit{Robert Durden, Bold Entrepreneur: A Life of James B. Duke} \textit{60} (2003). In fact, as early as 1887 the city of Charlotte, North Carolina banned picture-bearing cigarettes, causing nearly all the city’s dealers in Duke’s cigarettes to remove the pictures from the packages in order to “sell the packages on their own merit” and avoid indictment. One dealer related that he would return the pictures to Mr. Duke. The same dealer stated that he had seen boys buy the packages, selecting the “loudest” pictures and throwing away the cigarettes. “Cigarette Pictures,” \textit{USTJ}, vol. 23, July 23, 1887 (5:4). Ironically, according to the trade press: “The one cause which has operated most strongly in bringing it [the American Tobacco Co.] into existence was the necessity which the great cigarette manufacturers found themselves to be under, to reduce expenses incident to the ruinous ‘schemes’ to recommend themselves to the consumer. Human ingenuity and the art resources of the lithographer have been exhausted in the effort to find something ‘new’ to throw in with each purchase. Cigarette smokers have been trained to expect better and ever increasingly valuable presents with every package they bought. It is calculated that the formation of the American Tobacco Company will reduce the aggregate expenses of the cigarette manufacturers composing it fully two fifths, in other words many millions of dollars annually. It is well for the brethren to dwell in harmony, and if the small boy suffers the chastening will do him good.” “The Cigarette Trust,” \textit{USTJ}, vol. 28, Jan. 25, 1890 (2:5). Mystifying is the claim of two cancer prevention specialists that a cigarette advertising war in the 1890s “pitted industry leaders, whose promotion practice was to include a picture of a scantily dressed female inside each packet of cigarettes, against James Duke, who was one of the first to experiment on a large scale with a broad spectrum marketing strategy.” \textit{John Pierce and Elizabeth Gilpin, “A Historical Analysis of Tobacco Marketing and the Uptake of Smoking by Youth in the United States: 1890-1977,” Health Psychology} \textit{14}(6):500-508 at 504 (1995). Nor were pictures the only lure for children. An Ohio state senator, in advocating on behalf of his bill increasing the penalty for selling cigarettes to minors, reported that small stores located near schools “sold prize packages containing some toy or object that would attract the young, and given in connection with a Cigarette and a piece of Tobacco....” “Ohio’s Law on Selling Cigarettes to Minors,” \textit{WTJ} 22(44):1:1 (Feb. 10, 1896).}

\footnote{52}{An Act to provide revenue for the Government and to encourage the industries of}
Banning Tobacco Sales to Minors

In a forward-looking proposal for counter-advertising, a few weeks later the Chicago Tribune elaborated on the position adopted by the Boston Advertiser, which, building on the cigarette manufacturers’ acquisition of the “pictorial habit,” urged that they

be compelled to make the pictures illustrative of the effects of their wares. For instance, on one side of the package could be represented the features of a boy just before he began using the poisonous weeds, and on the other side the features of the same boy after the poison had got well started in its deadly work.

The public is protected in the purchase of all other poisons by a label which amply warns the purchaser of the character of the article.... In addition to pictures...a few statistics might be added to fill up the spaces on the outside of the packages.... The number of lives sacrificed to the habit might be set forth, with a few sample cases of young men who have sapped their constitutions and their mental and moral integrity by the degrading practice. 53

To be sure, five years later Congress significantly narrowed the scope of forbidden images, although the new emphasis on decency and morality may

---

53“New Use of Cigaret Pictures,” CT, Aug. 18, 1897 (6) (edit.).
Banning Tobacco Sales to Minors

nevertheless have satisfied the WCTU. The amended statute prohibited including “any paper, certificate, or instrument purporting to be or represent a ticket, chance, share, or interest in, or dependent upon, the event of a lottery, not any indecent or immoral picture, representation, print, or words.”\(^\text{54}\)

The WCTU clearly imagined that victory was nigh. The head of the WCTU’s anti-narcotics department reported to the 1897 annual convention that:

The most wonderful advance has been made in this line of work. Sentiment is strong against cigarettes. The tide is high, and our work seems to receive a response everywhere. The use of the cigarette is increasing, but the increase was less during the past year than

\(^{54}\text{Act of July 2, 1902, 32 Stat. 714, 715, ch. 1371, \S\, 2. Violations were subject to a $1,000 fine and confiscation of the entire stock of tobacco. Revised Statutes of the United States 1873-74, \S\, 3456, at 684 (2d ed. 1878); “Cards May Be Put in Smoking Tobacco and Cigarette Packages,” Landmark (Statesville, N.C.), July 15, 1902 (4:6). Shortly after enactment the Commissioner of Internal Revenue observed that, since these provisions had been inserted into the bill in conference without having passed either chamber, his office had not had the customary conversations with members that shed light on the law’s purposes. In addition to conveying manufacturers’ many complaints about the new law’s arbitrary and perhaps unconstitutional aspects, he recommended further amendments to authorize him to issue regulations concerning what tobacco packages should be permitted to contain. Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1897, at 57 (1897). Further legislative efforts focused on the use of coupons and prizes; non-Trust independent producers and their representatives objected to these techniques as “an indirect way of bribing people to buy their goods” in which small firms lacked the capital to compete. Coupons, Etc., in Statutory Packages of Tobacco: Prizes to Purchasers of Cigars, Cigarettes, and Tobacco: Hearings Before Subcommittee on Internal Revenue of the Ways and Means Committee, House of Representatives, 57th Cong., 2d Sess. 2 (Feb. 4, 1903) (Rep. Theobold Otjen). Otjen’s bills designed to restore the greater rigor of the Dingley bill and prohibit tobacco sellers from advertising independently of the packages that the latter could be redeemed for prizes were not enacted. H.R. 16026 (57th Cong., 2d Sess., Dec. 13, 1902); H.R. 16457 (57th Cong., 2d Sess., Jan. 7 and Feb. 12, 1903); H. Rep. No. 3766: Amending Section 3394, Revised Statutes (57th Cong., 2d Sess., Feb. 12, 1903). Interestingly, the president of the Association of Independent Tobacco, Cigarette, and Cheroott Manufacturers of the United States testified that “the Government should not encourage the people...to injure their health and destroy their brain by the use of dangerous concoctions, supposed to be tobacco, and although we are manufacturers of the various forms of tobacco we do not hesitate to say that the Government should no more tolerate a tobacco manufacturer who offers a premium or a gift to the youth who consumes the largest number of cigarettes than it should tolerate the barroom man offering similar inducements to the youths who consume the largest quantity of whisky.” Coupons, Etc., in Statutory Packages of Tobacco at 5 (John Landstreet).\)
Banning Tobacco Sales to Minors

for many years. The Dingley Bill prohibits pictures or any prizes being placed in the boxes. Everything points to the death of the little coffin nail, if you women will only continue faithful.\textsuperscript{55}

At least one member of Congress in the 1890s sought to use the taxing power for more than merely raising revenue. In 1896, Danish-born former Justice of the Peace Charles Woodman,\textsuperscript{56} a Republican representative from Chicago, introduced a bill that would have increased the excise tax one hundred-fold—from 50 cents to 50 dollars per 1000 cigarettes.\textsuperscript{57} Although this imposition of a 5 cent per cigarette tax

“would not put cigarettes beyond the reach of the small boy...he couldn’t borrow 50 cents or get it from his parents so often, as he now buys cigarettes without being cross-questioned, and they would discover his secret.

You can enact all the laws you want prohibiting the sale of cigarettes to small boys, but so long as the price remains within their reach they will be able to get them.”\textsuperscript{58}

Woodman was by no means an outsider or radical. School teachers in Chicago who were distressed by the prevalence and consequences of cigarette smoking among their young pupils expressed the hope that Congress pass his “almost prohibitory tax.”\textsuperscript{59} The \textit{Chicago Tribune} joked that Woodman’s proposal to impose such a heavy tax on cigarettes that “only millionaires can afford to buy them” raised a question as to whether it was “an effort to weed out the cigarettes or the millionaires.”\textsuperscript{60} Indeed, at a time when the newspaper apparently misunderstood his measure to increase the tax only three- or fourfold—which Congress in fact enacted by 1898—it editorially supported the action because the

\textsuperscript{55}Report of the National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting, Held in Music Hall, Buffalo, New York, Oct. 29 to Nov. 3, 1897, at 343 (1897).
\textsuperscript{56}On Woodman’s life, see “Woodman Is Near Death,” \textit{CT}, Oct. 13, 1897 (5).
\textsuperscript{57}H.R. 8264, 54th Cong., 1st Sess. (Apr. 17, 1896).
\textsuperscript{58}“Wants to Tax Cigarettes Out of the Reach of Boys,” \textit{Landmark} (Statesville, NC), Jan. 5, 1897 (1:7). The identical text appeared in the \textit{NYT}, Dec. 31, 1896 (2).
\textsuperscript{59}“Fear in Cigaret Shops,” \textit{CT}, Dec. 19, 1896 (9).
\textsuperscript{60}\textit{CT}, Feb. 4, 1897 (4) (untitled). The WCTU sounded a similar theme: “If the cigarette is so injurious as to make it desirable to virtually prohibit its use among the masses, why not legislate it entirely out of existence? This is an instance in which the welfare of the rich needs looking after. The millionaire’s son has as much right to protection in this matter as the boy of the slums.” \textit{US} 23(6):(3:3) (Feb. 11, 1897) (untitled).
no-sale-to-minors law was unenforceable and the opinion of teachers and others with contact with boys was “unanimous...that this habit is the most serious menace the youth of the land has to confront. It is necessary to protect these children from themselves.” The paper therefore urged the seven-member Chicago congressional delegation to draft an appropriate bill and “push it through.” In February 1897, Woodman presented an extended argument to the House Ways and Means Committee in support of his proposal. In particular he offered a precis of reports from school superintendents throughout the United States estimating that 2 to 25 percent of school children (and, on average, 20 percent of boys) were “addicted in a more or less degree to the cigaret habit,” which they all agreed was corrupting. To be sure, the insuperable impediment for anti-cigarette activists’ was, “of course,” as the Chicago Tribune put it, that:

There was no intention of putting a prohibitory tax on cigarettes, the industry having become so large as to have acquired a distinct standing. Most of the members of the committee are opposed to the use of the taxing power as a police regulation, and believe that the evil of selling cigarettes to children can best be reached by statutory prohibitions in the different States.

The WCTU’s reaction to Woodman’s approach was, “‘Not quite,’” because even the $50 tax did not eradicate evil: “The poison still continues to grow even with license. ... There will still be cigarette smokers among our men who can pay 25 cents a piece for them.”

What is especially potent about this position is that

---

61 “Chance for Chicago’s Congressmen,” CT, Nov. 14, 1896 (12) (editorial). By 1917, the paper’s editors had done an about-face, adopting the position that in effect cigarettes don’t kill—people kill: “The relative harmlessness of the cigaret causes its bad reputation in communities which still regard it as an instrument of deadly sin. A youngster who would get little pleasure and much punishment out of a cigar can smoke a cigaret because it is mild. He has no business smoking at all. The cigaret gets the blame. Because of the mildness of the cigaret the smoke can be inhaled and the cigaret carries the medical reproach that belongs to the manner of smoking it. ... Every now and then a legislature, anxious to be up and doing in good work, anxious to protect people from the risk of selection in their own habits, hits the cigaret with a bill for an act.” “Cigaret,” CT, Jan. 16, 1917 (6) (editorial). The transformation of editorial position was correlated with the fact that by this time the newspaper was replete with large illustrated advertisements for cigarettes.

62 “Too Few to Go Around,” CT, Feb. 13, 1897 (10). Since the Ways and Means Committee does not appear to have held any hearing on Feb. 12, 1897, it is unclear in what procedural context Woodman addressed the committee.

it was not rooted in the WCTU’s stereotypical solicitude for boys, but represented a relatively unusual transfer of its absolutist stance on liquor to cigarettes.

Woodman tried unsuccessfully to overcome the obstacle of congressional deference to capitalist power and states’ rights by predicting a fivefold increase in tax revenue that would contribute to “the redemption of an impoverished Treasury.” He then shifted the focus to a trope that might have resonated more deeply with Congress:

Protection is the watchword of the age. Protection to American workingmen. Protection to American industries. Protection, as by the immigration bill recently passed, to American citizenship. Protection, as in the case of the lottery law of a few years ago, of the people against themselves. Is there, then, any reason why the same protection should not be extended to our boys, especially when such protection involves a matter of much needed revenue to the government?

This approach of suppressing cigarettes through taxation rather than administrative controls was sometimes paired with anti-trust sentiment. In 1895, for example, the New-York Daily Tribune editorially urged the federal government to increase its revenues by raising the tax on cigarettes to high figures. It is generally conceded, except by infatuated and desiccated cigarette smokers, that the smoking of cigarettes is a pernicious and deleterious habit. The manufacture of cigarettes in this country is largely controlled by an exceptionally selfish and avaricious trust. It will be in the public interest, and great benefit to the country, if the tax on cigarettes is multiplied many times over. The Cigarette Trust is a peculiarly evil one, and it ought to be broken up.

Popular perception of the special dangers of cigarette smoking also loomed over congressional proceedings to extract the requisite resources from the citizenry to finance the imperialist campaign in the Philippines. In the course of the debate over the Spanish-American War tax on alcohol and tobacco in 1898, Nevada Democrat Francis Newlands urged the House to reduce both:

Now you ask me why we should relieve tobacco and beer of these taxes. Some think that the consumption of beer and the use of tobacco involve vices that ought to be prohibited by taxes.

---

64. “Cigarette Tax Bill,” NYT, Feb. 13, 1897 (3). Woodman asserted that consumption might fall by as much as one-half.


66. N-YDT, Feb. 6, 1895 (6:5-6) (untitled edit.).

688
**Banning Tobacco Sales to Minors**

Well, I do not think that that idea generally prevails.... There is one use of tobacco which I would oppressively tax if it were in my power, and that is the cigarettes. If I had the power I would put the entire tax of $5,000,000 on tobacco, as suggested by me, upon the cigarette industry, because I believe the use of cigarettes is a pernicious habit, destructive of the health and morals of our young people [applause], a habit usually acquired before a boy grows to maturity and which stunts him on the way to maturing.\(^{57}\)

In evaluating these incipient efforts at regulation, control, and prohibition, it is crucial to keep in mind that cigarette consumption in the 1880s was still in the infancy of what was to become explosive growth in the United States. The *Times* had observed in 1881 that Americans were smoking 10 times more cigarettes than five years earlier, a thousand times more than a decade earlier, “and so on till we reach a point about 30 years back, when we smoked none at all.”\(^{68}\) Nevertheless, the unsubstantiated claim in 1901 by a New York City councilman, in support of his proposed ordinance to criminalize the sale of cigarettes to persons under 18, that 99 percent of boys under the age of 15 in that city smoked cigarettes\(^{69}\) appears wildly implausible.

**Iowa Enacts the WCTU’s Scientific Temperance Instruction: 1886**

Boys are often disposed to use tobacco through the mistaken idea that chewing and smoking are manly accomplishments. They need to learn that the effects of tobacco are of the most harmful nature, and that they can not afford to form the habit of using it.

... Smokers often befoul the air which others must breathe, with the fumes of their pipes and cigars. This indifference to other people’s comfort is partly due to the effect of the tobacco itself, which, being a narcotic, tends to blunt the finer sensibilities. The same indifference is often shown by tobacco chewers in their disgusting habit of spitting in cars, on floors, stoves, sidewalks, steps, and other places where people must pass.\(^{70}\)

Although Iowa lacked any legal prohibition on sales of cigarettes to minors in the 1880s, the subject of adolescent smoking was a matter of public concern and debate. Prodded by the Woman’s Christian Temperance Union—which between 1882 and the turn of the century succeeded in petitioning and lobbying

---

\(^{57}\) *CR* 34:288 (Dec. 13, 1900).

\(^{68}\) The *Fragrant Cigarette,* "NYT," Apr. 10, 1881 (11).

\(^{69}\) To Regulate Sale of Cigarettes," *N-YDT,* Feb. 9, 1901 (4:5).

Banning Tobacco Sales to Minors

every state legislature and Congress to enact such a law\(^{71}\) and thus became “perhaps the most influential lay lobby ever to shape what was taught in public schools”\(^{72}\)—in 1886 the Iowa General Assembly passed a law requiring:

That physiology and hygiene, which must in each division of the subject thereof include special reference to the effects of alcoholic drinks, stimulants and narcotics upon the human system shall be included in the branches of study now and hereafter required to be regularly taught to and studied by all pupils in common schools and in all normal institutes, and normal and industrial schools and the schools at the Soldiers’ Orphans’ Home, and Home for Indigent Children.\(^{73}\)

The legislature specified that only schools complying with the reporting requirements would receive the school funds to which they were otherwise entitled.\(^{74}\) Finally, no one could receive a teacher’s certificate without having “passed a satisfactory examination” in the newly required subject matter, the certificate of teachers who failed to teach this subject matter had to be revoked, and the teachers would be disqualified from teaching for one year.\(^{75}\)

The very similar statutes that all other states and the federal government enacted also used some variant of “alcoholic drinks, stimulants, and narcotics....”\(^{76}\) Indeed, as late as the mid-1920s one education scholar ironically concluded that: “From the various enactments one might infer that ‘stimulants and narcotics’ is regarded as our most important branch of learning; not only is

\(^{71}\)Sen. Doc. No. 171: Reply to the Physiological Subcommittee of the Committee of Fifty 2 (58th Cong., 2d Sess., Feb. 27, 1904). On the federal enactment, see S. 797 (49th Cong., 1st Sess., Dec. 21, 1885) (Blair); H.R. 3496 (49th Cong., 1st Sess., Jan. 11, 1886 (Cutcheon); Sen. Rep. No. 85 (49th Cong., 1st Sess., Feb. 8, 1886); S. 1405 (49th Cong., 1st Sess., Feb. 8, 1886) (Blair); H. Rep. No. 1765 (49th Cong., 1st Sess., Apr. 20, 1886); CR 17:4603 (May 17, 1886) (passed House 209 to 8, with all 8 nays cast by Democrats, two of them from Iowa); Act of May 20, 1886, 24 Stat. 69, ch. 362. Andrew Sinclair, Era of Excess: A Social History of the Prohibition Movement 43 (1964 [1962]), asserted, without any documentation, that the WCTU “cajoled and bullied” the legislatures into enacting such laws, but failed to explain why it was unable to secure enactment of anti-cigarette laws in more than nine states. Id. at 180 (in fact it was 13 states).


\(^{73}\)1886 Iowa Laws ch. 1, § 1, at 1.

\(^{74}\)1886 Iowa Laws ch. 1, § 2, at 1-2.

\(^{75}\)1886 Iowa Laws ch. 1, § 3, at 2.

\(^{76}\)E.g., 1882 Vt. Laws No. 20 at 36 (first statute); 1883 Mich. Pub. Acts No. 93, § 1 at 89; 1885 Neb. Laws ch. 83, § 1 at 332; 1886 Iowa Laws ch. 1, § 1 at 1.
Banning Tobacco Sales to Minors

it more widely prescribed but it has received more extensive and more specific legislation than any other. It is our nearest approach to a national subject of instruction; it might be called our one minimum essential.”

Tennessee may have been the only state expressly to include in its original law any mention of a tobacco product and specifically cigarette smoking, but as many states amended their laws, two updated them to include tobacco. Moreover, other states administratively understood “stimulants” or “narcotics” to include tobacco, and by the turn of the century the WCTU could boast that these school programs “are now carrying to millions of children all over this country the facts concerning the effects of alcoholic drinks and tobacco on muscular working ability which have been wrought out by scientific experiment, largely within the past decade, and which, but for this practical application, would be reposing in dust-covered volumes on the shelves of medical libraries.”

As early as 1886, the state school superintendent of Vermont—the first state to enact a scientific temperance instruction law— remarked that: “The startling fact that so large a number of school boys are forming the habit of using tobacco by smoking cigarettes, thus

77Jesse Flanders, Legislative Control of the Elementary Curriculum 68 (Teachers College, Columbia U. Contributions to Education, No. 195, 1925).


79Alabama Code § 1746 at 759 (tobacco) (1907); 1909 Cal. Stats., ch. 269, at 412, 413 (tobacco). According to Jesse Flanders, Legislative Control of the Elementary Curriculum 65-67 (1925), between 1903 and 1913 Indiana amended its statute to add nicotine, but no such amendment could be located, although in 1933 Indiana did amend its law to add tobacco (together with sedatives). 1933 Indiana Acts ch. 256, § 2, at 1138, 1139.


Banning Tobacco Sales to Minors

retarding physical development, disordering the nervous system, and weakening their mental power, is a sufficient incentive to all the effort that has been or can be put forth to forewarn the children against this evil."\textsuperscript{82} In Connecticut teachers were to teach, inter alia, that using tobacco, “creates a strong appetite for itself

\textsuperscript{82}Report of the Secretary of the Interior 724 (H. Ex. Doc. 1, Pt. 5, 51st Cong., 2d Sess., 1893). Just as the overwhelming animus of the instructional movement was alcohol—one well-known 200-page text-book, Albert Blaisdell, \textit{How to Keep Well: A Text-Book of Health for Use in the Lower Grade of Schools} 126, 160-63, 181 (1885), devoted about three pages to tobacco, while Eli Brown, \textit{Youth’s Temperance Manual: An Elementary Physiology} iv, 21, 44, 54-55, 95, 104-105, 122-23, 126 (1888), which was endorsed and revised by Mary Hunt of the Department of Scientific Instruction of the National WCTU, devoted about three of 140 pages to tobacco—the scientific criticism directed at the substance of the teaching focused on alcohol. For examples, see selections in \textit{Report of the Secretary of the Interior} 733-37 (H. Ex. Doc. 1, Pt. 5, 51st Cong., 2d Sess., 1893). A study of what children in grammar schools recalled about the effects of alcohol and tobacco in Massachusetts included the statements that “[i]f the persons smoke it will make cancers come on their lips,” that tobacco caused yellowing of teeth and bad breath, and that tobacco contained the “deadly poison” nicotine. \textit{Id.} at 725. One study did fault school temperance texts for making such “ridiculous” claims as that “‘Tobacco is doing more harm in the world than rum’” and that “‘No young man can use tobacco without injuring himself seriously.’” W. Ferguson, “Temperance Teaching and Recent Legislation in Connecticut,” \textit{Education Review} (Mar. 1902), reprinted in \textit{Report of the Commissioner of Education} 1:1032-40 at 1035, in \textit{Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1901} (57th Cong., 1st Sess., H. Doc. No. 5, 1902). Since the nub of the scientific critique of Scientific Temperance Instruction was that having failed to distinguish between “the diametrically opposite conceptions of ‘use’ and ‘abuse,’ some of its advocates have not hesitated to teach our children that the terrible results of prolonged abuse of alcohol may be expected to follow any departure from the strict rules of total abstinence,” it did not apply to tobacco, which science today recognizes as having no safe lower limit of use, even if scientists a century ago and more recently had not yet achieved this insight. W. Atwater et al., \textit{Physiological Aspects of the Liquor Problem} 1:44 (1903). Even in 1888, a text, after observing that tobacco smoke fumes “irritate the delicate membrane that lines the lungs” of the smoker, called attention to the effects of involuntary exposure to second-hand smoke: “Young children, and non-smokers in delicate health have been known to suffer from breathing air loaded with fumes of tobacco smoked by others.” Eli Brown, \textit{Youth’s Temperance Manual: An Elementary Physiology} 104 (1888). On the other hand, typical of the deterrent-type of assertions disseminated by approved school books was the poisonous nature of nicotine, a single drop of which was said to be able to kill a cat in one minute; a leaf of tobacco placed under the arm or over the stomach was said to have made soldiers sick enough to shirk military duty. Albert Blaisdell, \textit{How to Keep Well: A Text-Book of Health for Use in the Lower Grade of Schools} 160-61 (1885).
Banning Tobacco Sales to Minors

and often makes a man slave to it—many try to leave off its use, but only a few succeed; “its use involves great expense without any valuable return”; tobacco chewing is a filthy habit, and smoking is offensive to many; and “many business men will not employ boys who are cigarette smokers.”

The WCTU’s purpose in causing such measures to be enacted was the long-term one of disseminating sufficient scientific knowledge to mobilize electoral support for prohibition. As Mary Hunt, the WCTU’s chief scientific temperance instruction organizer, explained to the Senate Committee on Education and Labor:

[M]ajorities make laws in our country...they are enforced if they are popular and unenforced if they are unpopular. A law prohibiting a beverage that a majority of voters in a community believe in and want to drink is scarcely possible. If, under high pressure, it becomes an enactment it will be very unpopular. The Czar of Russia could manage this matter better than we can. There law is the wish of one man; here every man who drops the ballot is a czar. Law here represents the wishes, the will, the appetites, and passions of that seething, swaying mass called the voters of our 56,000,000 people. ... As long as a majority of the people on the outside of the saloon want to drink what the man on the

83In other words, these anti-tobacco advocates recognized what medical science officially announced almost a century later—that “tobacco use and nicotine in particular meet all the[] criteria” of drug addiction, including pharmacological reinforcement, physical dependence, withdrawal syndromes, and relapse. The Health Consequences of Smoking: Nicotine Addiction: A Report of the Surgeon General iv (1988).


85Iowa’s statute was relatively rigorous, but some other states’ were more so, New York’s being the most comprehensive. See Report of the Commissioner of Education for the Year 1903, 2:2418-19 (1905).

inside wants to sell, we are aware he will sell. When the men who want to drink are in the minority, the majority who don’t will be in the place of power over alcohol. To reduce the number of these drinkers as speedily as possible seems to us to be the duty demanded by the great evil wrought by the drink upon the character of citizenship, and therefore upon the life of the nation. ... We come...to ask for an enactment that shall result in the enlightenment of the understandings and consciences of the people—not as to the vice and evil of drunkenness; of that they are now assured—but as to the nature of alcohol and of its effects upon the human system, that thus forewarned they may be forearmed.

Although the initiative did meet with some resistance in some states, especially from generally anti-prohibitionist Democrats, its passage in all jurisdictions may have been linked to the perception, voiced by New Hampshire Republican Senator Henry Blair, the WCTU bill’s chief congressional sponsor, that only a man who “hate[s] children and seek[s] an opportunity to transmit misery to posterity” could object to it. Proponents were insistent that instruction was necessary in primary school, “even for those who remain longest in school, to guide constantly-forming habits and to create aversion for wrong habits during these most impressible years of child life. ‘Most of the cigarette smokers in my schools,’ writes a superintendent, ‘are in the fourth and fifth years.’”

The attack on tobacco was at the time and always remained a subordinate campaign of the WCTU, whose central goal was prohibition of alcohol. In this sense mandatory teaching about the effects of tobacco use was clearly a by-product of the main drive, as made clear even in the text of the state statutes, which (with the exception of Tennessee’s) failed even to mention tobacco expressly. And just as prohibition itself sparked socially explosive contrary

---

91A central text of the campaign failed to deal with cigarettes or tobacco at all. Mary Hunt, *An Epoch of the Nineteenth Century: An Outline of the Work for Scientific Temperance Education in the Public Schools of the United States* (1897). The book’s only reference to tobacco or smoking came in the form of a quotation from a railroad officer in response to a question as to why the company forbade the employment of men to run trains who drank alcohol or smoked tobacco. *Id* at 64.
opinions, the teaching program was controversial as well.

In Iowa the Scientific Temperance Instruction bill was introduced in the Senate by Talton Clark, a lawyer who was an “earnest advocate of temperance and sustained the prohibitory law.” On February 5, shortly before the Senate began debate on the bill, a number of petitions were presented to the chamber on this and two other issues of great importance to the WCTU—women’s suffrage and the suppression of obscene literature; 13,000 citizens had petitioned for the mandatory instruction bill. Marion Howard Dunham, the superintendent of the department of scientific temperance of the Iowa WCTU from 1883 to 1887 and a socialist, was recognized by Frances Willard, the long-time head of the national WCTU, as having been chiefly responsible for having secured passage of the law. The floor debate was initiated by Democrat Lemuel Bolter—a lawyer in the midst of what at the time was the body’s longest legislative career—who offered an amendment obviously playfully designed to transcend the framework of the proposed measure by tacking on a requirement that pupils also be taught about “the effect of the present high protective tariff or tax, and especially as to its effects upon the human system of the poor and laboring masses that are now required to pay a much higher per cent of tax on the common and actual necessities of life, than are the rich and opulent required to pay on wines, diamonds, silks, laces, and other luxuries.” Bolter then launched into an intense but entertaining 70-minute speech. Beyond the empirical claim that medical scientists had “not yet fully determined that alcohol and narcotics are poison,” he objected to “this method of bringing up the American youth. When you attempt to make an angel of the average American boy, you spoil a prospective man.”
Moreover, the prohibitionists’ zeal was as intoxicating as whisky:

The men brought up under such influence and such radical prohibition make of the American youth spindly, whining, shriveling men which they are now becoming. Such men would not pay twenty-five cents for axle grease if the Almighty should bring His chariot down the Des Moines Valley [;] the wheels would refuse to turn at this point. ... The pining Senator from Scott, his sparingly emaciated form (referring to Senator Schmidt, a hearty German who weighs about 300) is an example of the effects of this poison upon that family.98

This class-centered mimicry of his bill did not appeal to Clark, whose point of order that the amendment was not germane was overruled.99 Substantively, Clark observed that, with not a single citizen protesting against the bill except Senator Bolter, he did not know how to reply to the amendment, which appeared to be based on the “strange” argument that the bill was grounded in “fanaticism.” Yet: “The use of tobacco, there are none but who will admit that it is a poison and injurious to the human system.”100 In due course Bolter’s amendment lost 29 to 6,101 and after Schmidt had weighed in with the comment that thousands of Iowans did not believe in the spirit of the bill, which was merely “a method of making every school house in the State a tabernacle in which to teach a pet theory at the expense of the State,”102 the bill passed 29 to 8.103 The House then passed the bill 83 to 15.104

In May 1888, in response to many inquiries, the Superintendent of Public Instruction, Henry Sabin, distributed a circular to teachers for their direction and guidance that expressly observed that it was especially important to give “a strong

98 “The General Assembly,” ISR, Feb. 6, 1886 (8:2-4).
99 “Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 148 (1886) (Feb. 5).
100 “The General Assembly,” ISR, Feb. 6, 1886 (8:2-4).
101 “Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 149 (Feb. 5) (1886). All the yeas were cast by Democrats, who held 19 of the 50 seats.
bent to the child’s mind against the use of liquor and tobacco. ... Total abstinence should be taught as the only sure way to escape the evils arising from the use of alcoholic drinks and tobacco.”

In his first biennial report following implementation of the mandatory instructional program he also urged enactment of “a law making it a misdemeanor, punishable by a heavy fine, to sell tobacco in any form to a minor under sixteen years of age. The necessity of such a law is becoming more apparent every day, and we ought no longer to delay its enactment.”

Compulsory education in the physiological and hygienic evils of tobacco evidently did not suffice: in his report six years later, Sabin acknowledged that the instructional program, even as supported by the newly enacted, “very wholesome” law prohibiting the sale of tobacco to minors under 16, was not operating flawlessly:

Unless the instruction given reaches the heart and convinces the judgment, it fails of its purpose. The boy is not greatly benefited by the instruction given in the school, if after reciting his lesson upon the ruinous effects of tobacco upon his system, and perhaps before he leaves the schoolhouse yard, he lights his cigarette and smokes it on his way home.

Sabin’s preferred pedagogical tool in achieving “[t]he chief aim in temperance instruction” of convincing pupils that “the only path to happiness or success lies through a life of temperance and sobriety” was to instill in them “an ever present, all powerful influence for good” in the form of a “high ideal of a noble life....”

So taken was Sabin by this imagery that in his next report he stressed that the societal evils linked to young people’s use of alcohol and tobacco could “never be lessened by the study of an elementary text-book, and the memorizing of a few cold, hard facts.” Though the law was “good,” teachers had to “go beyond the law, and hold up that lofty ideal of a noble man, a pure woman, a grand life, which can only be reached through paths of honesty, sobriety and industry.”

106 Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1889, at 32 (1889).
107 Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1895, at 86 (1895).
108 Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1895, at 85 (1895).
109 Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1897, at 90 (1897).
The tobacco trade press propagated a vastly different valuation of such learning, which suggested that the industry feared its consequences for the next generation’s amenability to picking up the “habit”:

The purpose of these text books is to make rebels of the children against their fathers who are in the habit of taking a glass of wine or beer or smoking a Cigar or pipe. For the children are by these text books not warned against an excessive use of alcohol or Tobacco, but their unmoulded and impressionable minds are to be imbued with the idea as a perfectly incontrovertible fact that any and every kind of alcoholic drink, as well as Tobacco in any shape whatsoever, is a poison sure to destroy the human organism.110

Though amended many times, Iowa’s Scientific Temperance Instruction law remained in force, largely unchanged in substance, until 1987; and even the modernization it underwent between 1974 and 1987 (involving the express addition of “tobacco”) did not transform the original structure.111

The challenge in the enforcement of anti-cigarette laws is met with in the enforcement of all other laws. Only a few, comparatively, of our people are deeply interested in the advancement of the human family, and laws seem to be made to be broken. The utter indifference of the guardians of the peace and the disrespect of law and order by some of our so-called “best citizens” has worked against the enforcement of cigarette laws.... [W]e believe that the women of this country can own the children without the help of men-made


111 Code of Iowa § 280.10 (1973); 1974 Iowa Laws ch. 1168, § 1, at 531, 532 (codified at § 257.25); it remained in force through Code of Iowa § 256.11 (1987).

112 “Have Smokers Any Rights?” USTJ, vol. 29, June 28, 1890 (2:3).
Banning Tobacco Sales to Minors

laws and men chosen by men to enforce these laws. We can own them insofar as the cigarette is concerned by forming anti-cigarette leagues and pledging the children not to use these vile and soul-destroying little traitors.\(^{113}\)

As late as 1889, when by one (unscientific) estimate in Iowa “about four out of every five men, and even a larger per cent of mere boys use tobacco,”\(^{114}\) the head of the legislative department of the Woman’s Christian Temperance Union of Iowa observed at the organization’s annual meeting that prohibition of the sale of tobacco to minors was “of great importance, and as the question has never been presented to the Legislature through petition, I think the people should, through petition, speak in such emphatic tones as will convince every legislator that the constituency of this state are in earnest on this subject.”\(^{115}\)

The following year, 1890, the Iowa WCTU split into a “non-partisan” organization, which rejected the national organization’s alliance with the Prohibition Party, and the newly named WCTU of the State of Iowa, which remained affiliated with the national WCTU.\(^{116}\) The state-level split had been preceded by one at the national level in 1889 precipitated by a proposed constitutional amendment offered at the organization’s annual meeting by J. Ellen Foster of Iowa, who objected to the “adoption of the most bitter partisan resolutions” and in particular to dragging “the names of honorable men in the Republican party...in the mud on the convention platform.” Only a small minority of 50 women voted for it.\(^{117}\) Foster herself admitted to the remaining Iowa membership that she had been “hissed” on the platform “both by members of the convention and by persons in the audience,” and that the amendment had “lost by


\(^{114}\)\textit{Sixteenth Annual Meeting of the Woman’s Christian Temperance Union of Iowa} 53 (1889). By the turn of the century an anti-cigarette activist reported that “fully one-half of all the boys in the public schools of Washington are cigarette smokers” and “even the girl pupils are addicted to cigarettes...” “Girls Smoke,” \textit{BH-E}, Apr. 29, 1900 (1:2) (copy furnished by Merle Davis).

\(^{115}\)\textit{Sixteenth Annual Meeting of the Woman’s Christian Temperance Union of Iowa} 88 (1889) (S. R. Woods).

\(^{116}\)\textit{First and Second Annual Meetings of the Woman’s Christian Temperance Union of the State of Iowa, held at Des Moines, Iowa, October 16th and 17th, 1890, October 6th, 7th and 8th, 1891}, at 3-4 (1891).

Banning Tobacco Sales to Minors

an overwhelming majority,"\textsuperscript{118} The Iowa delegation withdrew and the only Iowa delegate who did not withdraw (Mrs. L. D. Carhart), together with other women from Iowa who were attending the convention, occupied the Iowa delegation’s seats, Carhart being provisionally put in charge pending a new election of a reorganized group. The small non-partisan rump organized another national WCTU in accordance with Foster’s political views and in opposition to Frances Willard’s.\textsuperscript{119} The underlying fissure had been developing since the WCTU’s endorsement of the Prohibitionist party in 1884.\textsuperscript{120}

Because of the state WCTU’s overtowering importance for the development of the anti-cigarette movement in Iowa into the 1920s, it is useful to gain a sense of the size of the organization’s membership during these years. (The reported membership of the WCTU of the State of Iowa fluctuated significantly in part because the organization changed the operational definition from “paying members” to “active members” in 1897; in addition, nonuniformly varying local organizations failed to file reports from year to year; finally, within the same convention report more than one total was mentioned or resulted from adding county organization members.)

\textsuperscript{118}J. Ellen Foster et al., “The Iowa Delegation to the Unions,” \textit{Iowa Messenger} 4(46):2-3 at 2:3 (Nov. 21, 1889).


\textsuperscript{120}“A Troublesome Minority,” \textit{DIO} (Chicago), Nov. 7, 1889 (3:3-4); “Refused to Be Coerced,” \textit{CT}, Nov. 13, 1889 (3); “Will Leave the Fold,” \textit{CT}, Nov. 14, 1889 (10); “Pledged to Prohibition,” \textit{NYT}, Nov. 14, 1889 (3); “The Iowa W.C.T.U.,” \textit{DIO}, Nov. 20, 1889 (6:6); Ruth Bordin, \textit{Woman and Temperance: The Quest for Power and Liberty, 1873-1900}, at 129 (1981); K. Austin Kerr, \textit{Organized for Prohibition: A New History of the Anti-Saloon League 44-73} (1985); Sarah Boyle, “Creating a Union of the Union: The Woman’s Christian Temperance Union and the Creation of a Politicized Female Reform Culture, 1880-1892,” at 82-120, 174-228 (Ph.D. diss., SUNY Binghamton, 2005). For a list of the separate annual conventions of the WCTU of Iowa Auxiliary to National Non-Partisan WCTU and of the WCTU of the State of Iowa, Auxiliary to the National WCTU from 1891 to 1905 before they united in 1906, see Woman’s Christian Temperance Union, \textit{Forty-Second Annual Convention, held at Iowa City, Iowa, September 28-October 1, 1915} at 4 (n.d.).
Table 3: Membership of the Iowa WCTU, 1891-1921

<table>
<thead>
<tr>
<th>Year</th>
<th>1891</th>
<th>1907</th>
<th>3,413</th>
</tr>
</thead>
<tbody>
<tr>
<td>1892</td>
<td>2,903</td>
<td>3,571</td>
<td></td>
</tr>
<tr>
<td>1893</td>
<td>1,689</td>
<td>3,127</td>
<td></td>
</tr>
<tr>
<td>1894</td>
<td>2,055</td>
<td>4,669</td>
<td></td>
</tr>
<tr>
<td>1895</td>
<td>2,666</td>
<td>3,932</td>
<td></td>
</tr>
<tr>
<td>1896</td>
<td>2,998</td>
<td>4,233</td>
<td></td>
</tr>
<tr>
<td>1897</td>
<td>1,664</td>
<td>6,369</td>
<td></td>
</tr>
<tr>
<td>1898</td>
<td>1,689</td>
<td>8,104</td>
<td></td>
</tr>
<tr>
<td>1899</td>
<td>1,545</td>
<td>9,996.5</td>
<td></td>
</tr>
<tr>
<td>1900</td>
<td>1,788</td>
<td>6,847</td>
<td></td>
</tr>
<tr>
<td>1901</td>
<td>1,501</td>
<td>9,954</td>
<td></td>
</tr>
<tr>
<td>1902</td>
<td>2,477</td>
<td>10,748</td>
<td></td>
</tr>
<tr>
<td>1903</td>
<td>2,824</td>
<td>11,930</td>
<td></td>
</tr>
<tr>
<td>1904</td>
<td>3,360</td>
<td>11,556</td>
<td></td>
</tr>
<tr>
<td>1905</td>
<td>3,285</td>
<td>13,030</td>
<td></td>
</tr>
<tr>
<td>1906</td>
<td>3,001</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

For the years 1891-1906 the data refer to the WCTU of the State of Iowa. Note for the following years these alternative membership data (or explanations): 1907: 3,248 or 3,081; 1910: 4,743; 1914 (active members); 1916: 7,097; 1917: 10,554; 1918 (gain of 536); 1919: 7,708 reported members; 1921: 15,250. 121

121 First and Second Annual Meetings of the Woman’s Christian Temperance Union of the State of Iowa 52 (1891); Third Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 58 (1892); Fourth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 41 (1893); Fifth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 65 (1894); Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 54 (1895); Seventh Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 38 (1896); Eighth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 44-45 (1897); Ninth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 63 (1898); Tenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 70 (1899); Eleventh Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 73 (1899); Twelfth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 70 (1899); Thirteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 71 (1899); Fourteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 72 (1899); Fifteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 73 (1899); Sixteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 74 (1899); Seventeenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 75 (1899); Eighteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 76 (1899); Nineteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 77 (1899); Twentieth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 78 (1899); Twenty-First Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 79 (1899); Twenty-Second Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa 80 (1899).
Banning Tobacco Sales to Minors

By way of comparison, paying members in the rival WCTU of Iowa numbered 3,022 in 1892 and 2,086 in 1895. As early as 1891, Mrs. L. A. Burkhalter of Cedar Rapids, superintendent of the nationally affiliated group’s Legislation and Petitions Department, reported to the second annual meeting that: “In as many as seven of the states, a law exists forbidding the use of tobacco to minors. There is no reason why Iowa should not have such a law and we believe that we have only to ask for it to secure our boys from this deadly and growing evil.” At the same time, paying members in the rival WCTU of Iowa numbered 3,022 in 1892 and 2,086 in 1895.
time the “non-partisan” Iowa WCTU began memorializing the Senate to prohibit the sale of cigarettes to minors, and its annual meeting the following year recommended renewing efforts to secure a legal ban on the sale of tobacco to minors.

In order to capture the quintessence of the christian-socialist mind-set of the partisan WCTU of the State of Iowa at this time—which unmistakably embraced, but was not monomaniacally obsessed with liquor prohibition—Marion Howard Dunham’s annual presidential address in 1893 may be scrutinized, which took as its point of departure for analyzing the then spreading financial panic and deep economic depression the fact that “the seeming peace of society covers a seething discontent which is beginning to make itself felt.” Dunham (1842-1922) was the president of the WCTU of the State of Iowa during its entire existence (1890-1906) and then of the reunited organization in 1907-1908, at which time she moved from Burlington to Chicago. Born in Ohio, following seven years of teaching in the Chicago public schools, in 1873 she married the noted architect, Charles A. Dunham, with whom she lived in Burlington, where she organized and led the local WCTU, until 1908, when they moved to Chicago, where he soon died and she was elected president of the Cook County WCTU. She had joined

7th and 8th, 1891, at 90 (1891).

125 Nineteenth Annual Meeting of the Woman’s Christian Temperance Union of Iowa 54-55 (1892).

126 Twentieth Annual Meeting of the Woman’s Christian Temperance Union of Iowa 48 (1893).

127 Fourth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Oskaloosa, Iowa, October 3rd, 4th and 5th, 1893, at 9 (1893).

128 “Election Day Convention,” CREG, Sept. 25, 1908 (8:1); “Chas. A. Dunham,” BH-E, Dec. 15, 1908; “Clarence M. Dunham,” BH-E, Nov. 23, 1909; Standard Encyclopedia of the Alcohol Problem 3:867 (Ernest Cherrington ed. 1926). She appeared in the 1880 and 1900 population censuses, but not in the 1910 or 1920 population census; she moved to Dove, California near San Luis Obispo (population 10 in 1910) in 1914, whence for several years she continued to return to Iowa to attend the Iowa WCTU annual conventions. Rand McNally, The Library Atlas of the World, Vol. 1: United States 303 (1912); Fiftieth Annual Convention of the Woman’s Christian Temperance Union of Iowa, held at Shenandoah, Iowa, October 2-5, 1923, at 118 (n.d.)). In 1897 she was the unsuccessful Iowa Prohibition party candidate for state Superintendent of Public Instruction, receiving only 7,661 of 433,438 votes, but more than the Populist party candidate. Secretary of State, Iowa Official Register 227 (13th Year, 1898); CREG, Oct. 30, 1897 (7:1-5). The Chicago Tribune said of the Prohibition ticket: “With the exception of Mrs. Dunham the candidates are almost unknown as public men.” “Name Pastor Eaton for Governor,” CT, July 29, 1897 (2).
the temperance movement in 1877, but as early as 1893, Frances Willard, the national president of the WCTU, characterized her in a tome on *Leading American Women* as having “always been a radical equal suffragist” and “Christian socialist, deeply interested in all reforms that promise to better the social system and the conditions of life for the multitudes.”

Dunham’s focus was:

The great armies of the unemployed, especially in the larger cities, who, willing to work find no work to do, goaded by the knowledge of the great fortunes their labor has created for the enjoyment of others, remembering that when hunger gnaws and cold pinches...the coal barons have put miners’ wages down and the price of coal up, that on every necessity of life and death as well some monopoly has laid its hand making it more and more inaccessable to the great majority, with the truth that God made the world for the use and benefit of all His children, even though for ages sequestered by the few, and that by our false, unchristian social system they have been defrauded of their share, dawning upon their minds; and if in their blind struggle for existence relief does not come; if these other armies of the wage earners under this competition have their wages forced down to the starvation point and in a strike are met by the Pinkerton’s—those Hessians of our day, hired by our money kings—on the one hand and the tyranny and injustice of militia and courts on the other, and then counting the other armies of those who believe the world owes them a living whether they earn it or no, who can prophesy the result, who foretell what horrors may be before us.

At this juncture, Dunham’s powers of prophecy were immediately resuscitated as she turned to the liquor industry, whose distilleries and saloons, unlike the banks and manufactories, during the depression alone had “stood firm and...gone merrily on, seeming indeed to have reaped a greater harvest because of the greater calamities.” Regarding “the liquor traffic” as a kind of third thing, “[e]qually the enemy of oppressor and oppressed, greater in its political power than either,” which “reigns over the land,” she did not treat prohibition entirely as a panacea, but at the very least as an absolute prerequisite for transcending capitalism:

---


130 *Fourth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Oskaloosa, Iowa, October 3rd, 4th and 5th, 1893,* at 9 (1893).

131 *Fourth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Oskaloosa, Iowa, October 3rd, 4th and 5th, 1893,* at 8, 9 (1893).
Banning Tobacco Sales to Minors

Blot it [the liquor traffic] out root and branch and production will hardly be able to keep pace with consumption, the armies of the unemployed will become the prosperous legions of a prosperous nation, and the great question of the relation of employer to employee, the ownership of all things pertaining to the public interest and welfare, in short, the evolution of a new industrial and social system, can be safely be brought to the tribunal of a people with brains clear from the besetting influences of drink, and educated out of the false ideas of personal liberty and individual rights as opposed to the welfare of the community at large, which nothing has so fostered as the liquor traffic.\textsuperscript{132}

At the 1894 annual meeting, the same theme continued to grip Dunham, who emphasized the “increasing conflict between what is called the classes and the masses, when a larger and larger proportion of the profits is wrung from the hard toil of the thousands to add to the superfluous wealth of the few, when the monied men control the general government in their interest....”\textsuperscript{133}

To be sure, National WCTU President Frances Willard herself, influenced by the economic depression of 1884-85, had also been evolving toward acceptance and advocacy of a socialist critique of capitalism. Initially she began to reconsider the organization’s claim that since drunkenness caused poverty, eliminating the former would also do away with the working class’s economic straits. Bourgeois feminists may have been alarmed by Willard’s intensifying association with the Knights of Labor in latter half of the 1880s, but by 1889 she turned her causal scheme on its head, now identifying the roots of drinking in long hours and bad working conditions\textsuperscript{134}.

The colossal Labor Question looms up more and more; its correlations with the Temperance Question are being candidly considered, and as the two armies approach nearer to each other, they discover that uniform and weapons are curiously alike. ... It is being proved that intemperance is most prevalent where the hours of toil are long, because overwork drives men to drinking; hence the eight hour law finds steadily more favor with our temperance people. The fate of factory girls is being thought about, and “the slavish overwork that drives them into the saloon at night,” when “they come out so tired, thirsty and exhausted from working steadily so long and breathing the noxious effluvia from the grease and, other ingredients used in the mills.” This is especially true of eastern factories, and temperance people might wisely clasp hands with the labor reformers who in Chicago and elsewhere are securing the appointment of women inspectors, whose field should

\textsuperscript{132}Fourth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Oskaloosa, Iowa, October 3rd, 4th and 5th, 1893, at 9 (1893).

\textsuperscript{133}Fifth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marion, Iowa, October 3, 4 and 5, 1894, at 12.

\textsuperscript{134}Ruth Bordin, Woman and Temperance: The Quest for Power and Liberty, 1873-1900, at 104-107 (1981); Ruth Bordin, Frances Willard: A Biography 137-44 (1986).
extend to all places where women are employed. 135

By the time of the even deeper economic depression that began in 1893, Willard’s annual presidential addresses became ever more radical. For example, in 1894, after asking why one-eighth of the people in the United States owned seven-eighths of the property, she observed that so far from being a menace to the country, the wage-earning class were themselves the country. In addition to desiring the people’s ownership of the great plants then in the hands of “individual or associated capitalists,” Willard insisted that nothing would serve the people’s liberties and rights as their ownership of the newspapers so that they “should be the purveyors of their own ideas instead of taking them at second-hand.” 136 The next year she asked: “Why should humanity be divided into grades based on the fact that they work or that they do not work, and by what monstrosity of delusion did it ever come to be thought that those who did not work stood at the head, and those who worked, just in proportion to the degree of their work, stood at the foot? ... Because the work is not equalized, but certain thoughtless, selfish ‘privileged classes’ have heaped the work they ought to do upon those who had already more than was their share, and I am a Collectivist because I believe these burdens should be distributed according to those principles of justice which ought to teach every human being that every other has as much right as himself to life, liberty, the pursuit of happiness, the pursuit of knowledge, the pursuit of holiness. [T]he time will come when those who do not work will be drummed out of the camp and stung out of the hive, and placed by themselves as lepers are...” 137 Willard’s Christian socialism culminated in her adoption in her very last presidential address of Marx’s identification of the source of surplus value. After urging the convention to declare in favor of the eight hour law, not only because prevailing hours were oppressively long, but also because shorter hours would lead to the employment of additional workers, she instructed the membership that:

135 Minutes of the National Woman’s Christian Temperance Union, at the Sixteenth Annual Meeting, Chicago, Illinois, November 8 to 13, 1889, at 114 (1889).

136 Minutes of the National Woman’s Christian Temperance Union at the Twenty-First Annual Meeting...November 16-21, 1894, at 115, 119 (1894). Willard was not wholly bereft of a sense of humor. In vituperating against gum chewing by children she asked whether the jaw-working could be used as a “motor for a hand-printing or sewing machine...” Id. at 94.

137 Report of the National Woman’s Christian Temperance Union at the Twenty-Second Annual Meeting...October 18-23, 1895, at 103 (1895).
There is a commodity in the market which has the magic power of creating more than it costs to produce it. This is the labor power of the human being, of a free wage-worker. He sells it for a certain amount of money, which competition reduces to the average necessaries of life required to produce it; to so much food, clothing and shelter, which are absolutely necessary to recuperate his lost powers on the next morning, and to reproduce a new generation of wage-workers after this one is gone. Almost all above this goes to the employing class, and is called “the surplus value.”

And while Willard, vast as her authority was as the organization’s longtime preeminent leader, was certainly not synonymous with the WCTU, she was also hardly alone in her views. As, for example, the Superintendent of the Department of the Relation of Intemperance to Labor and Capital reported to the annual convention in 1894, in the wake of the “hostilities between capital and labor which culminated in the strike at Pullman, and was [sic] followed by a general uprising of labor throughout the country...we are...impressed with the importance of urging capitalists to abstain from anything which tends to arouse undue passion or kindle a spirit of animosity against those who are already staggering under the iron heel of oppression.” In its manifold betterment activities and one-sided sympathy for workers and strikers, the WCTU displayed a commitment to institutional social reform and a concern for “the victims of urbanization and industrial development” that later scholarship justifiably characterized as “progressive and liberal.”

The WCTU did not ascribe the same socially transformative properties to cigarettes (and their prohibition) as it did to alcohol, but its insistence that smoking cigarettes severely undermined boys’ physical, mental, and moral health strongly suggested that as adults—if they lived that long and were not killed off by what the WCTU and others weened was cigarette-induced insanity—they, too, would lack the requisite energy, intelligence, and rationality to appreciate the need and to fight for a society ruled by juster principles and loftier ideals than robber-baron capitalism. In this sense, the WCTU’s christian-socialist struggle against cigarettes cannot fairly be squeezed into the procrustean interpretive bed

---

138 Report of the National Woman’s Christian Temperance Union at the Twenty-Fourth Annual Meeting...Oct. 29-Nov., 1897, at 114 (1897). The convention appears not to have acted on Willard’s proposal. Willard also urged the organization of domestic servants and expressed the belief that competition was doomed. Id. at 116, 119.

139 Minutes of the National Woman’s Christian Temperance Union at the Twenty-First Annual Meeting...November 16-21, 1894, at 477 (1894).

Banning Tobacco Sales to Minors

of moralistic anti-modernity. But whatever impact Willard may have had in nudging the WCTU toward adopting socialist positions, the argument that following her death in 1898 the organization’s public image began changing—“from the best, most respected, most forward-looking women in town to narrow-minded antilibertarians riding a hobbyhorse”—did not, as will be seen below, apply to Iowa during its cigarette prohibitory period (1896-1921).

The Context of Alcohol Prohibition in Iowa Politics and the Emergence of the Mulet Tax as an Ambiguous Weapon Against and Shield of Saloons

The liquor problem has been so interwoven with State politics that no campaign or election since 1865 can be fully understood without taking into account the influence of this much mooted question. Indeed, the history of the Republican party in Iowa for a number of years is chiefly the history of its attitude toward prohibition.

As central as the enactment in 1894 of a ban on selling tobacco to children was to inaugurating a course of generalized tobacco control (and in particular to enabling the prohibition of cigarette sales even to adults in Iowa), there can be no doubt that “the preeminent issue” of that session was the liquor mulet bill, which was “[d]esigned to relieve the G.O.P. of the albatross of prohibition....” This section embeds the analysis of Iowa’s mid-1890s anti-cigarette legislation in the context of the (party-) politically more turbulent conflict over liquor precisely at a time when the Republican Party was abandoning its commitment to categorical statewide alcohol prohibition in favor of a less absolutist policy attuned to local preferences of voters whose disaffection had placed at risk the party’s traditional dominance of state government. It also illuminates the origins of and controversies over interpretations of the mulet tax as a policy of regulatory licensure, on the one hand, or punitively reinforcing prohibition, on the other, that would also engulf enforcement of the general cigarette sales prohibition in the

---

141On Dunham’s open membership in the Socialist Party, see below ch. 13.
years following enactment of the cigarette mulct penalty in 1897.\textsuperscript{145} More so perhaps than in any other state, the enduring struggle over banning the sale of cigarettes in Iowa must be seen in the context of, and as a side-show to, the much more tumultuous, divisive, and party-politics structuring battle over alcohol prohibition.\textsuperscript{146} Even Richard Bensel, a historical political scientist who has profoundly criticized ethno-cultural interpretations both for denying that late nineteenth-century American politics “generated class issues or parties because the electorate was divided along lines that cut obliquely through the social structure” and for imputing to national parties unlimited freedom to “assume any position they wished on the great developmental issues facing the nation, as long as their careful maneuvering through the intricate, subterranean catacombs of ethnic identity and cultural icons brought them victory in locally oriented electoral contests,”\textsuperscript{147} was nevertheless constrained to concede that in Iowa “temperance policies were, indeed, more salient in party competition than anywhere else in the nation.”\textsuperscript{148}

Speaking for many historians before him, Joseph Wall, author of a synthetic history of Iowa, observed that by the 1880s alcohol prohibition had become “the kind of issue that the abolition of slavery had been in the 1850s in arousing passionate controversy, and the temperance adherents were far more numerous and vocal than the abolitionists had been.” By ignoring the conservative and liberal political traditions, alienating old allies and forming new ones, the movement profoundly disturbed the static organizational expectations of the

\textsuperscript{145}See below ch. 12.

\textsuperscript{146}In the 1890s no close fit prevailed between statewide liquor prohibition and general cigarette sales bans. For example, in 1893 only six states qualified as “dry”: North Dakota, South Dakota, Kansas, Maine, Vermont, and New Hampshire. The Anti-Saloon League Year Book: 1910, at 30 (Ernest Cherrington ed. n.d.). Of these only North Dakota enacted a statewide cigarette sales ban (in 1895), while one house of the Maine legislature passed such a bill (in 1897). In 1909, when statewide cigarette sales bans reached their high point of 11, only three of those states (Kansas, Tennessee, and Oklahoma) were counted among the nine “dry” states. Id. at 31; above tab. 2.


\textsuperscript{148}Richard Bensel, The Political Economy of American Industrialization, 1877-1900, at 181 n.136 (2000). Compare the claim of one of the leading advocates of ethno-cultural political interpretation: “The prohibition question was the paramount state or local issue, year in and year out, throughout most of the Midwest (and much of the rest of the country) in the 1880s. Invariably the Republican party favored dry solutions, while the Democrats were on the wet side.” Richard Jensen, The Winning of the Midwest: Social and Political Conflict, 1888-1896, at 70 (1971).
professional party leaders.\textsuperscript{149} 

In an effort to redirect historians away from “the formal and outward aspects of events” and toward an emphasis on “the vital human quality of the past...human experience, understanding, values and action,” historian Samuel Hays instanced the “vast importance” of alcohol prohibition in Iowa. Indeed: “If one can argue that a single issue was more important than any other issue in Iowa between 1885 and 1918 it was prohibition.”\textsuperscript{150} However, Hays went on to point out that prohibition was more than an issue; it was the most specific aspect of a general conflict between patterns of culture in Iowa which dominated the political views of the state for many years. One of these cultural patterns we can call...Pietism. It stressed strict standards of behavior derived from Puritan sources, especially Sunday observance, and prohibition of gambling, dancing, and, above all, drinking alcoholic beverages. It was evangelistic; it exhorted individuals to undergo a dramatic transformation in their personal lives, to be converted, and it sought to impose these standards of personal character on the entire community by public, legal action. But there were others, whose pattern of culture was altogether different, who resisted these views. They came from a different cultural background, and their religion consisted more of a sequence of rituals and observances through which one passed from birth to death, with the primary focus of religion being the observance of those practices. For many of them Puritan morals meant little; Germans, for example, were accustomed to the continental Sunday of relaxation in beer gardens or to using wine for communion services.

These cultural differences divided groups in Iowa, and the voting patterns follow, to a remarkable degree, the differences in cultural patterns. On the one hand were the native Americans, from English and Scotch extraction, the Norwegians and Swedes, and the German Methodists and Presbyterians. On the other hand were the Irish, Bohemian, and German Catholics and the German Lutherans. In county after county in Iowa the persistently strong Republican precincts from 1885 to 1914 are predominantly from the first group, and the persistently strong Democratic precincts are from the second.\textsuperscript{151}

\textsuperscript{149}Joseph Wall, \textit{Iowa: A Bicentennial History} 163-64 (1978).


To the extent that these protagonists perceived cigarette smoking as partaking of the same morally objectionable or pleasurable qualities as drinking alcohol, its prohibition could fit seamlessly into the same political-socio-cultural conflict structure. That cigarettes never generated the same intensity of overarching strife as alcohol was due in large part to the fact that during the infancy of cigarettes in the late nineteenth century the prevalence of alcohol drinking exceeded that of cigarette smoking by a very wide margin. Had the WCTU and other groups sought to prohibit all forms of tobacco, the controversy might have rivaled that surrounding alcohol prohibition. Pragmatically, however, the anti-smoking movement understood the limits of its transformative project. In 1892, without having grasped the crucial importance of the unique window of opportunity that presented itself for putting an end to cigarettes, Lyman Abbott’s Christian Union accused the movement of engaging in half-measures:

Everybody will sympathize with the attempt to stamp out the smoking of the cigarette; but it must not be forgotten that the real trouble with the cigarette is not its form or its name, but the tobacco which it contains. There has been a crusade against it as if it were a special evil, and as if all other tobacco were innocent. No doubt the cigarette is often worse than tobacco in other forms, for the real difficulty with the cigarette is the facility that it affords for excessive smoking, and for the use of tobacco by boys. ... No boy should ever use tobacco. Whatever may be said with reference to the use of tobacco by adults, there is a consensus of opinion among all men who have intelligence upon the subject that the use of tobacco by boys is never otherwise than injurious. The cigarette is the enemy of the boy, because it gives him the opportunity of smoking something easily concealed and inexpensive. ... The agitation and legislation against the cigarette are all well enough so far as they go, but they must not divert public attention from the fact that it is the tobacco in the cigarette that is injurious, and not the cigarette itself. It is inconsistent to prohibit the sale of cigarettes to minors and allow them to buy tobacco in other forms.\(^{152}\)

---

Jensen, the “issue capable of shaking enough Republicans to defeat that party...was the tension between the pietistic and liturgical world views, and in 1889 it emerged in the guise of the prohibition of the liquor traffic. Indeed, for most of the last third of the century, the liquor question, throughout the Midwest, was the major factor activating the latent tensions and leading to changes in voting patterns.” Id. at 89. For his account of the playing out of this theme in Iowa, see id. at 89-121. For another influential ethno-religious interpretation of late-nineteenth-century Iowa history, see Paul Kleppner, The Third Electoral System, 1853-1892: Parties, Voters, and Cultures 306-28 (1979).

Liquor legislation in Iowa oscillated during the half-century from statehood in the mid-1840s to the mid-1890s, running the gamut from statewide constitutional prohibition to local option and licensure (including legislation submitted for voter approval) but not unilinearly, the swings resulting from legislatively endorsed reactions by the prohibitionist and anti-prohibitionist forces to enactment of regulatory regimes that either departed too far from their positions or, in the case of the former, were not enforced. For present purposes, the narrative flow may begin with the Republican Party’s espousal in 1879 of the newly inaugurated campaign, spearheaded by the WCTU, to anchor prohibition of the manufacture and sale of intoxicating liquor in a state constitutional amendment, both the prohibitionists and the party wanting, for different reasons, to remove the issue from party politics, especially since the Democratic Party officially declared in favor of liquor licensure. In 1880 both houses of the legislature, by comfortable majorities, passed a joint resolution to amend the constitution to prohibit the manufacture for sale, sale, or keeping for sale as a beverage any intoxicating liquor, including ale, wine, and beer. During the interim before the constitutionally required second round of legislative approval at the next session, the Republican Party solidified its support of the people’s expression of their will regarding the question, while the Democratic Party reinforced its opposition to any and all such sumptuary regulation. After both houses, again by large majorities, had adopted the earlier joint resolution, the special election was set for June 27, 1882. Interestingly, one of the prohibitionists’ most often deployed contentions was that, since liquor was chiefly responsible for crime, its prohibition was justified despite the sacrifice of a few persons’ rights for the whole community’s good. (In contrast, over the years, in Iowa and elsewhere, the anti-cigarette movement would almost never

---


154 “Almost every known method of regulating the liquor traffic has been given a trial in Iowa....” Dan Clark, “Recent Liquor Legislation in Iowa,” *IJHP* 15(1):42-69 at 42 (Jan. 1917).


Banning Tobacco Sales to Minors

concede the fact that they were demanding that adult men sacrifice their right to consume cigarettes for the good of the next generation, let alone address the moral-philosophical basis of that deprivation.) In the event, 55.3 percent of the voters and three-fourths of the counties supported the prohibition amendment, the opposition being centered in the Missouri and, especially, the more heavily Democratic and German and Irish Mississippi River counties.157

Despite this victory, prohibitionists soon received a shock when in November a district court judge invalidated the amendment,158 before the General Assembly could even enact implementing legislation, and in January 1883, the Iowa Supreme Court affirmed on the grounds of technical form errors in legislative procedures that had resulted in submission to the voters of an amendment that was not identical to the text of the resolution passed by both houses in 1880.159 The result of the invalidation, the Democratic Party’s continued insistence on licensure, and the Republican platform’s commitment to the party’s obligation to enact legislation at the 1884 session that would establish and enforce the principle and policy endorsed by the majority of voters on June 27, 1882, was prohibitionists’ concerted focus on electing Republican majorities to both houses in the 1883 elections.160 Although the Republican Party secured 39 of 50 Senate and 52 of 100 House seats, the “tremendous reduction” of its majorities vis-a-vis the 1882 session, especially in the House—which the Chicago Tribune causally linked to its identification with the prohibition movement161—prompted


158 “The Amendment,” Iowa State Reporter (Waterloo), Nov. 8, 1882 (1:3-4). The judge, Walter Hayes, a Democrat who later became a congressman and after defeat for reelection a state legislator, once delivered himself of the bon mot that in 1882 15,000 Democrats had voted for prohibition because they “wanted to get the Republicans in a hole, and they got there.” “The Resubmission Question,” Davenport Tribune, Mar. 28, 1894 (4:1) (edit.).

159 Koehler & Lange v Hill, 60 Iowa 543 (1883); “The Amendment,” EG, Jan. 19, 1883 (4:3).


161 “Temperance Question in Iowa,” CT, Oct. 16, 1883 (4) (edit.). In 1882 the Republican Party had controlled 46 Senate and 71 House seats. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 64 (2007). In addition, in 1884 six members of the Greenback Party, whose platform also supported
carrying out the people’s will as expressed in the pro-amendment vote, were elected to the House.


163 “Stand by Prohibition,” *Glenwood Opinion*, Nov. 3, 1883 (2:3) (reprinted from *Atlantic Messenger*). Two years later, *The New York Times* reported that “[c]onservative Republicans” insisted that the Party’s position had lost it 20,000 to 25,000 German voters, “whereas 75,000 Prohibitionists would have cut loose from the Republican Party if the party had not committed itself to prohibition. It was simply a choice of evils.” “Iowa for Any Good Man,” *NYT*, Mar. 8, 1884 (2).

164 1884 *Iowa Laws* ch. 8, at 8. H.F. No. 14 passed the House by a vote of 52 to 41 (with one member later changing his vote from not voting to No and another stating that he would have voted No had he been present). *Journal of the House of Representatives of the Twentieth General Assembly of the State of Iowa...,1884*, at 278, 299, 443 (Mar. 1, 3, 18) (1884). No Republican voted Nay and only one Democrat voted Yea; Greenbackers joined Democrats in opposition. “Prohibition in Iowa,” *CT*, Mar. 2, 1884 (7). The Senate
Passage, however, turned out to be considerably easier than enforcement. Although many saloons, especially in pro-temperance communities, immediately closed, and prohibition was successfully implemented in hundreds of smaller towns, the law became a virtual dead letter in larger cities where the majority opposed enforcement and even mob violence against enforcers was not extraordinary. Some cities, despite prohibition, unlawfully imposed license fees on saloons. Nevertheless, these set-backs neither prevented the election of Republican William Larrabee, a vigorous supporter of enforcement, as governor, nor deprived the Republican Party of its legislative majority. Consequently, in 1886 the Republicans pushed through the legislature a bill that,
Banning Tobacco Sales to Minors

inter alia, strengthened the law’s provisions concerning abatement of nuisances\(^\text{168}\) (which was sponsored by Talton Clark, who also introduced the aforementioned successful scientific temperance instruction bill). By 1889 prohibition had succeeded both to some extent in closing saloons in the vast majority of counties except for those located on the Mississippi and Missouri rivers and in virtually eliminating liquor manufacture.\(^\text{170}\)

Alcohol Consumers’ Increasingly Democratic Voting Unleashes Internecine Republican Struggles over Legislative Strategies to Propitiate Saloon Customers Without Alienating the Party’s Prohibitionist Base (1889-1893)

This partial success was paired with significant resistance to and animus against prohibition, which was clearly registered at the 1889 elections, in which, for the first time since the 1850s, a Democrat was elected governor and Republican majorities in the House and Senate were reduced to their smallest margins since the party’s founding.\(^\text{171}\) Republicans controlled 28 of 50 Senate and 50 of 100 House seats; Democrats occupied 45 House seats, while Independents and United Labor controlled the rest.\(^\text{172}\) Giving no ground, the Republican platform that year solemnly reaffirmed the party’s “past utterances”

\(^\text{168}\) 1886 Iowa Laws ch. 66 at 81. Largely along party-line, S.F. No. 263 passed the Senate by a vote of 31 to 17 and the House 56 to 43. Journal of the Senate of the Twenty-First General Assembly of the State of Iowa 453 (Mar. 20) (1886); Journal of the House of Representatives of the Twenty-First General Assembly of the State of Iowa 570 (Mar. 31) (1886).

\(^\text{169}\) See above this ch.


\(^\text{172}\) IOR: January 1890, at 72-76. After 136 deadlocked ballots over the speakership, on which the two minor parties voted with the Democrats, the two major parties agreed that, inter alia, a Democrat would become speaker, while a Republican would become speaker pro tem and the Republicans would have first choice of standing committees and choose five committees. Journal of the House of Representatives of the Twenty-Third General Assembly of the State of Iowa....1890, at 82-84 (Feb. 19) (1890); “Deadlock Broken,” CREG, Feb. 20, 1890 (1:5-6).
on prohibition, “which has become the settled policy of the State and upon which there should be no backward step. We stand for the complete enforcement of the law.” The Democratic party did not budge either, its platform once again demanding a $500 annual license based on a popularly voted-on local option. The New York Times depicted at least one-third of Republican rank and file as being “glad to call a halt” to the party’s full commitment to prohibition but incapable of altering that course vis-a-vis the “Simon-pure Prohibitionists,” who were demanding not only a declaration favoring the law’s “enforcement in every town, city, and county” in Iowa, but enactment of a law providing for summary removal of all local officials who failed to enforce prohibition and for establishment of a state-controlled system of constables. Finally, the Times reported, the continued (unlawful) sale of alcoholic beverages failed to generate revenues for cash-strapped local governments, whose “absolutely necessary current expenses” would require them to raise tax rates that had already reached their legal limits.

Prohibitionists and temperance organizations, the Chicago Tribune added, were not campaigning for the Republican gubernatorial candidate because they could not even dream that the law risked being repealed by a legislature certain to be controlled once again by Republicans. However, the newspaper speculated that such a Republican legislature might conclude from the election of a Democratic governor that “public sentiment has so changed that the repeal of the law should follow. Some of the most prominent Republicans of the State say that if the Prohibitionists allow Mr. Boies to be elected by failure to come out and vote, they will be in favor of repealing prohibition next winter. The Republican party has carried this policy at heavy expense to itself, and it will not feel like carrying it much longer if the men who are most interested in it don’t take enough interest to stand by the party on the Governorship as well as the Legislature.”

Boies’s own campaign speeches could not have left any doubt in his audiences’ minds about the Democratic candidate’s view that his former party’s general prohibitory law was inflicting horrendous harm on Iowa. Devoting a considerable portion of his opening speech in his hometown of Waterloo on October 5 to prohibition, Boies spared no condemnatory epithets. After having identified “a wide difference in...social habits, depending largely upon the

173IOR: January 1890, at 107 (5th Year).
174IOR: January 1890, at 110 (5th Year).
175“Iowa’s Three Candidates,” NYT, Aug. 12, 1889 (1). This tax revenue-based argument for licensure would also become a public policy staple in the campaign against statewide cigarette sales bans.
176“Hutchison Is All Right,” CT, Oct. 29, 1889 (6).
Banning Tobacco Sales to Minors

customs of their fathers, the influence of education and the surroundings in which they live” as accounting for disparate “public sentiment” in various parts of the state that either underwrote or rejected prohibition, Boies asserted that “it's enactment was the gravest injustice to a great number of our citizens....” This claim related back to the circumstance that “among the first public acts of the republican party, after it came into power [in 1858], was an act amending” an 1855 general prohibitory law to exempt beer, cider from apples, or wine from grapes, currants, or other fruits grown in Iowa. This relaxation had been the result of the insight of “sagacious legislators...that if Iowa was to be speedily developed it must be done by inviting all classes of people to come and make their homes within her borders” at a time when “[a]lmost unlimited areas of its generous soil had never been touched by the hand of man” and “citizens were needed to develop a wilderness of natural wealth into a great and thriving state....” During the 24 years that Iowans could lawfully drink beer, cider, and wine “under republican rule”—until the aforementioned constitutional amendment of 1882—“Iowa grew from a sparsely settled wilderness into a most populous and thriving state, with farms dotting its prairies in every direction and towns or cities scattered through all its counties.” To this ideal and idyllic impact of a quarter-century’s unimpeded consumption of non-whisky alcohol on Iowa’s economy and landscape corresponded an equally heartening vesting of property rights: “no man who invested his money [in] or devoted his time to a manufacturing business could point to so clear a legal right therefor as the brewers, the wine and cider makers of the state, for in addition to the right which they derived from the common law to engage in this business...they had also a statutory right, by clear implication....” Not only did prohibitionists know that their law would “destroy almost every dollar in value of the property invested in that business amounting to millions upon millions” and “bankrupt men, and that “vast industries would be crushed,” disemploying thousands of men, but the law’s underlying principle, by placing “every man’s property at the mercy of a majority” without indemnification, discouraged capital from flowing into Iowa lest “a dominant public sentiment...destroy[ ] it without mercy or remuneration, whenever in the judgment of the majority, the public good demands it....” Such a capital import boycott in combination with the state’s adoption of a “code of morals on this subject at variance with public sentiment in the great centers of population throughout the civilized world,” which meant that everyone who immigrated to Iowa “must if necessary leave behind him the lessons of his life, the customs of his fathers and the social habits of his people,” augured poorly for a state that did not have one-fourth of the population that it was “capable of supporting.” To Republican prohibitionism and all of its alleged untoward consequences Boies and the Democratic Party counterposed balkanized domination of “public
sentiment” based on “self-government,” under which local majorities of prohibitionists could keep the existing statewide regime and in other localities anti-prohibitionist majorities would instead be permitted to adopt a “rigid high license law.”  

In sharp contrast, Republican gubernatorial candidate Joseph Hutchison imbued prohibition with sacrosanctity. In stump speeches he stressed that public opinion had grown to support the law “by virtue of the moral and Christian, as well as the material advantage” that it had bestowed on Iowa. Unhesitatingly reaffirming the “the struggle for morality,...for the sacred virtue and honor of the home,” he proclaimed “by the goodness of God and the continued virtue of our people...to the civilized world that we shall maintain the stand we have taken.” In particular he emphatically declared that the murder of the militant activist prohibitionist Reverend George Haddock in Sioux City in 1886 by a saloon-keeper “is sacred to us, that we look upon his blood as the seal which pledged us to everlasting destruction and condemnation of the saloon in Iowa.” Denying the claim that prohibition was unenforcible, he insisted that it “was successfully enforced in nine-tenths of the counties of the state.”

On the eve of voting, The New York Times described the Iowa election’s doubtful outcome as the once in a lifetime phenomenon for the current generation. Ascribing the disaffection of leading Republicans to “disgust with the prohibition law and indignation at the course of its advocates,” the newspaper declared on its front page that with more liquor being sold in Iowa than ever before, no one would dare publicly claim that “prohibition prohibits. ... All that the Republican Party promises is that if it is successful this time it will pass another measure which it thinks will render the law capable of enforcement.”

Such a bill the Times conjured up as producing a nightmare scenario (giving a

---

177“A Rousing Speech,” HI, Oct. 10, 1889 (7:1-5 at 3-5, 8:1-2). For the laws, see 1855 Iowa Laws ch. 45 at 58; 1858 Iowa Laws ch. 143 at 283. The 1858 exemptions for beer and wine were interpreted as having been dispensed “[o]nly out of regard for the Germans and in the sincere belief that mild beverages might supplant the use of stronger liquors....”

“Local Option, But Not License,” ET-R, Aug. 19, 1893 (1:4-5) (edit.). In the wake of the enactment of the stringent prohibition law some breweries closed and moved to another state (e.g., from Iowa City to Illinois), whence they shipped beer by the car load to Iowa City. “A Review of the Situation,” CREG, Oct. 19, 1889 (2:1-3 at 2) (edit.). Such shipments became blatantly illegal after congressional enactment of the Wilson law in 1890. See below ch. 11. At the time of Boies’s speech Iowa’s population was about 1.9 million; 120 years later it is still only about three million.


179“Iowa a Doubtful State,” NYT, Nov. 5, 1889 (1).
Banning Tobacco Sales to Minors

piquant double twist to hell’s location in future Senator Jonathan Dolliver’s bon mot that Iowa would go Democratic when hell went Methodist:

Their further measure means a State constabulary, such as is now known in Ireland. It means the recruitment of constables in Worth County to act in Scott and attempt to enforce the laws with the armed strangers, and it is easy enough to guess what the moral character of such strangers would be to compel, by arms, the enforcement of a law which the public sentiment of a community repudiates and despises. If it shall come to pass that such measures are attempted in Iowa there will be riots and bloodshed such as were never known in the history of the United States, and an armed resistance to the law will spring up which all the militia in the State might find it impossible to overcome. The principle of home rule will never be abandoned without a struggle.

As surprised as anyone by his victory—receiving a plurality of 6,573 votes over the Republican candidate though only 49.9 percent of the total vote, he became the only Iowa Democrat elected governor between 1854 and the New Deal—Boies did not impute monocausal strength to prohibition as an explanation of the outcome, but “he was disposed to the prohibition issue as the main factor. ‘It seems to me...as a fair indication that a majority of the people of Iowa are tired of the workings of the prohibition law and prefer a good license law as the better method of regulating the liquor traffic.’” Asked whether it would be repealed, Boies thought that it would be because Republicans’ legislative majority was so small that there would be no difficulty in obtaining a majority for licensure.

That the election returns had not at all prompted the prohibitionist wing of the Republican Party to consider the possibility that the pendulum had begun to swing in the other direction was eloquently on display in the front-page editorial.

---

180“‘Iowa a Doubtful State,’” NYT, Nov. 5, 1889 (1). Scott County (whose county seat was Davenport), situated on the Mississippi River, was “wet,” whereas Worth County in north central Iowa, was “dry.” Whereas the former voted three to one against constitutional prohibition in 1882, the latter voted two to one for it. While denying that he was an “alarmist,” Candidate Boies had speculatively raised the specter of Republicans’ plan for a “state constabulary” in his opening campaign speech. “A Rousing Speech,” HI, Oct. 10, 1889 (7:1-5, at 2:2).

181Iowa Official Register: 1890, at 190. For minutely different figures (e.g., plurality of 6,564), see Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa,...1890, at 56 (Feb. 20) (1890).

182“The Surprise in Iowa,” NYT, Nov. 6, 1889 (1). Prohibition, according to the Chicago Tribune, was “responsible for the greater part of the havoc in the Republican party of this year,” but the paper rejected any monocausality and regarded the party’s 34 years in power as one of the chief reasons for defeat. “Mr. Boies Is Victorious,” CT, Nov. 7, 1889

720
Banning Tobacco Sales to Minors

We have again elected a republican legislature, and it is again, as strongly as any legislature ever elected in Iowa, committed and pledged to prohibition. ... At the lowest calculation three quarters of the republicans of Iowa are prohibitionists. ... The republican party is not going to change its policy on the temperance question just because, after a struggle of thirty-five years, one democrat is accidentally elected to a state office.¹⁸³

Outgoing Republican Governor William Larrabee’s second biennial message and incoming Democratic Governor Horace Boies’ first inaugural address were separated by only two weeks in February 1890, but they depicted parallel universes of prohibition in Iowa. Larrabee claimed that it was “safe to say that not one-tenth, and probably not one-twentieth, as much liquor is consumed in the State now as was five years ago” and denied that the 1889 state elections constituted a “verdict against prohibition” because “our temperance people, resting secure in the belief that prohibition was the settled policy of the State, took little or no part in the canvass, and thousands of them did not even go to the polls. Moreover, many who did go had their attention fixed upon other important issues....” Finally, if women had been permitted to vote in 1882, the majority in favor of constitutional prohibitions would have exceeded 200,000.¹⁸⁴

Waterloo attorney Boies (1827-1923), a New Yorker, who had served a term in the legislature in Albany in the 1850s, left the Republican Party in Iowa in the 1880s in large part because of its prohibitionist stance.¹⁸⁵ He attracted considerable attention in 1883 with his critique of the Republican Party’s aforementioned platform plank pledging the party’s support for enactment of statutory implementation of constitutional prohibition in 1884. Boies’s central objection to the proposed stringent prohibition was rooted in his revulsion toward its prospective substantial destruction of Iowa citizens’ lawfully acquired property valued in the millions of dollars, the driving of thousands of men from their lifelong businesses, and the revolutionizing of “the social habits and customs of nearly one-half of our population” (if it was enforced, or the “disrepute” into

¹⁸³“As to Prohibition,” Algona Republican, Nov. 13, 1889 (1:2-3).
which it would bring “the whole system of popular government” if it became an unenforceable dead letter). In either event, “a more serious question of political economy” was seldom presented to “the thoughtful mind,” especially since many believed that at least with regard to uncompensated investment in theretofore lawful beer and wine manufacture such a law would be “a cruel, unjust and tyrannical exercise of legislative power....” Moreover, Boies also manifestly associated himself with others’ belief that liquor prohibition would “ignore the fundamental principle that in our form of government,” undergirded as it was by the consent of the governed, “general laws must be liberal to the verge of reasonable safety to the State, because our people are composed of mixed classes, with different tastes, different habits and different opinions upon most of the great moral and religious topics of the day.” Consequently, it was as wrong in principle as it was futile in practice for one class to use the law to “compel...unanimity of thought or action upon a subject about which the masses of mankind have ever differed”—particularly “a great part of our population educated from infancy to a different belief.” In the end, Boies opted for organizing a faction within the Republican Party “with the avowed purpose of uniting with any party” to spare Iowa “the odium of intolerant and prescriptive legislation.”

In his inaugural the new governor recapitulated many of the arguments with which his stump speeches had already familiarized voters. Insisting that the law “has lain limp and lifeless, ignored, disregarded and despised in most of the large cities of the state from the day of its birth to the present time,” Boies declared that it “is a patent fact...that in many of our cities, containing...a large fraction of our population, the only effect of the law has been to relieve the traffic in these liquors from legal restraint of every kind.” Consequently, in the large cities, “the use of intoxicating liquor as a beverage has not been diminished by our prohibitory law, but instead thereof...it has been greatly increased....” More significant, however, were Boies’s remarks on the underlying cultural factors that, in his view, made alcohol prohibition a real-political impossibility in demographically heterogeneous Iowa despite universal agreement that the consequences of intemperance were evils that legislation should seek to “minimize, as far as practicable....” In what a historian would decades later

---


187 Governor Horace Boies, “First Inaugural,” in *The Messages and Proclamations of Governors of Iowa* 6:287, 288 (Benjamin Shambaugh ed. 1904 [Feb. 27, 1890]).

188 Governor Horace Boies, “First Inaugural,” in *The Messages and Proclamations of Governors of Iowa* 6:285 (Benjamin Shambaugh ed. 1904 [Feb. 27, 1890]).
characterize as Boies’s “endorsement of a pluralistic society in Iowa,” the new governor argued that the problem was that

an irreconcilable difference of opinion exists whenever we undertake to determine what that legislation shall be. This naturally, and almost necessarily, arises from the mixed character of our population—the disparity in our education and customs, and in our views as to the legitimate exercise of legislative control over social habits that do not directly invade either public or private rights.

In considering this question we cannot rightfully shut our eyes to the fact that a considerable portion of our population have been taught from infancy to believe that the moderate use of malt and vinous liquors at least is not criminal, but instead thereof that it is actually beneficial. ... We cannot think alike. For some inscrutable reason society everywhere is divided into classes. Habits which are pleasant to one are distasteful to another. Christianity itself has its votaries and its foes. Why then should we expect to compel uniformity of sentiment on this subject?

Despite all the attention that Boies lavished on diversity and the prohibitory law’s oppressive treatment of alcohol consumers, it is noteworthy that (as he had in 1883) he reserved his sharpest condemnation for its destruction of the capitalist enterprises that many regarded as the Democratic Party’s chief allies in the anti-prohibitory struggle:

In my own judgment the chief obstacle to the enforcement of this law lies in the fact that in and of itself it is a cruel violation of one of the most valued of human rights. By that act Iowa stands convicted of first making the business of the brewer and wine-maker legal, of watching, without warning, the expansion of their business within her borders until millions upon millions of the capital of her citizens had been invested therein, and then coldly wiping it out without one effort to compensate those who were ruined thereby.

Boies proposed what he called “a middle ground between the extremes of opinion” that would “leave to every locality in Iowa that desires it the present prohibitory law or its equivalent” but not “force” it on any city or town where “public sentiment” rejected it. This approach was based both on “the self-evident truth that a law which is entirely efficient for the control of this traffic in the rural

---


190Governor Horace Boies, “First Inaugural,” in The Messages and Proclamations of Governors of Iowa 6:285-87 (Benjamin Shambaugh ed. 1904 [Feb. 27, 1890]).

191Governor Horace Boies, “First Inaugural,” in The Messages and Proclamations of Governors of Iowa 6:289 (Benjamin Shambaugh ed. 1904 [Feb. 27, 1890]).
Banning Tobacco Sales to Minors

districts of the state is wholly inadequate...in its great cities” and on “the right of self-government to citizens capable of deciding for themselves what is best for their own localities” and denial “to people in one section of the state the power to determine what regulations shall control those of another, in whose affairs they have no rightful interest and with whose circumstances and needs they are necessarily unacquainted.” For this “radical change” in Iowa’s prohibitory laws Boies adduced a “more weighty reason” than all the aforementioned “theories”—namely, that voters, “under circumstances that leave no room for doubt as to their meaning, have expressed their wish in this respect.” He derived this conclusion from the “glaring truth” that the party platforms, the gubernatorial candidates’ letters of acceptance, and the ensuing discussions meant that “no political issue was ever more clearly defined, more thoroughly discussed, or better understood by the masses than that relating to” prohibition during the 1889 campaign.192

To be sure, Governor Boies failed to explain how or why voting that did not even produce a majority for him (or elect any other Democrat to a statewide post) but did leave Republicans in control of the legislature could or should be interpreted as a mandate for replacing statewide prohibition with local option and/or licensure. And as was to be expected, Boies’s alleged middle-grounders simply lacked the votes to pass such a fundamental revision of state alcohol policy.193 During the twenty-third General Assembly numerous bills were introduced in both houses by anti-prohibitionists for establishing local option and licensure regimes,194 while prohibitionists sought, once again, to anchor their law

192 Governor Horace Boies, “First Inaugural,” in The Messages and Proclamations of Governors of Iowa 6:290-91 (Benjamin Shambaugh ed. 1904 [Feb. 27, 1890]).

193 It had, according to one major Republican newspaper, been “apparent from the opening day” that there would be no change in the prohibitory law because “[t]he democrats never expected to accomplish anything, but were simply skirmishing for political advantage.” “Des Moines Letter,” Iowa State Reporter (Waterloo), Apr. 17, 1890 (4:2-3).

194 S.F. No. 336, which was introduced by Davenport Democrat William Schmidt and was similar to Boies’s proposal, lost 21 to 29 on a nearly party-line vote. Benjamin Gue, History of Iowa: From the Earliest Times to the Beginning of the Twentieth Century, IV: Iowa Biography 234-35 (1903); Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa, 1890, at 271, 613 (Mar.19, Apr. 10) (1890). Republican Lewis Hanchett voted Yea on the grounds that prohibition had done more to retard and check immigration into Iowa than all other causes combined. Id. at 613. Republican Senator Richard Price criticized the bill for making the incorporated town the election unit, although it was “but the center of a community. Outside of the imaginary line which marks the boundary lies the greater part of the community who have just as great an interest in
Banning Tobacco Sales to Minors

in the constitution, but none of these came to fruition—in part because by no means were all Republican legislators prohibitionists. Even anti-prohibition Republican Senator Joseph Lawrence’s bill, which would have established a local option and a minimum annual license of $1,000 for cities with a population of more than 5,000, was doomed to be defeated because it failed to satisfy Boies’s and the Democratic Party’s demand for opening up in principle every locality to the reintroduction of whisky and thus rebuffed cooperation with anti-prohibition Republicans who were amenable to some relaxation of the law.
Non-legislative anti-prohibition Republicans even organized themselves sufficiently during the session to meet on April 2 in Des Moines and adopt unanimously a resolution calling for an end to the “experiment of general prohibition,” which “in many portions of the state...ha[d] lamentably failed.” Their insistence that the party alter its platform to help “restor[e] its supremacy” initially bore—despite the prediction by Fred Faulkes, editor of the Cedar Rapids Gazette, that the conference would “prove one of the most important events in the line of moral-business-political gatherings in the history of Iowa”—as little fruit as their request to the legislature to support local option and high license so that the party could regain its strength in the river cities while retaining the support of “the most pronounced prohibitionist in the interior districts” and thus “save the party from political suicide.” The next day an 11-member committee appointed by the convention submitted a statement that had been unanimously adopted by the convention to the chairmen of the House and Senate Republican caucuses urging on them the “imperative necessity” of amending the law on moral, social, political, and commercial grounds. The

Lawrence Bill,” BH-E, Apr. 9, 1890 (1:3-5) (sect. 10 provided for a $500 permit fee). After all the floor amendments to lower the threshold of population coverage had been defeated, the bill lost on engrossment by a vote of 13 to 34 (Democrats accounting for 11 of the 13 Yeas). Republican James Barnett, who personally favored high license in larger cities because he supported prohibition where it worked and local option elsewhere, explained his Nay as having been cast out of deference to his constituents. Union Labor Senator Perry Engle believed that local option would be in the interest of “true temperance” in many large Iowa cities, but voted Nay because the bill had too many defects. *Id.* at 620. On Engle, who introduced a no-tobacco-sales-to-minors bill in 1890, see below this ch.

198Delegates included both decided prohibitionists who supported a modification for cities and anti-prohibitionists who declared that they would not longer stand by the party unless the law were amended. “Favor a Change,” CREG, Apr. 2, 1890 (1:3).

199“The Liquor Question in Iowa,” New Era (Humeston), Apr. 9, 1890 (8:2). Those claiming that prohibition had failed in Iowa came, “for the most part,” from areas in which enforcement was difficult: “The man who asserts that prohibition is a failure in Kossuth county, for instance, would be making a statement at variance with the fact, while it is notoriously true that in Dubuque, Sioux City, Des Moines, and many other places...the prohibition of liquor selling has been very much...a dismal failure.” “Against Prohibition,” Upper Des Moines (Algona, Kossuth County), Apr. 9, 1890 (1:3) (edit.).

200“Want a Change,” CREG, Apr. 3, 1890 (2:1) (edit.).

201J. W. R., “From the Capital,” WC, Apr. 9, 1890 (1:1) (quoting George E. Hubbell of Davenport). See also “A Halt Called,” CREG, Apr. 3, 1890 (1:3-4); “A Notable Affair,” Hawarden Independent, Apr. 3, 1890 (3:1).
Banning Tobacco Sales to Minors

crucial reason, however, was spelled out with all possible clarity: “The party has already lost its magnificent majority solely on account of its attitude towards prohibition. The defection goes on every day.” Bursting with Schadenfreude, one Democratic weekly, commenting on the convention of “representative republicans taught in the disagreeable school of disaster,” congratulated Boies on “the support which a conference of distinguished republicans whom defeat has sobered gives his liquor party....”

The direction in which the professional party leadership wanted liquor policy to go was clearly indicated the following day by James Clarkson, “manager for...party affairs for the railroad magnates and other business interests who supplied most of the sinews of political warfare,” former editor of the Iowa State Register, the state’s leading Republican newspaper, head of national patronage, and, in 1891-1892, national party chairman. In an interview in Washington, D.C., where he was assistant postmaster general, Clarkson observed that while prohibition during its seven-year trial had

proved an[ ] admirable law for agricultural counties and smaller towns, it has failed to find public opinion to enforce it in the larger cities and counties on the Mississippi river, which are largely settled by people of European birth. It is an open fact that it cannot be enforced in such localities without a state constabulary, which the temper of Iowa people would never permit. The republican party has never been united in support of the measure. As many as fifty or sixty thousand republicans have opposed it, but have gone along with the party willing to see the experiment tried. Now that it has been tried for seven years and failed in part, they insist that the law be amended to give prohibition to 80 per cent of Iowa where public opinion favors and enforces it, but that some other method regulating and repressing the traffic be given to the twenty per cent of the state where experience shows it can never be enforced. ... The present legislature should, in my judgment, modify the law as demanded by the experience of actual trial. All good people wish to reach such legislation as will be nearest right and most repressive of the liquor traffic, and if possible, destruction of it, but common sense must regulate in this as in all other affairs of men. Clarkson and other leaders had not yet regained the control over the party that

---

202“Anti-Saloon,” Pocahontas County Sun (Laurens), Apr. 10, 1890 (1:3).
203“Iowa Converts,” Pocahontas County Sun (Laurens), Apr. 10, 1890 (2:3) (edit.).
204Leland Sage, A History of Iowa 205 (1987 [1974]).
206“Legislative,” CREG, Apr. 4, 1890 (1:4). Clarkson opposed another vote on a constitutional amendment.
they had lost to prohibitionists at the 1889 local and state conventions, but Iowa Republicans’ electoral fortunes would soon force a reconfiguration of their priorities. That transformation, however, could not take place so long as a critical mass of Republicans agreed with Iowa House Representative Madison Walden, a former lieutenant governor and congressman, who just the day before Clarkson’s interview had stated during Committee of the Whole consideration of a Democratic local option bill: “Some say it will bring defeat to the republican party if this law is continued on the statute books. The party has never adopted anything but good principles.... It was right and he was willing to go down in the right rather than succeed in the wrong. ... Prohibition must prevail and the house was not willing to let it go down. [T]hough a sentiment of this nature was slumbering in the cornfields last fall it was now fully aroused and demanded retention of the law as it stands.”

In 1890 the Republican Party platform continued to “declare against any compromise with the saloon” and reaffirmed its solidarity with the Iowans’ “hostility to its existence, spread and power.” The following year the platform, while renewing the party’s “pledge,” became considerably more aggressive in attacking Democrats’ position and warning that whereas their control of the next legislature “means State wide license,” Republicans’ control “means continued opposition to the behests of the saloon power through the maintenance and enforcement of the law.”

Prohibitionists’ hold over the Republican Party state convention was signaled by the overwhelming 951 to 84 defeat inflicted on the proposed local option/high license substitute.

---


208Journal of the House of Representatives of the Twenty-Third General Assembly of the State of Iowa,... 1890, at 125 (Mar. 1) (1890) (H.F. No. 42, by Dent). The last action on the bill was a motion to postpone indefinitely, which was withdrawn. Id. at 437 (Apr. 4).

209“Anti-Prohibitionists,” BHE-E, Apr. 3, 1890 (1:3-4). The depth of the party’s commitment to prohibition at this point was signaled by the speech during the same debate by conservative James E. Blythe, a successful lawyer and member of the Republican Party central committee (who would become its chairman in 1893), who declared that the party would “stand by prohibition until the people express[ed] themselves against it directly without the troubles and side-issues of a general election.” Id. On Blythe, see Iowa Official Register: January 1891, at 77 (1890); Iowa Official Register: January, at 95 (8th Year, 1893); Leland Sage, A History of Iowa 223-24 (1987 [1974]).

210Iowa Official Register: January 1891, at 80 (1890).

211Iowa Official Register: 1892, at 164 (7th Year, 1891).

212“Republicans of Iowa,” CREG, July 1, 1891 (1:1-8 at 8); “Wheeler Is the Man,”
While the Democrats repeated their local option/$500 license proposal in 1891, the newly organized People’s Party, which focused its attack on the “vicious system of class legislation” that “protects a moneyed oligarchy most dangerous to the rights and liberties of the people, and is fast undermining the foundation of our civil government,” also “censure[d] the Republican and Democratic leaders “for the constant efforts to re-open the temperance question...to the exclusion of the grave economic questions which now confront the people.” And the contrast between the two major parties grew even sharper literally on election eve when newspapers reported that the Republican candidate for governor, Hiram Wheeler, had written a letter promising that he would not only not sign a license bill, but would deem it his duty to approve a state constabulary bill in order to provide for complete enforcement in all localities.

At the November gubernatorial election, marked by a record-high participation rate, Boies was reelected: although his plurality of 49.4 percent was marginally lower than in 1889, all the Democratic candidates for statewide offices prevailed and the Democrats gained control of 25 of 50 Senate seats (leaving the lone Populist Dr. Perry Engle in an influential position); however, since Republicans actual increased their representation in the House to 54 seats, any Democratic initiative to overturn prohibition appeared precluded.

The press widely expressed the view that opposition to the prohibitory law was largely responsible for the Democratic victory, an interpretation that many anti-prohibition Republicans not only shared, but promptly began to act on. For example, in November in ‘wet’ Fort Madison they appointed a committee to draft

---

*Iowa Citizen* (Iowa City), July 3, 1891 (10:1-3 at 2).

213 *Iowa Official Register: 1892*, at 167 (7th Year, 1891).
214 *Iowa Official Register: 1892*, at 171, 172 (7th Year, 1891).
216 In the event, Engle was deathly sick during part of the session and missed numerous votes on liquor prohibition bills. “Senator Engle May Die,” *BH-E*, Feb. 24, 1892 (1:6); “Perry Engle May Die,” *CREG*, Mar. 10, 1892 (2:4).
217 *Iowa Official Register: 1892*, at 72-77, 233 (7th Year, 1891). Nevertheless, as Republican Senator Conduce Gatch, who proposed county option, pointed out, the aggregate of Democratic majorities in those House elections exceeded that of Republican majorities by more than 6,000 and the population of the counties represented by Democrats exceeded that of Republican-represented counties by more than 27,000. “For County Option,” *CREG*, Mar. 4, 1892 (3:2).
218 “What They Think of It,” *Iowa Citizen* (Iowa City), Nov. 13, 1891 (10:1-3) (potpourri of editorial opinion).
Banning Tobacco Sales to Minors

a petition to the legislature requesting enactment of high-license. And a conclave in Sioux City advocated “harmonizing the party on the prohibition question” statewide in order to secure repeal of prohibition and “restoration of the party to its old-time supremacy in the state” by gaining the cooperation of enough Republican legislators to pass a license bill at the 1892 session regardless of which party introduced it.220

As that session was about to convene, the national press was clear both that “[t]he question that will attract the most attention in the Legislature...is that of prohibition”221 and that it was “past the comprehension of Republicans elsewhere to understand why their brethren of the Hawkeye State so fatuously persist in hanging this millstone around their necks, knowing, as they must know by this time, that it is certain to engulf them in defeat.”222 For this very reason chairman Clarkson of the Republican National Committee, a power in the Iowa party, wanted the latter to abandon its attachment to prohibition, but since a majority of the party’s remaining membership either supported it or was in any event committed to it, altering party policy would prompt still more defections.223

Unsurprisingly, in light of the arithmetical constraints of party-line voting in each chamber, the symbolic efforts at passing liquor legislation came to nought during the 1892 session. House Republicans were able to pass a joint resolution in support of constitutional prohibitory amendment,224 which Senate Democrats then killed.225 A similar pattern marked treatment of liquor bills. Only two of

220 “Want It Repealed,” CREG, Nov. 24, 1891 (1:2).
221 “State Questions in Iowa,” NYT, Jan. 11, 1892 (1).
222 “Local Option in Iowa,” WP, Jan. 5, 1892 (4) (edit.).
223 NYT, Jan. 8, 1892 (4) (untitled edit.).
224 Journal of the House of Representatives of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 311 (Feb. 27) (1892) (H.J.R. No. 7, by Chase). The resolution received a favorable report and a Democratic minority report. Id. at 364-65 (Mar. 3). On straight party-line votes the latter lost 46 to 52, while the former was adopted 52 to 46 (two Republicans not voting and the only Independent, Dan Campbell, voting with the Democrats as he had on the election of the House speaker). Id. at 435-37 (Mar. 9).
225 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 460 (Mar. 15) (1892) (committee recommendation of indefinite postponement of H.J.R. No. 7, which was ordered passed on file). A Republican constitutional initiative to the same effect ultimately lost because, while gaining 26 votes, it lacked the two-thirds majority that the speaker ruled was required to consider it. Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 113, 316, 603-604 (Feb. 2, Mar. 3, 25) (1892) (S.J.R. No. 10).
them made any progress in the Senate. S.F. No. 1—which provided for a vote in any incorporated city or town or unincorporated area, based on a petition submitted by two-fifths of the number of qualified electors, on whether to permit the manufacture or sale of spirituous, vinous, or malt liquor subject to an annual license fee of at least $500—early on became the Democratic caucus bill, which all members pledged to support and which thus displaced other similar Democratic measures. Introduced by Senator Schmidt, the Democrat who had also been a prominent sponsor in 1890 and whose effort was primarily inspired by the need to “release the people of the State from the burdens of prohibition which they have carried for a decade to the great detriment of the commercial and financial interests of the State,” it received on February 24 all 25 Democrats’ votes but no others, thus failing one vote short of a constitutional majority.

The hard line that many Republicans adopted on local option/license bills was rhetorically on display in the minority report filed by the two Republican members of the Suppression of Intemperance Committee, who insisted that, Iowans never having voted for licensing or legalizing traffic in intoxicating beverages, the people’s will should be respected until they voted otherwise. They also argued that liquor trafficking either was or was not detrimental to public morals, health, and welfare: if it was not, then “it ought to be as free and untrammeled as any legitimate business” in Iowa; if it was, then it “ought to be suppressed by law, as a crime against the public” like gambling, betting, selling obscene literature, and the social evils. In that connection, the claim that the prohibitory law was violated in certain places constituted no more a reason for licensing liquor than the existence of gambling in larger cities justified licensing

---

226 S.F. No. 1, by Schmidt (in 1892 Senate bill book in University of Iowa Law Library).

227 “Local Option Measure in Iowa,” CT, Jan. 30, 1892 (2). In the process of gaining supremacy the bill was somewhat amended; for example, the two-fifths requirement was lowered to one-fifth. Id.

228 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa...1892 at 381 (Mar. 5) (1892).

229 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa...1892 at 36 (Jan. 20) (1892). For the committee amendments, see id. at 128-29 (Feb. 4); for the vote, see id. at 250-52 (Feb. 24); for speeches on the bill, see “Repeal or Not,” CREG, Feb. 12, 1892 (2:3-5). The House version of the Schmidt bill, a Democratic caucus bill, was defeated by a straight party-line vote of 41 to 42. Journal of the House of Representatives of the Twenty-Fourth General Assembly of the State of Iowa...1892 at 43, 188-89, 476-77 (Jan. 18, Feb. 11, Mar. 12) (1892) (H.F. No. 25, by Irving Richman); “License Bill Discussion,” BH-E, Feb. 13, 1892 (1:1-3 at 2); “Legislature,” CREG, Mar. 12, 1892 (1:3).
Linked to S.F. No. 1’s defeat, but also bristling with much greater political explosiveness, was S.F. No. 23, which had originally been introduced by Democrat William Groneweg, whose orientation regarding alcohol was virtually overdetermined by his being a prosperous German-born wholesale grocer in the Missouri River city of Council Bluffs ("a plain old German merchant who made an honest argument for license from the Faderland standpoint"). Two days after his own bill had failed to pass, Schmidt as chairman of the Committee on Suppression of Intemperance recommended passage of Groneweg’s, which, however, was quickly overtaken by a new legislative strategy that united Democrats and the minimal number of Senate Republicans needed to secure that requisite 26th vote for passage. As early as the end of January press reports had disclosed that while probably no Senate Republican would vote for Schmidt’s bill, two Republicans in the Senate and four in the House had “heartily endors[ed]” taking the county as the unit for a local option election, one of them even positively stating that he would vote for such a bill. During the run-up to the vote on the Schmidt bill, just as non-legislative

230 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 178 (Feb. 10) (1892).
231 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 47 (Jan. 22) (1892) (S.F. No. 23, by Groneweg).
233 “Iowa Legislature,” Sioux County Herald, Feb. 24, 1892 (1:5). For the text of Groneweg’s speech, see “Groneweg Talks,” CREG, Feb. 20, 1892 (2:2-3).
234 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 268 (Feb. 26) (1892). Groneweg’s bill differed from Schmidt’s most prominently in not only fixing graded license fees ($800 for first-class cities, $600 for second-class cities, and $500 for incorporated towns and townships), but also creating an indeterminate fee (not less than $500) for the special charter cities of Dubuque and Davenport, “where a low license [wa]s desired. This bill would suit the saloonmen of these cities better than the Schmidt bill.” “War on Prohibition,” CT, Jan. 24, 1892 (8). The license fee provisions (which do not expressly mention Dubuque or Davenport) are found in § 11. S.F. No. 23 (by Groneweg), in 1892 Senate bill book (University of Iowa Law Library).
235 “Local Option Measure in Iowa,” CT, Jan. 30, 1892 (2). The arch-Republican Chicago Tribune, which echoed these concerns, mocked Iowa Republican legislators’ irrational insistence on retaining a prohibitory law that could no more be enforced in 25 or 30 of the largest and most populous Democratic counties than in Africa or on the moon because a decade’s experience had proved that Republicans could not make Democrats stop drinking. “Iowa Republicans and the Schmidt High License law,” CT, Feb. 9, 1892
Iowa Republican Party leaders, with an eye on the deleterious impact on national party strength of the loss of the state as a Republican electoral bastion, were renewing their complaints about state legislators’ rigid attachment to prohibition, which had lost the votes of thousands of Germans and Scandinavians.\(^{236}\) Senate Republicans caucused on February 17, at the request of two members, to discuss amending the prohibitory law. The latter’s proposal was a countywide option, which, in the event that a majority voted for licensure, was rendered more restrictive by confining saloons to townships and wards in which a majority also supported licensing. Other restrictions included outlawing saloon operations between 11 p.m. and 6 a.m. or on Sundays as well as any playing of games. The annual license fee was set at $500 for cities of 2,000 or under and $1,000 for the larger cities. Despite the proposal’s relative stringency, only two senators voted for it.\(^{237}\) Although the caucus agreed that all members would vote against Schmidt’s bill, it was “rumored that thereafter they will vote as they please.”\(^{238}\) Since only one Republican vote was needed to pass local option/licensure, such non-caucus-dictated voting appeared to insure an anti-prohibitionist victory, at least in the Senate. Such a prospect refuted the conclusion that The New York Times had just drawn that the party’s unanimous opposition to S.F. No. 1 was of “great political significance” because it indicated that Republicans were once again determined to retain prohibition as a campaign issue later that year.\(^{239}\)

The same day that Schmidt’s committee recommended passage of Groneweg’s bill Republican Senator Conduce Gatch, a Des Moines lawyer,\(^{240}\)

\(^{236}\)“Iowa Republicans and the Schmidt High License Law,“ \textit{CT}, Feb. 9, 1892 (4) (edit.).

\(^{237}\)“Iowa Republican Senators’ Bill,” \textit{CT}, Feb. 18, 1892 (2).

\(^{238}\)“Will Vote Solidly,” \textit{BH-E}, Feb. 19, 1892 (1:1) (reporting that Senators Gatch and Brower were the two dissenting members, who presumably had also requested the caucus meeting).

\(^{239}\)“Prohibition in Iowa,” \textit{NYT}, Feb. 27, 1892 (1). According to the \textit{Times}, Republican National Committee Chairman Clarkson’s proposal that the party vote for a high-license law as a way of getting rid of the prohibition issue was trumped by Iowa U.S. Senator William Allison’s influence, which was “thrown against the bill” based on the argument that the party had less to fear from those whom prohibition had already prompted to defect than from “the great body of Prohibitionists...still in the party...who would leave it almost en masse if it should become responsible for license.” \textit{Id.}

\(^{240}\)On Gatch, see “Senator C. H. Gatch,” \textit{CREG}, Feb. 22, 1892 (2:1); “A Sudden Summons,” \textit{DIC}, July 1, 1897 (1:3-4) (obit.). At the aforementioned secret Republican joint caucus in 1890 Gatch had been one of three Republican senators to speak strongly against the motion to support the prohibitory law without repeal or modification.
“thr[e]w a bomb into the camp of politicians”\textsuperscript{241} by moving that everything after the enacting clause in Groneweg’s bill be stricken and that his own countywide option measure be substituted for it.\textsuperscript{242} (In fact, the substitute bill’s passage was insured even before Gatch had offered it: when the Democrats learned the night before that he would be proposing it, they caucused and unanimously agreed to support it “if it was not entirely too restrictive.” Although some Democrats did regard it as “pretty restrictive,” they also “realize[d] that if they should fly the track now the Republicans would have the club in their own hands”\textsuperscript{243}) Gatch had been the author of the proposal to the caucus, which was very similar to his substitute measure,\textsuperscript{244} and he and his then-confederate, Republican Senator Norman Brower, a former newspaper editor and owner,\textsuperscript{245} had been under “[g]reat pressure” to vote for Schmidt’s bill, but both that step and the alternative of voting for a countywide option were favored by some in the party who sought to conciliate “independent or license Republicans,”\textsuperscript{246} whose votes were needed for the upcoming national presidential campaign.\textsuperscript{247} Non-Democratic anti-prohibitionists heaped praise on Gatch, the “manly man,”\textsuperscript{248} for his “manly action” in becoming “[a]t last” the “one true republican” with the “courage to tear off the mask of hypocrisy,” thus liberating himself from the “shackles” of the “farce called prohibition”—all towards the end of saving the Republican Party from itself by enabling it to “extricate” itself from its embrace of “extreme prohibition” and thus to regain the electoral support of its one-time imbibing voters.\textsuperscript{250} (Not for nothing did a critic label it the “Gatch-Clarkson-Allison bill.”)\textsuperscript{251} Gatch’s substitute included a slew of restrictive conditions such as

\begin{itemize}[itemsep=2pt,parsep=0pt]
\item \textsuperscript{241}“Our Des Moines Letter,” \textit{Morning Sun News}, Mar. 3, 1892 (1:3).
\item \textsuperscript{242}\textit{Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892} at 271 (Feb. 26) (1892).
\item \textsuperscript{243}“Iowa’s License Law,” \textit{CT}, Feb. 27, 1892 (7).
\item \textsuperscript{244}It dropped the bifurcated annual license fee according to population size, replacing it with a flat minimum $500 (“and such additional sum as shall be fixed by the municipality”), \textit{Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892} at 272 (Feb. 26) (1892) (§ 6).
\item \textsuperscript{245}“Newspaper Man and Senator Dies,” \textit{Garner Signal}, Jan. 31, 1917 (1:1-2) (obit.).
\item \textsuperscript{246}BH-E, Mar. 4, 1892 (2:2) (untitled edit.) (citing Des Moines News).
\item \textsuperscript{247}“Iowa Republican Problems,” \textit{NYT}, Mar. 14, 1892 (1).
\item \textsuperscript{248}“They Weren’t in It,” \textit{BH-E}, Feb. 24, 1892 (1:5).
\item \textsuperscript{249}“The Probable Passing of Prohibition,” \textit{CREG}, Feb. 27, 1892 (2:1) (edit.).
\item \textsuperscript{250}“Gatch’s Brave Action,” \textit{CREG}, Feb. 27, 1892 (2:4).
\item \textsuperscript{251}“The Iowa Republicans,” \textit{NYT}, Jan. 27, 1892 (3).
\end{itemize}
as: prohibiting a second election within three years of the first or more often than every five years thereafter; a requirement that the license application be signed by a majority of property owners on both sides of the street within 200 feet of the applicant’s proposed business site; a requirement that licensed saloons be closed on all public election days; and liability of licensed sellers to all persons injured by any intoxicated person if the seller caused the intoxication even in part.252

In the midst of these Senate proceedings on the Gatch bill, conflict in the Republican Party was intensified by the State Temperance Alliance annual convention on March 1 in Des Moines, which had been “called to scare the Republicans, who had intended to vote for the Gatch bill, back into line....” The presidential address specifically “warned the Prohibitionists against threatened betrayal, and predicted the destruction of the Republican Party if a single one of its lawmakers in the General Assembly failed to vote to retain the law.” Regardless of the outcome in the Senate, the press viewed the pressure as “likely to succeed” in the House.253

On March 3, following the presentation of a number of petitions, protests, and remonstrances (including one by the WCTU) against repeal of the prohibitory law,254 the Senate took up the substitute for S.F. No. 23. Gatch offered a number of (Democratic) amendments, the most important of which was perhaps the reduction of the requisite proportion of the number of qualified electors on the poll books of the previous county election required for a petition to the board of supervisors for a license election from two-fifths to one-fifth.255 The Senate failed to reach the issue of voting on the adoption of the substitute as a result of the time consumed by several speeches, above all Gatch’s, the burden of which was to demonstrate both that the Republican Party’s stance on prohibition had cost it electoral dominance in numerous counties and that “unless by mutual concession some middle ground” were taken between the two parties’ policies (namely, countywide option) and the question were taken out of politics—with the result that 80 or 90 percent of counties would remain saloonless—Democrats would soon have the power to repeal prohibition and enact a municipal-level option bringing in its wake saloons in at least one or two towns in every county.256

252 S.F. No. 23 (Substitute by Gatch), §§ 1, 4, 6, 7, 16, in Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 271-75 (Feb. 26) (1892).
253 “Iowa’s Prohibition Fight,” NYT, Mar. 2, 1892 (2).
255 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa,...1892 at 315-16 (Mar. 3) (1892).
256 “For County Option,” CREG, Mar. 4, 1892 (3:2-4, 4:4). Gatch tried to justify the
Not disappointing those who suspected Republican prohibitionists of harboring party-politically suicidal tendencies, Senator (and former state district Judge) Robert Reiniger declared that “if it was necessary to abandon right principles to avoid defeat, he preferred defeat.” However, on March 8, the chamber did adopt all of the proposed amendments and the substitute before holding the anti-climactic vote on the bill, which passed 27 to 22, with only Gatch and Brower joining all 25 Democrats, for which apostasy both were duly “roasted” on the floor by a leading Republican prohibitionist.

Eight of those Democrats (but no Republican) found it politically prudent to issue (in some cases rather lengthy) explanations of the “expediency” of their votes to be printed in the *Journal of the Senate*, which generally emphasized that although the bill was far from ideal, as “one step away from prohibition” and an “‘entering wedge’” it was “the best” that the Democrats, lacking a constitutional majority, could achieve. The harshest and bluntest remarks were made by Senator Theodore Perry, a lawyer from southern Iowa, who suggested that the Gatch bill was largely a Republican Party public relations hoax. For him it was “but little better than prohibition,” “a mere deception,” and “prohibition under the guise of license.” By furnishing the absolute minimum number of Republican Senate and House votes required for passage (insured by solid Democratic support) “while the party organization will remain steadfast to the cause of their prohibitionist allies,” the bill would “be classed as a Democratic measure” and the Republican party would be spared a prohibitionist split. It thus served to achieve the purpose of U.S. Senator Allison, Clarkson, and the Republican press of “induc[ing] the Democrats to unload prohibition from Republican shoulders and tak[ing] it out of politics, so that it may cease troubling” Republicans. The mechanics of the “trap” that Gatch had set for Democrats was rooted centrally in the countywide vote, which meant that even if every voter in the cities and town voted for licensure, country voters could prevail with the result that, as Gatch

---


258 *Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa*,...1892 at 376-78 (Mar. 8) (1892).

259 “Gatch Bill Passed,” *CT*, Mar. 9, 1892 (2) (Senator George Finn).

260 *Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa*,...1892 at 381 (Groneweg), 380 (Perry), 382 (Schmidt), 381 (Groneweg) (Mar. 8) (1892).
himself claimed, prohibition would be perpetuated in 90 percent of Iowa’s counties. Why, Perry asked rhetorically, would Gatch have included such requirements if the real intention was to provide for a license? He also accused Gatch of having been “so thoughtful, while planning for county option, that in order to make the law so distasteful to the voters residing in the county that they may not vote for it, he provides that should license carry in the county, any township voting for it may have a saloon. While Democrats in the country are opposed to prohibition and are willing for cities and towns to have license, where prohibition is a mockery and cannot be enforced, they do not want saloons out in their own townships. Hence they will be disposed to vote against county license.” Perry instanced Polk County, whose county seat was Des Moines, the state capital. Claiming that prohibition had not succeeded in any Iowa city with a population above 5,000, he declared that its operation in Des Moines was “simply a farce,” because even its Republican mayor and police force did nothing to interfere with the city’s no fewer than one hundred open saloons. Even though precisely such a city cried out for licensure, he found “great room for doubt” that it could pass in Polk County because of the arithmetic of the constellation of opposing and supporting forces. Among the former he counted in the first place “all the prohibition Republicans,” who, he conceded, alone “constitute not far from a majority in the city.” (Perry failed to explain why this brute social-demographic fact alone did not cast doubt on the superiority of a city-level option regime.) Next came “all the saloon and joint keepers in Des Moines,” whom no “sensible man” could imagine voting for licensure, which would cost them $500 plus a bond and potential penalties, when under the existing unenforced prohibitory law they did not have to pay anything to sell liquor. Consequently, if the saloon keepers “and their influence” joined the prohibitionists in opposition, and “with the country vote most probably against it,” what chance did the Gatch law have in Polk County? Instead of confronting the inescapable fact that under his own assumptions no Democratic city-level option bill could attract a majority either, Perry blamed “the cunning leaders of the Republican party” and S.F. No. 23’s “able author” who “very shrewdly requires the people of the cities and towns to go into the country and procure the consent of those living in even the remotest parts of the county, thus to obstruct the operation of the law, rather than to make it possible for it to go into operation....”

---

261 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa, 1892 at 378-80 (1892). Though his audience must have been aware of this demographic fact, Perry’s account made little sense since according to the 1890 census Des Moines made up 76.6 percent of Polk County’s population. In four of the six chief Mississippi River counties and one of the two chief Missouri River counties with the
The meeting of the Republican state convention in Des Moines during the interim between the Senate and House votes on Gatch’s bill furnished yet another opportunity for party leaders and delegates to compose a new strategy for dealing with the electorally havoc-raising impact of the party’s prohibitory plank. Called by the press on its eve “probably the most important convention ever known in the history of Iowa,”262 the meeting was seen days beforehand as the stage for a bitterly contested fight between roughly equal factions over adoption of a “resolution declaring that prohibition is not a test of party fealty,” passage of which would trigger 10 to 20 House Republican votes for the Gatch bill. Nevertheless, the fact that even in counties in which the party had been most severely hurt by its prohibitory policy pro-Gatch bill resolutions had been defeated at recent county conventions suggested that state convention passage was improbable,263 although anti-prohibitionists, based on their having “secured many whole [county] conventions,” expressed the belief that they would gain control of the pivotal committee on resolutions.264 The meeting’s main business may have been choosing and instructing delegates for the national presidential nominating convention, but the old question of prohibition remained the most perplexing for Republicans, the prohibitionists among whom had so far succeeded in persuading Gatch bill supporters to delay action on the measure until the convention had taken a position on it, which the former expected to be a denunciation. Their chief adversaries were the large delegations from the river cities of Davenport, Burlington, Keokuk, and Council Bluffs, which insisted that the mere prospect of the Gatch bill’s passage had already had the effect of bringing back to the party thousands of voters whom prohibition had alienated. The easiest way for the Resolutions Committee to extricate the party from this “trying position” was to strip the dispute of its substance by barring all local

---

262 “Some Iowa Issues,” CT, Mar. 17, 1892 (1).
263 “Iowa Republican Problems,” NYT, Mar. 14, 1892 (1).
264 “A Bitter Fight Expected,” NYT, Mar. 17, 1892 (1). See also “It’s Warming Up,” BH-E, Mar. 17, 1892 (1:3).
issues and limiting the platform to national matters. Though silence was only anti-prohibitionists’ second choice, it was no choice at all for prohibitionists, who felt that they needed an express and formal attack on local option/licensure to ward off House passage with the help of five Republican defectors. In the event, with eight of the 11 Resolution Committee members “firmly believ[ing] with Gatch and Brower” that “[f]or the first time in twenty years a Republican convention [w]as...held in Iowa and its platform [w]as bereft of an indorsement of prohibition.” Even if this upshot supported the conclusion that the party’s anti-prohibition wing was “again in control” the further prediction that the lack of a declaration on prohibition sufficed to give the Gatch bill “an exceedingly good chance” of House passage turned out to be the intended initiation of a self-fulfilling prophecy whose time would soon, but had not quite yet, come.

Senate passage of the Gatch bill left “the business men” of Des Moines “jubilant” and prompted The New York Times prematurely to declare that Iowa’s prohibitory law “was practically wiped out of existence to-day.” In fact, many legislators and newspapers had predicted that passage in the Republican-controlled House was doubtful or unlikely, and shortly after S.F. No. 23’s arrival there the Suppression of Intemperance Committee unsurprisingly recommended that it be indefinitely postponed. The committee’s Democratic minority, though far from satisfied with the bill, nevertheless recommended its passage both because the measure was an improvement over the existing law and because little time remained before the end of the session. (Democrat and Scottish immigrant Andrew Addie sarcastically explained his vote by reference to his belief that as law the bill would “tend to the suppression of cranks and hypocrites, as well as intemperance in the use of intoxicating liquors....”) The night before the House vote “several...Republican members who ha[d] been considered liberal on this issue” met in a committee room with the anti-prohibitionist temporary chairman of the state convention, Albert Cummins, and Nathaniel Hubbard, the Chicago & Northwestern Railway’s Iowa lawyer and one

---

265“Some Iowa Issues,” CT, Mar. 17, 1892 (1).
266“Iowa Now in Line,” CT, Mar. 18, 1892 (1).
267“The Antis in the Saddle,” CREG, Mar. 18, 1892 (4:3).
268“Iowa Now in Line,” CT, Mar. 18, 1892 (1).
269“The Gatch Bill,” BH-E, Mar. 9, 1892 (1:3).
270“Prohibition Dead in Iowa,” NYT, Mar. 9, 1892 (2).
Banning Tobacco Sales to Minors

of the Iowa Republican Party’s organizers and most influential leaders, who “urged the necessity of the bill passing the House to the end that the era of good feeling inaugurated” at the state party convention a few days earlier “not be impeded.” In the end, however, it became, according to the Chicago Tribune, “evident that the boys had been whipped into line and that not one of them was willing to make a martyr of himself for the purpose of helping the party out of the hole.” Consequently, with Republicans refusing to deviate from the party platform (or to acquiesce in the party’s non-legislative professional business leadership preference for abandonment of strict prohibition), on a strict party-line vote the full House voted 52 to 46 to adopt the majority report and kill the bill.

Gatch immediately reacted by sharply criticizing House Republicans for having defied party members’ “manifest desires” as indicated by the (aforementioned) party state convention and the state’s leading Republican newspapers. Ominous for the party’s electoral future in his view was their (implied) statement that the “republican party has no use for the republicans of the counties containing cities and larger towns...where prohibition is defied and free whisky holds unrestrained sway. They have, if I am not mistaken, shut the door against the return of many thousands of as good republicans as ever followed the republican flag but who think republicanism stands for more than prohibition.”

The Cedar Rapids Gazette, which reported that Republican legislators had crossed the Rubicon, adopted a different and partly perspicacious perspective (based implicitly on the non-suicidal choices that Realpolitik’s constraints
imposed on the party) in declaring that “[p]rohibition cannot stand” and predicting that “within two years it will be repealed, and we would not be surprised to see it changed by the party that put it on the books.”

A convention of anti-prohibition Republicans meeting in Des Moines made a last-ditch appeal to House Republicans to reconsider their vote on the Gatch bill or to bring up another local option/high license measure before the session ended, but following a secret caucus session the legislators announced that they could not renge on the party’s pledge to retain prohibition.

The paralyzing impasse over prohibition began to dissolve in 1893 after Republican Party leaders’ alarm in Washington, D.C. over Iowa Democrats’ capture of a majority of congressional House seats for the first time in 40 years had generated outside pressure to persuade Iowa Republican Party leaders to jettison prohibition as a political issue in an attempt to restore safe Republican supremacy to Iowa. Public evidence of this turn toward pragmatic policy emerged at the Republican State Central Committee meeting on March 28, 1893, in Des Moines, after which Chairman James Blythe, while denying that he was empowered to speak for the committee, did tell the press that: “You can say...that the report which the members brought from the districts indicated that the two wings of the party are working towards each other and each seems willing to make concessions.” In fact, the compromising seemed to be rather one-sided, with strict prohibitionists (allegedly) acquiescing in what was essentially the Democrats’ local option/licensure regime: all of the seven (of 11) districts represented at the session reported that a majority of Republicans “favored a modification of the present law with the view of saving prohibition to those localities where the present can be enforced and giving to other localities the power to control the traffic.”

During the interim before the state convention in August the (anti-
Banning Tobacco Sales to Minors

(prohibition) press interpreted Blythe as having “no hesitancy in saying that every indication points toward making concessions that will not allow the party to be avowed representatives of the strong prohibition element.” Indeed, the “feeling,” claimed the Cedar Rapids Gazette, that the “conciliatory” state party platform that he predicted would be adopted “must not be construed to mean that any advances will be made today to toady to prohibitionists” was “gaining such ground over the state that it has not been deemed necessary by the leaders of the party to call a preliminary conference to talk the matter over before the convention....”

The New York Times defined the Iowa Republican Party’s problem as: “How can the law be unloaded with least injury to the party?” The conflict arose between retaining a law that insured Democratic control and openly repudiating it to the irritation of “the prohibition element, still quite strong, but not so powerful a factor as formerly, and thus render defeat just as certain.”

The 1893 Republican state convention itself made manifest that strife rather than harmony still prevailed in the party on the question of prohibition, which was “still the dominant one in Iowa politics. Panics may come, banks may fail and McKinley tariffs remain to oppress and burden the people, but none of them can be made to supplant this burning local question.” Boies, seeking to become the state’s first three-term governor, declared that “all other issues were subservient” to prohibition.

Pressure on the Republican Party to take some action to enable cities that had already de facto undergone saloonification to license and extract revenue from liquor sellers was bubbling up in the form of the spread of saloons and anti-prohibitionism from the river counties to the interior (especially to east central and northwestern Iowa), where enforcement efforts had been abandoned and some town and city councils had begun unlawfully to impose a monthly tax or license in the form of a fine.

Such initiatives constituted blatantly illegal proto-quasi-mulct tax regimes, for the local adoption of which the legislature, as discussed below, provided in 1894. (Des Moines itself was an anomaly among larger cities in not having “adopted the plan of illegal license”; instead, the capital neither regulated the saloons nor derived any revenue from

---

285 “Iowa’s Political Outlook,” NYT, July 10, 1893 (3).
286 “Ready to Dodge the Issue,” NYT, Aug. 16, 1893 (1).

For but one example of a saloon owner in Muscatine who was found guilty of selling intoxicating liquors without a permit after he had “refused to pay the monthly mulct of $50,” see “Refused to Pay the Fine,” CREG, July 12, 1893 (1:5).
tax licensing them.\textsuperscript{289}

The direction and tenor that Republican Party leaders intended to give the convention resonated strongly in the opening speech given by former U.S. Senator James Harlan, a towering figure in the state and national party (whom Lincoln had named to his cabinet), who, after enumerating the principles of Republicanism, from which prohibition was conspicuously absent, dramatically asked the large audience of party faithful: “And if I do not know what Republicanism and its fruits are, who does?”\textsuperscript{290} The Committee on Resolutions having been selected with a view towards “liberalization,” the resolution that it reported formulated the Republican Party’s internal defeat of prohibitionism; the liquor plank, as the intensely anti-prohibition Chicago Tribune noted, was “a longer advance towards local option than was expected”\textsuperscript{291}:

That prohibition is no test of Republicanism. The general assembly has given to the state a prohibitory law as strong as any that has ever been enacted by any country. Like any other criminal statute, its retention, modification or repeal must be determined by the general assembly, elected by and in sympathy with the people, and to them is relegated the subject, to take such action as they may deem just and best in the matter, maintaining the present law as to those portions of the state where it is now or can be made efficient, and give [sic; should be “giving”] to other localities such methods of controlling and regulating the liquor traffic as will best serve the cause of temperance and morality.\textsuperscript{292}

After a committee member had read the resolutions aloud and moved their adoption without asking whether the convention wished to vote, hard-line prohibitionist George Struble, a former state judge and House speaker, demanded recognition, but in the meantime the platform had been adopted without the chair’s asking for the Nays,\textsuperscript{293} the liquor plank “being the signal for a burst of cheering which was only second to the one that greeted” the gubernatorial nomination of Frank Jackson for governor.\textsuperscript{294} “At this point Judge Struble

\textsuperscript{289}“Illegal License,” CREG, Mar. 22, 1894 (4:5) (edit.) (reprinted from undated issue of Sioux City Journal).

\textsuperscript{290}“Jackson and Liberalism,” ISR, Aug. 17, 1893 (Morning ed., 3:3-7 at 4).

\textsuperscript{291}“Iowa Goes in to Win,” CT, Aug. 17, 1893 (2).

\textsuperscript{292}“Jackson the Man,” CREG, Aug. 17, 1893 (1:1). For somewhat different contemporaneous versions, see “Iowa Goes in to Win,” CT, Aug. 17, 1893 (2); “Modification of Prohibition in Iowa,” CT, Aug. 18, 1893 (4). The text in Iowa Official Register 100 (9th Year, 1894), differs possibly substantively in using “it” instead of “them” in the fourth line.

\textsuperscript{293}“Jackson the Man,” CREG, Aug. 17, 1893 (1:1).

\textsuperscript{294}“Iowa Goes in to Win,” CT, Aug. 17, 1893 (2).
Banning Tobacco Sales to Minors

mounted a chair and attempted to address the convention, but the confusion was so great that he could not be heard.” An India-rubber-lunged associate then conquered the din sufficiently to call on fellow prohibitionists to march down the aisles, with the result that Struble was now on a chair in the center of the hall, while “a hundred strong lunged prohibitionists forged forward and were demanding their rights.” Once this tumult had died down, Struble asked for the floor while large numbers of others demanded a roll-call vote on the nomination for lieutenant governor, but Chairman Blythe successfully appealed for a hearing for Struble, who together with like-minded delegates insisted on striking out the last part of the last sentence of the plank (beginning with “maintaining”) on the grounds that it “provides that the Legislature should adopt local option. They said that they were ready to accept a relegation of the matter to the legislative districts, but they were opposed to being pledged to local option.”* Remarkably, at the outset of the ensuing debate, which “furnished three hours of pandemonium”297 and which the Iowa State Register called “one of the most notable in the history of politics in Iowa,”* delegates from such arch-anti-prohibitionist Mississippi River counties as Dubuque, Scott, and Lee seconded Struble’s amendment, but the tide turned when a delegate from the Missouri River city of Council Bluffs argued that “simple relegation would not improve the situation in Pottawattamie County, for if the matter be relegated to the districts and a majority of the districts elect Prohibition representatives they will continue

---


296“Iowa Goes in to Win,” CT, Aug. 17, 1893 (2). The Chicago Tribune argued that if the amendment had succeeded and if “liberal Republicans” had held the balance of power in the 1894 legislature, “they would not be bound to ‘maintain the present law in those portions of the State where it is now or can be made effective,’ but would be at liberty to vote for the Democratic measure, which will be unquestionably State wide license.” However, because “such liberal Republicans are now pledged to save the law to all parts of the State where it is effective,” numerous Republicans who had regarded the defeat of the amendment as surrender had begun to understand the plank’s “true meaning and give it hearty support.” “It Is Not Surrender,” CT, Aug. 18, 1893 (3). Once the next session began, the Register went even further, asserting that if Struble’s amendment had prevailed, “there would be no doubt now but the prohibition law would be repealed by the present legislature....” “Keep Faith with the People and Party,” ISR, Jan. 28, 1894 (6:3-4) (edit.).


the law as it is and not give any relief to the districts where prohibition cannot be enforced.” This interpretation prompted the Mississippi River county delegates to withdraw their seconds, but the debate raged on for another two hours, with the confusion scaling heights so great that the chair threatened to clear the galleries and did summon the sergeant-at-arms. In the end, the prohibitionists’ amendment lost by the very close vote of 590 to 613,\textsuperscript{299} which, there was no gainsaying, represented a “most remarkable” turn of events vis-a-vis the 107 to 951 vote for local option at the convention just two years earlier.\textsuperscript{300} Revelatory, too, was the fact that numerous interior prohibition counties voted against the amendment.\textsuperscript{301}

The Republican compromise, which did not specify the framework for non-prohibitory regulation in de facto “wet” localities, contrasted sharply with the counterpart Democratic plank, which “demand[ed] in the interest of true temperance the passage of a carefully guarded license law,” which “shall provide for the issuance in towns, townships and municipal corporations...by a vote of the people of such corporations” of a $500 annual license.\textsuperscript{302} The People’s Party denounced the “utter demoralization” of both major parties in their “attempt to outbid one other for the support of the saloon element” and “drown by their cry for the saloon every other important consideration relating to the public welfare.” Instead, it called for retention of prohibition until it could be replaced by “State and national control with all profits eliminated.”\textsuperscript{303}

The election of a Republican licensure advocate as governor over Boies\textsuperscript{304} and the return of lopsided Republican majorities in both House (78 percent) and

\textsuperscript{299}“Iowa Goes in to Win,” CT, Aug. 17, 1893 (2).
\textsuperscript{300}“Modification of Prohibition in Iowa,” CT, Aug. 18, 1893 (4) (edit.).
\textsuperscript{301}“Vote on the Amendment,” CREG, Aug. 19, 1893 (4:4-5).
\textsuperscript{302}Iowa Official Register 103 (9th Year, 1894). The plank also authorized local governments to add a further tax and favored “as a partial reparation for the unjust confiscation of private property caused by the prohibitory law...such legislation as will permit the manufacture of spirituous and vinous liquors within the State....” Id.
\textsuperscript{303}Iowa Official Register 107 (9th Year, 1894).
\textsuperscript{304}Frank Jackson received 49.7 percent of the votes against 42.0 percent for Boies, 5.8 percent for the Populist candidate and 2.5 percent for the Prohibition candidate. The Prohibition vote of 10,349, though an 11-fold increase over the 1891 figure, remained far below the level at which the press predicted that it would pose a threat to the Republican candidate. Iowa Official Register 186 (9th Year, 1894); Iowa Official Register 233 (7th Year, 1892); “Nothing Certain as to Iowa,” NYT, Nov. 6, 1893 (2). On Jackson, see “Jackson the Man,” CREG, Aug. 17, 1893 (1:1).
Banning Tobacco Sales to Minors

Senate (68 percent)\(^{305}\)—leaving Democrats “hopelessly in the minority”\(^{306}\)—suggested that the Republican Party’s liquor plank had indeed conciliated the requisite number of would-be saloon customers, but anti-Prohibition Republicans were purportedly “appalled at the present aspect of their movement to repeal prohibition or, at least to modify it through the Republican Party,” inasmuch as Prohibitionists had “circumvented” the platform “by securing iron-clad pledges from about thirty of the Republican nominees for the Legislature, who are sure to be elected, that they will vote against any repeal or modification of the present law regardless of the platform.”\(^{307}\) A week after the election, with the number of House Republicans absolutely pledged to vote against repeal estimated to have reached 55, thus constituting an absolute veto, many voices were predicting that the legislature would do nothing (despite Republican leaders’ claims that they would drive those prohibitionists into the ranks of local optionists)\(^{308}\)—a prospect that prompted anti-prohibition Republicans, at least in Cedar Rapids, openly to threaten to unite with Democrats at the following session.\(^{309}\)

**Origins, Interpretation, and Enactment of a Mulct Tax: The Republican Party’s Escape Route from Its Electoral Dominance-Threatening Commitment to Statewide Prohibition (1894)**

The Liquor Mulct Law of 1894, one of the most inane laws ever passed by the Iowa legislature. Under the provisions of this law, there was to be statewide prohibition, but in any town with a population over 5,000, a majority of the voters could approve an option by which the law would not be enforced against saloon keeper who paid a tax of $600 a year. Rarely has a law so openly provided for a legal means of bribery for its nonenforcement! It was enough to drive the most ardent prohibitionist to drink.\(^{310}\)

During the two months between the election and the convening of the General

---

\(^{305}\) At the 1894 session Republicans controlled 78 House and 34 Senate seats. *Iowa Official Register* 37, 41 (9th Year, 1894).


\(^{307}\)”The Situation in Iowa,” *NYT*, Oct. 28, 1893 (3). See also “Nothing Certain as to Iowa,” *NYT*, Nov. 6, 1893 (2) (raising to “over forty” the number of Republican nominees who had “agreed to stand by prohibition to get elected”).

\(^{308}\)”A Divided House,” *CREG*, Nov. 16, 1893 (2:1).

\(^{309}\)”A Spoils Hunter’s Howl,” *CREG*, Nov. 9, 1893 (4:2) (edit.).

Assembly a new approach to operationalizing the Republican Party’s conciliation promise entered the discussion. Back in April 1893, Welker Given, the editor-publisher of the Marshalltown *Times-Republican*, had, in contemplation of that summer’s Republican state convention, initiated an extended front-page editorial campaign on behalf of a platform plank on the prohibition question, which triggered a plethora of press republications of his editorials and an outpouring of journalistic responses. Despite efforts by some competing newspapers to belittle him as some kind of crank, Given was in fact an experienced editorialist with long-term ties to Iowa Republican Party leaders. Rising to the self-set challenge of composing “offhand” a liquor plank “without extended explanations as to its operations”—than which there could “hardly be a more severe or crucial test”—he submitted the following effort:

“In respect to legislation against intemperance we declare in the language of the supreme court of Michigan that ‘if one keeps up a prohibited [sic] traffic the fact is a reason for discrimination in taxation against him,’ and as a traffic in liquor is so maintained in parts of this state we favor a special police tax mulct from which no lawless saloon shall escape, and from the restraints and discipline of which not even the democratic party can secure it immunity in any quarter; provided that no licenses shall be issued and the law supplying this additional penalty shall declare an [sic] its face here, as like measures have been made to do in other states, that it shall not be construed as legalizing or licensing saloons anywhere or operating to abrogate any essential part of the existing prohibitory

---

311The *Cedar Rapids Gazette*, for example, asserted that he was trying to “make a Moses of himself” by “concoct[ing] some kind of a split-eared scheme, the object of which is to lead the republican party...into the land of Canaan and power again.” “The Mulct Nonsense,” *CREG*, Apr. 19, 1893 (4:3) (edit.). Later it joked that he had “discovered mulct somewhere in the state of Ohio and brought it to Iowa in his hand sachel....” “The Grind Resumed,” *CREG*, Mar. 6, 1894 (2:1). Given made no secret of the saloon mulct’s origin in Ohio, where, however, it performed a different function as a result of a different constitutional and statutory background.

312Given (1853-1938) had been, inter alia, editor in chief of the *Iowa City Daily Republican*, acting editor-in-chief of the (Des Moines) *Iowa State Register*, and an editorial writer at the *Chicago Tribune*. In 1879 he was appointed secretary of the Republican Party state committee and in 1882 Governor Sherman’s private secretary. He also devised the absentee ballot procedure. After the period in question he was chosen secretary of Iowa’s new Employers’ Liability and Workmen’s Compensation Commission. A well-known author, he published a scholarly tome on Shakespeare. Jeriah Bonham, *Fifty Years’ Recollections* 484-87 (1883); Benjamin Gue, *History of Iowa*, vol. 1: *Iowa Biography* 104 (1903); “Walker Given, Retired Editor, Dies in Clinton,” *Carroll Daily Herald*, Mar. 7, 1938 (1:5, 5:2).

313“Suggestion of a Liquor Plank,” *ET-R*, Apr. 4, 1893 (1:2) (edit.).
Banning Tobacco Sales to Minors

law. In this way prohibition may be maintained without any backward step, all possible local benefits of repressive taxation secured without compromising with or sanctioning the traffic and a system of regulation attained that will adjust itself promptly to the advanced and advancing state of temperance sentiment in Iowa."

The only “sound objection[]” that Given was able to imagine and tried to refute related to the mulct’s resemblance to Democrats’ nationally ubiquitous approach to alcohol: “If under certain circumstances it might secure in places the benefits incident to high license it would be without the fatal concession usually involved in that system.” He acknowledged that “[e]xtremists on both sides” would attack his proposal as “inconsistent,” but he insisted that it “could not fail to afford relief for the out-and-out saloon cities without asking any prohibitionist anywhere to vote for or assent to any license or legalization of the liquor traffic.”

The overridingly important point about Given’s proposal, especially with regard to the later use to which the Iowa legislature put the mulct tax in liquor (1894) and cigarette legislation (1897), was that it was intended to reinforce the prohibitory liquor law’s repressive character and not at all to immunize saloon owners who paid the mulct tax against prosecution under the liquor law. Although this fundamental distinction was ever-present to legislators’ minds in 1894 because various bills and amendments differed expressly over whether payment of the mulct tax functioned as a bar to prosecution under the existing law, numerous officials charged with enforcing the cigarette sales ban (as well as sellers and newspapers) mysteriously failed to understand that the mulct tax was not a license. (After the law had gone into effect, anti-prohibitory opponents insisted that its “object...was not to close saloons in prohibition districts, but to ‘relieve’ the places where saloons now exist, which in plain language means to license or tax in accord with law. It thus begins to dawn upon people

---

314 “Suggestion of a Liquor Plank,” ET-R, Apr. 4, 1893 (1:2) (edit.). Given neither quoted the opinion precisely nor identified it. What the Michigan Supreme Court actually had written was that: “If one puts the government to special inconvenience and cost by keeping up a prohibited traffic..., the fact is a reason for discriminating in taxation against him; and if the tax is imposed on the thing which is prohibited..., the tax law, instead of being inconsistent with the law declaring the illegality, is in entire harmony with its general purpose, and may sometimes be even more effectual.” Youngblood v Sexton, 32 Mich. 406, 426 (1875).

315 “Suggestion of a Liquor Plank,” ET-R, Apr. 4, 1893 (1:2) (edit.).

316 See below ch. 12.

317 See below chs. 12-14.
that...mulct...as a repressive measure...will not amount to anything.”)\(^{318}\) Nevertheless, in spite and/or perhaps precisely because of Given’s clear intent, his approach raised the question that he did not directly answer (in part because it appears not to have been directly posed)—namely, why, if the point was to repress all saloons and not merely to license the more ‘financially responsible’ ones, not simply increase the already existing penalties in the prohibitory law?\(^{319}\)

Some, especially Democratic, editorialists sarcastically accused Given of being unaware that most Iowa cities were already “mulcting the liquor dealers...”\(^{320}\) In fact, he was well aware of the “utterly corrupt and vicious character of the bribe-license fees taken from saloonkeepers in some Iowa towns,” which was reinforced by the “stupefying and corrupting” monthly dosage by which “the official conscience” was “kept drugged.” Instead of police and city officials, under his mulct plan “wholly independent and separate tax officials” toward the end of the year would “put their penalties on any saloons found escaping, surviving or defying prohibition punishment.”\(^{321}\) This description may have satisfied Given’s dichotomous classification of purchasing immunity from penalties.

---

\(^{318}\)“Soon Be in Force,” CREG, Apr. 3, 1894 (1:1).

\(^{319}\)The penalty for selling intoxicating liquor without a permit—selling liquor for medicinal, mechanical, and sacramental purposes was permittable—was $50-$100 for a first offense, and $300-$500 and imprisonment for up to six months for additional offenses. 1884 Iowa Laws ch. 143, § 10; McClain’s Annotated Code and Statutes of the State of Iowa 1:614, § 2381 (1888). One Democratic newspaper, which called Given’s proposal “the most delusive” of the Republican schemes to “crawl out from under the burden of prohibition, which has so nearly crushed the life out of the party,” argued that “[t]he first question that every honest man will ask” about it was: “Are not the present penalties sufficiently severe?” H.C.S., “Trying to Unload,” Cedar Rapids Standard, Apr. 27, 1893 (1:4).

\(^{320}\)Carroll Sentinel, Apr. 19, 1893 (1:2) (untitled edit.). For example, in Davenport 219 licensed saloons were paying $50 per quarter in advance into the city treasury. “City Beverage Licenses,” Lyons Weekly Mirror, Aug. 5, 1893 (5:3) (reprinted from Davenport Democrat).

\(^{321}\)“Honest Tax Mulct Doctrine,” ET-R, Apr. 10, 1893 (1:2) (edit.).
prohibition with a bribe under the one system and exacting a penalty without any protection in the other,322 but it remained unclear whether his proposal in fact constituted a “crippling, suppressive, prohibition supporting no-license police mulct” as a supplement to the liquor prohibitory law.323 The reason for this uncertainty is that Given also claimed that historically mulct taxes had proved able to “wipe...out of existence” prohibited commodities and effect “complete prohibition”—when set high enough.324 If the mulct’s purpose was in fact to

322 As the Register noted: “We can clearly see that the one is a bribe and the other a mulct. But in a general way there is little or no difference. The effect is practically the same.” “The Ohio Mulct System,” ISR, Apr. 9, 1893 (8:2) (edit.). A year later, during a debate with Given on the mulct tax at the Grant Republican Club in Des Moines, the aforementioned Republican Senator Brower argued that the mulct was not prescribed to prevent illegal liquor sales, “but intending its commission, to make safe and practicable its commission.” “Turning on the Light,” ISR, Mar. 6, 1894 (3:2-4 at 4). And a few days after the mulct bill had passed, a weekly charged “the cranks” with responsibility for not having allowed it to be termed “a license, when in reality it is nothing else but city and county option license. ... Here is the anomaly of two laws remaining on the statute [sic] at the same time diametrically opposed to each other, one a criminal and the other a civil statute.” “The Mulct Law a Bill,” Postville Weekly Review, Mar. 31, 1894 (2:2) (edit.). Almost a year after he had launched his intensive agitprop, Given made clear the great extent to which his animus pivoted on his perception that “[m]ore than any other one thing saloon license is the great cause of corruption in American municipal politics.” Consequently, he did not deny that there was “much truth” in the claim that “whichever form of mulct is adopted the actual result will be the same so far as the actual existence of the traffic is concerned. Communities that so desire will enforce the tax only and allow prohibition to lapse thus giving the saloon complete actual protection. This is what the saloon communities in Iowa do now, and always have done under prohibition.” The reason that he opposed letting them continue to protect saloons, under license, was “the fearful cost of the saloon in politics.” He nevertheless conceded that even in such communities it was “still possible to command some of the benefits of mulct and avoid the worst evils of license by ‘local option mulct’ under which communities elect which penalty they will enforce—prohibition or tax—the choice of one staying the enforcement or operation of the other in that particular locality. Of course, under ‘local option mulct’ the saloons in saloon towns would be actually secure if not directly ‘protected’ from any penalties additional to the tax. Yet they would fall short of being licensed by the state.” “Weakest Mulct Better Than Best License,” ET-R, Feb. 1, 1894 (1:2) (edit.). This position may explain why in March he did not completely reject passage of the Funk-Martin bill, which, by virtue of making payment of the tax a bar to prosecution under the prohibition law, qualified as a local option mulct. See below this ch.


324 “How Tax Mulcts Prohibit,” ET-R, Apr. 12, 1893 (1:2-3) (edit.) (instancing a 10-percent congressional tax on state bank paper money and a $1,000 Georgia tax on every
Banning Tobacco Sales to Minors

impose a tax on saloons so high that it would eliminate all profit and thus drive them all out of business, the question again arises as to why this purely quantitative means could not have been applied more directly by simply radically increasing the fine in the liquor prohibition law itself. In other words, if Given believed that the political will existed to enact a literally prohibitory mulct, why would it not have supported amending the existing law to the same effect?

Such questions did not occupy public opinion, which was much more tightly focused on the pre-eminent party-political issue, which had, after all, given rise to Given’s intervention and which he articulated this way: “Prohibition must be taken out of politics in Iowa or it will be killed. Resubmission [of the constitutional amendment to the electorate],...silence, etc., only mean prolonged partisan controversy over the question and the advantage all with the democrats.” A more acute way of formulating the issue might have been: If prohibition was not taken out of politics, it was the Iowa Republican Party that would be killed. This perspective doubtless underlay skepticism toward or rejection of Given’s proposal on the grounds that its adoption would “simply mean that the Republican party will shoulder the burden of prohibition in only another form, and that in the future the party will have to fight as in the past the saloons on one side and partisan prohibitionists on the other; that is, that it will not bring new friends to the party nor bring together Republicans who are now at

325Given exhibited ambiguity on this issue. At one point he seemed to merge quantitative and qualitative distinctions between bribe-license fees and mulcts by asserting that “the difference between a tax which protect [sic] and encourages a traffic and one which blister [sic] and scorches it is like that between light and darkness.” “The Ohio Liquor Law System,” Herald (Eldora), Apr. 13, 1893 (1:1-4 at 3) (reprinted from undated Times-Republican). He stated that the mulct should be at least $500 a year, and more where communities would support it, but $500 would not have sufficed to make all saloons unprofitable. “How to Apply the Tax Mulct,” ET-R, Apr. 24, 1893 (1:3) (edit.). One newspaper faulted a prohibitionist for rejecting the mulct as a “permit or indulgence, obtained for a special price” on the grounds that, for example, a man who is arrested and pays a fine for keeping a gambling house might repeat this process “as long as the business warrants the expense, but if the fine acts to make the business unprofitable, the gambler shuts up. No one would claim the fines in this case a permit.” “The Liquor Question,” Iowa State Reporter (Waterloo), Dec. 7, 1893 (4:2) (edit.). Even if this argument were accepted, the empirically more relevant question would have been whether the mulct acted as a permit where it did not make the gambling house (or saloon) unprofitable, but merely became a cost of doing business.

326“Taking the Issue Out of Politics,” ET-R, Apr. 11, 1893 (1:2) (edit.).
Given’s mulct appears not to have played any overt part at the Republican convention in August, but in the convention’s immediate aftermath many newspapers observed or speculated that the liquor plank pointed to, affirmed, or even endorsed the mulct plan. Above all, Given himself editorialized that the “mulct comes squarely within the terms of the plank and meets its requirements as no form of license can.” During the final months of 1893, particularly following the election, interest in mulceting became more intense in connection with discussions of the need for the upcoming legislature to implement Plank 13. The mulct plan’s potential attractiveness to prohibitionist legislators inspired anti-prohibitionists to defang it. At the end of November, almost six weeks before the session opened, the Daily Iowa Capital obliged with a draft bill (drawn by an unidentified lawyer and an unnamed prohibitionist), which “d[id] away with the objections which the liquor dealers have raised against it”—in

327 “Ohio Plan in Iowa,” CT, Apr. 20, 1893 (10).

328 At the beginning of August the press reported that: “No trace has been discovered of Welker Given’s ‘mulct plan, which has been mysteriously missing from Iowa politics for some time.” CREG, Aug. 1, 1893 (4:1) (untitled edit.). Senator Brower also insisted that the “‘[m]ulct plan...was never considered by the framers of the last republican platform....” “Almost a Row,” CREG, Feb. 2, 1894 (2:3).


330 “The Prohibition Plank,” ET-R, Aug. 18, 1893 (1:4) (edit.). He went on to urge “radical republican prohibitionists” to “declare that they will give the river counties relief such as is demanded by the republican platform, but...supply it in a mulctuary no-license tax.”

331 Both before and after the election the anti-prohibitory Cedar Rapids Gazette, stressing that prohibitionists represented a majority of the Republican caucus, predicted that the legislature would oppose general licensure, mulceting, and local option. “Warning to Anti-Prohibition Republicans,” CREG, Oct. 21, 1893 (1:1-5); “Prohibition Safe,” CREG, Nov. 16, 1893 (1:5).

332 Nevertheless, Spencer Smith, a Republican who had led those opposed to striking the final clause of the plank at the convention and who insisted that it “meant local option pure and simple,” ignored the enormous press coverage in April 1893 when he erroneously asserted in March 1894 that: “‘No one in Iowa ever heard of a mulct law until this fall.’” “Wrecking the Bill,” CT, Mar. 10, 1894 (3). In contrast, the word “mulct” itself was uncommon enough that in reference to it a newspaper could joke: “The Iowa legislature ought to be able to legislate on the liquor question without going to night school to learn a new language.” SCJ, Jan. 31, 1894 (4:3) (untitled edit.).
particular the complaint that payment of the mulct still left liquor sellers liable to the prohibition law’s penalties—simply by making payment of the mulct tax “a bar to any other prosecutions” under the state prohibition law. In the event, this severe dilution, which turned Given’s mulct approach qua straightforward intensification of the prohibition law’s penalties on its head, became the crucial provision in the bill that the legislature ultimately passed in March 1894.

An important recruit to the mulct plan was newly elected Republican Representative James H. Funk, a lawyer and farmer from Iowa Falls in Hardin County in central Iowa, who was to play a crucial part in the legislative process as chairman of the House Committee on Suppression of Intemperance. Born in 1842, Funk became a teacher in Illinois at 18 despite having attended school himself only a total of 17 days in his whole life. After participating in the Civil War he returned to Illinois, studied law, became a prosecuting and city attorney, but for health reasons abandoned law for farming, and was elected to two terms in the Illinois legislature in the 1880s. Three years after moving to Iowa in 1890, where he became owner of several farms, he was elected to three consecutive terms in the House, during the last of which he was elected speaker. On leaving the legislature he became a railroad promoter, director, and general counsel as well as mayor of Iowa Falls. A month before the 1894 session opened, in response to a question about his stance on the party’s temperance plank, Funk—who during his election campaign had promised that he would never vote to “enable a saloon to cast its blighting shadow in Hardin county”—outright rejected any distorted interpretation that would “surrender to the lawless elements” of those areas of the state in which “democratic majorities” had rendered the prohibition law inoperative “the lawful right to do what they are now doing in open and flagrant violation of law.” Instead, he viewed giving those localities “additional means of enforcement” as a “fair and reasonable interpretation” of the liquor plank. As a possible embodiment of that approach he mentioned a mulct law, while absolutely barring local option.

By mid-December a lengthy overview article in the Chicago Tribune predicted that the mulct, primarily because of its superiority both in taking

---

334“The Mulct Tax,” DIC, Nov. 30, 1893 (4:2-3) (§ 2). The draft empowered cities (of a certain but unstated size) to provide by ordinance for the assessment and levy of a monthly fine of $50 to $100 (§ 1).
335See below this ch.
336Past and Present History of Hardin County, Iowa 496-500 (1911).
337“Bothers the Best of ‘Em,” Upper Des Moines (Algona), Dec. 6, 1893 (1:2) (letter to editor reprinted from Iowa Falls Sentinel).
Banning Tobacco Sales to Minors

prohibition out of party politics by virtue of its circumventing corruptible local elected officials forced into saloon politics and in entrusting the process to assessors and tax collectors, seemed poised to "gain enough in popularity to insure its enactment in some form or another."338 A year-end survey of "prominent Republicans" conducted by an Iowa newspaper also revealed that many favored the mulct.339

Nine months after he had proffered the aforementioned "offhand" convention plank and barely two weeks before the General Assembly was to convene, Given bestowed greater solemnity on his proposed mulct tax by publishing a front-page draft bill for "An act providing additional penalties against dealers in intoxicating liquors" designed to "elicit discussion" and improve it "in the light of candid, intelligent conversation." In addition to limning possible amendments (such as "putting more state power behind the tax collecting provision"), Given asked readers whether, since the mulct would be operating in localities where the existing liquor prohibition law was "absolutely nullified," it would "not be well to begin rather lightly and tighten up the law gradually" after it had taken hold.340 The draft bill in its central provision (§ 1) required the assessment against anyone selling or keeping with intent to sell, and on the real property where such activities were taking place contrary to state law, a total annual tax of $500, which the county board of supervisors was authorized to increase. The hallmark provision that distinguished Given’s mulct from other approaches and that would quickly become its most contentious feature and divide legislators until it was ultimately defeated—though it would be restored when the legislature added a mulct in 1897 to the 1896 cigarette sales ban341—specified that:

Nothing in this act...shall be in any way construed to mean that the business of the sale of intoxicating liquors is in any way legalized, nor is this act to be construed in any manner or form as a license, nor shall the assessment or payment of any tax for illegal sale of liquors...protect the wrong-doer from all penalties now provided by law.

The meaning and intent of this act is that the taxes to be assessed and paid shall be an additional penalty to those now provided by law for the illegal sales of intoxicating

341See below ch. 12.
Banning Tobacco Sales to Minors

The practical relevance of Given’s intervention in the statewide debate was undeniably on display in the bill that Representative Funk was to introduce a month later, which was overwhelmingly taken verbatim from this draft.343

At the same time, however, Given was realistic enough to understand not only that his proposal was not a panacea, but that the roots of the conflict over alcohol went so deep in social life that the problem would remain more or less intractable regardless of what regulatory method was adopted to deal with it. In his response to the aforementioned end-of-year survey that he composed the day after he had published the draft mulct bill, Given, after wishing a plague on all Republican “extremists,” openly conceded that his proposal would by no means “solve the question finally.... Nothing can do that. The great contest between society and the liquor traffic will go on with varying results. Some localities, under any law, will be captured and held for a time by one side, then by the other. Whatever law is adopted, agitation will continue.” The only positive prospect that Given held out for Iowa (or any other state for that matter) was the dubious claim that a mulct tax and only a mulct tax “promises” to put the liquor question “out of party politics and dispose of it as a party issue.”344

In his inaugural message to the legislature at the beginning of the 1894 session Governor Boies observed that “the most difficult question” that would occupy the General Assembly might be that of repealing or retaining prohibition, and, on the assumption that any change in the law would involve legalizing different regulatory methods in different localities, the only difficult sub-question was the governmental unit level at which the local option law would apply.345 Opting for the municipal and township unit,346 he rejected countywide regulation on the grounds that it was vulnerable to exactly the same severe criticism that applied to the statewide prohibitory law—namely, “that in a government professedly controlled by its subjects in their own interest, residents of localities

343Given understated when he characterized it as having been in “substance” published in his paper. “Mr. Funk’s Mulet Bill,” ET-R, Jan. 29, 1894 (1:2).
345Governor Horace Boies, Second Biennial Message (Jan. 9, 1894), in Messages and Proclamations of the Governors of Iowa 6:346-81 at 376-77 (Benjamin Shambaugh ed. 1904).
346Governor Horace Boies, Second Biennial Message (Jan. 9, 1894), in Messages and Proclamations of the Governors of Iowa 6:346-81 at 381 (Benjamin Shambaugh ed. 1904).
foreign to those to be affected, having no interest in and no knowledge of their wants, are permitted to dictate their policy upon a question that most vitally affects the immediate interests of one and in no manner the interests of the other.” The (demographic-electoral) prohibitionist and anti-prohibitionist scenarios for replicating this “fact” on the county level included remote townships that could dictate to a city and a single city that, “if large enough, could force the licensed saloon into every other city, town and township of the county, no matter how unanimous any of these might be in their opposition....”

Boies also directly attacked the much talked about mulct regime of retaining the statewide prohibitory law while imposing a periodic penalty on saloon keepers (as a kind of cost of doing business) “without interference with present laws....” Morally he was revulsed by an approach under which the “State would stand before the world convicted of maintaining as part of its penal code a statute that it deliberately encourages its own subjects to violate.” Moreover, on the practical level mulcting was “a disgrace to the State and a crime against her citizens” because it would neither place a limit on the number of (quasi-)authorized saloon keepers nor distinguish between “the vilest men in a community” and “the best,” both of whom would be equally protected. Finally, the outgoing governor objected to the mulct on the grounds that paying it would (anomalously) still leave the saloon keeper “liable to indictment, fine and imprisonment...for the very sales he made on the faith of his supposed protection....”

Two days later in his inaugural address, incoming Republican Governor Frank Jackson argued for retention of the “present prohibitive principle,” which was “so satisfactory to many counties and communities,” while insisting that “wisdom, justice and the interests of temperance and morality demand that a modification of this law should be made, applicable to those communities where the saloon exists, to the end of reducing the evils of the liquor traffic to the minimum.” To buttress this recommendation Jackson emphasized that the “earnest demand for relief” from localities in which “the open saloon exists in spite of the most determined efforts to close them” stemmed “not from the law-defying saloon sympathizer, but from the best business element; from the best business element....”

---

347 Governor Horace Boies, Second Biennial Message (Jan. 9, 1894), in Messages and Proclamations of the Governors of Iowa 6:346-81 at 377-78 (Benjamin Shambaugh ed. 1904).

348 Governor Horace Boies, Second Biennial Message (Jan. 9, 1894), in Messages and Proclamations of the Governors of Iowa 6:346-81 at 378-80 (Benjamin Shambaugh ed. 1904). It is unclear why Boies was unable to imagine a mulct law that would limit the number of mulctees in proportion, for example, to the size of the local population.
Banning Tobacco Sales to Minors

moral sentiment of such communities; from the churches and the pulpit.  
Not only did Jackson fail to take a position for or against the mulct regime, but he offered no details at all concerning his vision of an appropriate method for regulating saloons in places with anti-prohibitionist majorities.

The intense controversy over the 13th plank insured that a plethora of liquor-related bills would be introduced during the 1894 legislative session. However, because the vast majority of these measures made no progress, and the mulct tax approach that was enacted is pertinent because the 1896 cigarette sales ban law was also subject to mulcting in 1897, the focus here is on the mulct measures. Although two weeks into the session the anti-prohibitionist press remained certain that Republican Party leaders would insist on the passage of some measure to implement the liquor plank—because failure to do so would “simply...restore the whole question to its old place in politics, which would mean, as it meant before, disruption of the republican party and democratic victory”—and fears that prohibitionists formed a majority of the House had lessened since the chamber’s organization, it was still possible that inner-party rifts could thwart passage of any measure. Whether prohibitionists in fact dominated the Republican caucus, let alone the House, the all-important liquor bill gatekeeper, the House Committee on Suppression of Intemperance, was “undeniably hostile to any change” that would make the existing law “less vigorous.” To the Cedar Rapids Gazette it was a “mystery” that House Speaker Henry Stone, a Marshalltown lawyer who was “a warm advocate of anti-prohibition, ever made up such a committee,” whose “complexion” was both surprising and disappointing to representatives pushing for amendment. At the center of this puzzlement and disgruntlement was committee chairman James Funk—even towards the end of the session his “mental and moral processes,” the Iowa State Register complained, were “hardly understood”—“an out and out prohibitionist,” who in his campaign speeches had “pledged himself to oppose every change in the law that d[id] not look to its more complete enforcement. He was particularly radical in his views, and his selection as chairman of so important a committee was considered a severe blow

349 Governor Frank Jackson, “Inaugural Address” (Jan. 11, 1894), in Messages and Proclamations of the Governors of Iowa 7:5-18 at 16 (Benjamin Shambaugh ed. 1905).
350 For the introduction of and actions taken on the liquor traffic-related House bills (other than the ones discussed below), see the entries in the House bill index for H.F. No. 12-13, 29-30, 162, 177-78, 256, 263, 460, 469 in the 1894 House Journal. For the Senate bills, see below this ch.
353 “The Meanest of the Funks,” ISR, Mar. 9, 1894 (4:2) (edit.).
to the anti-prohibition sentiment.” Exacerbating the situation was that many other Republicans on the committee were also “pronounced prohibitionists,” while only three Republican members were known to favor amendment.\textsuperscript{354}

Much more hospitable to amending the liquor law was the Senate Committee on Suppression of Intemperance, which, coincidentally, was headed by a “different kind of a Funk,” Abraham Funk, a newspaper editor and “avowed anti-prohibitionist,” who had been a member of the state convention resolutions committee,\textsuperscript{355} which had inserted the 13th plank, and which he regarded as “the greatest Republican convention ever held” in Iowa.\textsuperscript{356} His leadership of and the presence of “well-known liberals” on the committee meant that an amendment “would go through flying,” while the House would “prove the stumbling block....”\textsuperscript{357}

Representative Funk quickly got to work. At an evening meeting of his committee on January 25, after a “free discussion” had revealed that a majority not only favored a mulct measure, but had, according to the \textit{Gazette}, “gone so far as to frame a bill embodying their views, which Chairman Funk...pulled out of his pocket and read to the committee, much to the astonishment of the local option members” and creating a “decided sensation among the republican members” of the legislature when they learned of it the next morning. To be sure, the anti-prohibitionist newspaper, whose reportage was unmistakably designed to galvanize public and legislative action, was massively exaggerating since the bill was virtually a replica of the aforementioned draft that Given had, to much fanfare, published on the front page of the Marshalltown \textit{Times-Republican} exactly a month earlier. The \textit{Gazette}’s further claim that “the senators were disgusted [wa]s putting it mildly” because almost all of them were county optionists was similarly tendentious——that very day at a secret Republican senatorial caucus “[q]uite a number of [senators] seemed to favor the mulct plan as an additional penalty”\textsuperscript{358} and the following day even the Republican members at an informal meeting of the Senate Committee on the Suppression of

\textsuperscript{354}“Hot Times Ahead,” \textit{CREG}, Jan. 23, 1894 (2:1-2). For the committee member list, see \textit{Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa} 41 (1894).


\textsuperscript{356}“Republican Legislators’ Views,” \textit{CT}, Feb. 10, 1894 (9).


\textsuperscript{359}“Mulct Plan in Favor,” \textit{CT}, Jan. 27, 1894 (3).
Intemperance generally favored some sort of mulct measure—but doubtless much more accurate was the statement that “a careful poll of the republican members of the house” indicated that a majority favored the mulct bill. 361

House File No. 162, which Funk introduced on January 26, 362 was, as already noted, almost an exact replica of Given’s draft. 363 An optimistic Funk immediately expressed the belief that anti-license/anti-local option people would probably accept his measure. 364 To be sure, he was not the only legislator to introduce a mulct bill.

The very same day Republican Senator James Harsh, a Creston bank president, 365 filed one (applicable only to cities with a population of 2,000 or more) that, however, defeated the whole alleged purpose of mulcting qua additional penalty by making payment of the $1,000 annual fine, payable monthly in advance, a bar to prosecution under state laws. 366 While he praised his measure

360 “Will Amend His Bill,” CT, Jan. 28, 1894 (4).
363 Funk specified that the annual tax was $500 and could be increased to a maximum of $1,000 by the county board of supervisors. His bill also added two sections, one of which required the governor to enforce the bill and conferred on him the power to remove from office any assessor, county treasurer, board of supervisors member, or county attorney who willfully refused or neglected to perform any duty that the bill imposed on him. H.F. No. 162, §§ 1, 13, 16, in “The Mulct Plan,” CREG, Jan. 26, 1894 (2:1). Given Funk’s transparent verbatim adoption of Given’s draft bill, the Sioux City Journal’s uncertainty as to whether the “common report” that Funk had prepared it in consultation with Given was odd. “Some More ‘Mulct,’” SCJ, Feb. 3, 1894 (4:2) (edit.).
364 “Will Amend His Bill,” CT, Jan. 28, 1894 (4). At least one legislative commentator immediately agreed that “the present indications are decidedly favorable to the prediction that the only modification of our present prohibitory laws will come along this line [i.e., Funk’s bill].” Charles Lawrence, “Des Moines Doings,” WDC, Jan. 29, 1894 (1:3). Nevertheless, that same day the Gazette reported that local optionists and even some prohibitionists were “very much disgusted” that Funk had introduced and championed a “radical measure” because his action “was very much against a fair hearing of the other bills.” “Enter the Arena,” CREG, Jan. 29, 1894 (2:1).
366 Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 73 (Jan. 26) (1894) (S.F. No. 99, by Harsh); S.F. No. 99, § 1 (by Harsh), in 1894 Iowa Senate bill book in University of Iowa Law Library. The bill text was also published in “Mulct Plan in Favor,” CT, Jan. 27, 1894 (3). The bill empowered but did not require a city council, “if it desires to control such saloons under this act,” to provide by ordinance for
Banning Tobacco Sales to Minors

for conferring “flexibility” on cities that had theretofore not enforced the law to control saloons, with only moderate exaggeration one journalist called it “simply a repeal of the prohibitory law carefully disguised.” Whether Republican Senator and farmer David Palmer was also waxing ironic is, at this remove, unclear, but he surely identified a significant vulnerability when he opined that he did not know whether there would be “much necessity” for making payment a bar “because in those places where relief is asked for it is hardly probable that there would be prosecutions under the present law anyway.”

Especially Democratic newspapers took delight in exploiting the ambiguity that Given and Funk had created in proposing the mulct fine rather than simply increasing the fine in the existing prohibitory law. The Dubuque Herald declared that it “would be just as consistent to tack a mulct clause, or permit, on any other general criminal law of the state,” while the Clarion Democrat submitted the modest proposal that the legislature grant a man an “indulgence to steal for thirty days” for $100 and “good round sums” for rape, arson, and incest. The Greene Recorder analogically argued that the liquor mulct was the “same as leaving the penalty for burglary as now found in the code, and then permitting burglary by the burglar paying an annual fine of a few hundred dollars!”

In the face of the considerable controversy that was mounting over both the mulct bill’s failure to offer any accommodation to anti-prohibition Republicans and the selection of prohibitionist Funk “as chairman of the most important committee of the house”—inasmuch as it was delegated the task of shepherding to passage a modification of the prohibition law that would deter anti-prohibition Republicans from voting Democratic and thus jeopardizing Republican state political supremacy—it is unclear what motivated Funk at this very juncture to give a newspaper interview that seemed almost calculated to infuriate his already highly irritated opponents. That he manifestly felt that nothing he said in the

---

367 “Republican Legislators’ Views,” CT, Feb. 10, 1894 (9).
368 La Plume, “Harsh Mulct Tax Bill,” CBN, Feb. 1, 1894 (1:5).
369 “Republican Legislators’ Views,” CT, Feb. 10, 1894 (9).
372 That Funk had somehow been tricked or manipulated into agreeing to the interview comments (the accuracy of which he did not later disavow) was denied by the Tribune reporter, J. N. Richards, who, in an interview with Given’s paper, stated: “I had no intention of misquoting Mr. Funk, nor of drawing out of him anything he desired to keep
Banning Tobacco Sales to Minors

interview required him to propitiate those Republicans was visibly on display the night before its publication when, as “leader of the prohibition forces,” he said that “he would make no compromises whatever; that the senate must accept the ‘mulct’ tax as an additional penalty embodied in the bill introduced by himself, or nothing.” He made no secret of his view that the Harsh bill, which made payment of the mulct a bar to prosecution, was “worse than local option.”

In the event, Funk’s elevation to committee chair became, as a scoop in the Chicago Tribune revealed, considerably less mysterious. In an interview published but three days after he had introduced his bill, Funk stated that he had been asked some time earlier to take the chairmanship:

“I was a Prohibitionist and some of the [Iowa Republican Party] leaders, such as Jim Blythe and Ed Mack, thought that the people might accept a measure coming from a committee of which such a man was Chairman better than if the Chairmanship had gone to some one [sic] from the river counties. I agreed to accept the position provided I was permitted to have a majority of the committee with me and opposed to local option or the repeal of the present prohibitory law. I was allowed to name a majority of the committee. For some time before the session met I was engaged in finding out the sentiments of the members on that subject, and...I got a pretty accurate idea of the views of the Republican members of the House. When the committee was formed it was understood that nine members were of my way of thinking, and eight, including the two Democratic members, would be for some form of local option. I have polled the Republican members of the House...carefully, and I think that there will be at least fifty-one who will not favor any change in the law other the adoption of some sort of ‘mulct’ plan. This will leave twenty-seven members on the Republican side who will favor local option. I think, however, that they will finally consent to vote for the ‘mulct’ plan. At any rate, we who are the supporters of that plan, or more correctly speaking, are opposed to any sort of repeal of the prohibitory law, can sit still. We are on the inside, and those who are seeking for a modification of the law are on the outside, and they are the ones to hustle.”

While Funk insisted that his mulct bill could implement the spirit of the 13th plank by virtue of giving “those cities, where the present law cannot be enforced, a chance to obtain relief,” the Chicago Tribune was a tad skeptical, observing that it was “hardly probable” that Funk’s bill, as introduced, would pass both houses, though even the anti-prohibitionist paper conceded that “something like it” would

quiet. He talked of the matter freely, and of course knew that it was for publication. Besides that, I have, and can produce evidence that he told others substantially the same thing.”

“Funk Will Not Compromise,” CREG, Jan. 29, 1894 (1:3).
“Has Them on the Hip,” CT, Jan. 29, 1894 (12). James Blythe was chairman of the Iowa Republican Party Central Committee and Edgar Mack had been his predecessor.
“probably...finally be adopted by the House.”375
Funk’s self-revelations unleashed an outpouring of ferocious attacks on Funk and Blythe,376 in particular by anti-prohibition Republicans, and a “volcano...smothering in the house,”377 especially among (irate and/or embarrassed) members of the Committee on the Suppression of Intemperance.378 A driving role in this campaign was played by the anti-prohibition Republican Sioux City Journal,379 which on the very morning of the day on which the Tribune interview appeared editorially questioned Blythe’s role in Funk’s appointment, especially since Funk had not only introduced the mulct bill, but had reportedly also stated: “For myself I will never consent to a bill allowing the mulct tax to afford any protection to the liquor traffic.” The Journal did not rebuke Funk for his repudiation of the party platform plank because he had run for office upholding prohibition and had been elected in defiance of the party convention’s stand, but did demand an explanation as to why Blythe and his candidate for House speaker, Stone, selected him of all Republican House members to implement the party pledge on liquor.380

Quickly escalating, the attack no longer spared Funk, who became an equal partner in what was now viewed as “treachery to the republican party of Iowa.” Or as the Council Bluffs Nonpareil’s belligerent editorial headline put it: “Who Made Funk a Dictator?”381 Seemingly unaware of (or untroubled by) this blast, Funk gave an interview to the Nonpareil that very day, asserting that everything pertaining to the committee make-up or any understanding with Stone, Blythe, or

---

375“Has Them on the Hip,” CT, Jan. 29, 1894 (12).
376One of the lighter-hearted offerings was this limerick in the Gazette: “There was a bright fellow named Funk,/Of statesmanship he had quite a hunk./He flirted with Jim,/Jim flirted with him,/And for prohi they went in ker-plunk.” “It Is Telling,” CREG, Feb. 8, 1894 (1:1).
377“Morning Sessions,” DIC, Feb. 1, 1894 (1:5). See also “Truth Comes Out,” CREG, Feb. 1, 1894 (1:3-4). For an alternative conjecture that Funk’s appointment was the quid pro quo for support by prohibitionists in the Republican legislative caucus for John Gear as U.S. senator, see “A Democratic View,” SCJ, Feb. 1, 1894 (4:4) (edit.) (reprinted from Dubuque Telegraph). See also “Almost a Row,” CREG, Feb. 2, 1894 (2:3) (“There is no doubt in the minds of most of the members that Funk got the chairmanship as a reward for his support of Gear”).
379The newspaper’s editor-publisher, George Perkins, was at the time a Republican congressman.
380“An Extraordinary Situation,” SCJ, Jan. 29, 1894 (4:1) (edit.).
381“Who Made Funk a Dictator?” CBN, Jan. 31, 1894 (2:3) (edit.).
Banning Tobacco Sales to Minors

Mack was “wholly false.” More interesting was Funk’s admission that “I am aware that my bill is extreme, as are all the other bills on this subject, but it was thought best that the extreme views of the party should be outlined in the various measures and then in conference there should be such modification of these views as to meet the exigencies of the occasion and to carry out the party pledge as interpreted by reasonable men. I do not expect any bill to be adopted as it was originally presented.” Although this conciliatory attitude might explain why non-legislative party leaders might have regarded Funk as a plausible committee chairman, it appears utterly inconsistent with his no-compromise boast just three days earlier.

The day after the Sioux City Journal had resumed its criticism, demanding to know why the committee charged with fulfilling the party pledge—“the very question which may involve the fate of the party in this state in the immediate future”—was “captained” by “one of the most radical prohibitionists in the legislature,” Funk, in damage control mode, published a very brief denial in the sympathetic Daily Iowa Capital, insisting that he had “never had any conversation whatever with Mr. Blythe, relative to my appointment as chairman of the committee...nor as to the membership of the said committee. To the best of my knowledge, Mr. Blythe was not consulted in the matter at all and certainly not by me.” After Iowans had read the corrected record directly from the horse’s mouth, the horse’s ear and amanuensis, the Tribune’s Des Moines correspondent, J. N. Richards, pulling out the rest of the stops, backed up Funk as his confidential interpreter by disclosing parts of the interview that had fallen on the cutting-room floor. Rejecting the proliferating editorial “deduction that the committee was arranged to defeat modification of the law,” Richards confirmed on his interviewee’s behalf that “nothing of that sort was said in the interview.” Nor had Funk said that Blythe had either selected the committee or been consulted about it. Instead, Funk had (merely) “indicated that it was the desire of the republican leaders to have a conservative committee, one that would as far

382La Plume, “Harsh Mulct Tax Bill,” CBN, Feb. 1, 1894 (1:5-6).
383“Mr. Blythe and Mr. Funk,” SCJ, Jan. 31, 1894 (4) (edit.) (reprinted in CREG, Feb. 2, 1894 (4:2)).
384In the same article the Capital argued that Funk’s explanation was consistent with several uncontested facts about Blythe’s and Stone’s activities at the time. “Mr. J. H. Funk Speaks,” DIC, Feb. 1, 1894 (1:3). Lafayette Young, the paper’s editor-publisher, had been a Republican state senator and an unsuccessful candidate for the party’s gubernatorial nomination in 1893.
385“Mr. J. H. Funk Speaks,” DIC, Feb. 1, 1894 (1:3).
386Charles Lawrence, “Des Moines Doings,” WDC, Feb. 5, 1894 (1:2).
as possible reflect the good judgment of those who were not extremists on either side. That is the only legitimate conclusion that his interview warrants.” Richards then closed by noting that Funk “was evidently friendly to the mulct plan,” which Funk “thought would carry out the promises of the platform.” Although a grateful Capital certified the correspondent’s statement as Funk’s “vindication,” which “ought to set everybody right,”387 in fact Richards not only left readers in the dark as to what Funk had actually said, but failed to reconcile Funk’s alleged (but unpublished) statement that Republican leaders wanted a committee chock full of non-extremists with the apparent fact that Funk himself was an extremist. To be sure, Funk’s (published) agentless passives—“I was permitted to have a majority of the committee with me,” “I was allowed to name a majority of the committee”388—were a dream come true for deniability as to Blythe (and Mack), but no spinmeister came forward to name less vulnerable plausible names.

Since Blythe, seeking to position himself above the fray, declined to engage the accusations—which he condescended to mock as “simply the visionary dreams of the newspaper boys,”389—the only implicated figure with firsthand knowledge was House Speaker Stone, who denied that he had had any connection with any “pre-arrangement with anybody....” Instead, he insisted that committee members had been “selected to fairly represent the proportionate views of members” so that “every element [was given] its rightful representation....” Though two columns over on the same front page the Capital was celebrating Funk’s vindication, it reported that the “concensus [sic] of opinion is that Chairman Funk was talking through his hat.” Despite the anger and provocation that his speaking out of school had prompted, Funk reportedly “made his peace” with his House colleagues.390

Regardless of whether Funk had accurately related all the details of Blythe’s role, with less than two months’ hindsight the latter’s strategic political insight that a prohibitionist like Funk was in a better position to ward off passage of a

387“Mr. J. H. Funk Speaks,” DIC, Feb. 1, 1894 (1:3). Without revealing that it was republishing verbatim part of Richards’ statement, the next day in a non-editorial article (datelined Des Moines and presumably written by Richards) the Tribune repeated it. “To Draft Constitutional Bills,” CT, Feb. 2, 1894 (5).

388“Has Them on the Hip,” CT, Jan. 29, 1894 (12).


390“Morning Sessions,” DIC, Feb. 1, 1894 (1:5). Concerning his mulct standard-bearer Given’s paper reported that the “general opinion is that...Funk has not only been indiscreet, but that he has drawn upon his imagination as to matters and things of history.” “That Interview,” ET-R, Feb. 1, 1894 (3:1).
Banning Tobacco Sales to Minors

purely additionally punitive mulct that would alienate anti-prohibition Republican voters was fully vindicated. To be sure, Funk turned out to be admirably suited to performing this role primarily because he himself ultimately defected to the side of the supporters of the diluted mulct, payment of which became a bar to prosecution under the prohibition law.\footnote{See below this ch.}

In the midst of these roiling controversies Funk’s mulct bill began to stall in his own committee, which on January 30, despite his zealous advocacy, adjourned after two and a half hours of “acrimonious discussion” without even voting.\footnote{“Democrats in It,” \textit{CREG}, Jan. 30, 1894 (1:3).} Although a press report was already speaking of an official and authoritative statement that no license or local option bill could pass either house, while only a mulct measure that in no way impaired the existing prohibitory law could,\footnote{“Can’t Down Prohibition,” \textit{Emmetsburg Democrat}, Jan. 31, 1894 (2:2).} the legislative process was in sufficient flux that the \textit{Gazette} a week later reported that the bill that would be passed would be much closer to local option than had been deemed possible just a few days earlier.\footnote{“It Is Telling,” \textit{CREG}, Feb. 8, 1894 (1:1). The \textit{Chicago Tribune}’s Des Moines correspondent reported that a hybrid local option/mulct bill was looming in the Senate. “Gatch Bill Favored in Iowa,” \textit{CT}, Feb. 4, 1894 (3).} At that time blockage in the House Committee on Suppression of Temperance forced the appointment of a seven-member subcommittee to draft a substitute for all of the many retail liquor traffic bills that had been referred to the committee. All seven were Republicans, whose views ranged from local option to prohibition, but the majority favored some form of mulct.\footnote{“Division of Opinion in Iowa,” \textit{CT}, Feb. 7, 1894 (5). See also “They Can’t Agree,” \textit{CREG}, Feb. 7, 1894 (1:1-2); “‘Merchantdize,’” \textit{CREG}, Feb. 8, 1894 (1:4). The subcommittee was composed of one radical, three mulct prohibitionists, and three local optionists. “May Come Today,” \textit{CREG}, Feb. 13, 1894 (1:3).} Nevertheless, the dynamic situation was reflected in press rumors that two prohibitionist members of the committee were preparing interventions that revealed the House’s inclination to “recede somewhat from its position...in favor of mulct or nothing”: one was drafting amendments to Funk’s mulct bill incorporating local option, while the other intended to introduce a version of Harsh’s Senate bill (which barred further prosecution if liquor sellers paid the mulct tax).\footnote{“‘Prohibs’ Giving In,” \textit{CT}, Feb. 8, 1894 (7).} Pushing powerfully in the same direction of reporting out a local option licensure bill was the plan, soon to be implemented, of marshalling “a score or two of determined river city” representative Republican businessmen to testify before joint hearings of the House and Senate Suppression of
Intemperance Committees in an attempt to “overawe the mulct taxers of the two committees....”

As the practicalities of passing some piece of legislation that would finally extricate the Republican Party from its prohibition-induced electoral predicament began to weigh on legislators, the sharp differences—also concerning the meaning of the 13th plank itself—became profiled and seemingly so intractable that their harmonization appeared unimaginable. State Republican Party Chairman Blythe himself ominously allowed as the enactment of a mulct tax that was purely an additional penalty would neither find majority approval in the party nor capture the spirit of the framers of the convention platform. Although some legislators viewed the platform as (self-)contradictory, others, such as ex-senator Gatch, were certain that it meant local option. In contrast, militant prohibitionist Senator George Finn conceived of the platform as “indefinite” because if the convention had wanted license or local option, it would have been simple to insert those words; since it did not, the party must have “meant some other remedy.” Having, like the lawyer he was, recourse to gap-filling as an interpretive method, Finn reasoned that “the platform must refer to what the counties that demanded relief because they could not enforce prohibition were then asking—that is for a right to make their own penalties legal by ordinance.” As much as his argument may have sounded like sheer mockery as applied to the saloon-saturated river counties, Finn insisted that his (mercifully concise) bill, which even quoted the plank—“any city or incorporated town may provide by ordinance such further and additional penalties for the sale of intoxicating liquors as shall best serve the cause of temperance and morality”—was “the practical solution of the whole question, for it gives to those people who claim that they cannot enforce prohibition the right to legalize their ordinances, and that was all they asked.” Representative Funk, who agreed with Finn to the extent that he “interpret[ed] the

---

397“Merchantdize,” CREG, Feb. 8, 1894 (1:4) (quotes); “It Is Telling,” CREG, Feb. 8, 1894 (1:1).

398“Republican Legislators’ Views,” CT, Feb. 10, 1894 (9). To be sure, the Iowa General Assembly’s website states (without a source) that Finn was a “man who will always have his little joke....” http://www.legis.iowa.gov/Legislators/legislator.aspx?GA=21&PID=3904.

399S.F. No. 114 (by Finn), in 1894 Iowa Senate bill book at University of Iowa Law Library; Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 85 (Jan. 29) (1894) (S.F. No. 114, by Finn). The bill made no progress, the Senate adopting the recommendation by its Committee on Suppression of Intemperance that it be indefinitely suspended. Id. at 331, 596 (Mar. 1, 23). His bill to prohibit the sale of liquor within two miles of any state university suffered the same fate. Id. at 329, 457, 596 (Mar. 1, 14, 23) (S.F. No. 331).
plank as meaning protection to the community and not to the saloonkeeper,” expressed a preference for “some sort of a mulct law,” but “infinitely prefer[red]” a county option bill to “a mulct law which contemplates the abrogation or suspension of the present prohibitory law....”

A strong indication that the pragmatic Republican Party leadership was finally succeeding in effecting a sea change in policy emerged in a news leak during the second week in February that the House subcommittee—insuring that Chairman Funk’s preferences were about to be tested—had drafted and informally agreed on the aforementioned substitute measure, which imposed on anyone unlawfully selling intoxicating liquors (as well as on the real property where the sales took place) a $1,000 annual mulct tax and empowered city councils, by ordinance, to impose an additional tax. The crucial clause provided that payment of the tax, which was to be paid quarterly in advance, acted as a bar to prosecutions under the existing law during those three months. Because it applied only to first- and second-class cities or incorporated towns with populations over 2,000, representatives of some smaller towns with saloons would doubtless push for expanded coverage. More importantly, resistance was expected from many House members who objected to its imposition of quasi-local option (minus a right to vote on the innovation). The chief drafter and subcommittee chair, William Martin, a real estate businessman, was a so-called mulct prohibitionist, who at the beginning of his term had been “about satisfied to do nothing, but the pressure from his district and the apparent demand of the republicans of the state forced him to modify his opinions a little. Still he is in favor of the least change that can be made and carry out the platform.” Whether enactment of the mulct qua mere cost of doing business satisfied that condition remained to be seen.

In mid-February, in the wake of the emergence of Martin’s disequilibrating draft, large Republican delegations from the Mississippi and Missouri River saloon cities (as well as from such interior cities as Marshalltown, Fort Dodge, and Des Moines) descended on the capital for the joint House and Senate Suppression of Intemperance Committees hearing to urge passage of a local option license bill and to protest against any kind of mulct measure, though some were said, as a last resort, to be willing accept the latter if it was a bar to prosecution and linked to a high license. That opposition to the mulct system

400“Republican Legislators’ Views,” CT, Feb. 10, 1894 (9).
402“Oppose Mulet Plan,” CT, Feb. 15, 1894 (7); “In Favor of a Local Option Law,”
Banning Tobacco Sales to Minors

was not confined to anti-prohibitionists was made clear by Mary Aldrich, the recording secretary of the arch-prohibitionist WCTU of Iowa, whose “pyrotechnics” at the hearing included questioning whether cities did “not simply want to make legal what they are now doing illegally” and whose suspicions of the mulct plan were rooted in the fear that it would not enhance the law’s efficiency.

The day after the joint hearings the Republican members of the Senate committee met and rejected Harsh’s mulct tax bill even though it barred prosecutions of sellers who paid the tax, and declared instead for local option. Despite the fact that even anti-prohibition Republicans had shunted his bill aside, Harsh nonetheless reserved his sharpest criticism for those of his legislative party mates who interpreted the 13th plank as tolerating no change in the prohibitory law beyond an increase in penalties.

The House committee’s impasse on Funk’s mulct bill earlier in the month was, by the last week in February, turned into a deadlock on the Martin bill: what had once been a full committee dispute over whether payment of the mulct should act as a bar to prosecution in general was now transmuted into the subcommittee’s hopeless division over whether the bar should also apply to incorporated towns. Finally, a week later, against three dissenting votes, the House committee agreed on a compromise Martin mulct with which “[p]robably” no member was “entirely satisfied.” This committee bill (H.F. No. 537), which Chairman Funk introduced on February 28 and was made a special order for a week later, reduced the annual tax to $600 and provided that, although the bill was not to be construed as legalizing liquor sales or as a license and payment of taxes did not protect wrongdoers from existing penalties, when a city or county adopted the mulct system, payment of the tax did operate as a bar to prosecution.

---

CT, Feb. 16, 1894 (2).

PROHI Love Feast,” CREG, Feb. 16, 1894 (1:1). On Aldrich, see Twentieth Annual Meeting of the Woman’s Christian Temperance Union of Iowa...Oct. 10-13, 1893, at iii (1893).

“Reject Harsh’s Bill,” CT, Feb. 17, 1894 (3) (describing further details of the county election procedure).

“It Might Be Invalid,” CT, Feb. 19, 1894 (7).

“Nearly Agreed on Liquor Bill,” CT, Feb. 21, 1894 (5).

Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 509 (Feb. 28) (1894). For the complete text of the bill, see “The House Has a Bill Day,” ISR, Feb. 28, 1894 (4:5-6, at 5:3-5).

“Agree on a Mulct,” CREG, Feb. 28, 1894 (1:1).
Ironically, in spite of this latter provision, initially prohibitionists were said to be less dissatisfied with the House bill than were anti-prohibitionists: although neither side was satisfied, whereas the former had to acknowledge that the platform had promised some relief (to counties in which prohibition was not enforced), the latter, wanting nothing but local option, insisted that the bill was a “make-shift at best....”\textsuperscript{409} Within a few days, however, it became clear that House prohibitionists and mulct taxers opposed the bill precisely because of its suspension of prosecution clause, whereas local optionists’ interest in it rested on their belief that H.F. No. 537 “represents the limit of liberal legislation that can possibly receive the sanction of the house.” Indeed, contrary to the aforementioned earlier report, by the end of the first week in March it developed that the House committee had reported the bill to the full House “without the approval and over the protest of five of the republican members,” including Chairman Funk, all of whom “propose[d] to prevent its passage if possible.”\textsuperscript{410}

The first step in that resistance strategy was Funk’s introduction on March 6 of a bill\textsuperscript{411} resembling Senator Finn’s aforementioned pure additional penalty bill: H.F. No. 556 provided that “any city or incorporated town may provide by ordinance such further methods of regulating and controlling the sale of intoxicating liquors as shall best serve the cause of temperance and morality.”\textsuperscript{412} Bluntly and forcefully Funk explained the reason for his initiative:

“I gave notice to the committee before they left the room at the time they decided to

\textsuperscript{409}“Fight Is Underway,” CT, Mar. 2, 1894 (5). Given criticized the bill both for being local option and for barring penalties, but judged that it would not have any actual effect in nine-tenths of the state because saloons would continue as before in the river counties and would continue prohibited as before in the smaller interior towns: “The real pressure and stress of the law would be felt in a few of the larger interior towns of over 5,000, where there are no saloons now—Des Moines, Marshalltown, Oskaloosa, etc.,” although the probabilities were that saloons would be quickly opened in almost all of them. “The Two Half-License Bills,” ET-R, Mar. 2, 1894 (1:2) (edit.). It is unclear what Given meant by asserting that there were no saloons in Des Moines. Rep. Funk himself stated on the House floor that there were at least 200 “‘blind tigers’” there. “Work of Iowa Solons,” Carroll Sentinel, Mar. 9, 1894 (4:2).

\textsuperscript{410}“The Fight Is On,” CREG, Mar. 7, 1894 (3:2).

\textsuperscript{411}Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 564 (Mar. 6) (1894) (H.F. No. 556, by Funk). The bill was ultimately indefinitely postponed. Id. at 816 (Mar. 26). The wording of Funk’s bill was broader than Finn’s and for that reason gave local governments greater discretion to implement regulations that might have been more to the liking of anti-prohibitionists in saloon cities.

\textsuperscript{412}“Local Option Gains in Iowa,” CT, Mar. 7, 1894 (5).
recommend the committee bill that I would kill the bill on account of the clause in it that provides for the suspension of the present prohibitory law. I consider that suspension clause immoral. As between local option and a bill with this suspension feature I infinitely preferred local option as being less mischievous and more conductive [sic] to the moral interests of the State.”

House prohibitionists’ plan was to offer Funk’s bill as a substitute for the committee bill when the House took up the latter on March 7, by which time there was “but one single question of interest before the general assembly of Iowa.” To be sure, the quintessentially Republican Des Moines Register presented a very different perspective on Funk’s and his committee members’ mindsets, which appears to provide a plausible account of the bill’s swift demise. As a subhead put it: “Representative Funk Is Not Quite Sure What to Do and Offers the Finn Bill.” Having “become alarmed,” he introduced the Finn-Funk measure, but when he then tried to set up a meeting of his own committee to consider the bill and report something other than H.F. No. 537 with the committee’s endorsement, he was unable to secure a quorum; consequently, nothing was done.

The kaleidoscopic flux of prohibitory legislation generated by the Republican Party’s pressing need to regain its traditional hold on governmental power in Iowa manifested itself that day when, instead of moving to substitute his new bill for H.F. No. 537, Funk spoke at length and vigorously in favor of the bill he had just the previous day denounced as “immoral.” No Republican party official or legislator could ignore the intensity of the pressure being mounted by anti-prohibitionist Republican capitalists and the dangers that the party faced if it failed to accommodate such demands being raised at that very juncture in a petition to the legislature that originated in Sioux City but was circulating among Republicans throughout Iowa. Basing their profit-driven policy agenda on the (apparently quasi-genetic) premise that “[y]ou may legislate until the end of time, and you will never thereby change the nature of men and women,” the petitioners did not shy away from direct confrontation: “We do not desire to make any threats, but...in case your legislation fails to give us relief along the lines the party has promised us...we have to say that thousands of Republicans...”

413“Local Option Gains in Iowa,” CT, Mar. 7, 1894 (5).
414Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 578 (Mar. 7) (1894); “Local Option Gains in Iowa,” CT, Mar. 7, 1894 (5).
416“Liquor in the House Today,” ISR, Mar. 7, 1894 (5:3-5 at 5).
regard this question as a business proposition: that it affects their business interests...and that it affects the general prosperity of the state...” They then openly formulated the threat: through their votes, influence, and money, “‘multitudes’” would lend their aid against the Republican Party.  

Funk’s sudden about-face might also have resulted from a discussion that had taken place the previous evening at a “secret conference of the prohibition members” at which some decided on an alternative plan to offer an amendment to strike out all of the bill’s section containing provisions making payment of the mulct a bar to prosecution. Unsurprisingly, Representative Martin, the committee bill’s eponymous drafter, objected to this strategy: “He told the Prohibitionists who proposed by such an amendment to practically emasculate the bill that it was not an honest thing to do. He begged of them to do what was just to all parties or to do nothing.” Just as unsurprisingly, the next day some of the “ultra-Prohibitionists...complained of the appointment of Mr. Martin as a member of the steering committee on account of the stand he took at the conference.” The possibility that his fellow prohibitionists’ new legislative maneuver might have swayed Funk to change his position is undermined by the fact that Funk himself then voted against those very amendments seeking to strike out the prosecution bar.

During his half-hour floor speech in support of the committee bill—which “had been introduced against his protest”—Funk, defecting from his former hard-line position “in loyalty to the people and to the republican party,” did not conceal that he still did not like certain of its features, but contended that “he had yielded his personal views to the judgment of the majority of the committee and...hoped that those who differed from him would be equally liberal.” He

---

417“Requests for Legal Relief,” ISR, Mar. 10, 1894 (3:3-4). The petition also alleged that as a result of the Republican prohibitory law Germans had been “‘largely driven away from our state...’” The text was also published as “Threatening,” CREG, Mar. 9, 1894 (1:4-5, 3:3).

418“Whisky War Begins,” CT, Mar. 8, 1894 (5). The five-member steering committee, which the approximately 30 House Republicans attending the aforementioned secret conference appointed, also included Funk; its purpose was to “pilot the committee bill through the breakers between license and state-wide prohibition.” “The Liquor Debate Begins,” SCJ, Mar. 8, 1894 (1:1). In other words, Funk’s shift in allegiance had been sealed at that meeting.

419Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 612, 624 (Mar. 10, 12) (1894). On why he did vote for one such amendment, see below.

420“The Liquor Debate Begins,” SCJ, Mar. 8, 1894 (1:1).
sought to justify his apostasy by claiming that H.F. No. 537 “did not, either by implication or directly, license the traffic nor throw the protection of law around it.” His support for the bill was purportedly driven in part by the undeniable fact that prohibition had failed in some parts of Iowa. Funk did not specify which provisions he meant, but he may have been referring, inter alia, to the rules enumerated in § 18, such as: confining the saloon to a single room; requiring it to be conducted in a “quiet and orderly manner”; and prohibiting gambling, music, dancing, billiards, dice, or any other form of entertainment or amusement in the saloon room.

Unable to ignore outright the bill’s most offensive feature—the suspension of prosecution—Funk dramatically claimed that the law’s provisions “constantly hung over the saloonkeeper like the sword of Damocles, and if he broke any of the provisions...he lost all rights and his business would be closed.” Moreover, he praised the committee bill, which sought to “protect the people against the aggression of unauthorized saloons,” because its “machinery...is entirely removed from the local sentiment so that it can be freely and fearlessly enforced.” Professing pragmatism, he confessed that “in looking abroad at the needs and wants of the State he was called upon as a law maker to do something to minimize the traffic,” and as far as he was concerned H.F. No. 537 would both implement the party platform and “harmonize the party...” Curiously, although Funk’s abandonment of the hard-line prohibitionist position clearly marked a crucial symbolic turning point in the debate and heralded the Republican Party’s shedding of its long-time prohibitionist orientation, the press failed to focus on it.

Plenary consideration of H.F. No. 537 began on March 7 with the Democrats’ effort to substitute for it their local option/licensure caucus bill, but the latter was predictably disposed of on a nearly party-line vote of 23 to 69. The “real fight”

---

421“Whisky War Begins,” CT, Mar. 8, 1894 (5).
422“Liquor Talk in Both Houses,” ISR, Mar. 8, 1894 (5:3-4).
423“The Liquor Debate Begins,” SCJ, Mar. 8, 1894 (1:1). Funk did not specify which provisions he meant, but he may have been referring, inter alia, to the rules enumerated in § 18, such as: confining the saloon to a single room; requiring it to be conducted in a “quiet and orderly manner”; and prohibiting gambling, music, dancing, billiards, dice, or any other form of entertainment or amusement in the saloon room.
424“Liquor Talk in Both Houses,” ISR, Mar. 8, 1894 (5:3-4). Funk meant that “anyone could take an appeal from the action of the board of supervisors to the district court.”
425“Whisky War Begins,” CT, Mar. 8, 1894 (5).
426“Wrecking the Bill,” CT, Mar. 10, 1894 (3); “The Weary Grind,” CREG, Mar. 10, 1894 (1:1-2); Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 579-83, 599 (Mar. 7, 9) (1894). The caucus bill was H.F. No. 308. Id. at 209 (Feb. 12, by Robinson).
on the bill began when Republican prohibitionists offered amendments to strike out the various sections containing clauses that triggered the bar to/suspension of prosecution.\textsuperscript{427} This debate and these votes were crucial because they would reveal whether the forces supporting the mulct as a purely reinforcing penalty were in a position to undo the subversion of the original Given-Funk mulct bill that the Committee on the Suppression of Intemperance had effected and that Chairman Funk himself had ultimately supported. The first such amendment, which, if successful, was to be followed by all the others, lost by an exclusively Republican vote of 28 to 44 (not a single Democrat casting a vote).\textsuperscript{428} Prohibitionists’ weak showing not only underscored that the House would not pass a bill strengthening the existing law, but encouraged those backing the local option/licensure bill prepared by (Republican and Democratic) representatives of 10 saloon cities to hope that if they could secure some Democratic votes the House might pass it.\textsuperscript{429} Despite the amendment’s defeat, Republican William Harriman, “the champion of the plan to make the bill a mulct law pure and simple,”\textsuperscript{430} moved to strike all of section 17 (which contained another clause barring prosecution if the liquor seller paid the mulct, a majority of voters residing in the city who had voted in the last general election signed a consent, the city council adopted a resolution consenting to the sales, and all the resident freeholders within 50 feet of the selling premises signed a consent), but it was defeated by about the same exclusively Republican vote.\textsuperscript{431} The tide seemed to turn and Funk seemed to experience a change of heart when the House reached section 18 of the bill, which applied only to cities and towns of fewer than 5,000 inhabitants and made a written consent signed by a majority of a county’s legal voters (voting at the last general election) residing outside of cities with a population of 5,000 or over a bar to proceedings against intoxicating liquor sellers (but was not to be construed as such a bar in incorporated towns in townships in which less than a majority of the township voters signed the consent or in

\textsuperscript{427}“Wrecking the Bill,” \textit{CT}, Mar. 10, 1894 (3).

\textsuperscript{428}Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 602, 612-13 (Mar. 9, 10) (1894); “Wrecking the Bill,” \textit{CT}, Mar. 10, 1894 (3).

\textsuperscript{429}“Urge the City Bill,” \textit{CT}, Mar. 12, 1894 (7).

\textsuperscript{430}“Liquor Fight Is Hot,” \textit{CT}, Mar. 13, 1894 (2).

\textsuperscript{431}Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 624 (Mar. 12) (1894). The tally was 27 to 46 (which was a miscount of the listed named and should have been 47) with 28 absent or not voting, but two members (McNeeley and Taylor) were listed as having voted Yea and Nay and absent/not voting, respectively.
incorporated towns in which a majority of voters did not sign the consent). The amendment was offered by prohibitionist Joseph Morris, who represented Clarke County in south-central Iowa, the population of whose largest town (Osceola), barely exceeded 2,000. Arguing on the floor that the provision would make a saloon possible in every county, Morris, who had also voted to strike sections 16 and 17, allowed as he might possibly support the law including the bar to prosecutions in large cities, “but he could not support any bill that would undertake to bring a saloon to his county.” The amendment’s opponents turned Morris’s logic on its head: whereas he was concerned that section 18 would facilitate the opening of saloons in small towns that did not have any, the anti-prohibitionists asserted that the provision was needed to bestow the benefits of saloon control on counties without large towns but some of whose small towns already had saloons. Funk’s reasoning aligned with Morris’s—the population of Hardin County’s largest town, Iowa Falls, was only 1,796—but his high-profile chameleon-like pronouncements as committee chairman necessitated a more detailed justification. Although he had subordinated his personal convictions to the demands of House members representing cities and signaled his readiness to vote for the relief they claimed was needed, he was now confronted with a different issue:

You are now proposing to legislate upon questions touching my own locality, and concerning the interests of my own people. And I say hands off. A book that stands higher even than the thirteenth plank, in the hearts of some people, says: “He that neglecteth his own, and the members of his own household, has denied the faith, and is worse than an infidel.” To adopt this bill with this section as a part of it, would bring disaster to his people. The saloon would come to his county by the enactment of this

---

433 “Backset for Mulet,” CT, Mar. 14, 1894 (7).
437 On this point Sioux City Republican anti-prohibitionist P. A. Sawyer tore into Funk personally, verging on the “grossly unparliamentary.” With regard to Funk’s statement that he wanted to be able to return home and say that he had done right, Sawyer sarcastically observed that Funk “can even now go home and honestly declare that he had been right, for he has been on all sides of this discussion, at some stage of it he has been right. The only question is, at which particular hour he has been right.” “Utterly Useless,” CREG, Mar. 14, 1894 (1:1-3 at 2).
Following this and other testy exchanges, Republicans—the Democrats again did not participate—voted 39 to 33 to strike out all of section 18. So serious was this “backset” that the Chicago Tribune opined that it would result in the bill’s final defeat unless it were reconsidered. But the next day the House narrowly reversed itself, Republicans voting 37 to 33 to reconsider the vote. After the chamber had voted 32 to 16 to raise the petition threshold from 50 percent to 65 percent of voters (Funk, Harriman, and Martin voting Yea, and Morris Nay), Morris’s original motion to strike out the (now newly amended) section was narrowly defeated by a vote of 32 to 34 (Morris and Harriman voting Yea, Martin Nay, and Funk absent/not voting).

Funk closed the debate on March 16, creating a “sensation” by charging that lack of enforcement theretofore had resulted from the fact that “the paid attorney of the whisky ring, Horace Boies, had been governor of Iowa for four years.” For good measure, he added that saloons were “the breeding places of the democratic party, while Sunday schools performed a like office for the republican party.” At the conclusion of the roll call on final passage, which took place “amid breathless interest,” “a cheer went up from the Democrats and radical Prohibitionists” as H.F. No. 537 was defeated by a vote of 43 to 57. All 21 Democrats voted Nay, while a small majority of Republicans supported the bill (43 to 36). Of the 36 Republicans casting Nays 31 were said to be

---

438 “Utterly Useless,” CREG, Mar. 14, 1894 (1:1-3). Funk went on to criticize the use of petitions, which people often signed because they were influenced by the circulators. In proposing a secret ballot, he demanded that women (and especially mothers) vote.


440 “Backset for Mulct,” CT, Mar. 14, 1894 (7).


442 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 642-44 (Mar. 14) (1894). According to “Mulct Saved Again,” CT, Mar. 15, 1894 (12), the vote was 31 to 35.


444 “Both Liquor Bills Defeated,” Carroll Sentinel, Mar. 17, 1894 (2:3).

445 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 693 (Mar. 16) (1894). Party affiliation is taken from Iowa Official Register 30-33 (10th Year, 1895). Even if it was true that the bill could have passed if it had been “acceptable to the local option element,” failure to adopt the 65-percent consent
Banning Tobacco Sales to Minors

prohibitionists and only three local optionists. Numerous representatives, doubtless driven by fears that their constituents might misinterpret (or, perhaps even more fatally, correctly interpret) the reasons for their votes, made sure that their explanations were printed in the House Journal. None of them expressed satisfaction with the bill. Prohibitionist Harriman, for example, defended his Yea on the grounds that H.F. No. 37 “most nearly conform[ed]...to demands of the thirteenth plank that can be passed by this House,” was “substantially a mulct bill,” did not legalize liquor selling, and would decrease the number of saloons. Prohibitionist Joseph Morris explained that he was “compelled” to vote Nay because it virtually repealed the existing prohibition law, whereas he was “instructed to maintain” the latter. Despite its “several obnoxious provisions,” Sawyer voted for the bill because it was “better than nothing” as relief legislation. And Funk himself voted Aye because it was “a repressive measure and...an additional penalty.”

Despite its defeat, the mulct bill was not dead, because 55 Republicans voted to reconsider it, although the House decided to wait five days to do so. In the meantime, House rejection of the almost unrecognizable quasi-mulct bill prompted Welker Given, the mulct’s tireless propagator, to write “the obituary of the mulct plan,” which had been “beaten fairly and squarely...even in its weakest dilution,” and concede that it “should be dropped altogether.”

During the interim before the vote on reconsideration some House local optionists were busy preparing a bill along the lines of a measure that representatives of 10 saloon cities had earlier presented to the steering committee; combining county option with a license for manufacturing (which was absent from other bills), it was, at least in one version, paired with coverage restricted

---

threshold for towns of fewer than 5,000 inhabitants would have led a dozen prohibitionists to abandon the bill. “Both Liquor Bills Defeated,” Carroll Sentinel, Mar. 17, 1894 (2:3).

446 “Where Are We At?” CREG, Mar. 17, 1894 (1:3). However, not all prohibitionists voted Nay: for example, Harriman voted Yea.


448 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 694-95 (Mar. 16) (1894).

449 All 20 voting Democrats, joined by 22 Republicans, voted Nay. Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 695-96 (Mar. 16) (1894). If the press report that reconsideration was designed to allow Democrats and local-option Republicans to agree on a substitute was accurate, in fact a different outcome resulted. “Both Liquor Bills Defeated,” Carroll Sentinel, Mar. 17, 1894 (2:3).


776
Banning Tobacco Sales to Minors

to cities of at least 3,500 population. Reportedly, some prohibitionists representing districts lacking any city of that size had stated that they would not resist such a measure, but Funk, Harriman, Morris, and Martin were known to be opposed to any local option bill unless it excluded all cities with fewer than 5,000 inhabitants. Further complicating the forging of any successful voting coalition was the opposition to such bills by representatives of counties with towns below those demographic thresholds in which liquor sales were uncontrolled and which would derive no benefits from that kind of law.451

In the event, these conflicts having precluded the fashioning of a compromise or stitching together a majority coalition, the House on March 21 reconsidered the vote on H.F. No. 537. This time, however, the voting alliance of “ultra prohibitionists” and Democrats failed to produce a Nay-majority.452 Instead, more than enough Republicans who had voted against the bill five days earlier switched, producing a 53 to 45 majority; once again, not a single Democrat voted Yea in contrast to more than two-thirds of Republicans.453 Only three of eight switchers explained their vote—two of them frankly characterizing it as a quid pro quo for passage of a resolution resubmitting a prohibitory constitutional amendment to the electorate—while many non-switching Yeas merely repeated their previous explanations verbatim, emphasizing their lack of satisfaction with the chamber’s work product.454

The anti-prohibitionist press outdid itself in excoriating House passage of the bill, which, nevertheless, bore the distinctly non-prohibitory title: “An Act to tax

451“Sorry for the Act,” CT, Mar. 19, 1894 (11). The Democratic Des Moines Leader charged editorially that out-of-state brewers and distillers together with railroads bankrolled House passage of a mulct bill not permitting manufacture so that Iowans would “drink and pay for all the liquor they want,” but these non-Iowa corporations would manufacture it and railroads would haul Iowa grain to these foreign entities and liquor back. “Who Did It?” CREG, Mar. 22, 1894 (4:5).

452“Mulct Bill Passes,” CT, Mar. 22, 1894 (2).

453 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 748 (Mar. 21) (1894). In addition, Morris did not vote.

454 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 748-50 (Mar. 21) (1894). “May Have Restricted Local Option,” NYT, Mar. 22, 1894 (3), reported that the bill was “not satisfactory to even a majority of those who voted for it, but...passed as a compromise in response to an almost universal demand from the cities for relief from the prohibitory law.” The Gazette, based on 1890 population census data and the 5,000 population threshold, stated that the bill applied to only 20 cities, leaving 81 counties “without the promised modification in any form.” “Republican Cheers,” CREG, Mar. 22, 1894 (4:3) (edit.).
Banning Tobacco Sales to Minors

the traffic in intoxicating liquors and to regulate and control the same.” The Gazet" was perhaps only the most extreme in sluicing such cascading and unintentionally comical hyperbole through its columns as this subhead: “The Most Dishonest, Hypocritical, Rotten, Measly Measure Ever Adopted by Any Legislative Body.” Somewhat less vituperatively and more plausibly, the newspaper added that if “the thing called the Martin mulct bill” had been presented to the 1893 Republican convention, it would have been “kicked into the street.”

As soon as H.F. No. 537 passed the House, Republican Party Chairman Blythe was very busy far into the night “urging senators to get in line.” Giving senatorial demands for amendments short shrift, “the order ha[d] gone forth to pass the bill as it came from the house” lest prohibitionists who had voted for the bill and were now “getting letters that make them sick at heart” change their minds: since it had been “hard work to hold them to the line” the first time round, “it was doubtful whether the bill could get” 51 votes on a second roll call. On the other hand, House passage “simplifie[d]” the legislative process in the Senate, where, with Democrats occupying almost one-third of the seats and Republicans divided between prohibitionists of varying militancy and various kinds of anti-prohibitionists, at least 15 relevant bills had been introduced, but none had even come close to passage. The day after House passage the Senate substituted H.F. No. 537 for the Senate Committee on Suppression of Intemperance licensure bill, which the chamber’s prohibitionists and Democrats had defeated by a vote of 12 to 36 on the same day that the House had initially

---

455 1894 Iowa Laws ch. 62 at 63.
456 “Oh! Rats!” CREG, Mar. 22, 1894 (1:1).
458 “Strangled,” CREG, Mar. 22, 1894 (1:5).
459 “Mulct Bill Passes,” CT, Mar. 22, 1894 (2).
460 Because the burden of this section is to explain the genesis of and contextualize the liquor mulct system in order to understand its application to cigarettes in 1897, it does not analyze the complex legislative process in 1894 in the Senate, where a mulct bill did not play a significant part until H.F. No. 537 had passed the House and was immediately taken up by the Senate. For the introduction of and action on the various Senate liquor sales bills—none of which progressed except S.F. No. 324 and 330 (on which see below)—see the bill index in the Senate Journal for S.F. No. 3, 96, 99, 102, 108, 114, 130, 136, 169, 198, 350, 395.
461 Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 562 (Mar. 22) (1894). On S.F. No. 324, see id. at 328, 389-94, 399-403, 433-34, 459-61, 466-70 (Mar. 1, 8, 9, 12, 14, 15).
rejected H.F. No. 537. In short order—masking the difficulties involved in securing the requisite tie-breaking 2 votes—the Senate passed it by the closest possible constitutional majority of 26 to 24, with Republicans splitting 26 to 8 and all 16 Democrats voting Nay.

The extent to which the irreconcilable extremes—radical Republican prohibitionists and Democratic anti-prohibitionists—met in opposition to the bill was explosively on display in the explanations of their votes that two of them had published in the Senate Journal. In addition to repeating the well-known charge that H.F. No. 537 violated the 13th plank inasmuch as it undertook to alter the prohibition law all over Iowa instead of maintaining it in prohibition localities and controlling liquor sales by other methods in other places “in the interest of temperance and morality,” Finn focused on liquor’s immorality: “I believe inebriety to be a disease of the most pitiable and unfortunate character,” against which Iowa “should be protected...as much as small pox or any deadly contagion.” Because the (pseudo-mulct) law—which was only slightly less virulent than the Democratic bill—tended to “recognize the legal existence of the saloon, in direct opposition to the established and declared doctrine of the party...for the last twelve years,” it empowered saloon keepers to enlarge the universe of their victims. Throwing drunkenness together with gambling and prostitution as “evils alike to be deplored,” Finn deemed their licensure “unworthy of patriotic citizenship” and forcing the public to share in their
proceeds through the mulct “abhorrent.” Democrat Theodore Perry, a lawyer from the south-central town of Albia (pop. ca. 2,500), interpreted the bill as a hoax designed “merely to relieve those in charge of the machine of the Republican party from a very perplexing and embarrassing situation,” but emphasized that those leaders had nevertheless failed to disentangle the party from the self-contradictions that were undermining its electoral coalitions because “this prohibition measure called license” was a “serious blow to prohibitionists. The Republican party...has at last done what it has so long declared it would not; it has legalized the saloon.” Ultimately, then, Finn and Perry agreed that behind the party’s obfuscation, the bill had brought licensure to Iowa, though they imputed vastly different social, cultural, moral, and economic meanings to that innovation.

When the bill finally received its constitutional majority, Blythe, who was standing at the back of the chamber, smiled. (While not completely to his liking, H.F. No. No. 537 was “the best that could be passed through both houses” and he viewed it as “essentially fulfilling” the party pledge.) In sharp temperamental contrast, up in the gallery sat “seven sad faced...prominent W.C.T.U. ladies” who, having been present “at the birth of prohibition,” now “sorrowfully...sat as mourners at the funeral, unnoticed and unheeded.” Thus ended (at least for the time being) what one Republican senator called “the long struggle—the most intense and bitter in the history of Iowa politics or legislation....”

After the resurrected “Given-Martin mulct” had become “a matter of fact,” the Register congratulated Given: it may not have been his mulct that passed, “but it was a bill that borrowed largely from the theories that he had been advocating.” For his part, Given was willing to take credit for the two-thirds of the new law that was “taken bodily” from the draft that his newspaper had published in December, but he was able to approve of it only “with unfeigned reluctance”; he reminded readers that the Times-Republican had “earnestly

---

465 Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 568 (Mar. 22) (1894).
466 Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 569-70 (Mar. 22) (1894).
467 “Strangled,” CREG, Mar. 22, 1894 (1:5).
468 “A Wail of Woe,” CREG, Mar. 23, 1894 (1:1-4 at 3).
469 “Strangled,” CREG, Mar. 22, 1894 (1:5).
470 “A Wail of Woe,” CREG, Mar. 23, 1894 (1:1-4 at 3) (Brower).
472 “In General and Particular,” ISR, Mar. 23, 1894 (4:2-3) (edit.).
opposed the local option or bar mulct up to the last moment and accepts it now under protest and only because it was necessary to avoid the much worse thing of state-wide license brought about “by a combination of democrats and so-called liberal republicans....” The law’s chief “unfortunate effect at first, at least, and for some time” was the spread of “the saloon to new territory,” for example to central Iowa, “under the supposed shelter of the bar” to prosecution triggered by payment of the mulct.\textsuperscript{475}

Once the bill had passed both chambers, Representative Funk, the bill’s chief legislative advocate, expressed himself a bit more candidly about its virtues and vices. He believed that the mulct would “practically close all the saloons” in small towns, whereas in cities “the tendency would be to close the more disreputable ones, to places safeguards around the traffic, protecting the people from the lawlessness of the clandestine saloon,” and resulting in the closure of 90 percent of saloons in the larger cities. To the mulct payment as a bar to prosecution Funk affirmed his opposition “on principle,” but sought to downplay its real-world significance by claiming that “I feel that my position is more sentimental than real.” And, finally, with regard to the bill’s Republican party-political payoff, Funk was much less agnostic: “it certainly will strengthen us in the river counties....”\textsuperscript{476}

The mulct law’s real-world impact can be gauged by the fact that one year after it had gone into effect, 48 counties with 59 percent of the state’s population had adopted it, while 51 counties with 41 percent of the population had not.\textsuperscript{477}

\textit{Relaunching the Sideshow of Constitutionalizing Liquor Prohibition (1894)}

Executing a dual-track strategy, prohibitionist Republicans during the 1894 session also pursued, once again, passage of an amendment to anchor prohibition in the state constitution. Each chamber passed its own joint resolution, the Senate
Banning Tobacco Sales to Minors

taking no action on the House version, the House amending the Senate version, and the Senate ultimately concurring in that amended resolution. Although all passed by large majorities, not a single Democrat in either house voted for any.\footnote{Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 68, 345, 580, 630, 656-58, 795-96 (Jan. 25, Mar. 2, 23, 27 28, Apr. 5) (1894) (S.J.R. No. 5, by Perrin); Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 576-77, 718, 750-52, 963-65 (Mar. 7, 19, 21, Apr. 3) (1894) (H.J.R. No. 12, by Cornwall). The final votes were 62 to 34 in the House and 29 to 16 in the Senate. The extraordinary dynamic in the lawmaking process was starkly illustrated by the fact that just after this vote 43 House members (including 27 Republicans) voted for a bill to permit the manufacture and wholesale sale of liquor on a county option basis (though 56 Republicans defeated it). Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 969 (Apr. 3) (1894) (H.F. No. 651, by Chassell) (incorrectly tallying the voting members as 44 to 55); “Chassell’s Liquor Bill Defeated,” CT, Apr. 4, 1894 (5); “The Legislature,” WDC, Apr. 4, 1894 (1:4). A possibly even starker about-face was Senate passage of virtually the same manufacture bill by a vote of 27 to 17 three days before its adoption of the constitutional amendment resolution. Eight Republicans who had voted for the manufacture bill then voted for the resolution. Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 743-44 (Apr. 2) (1894) (Substitute for S.F. No. 330, by Dent); “Wets Gain a Point,” CT, Apr. 3, 1894 (2).}

\footnote{1894 Iowa Laws, Joint Resolution No. 5 at 203-204.}

\footnote{1894 Iowa Laws, Joint Resolution No. 5 at 203-204.}

\footnote{Walt H. Butler, “”A Liquor Bill Passed,”” Algona Courier, Mar. 30, 1894 (4:5); WC, Apr. 4, 1894 (2:1) (untitled edit.). See also “Raise a Vital Point,” CT, Mar. 24, 1894 (7). Four House Republicans (Doubleday, McNeely, F. Cooper, and Wood) officially explained their Yeas for H.F. No. 537 in the Journal as a quid pro quo for the agreement by the bill’s friends to vote for resubmission. Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 748-49 (Mar. 21) (1894). Oddly, two of these four (Doubleday and Wood) had voted against H.F. 537 five days earlier, even though the quid pro quo agreement had been earlier. Id. at 693-94 (Mar. 16). On March 6, a number of House Republicans (including Trewin and Cornwall) favoring local option met and mentioned that if local optionists voted for resubmission, some}
been viewed as implementation of the “conciliation” that plank 13 was designed
to furnish. Moreover, neither state WCTU organization petitioned for
resubmission. Indeed, Lucy Burkhalter, the superintendent of legislation at the
more radical WCTU of the State of Iowa, explained to its annual meeting in
October 1893 that the organization did “not favor re-submission of a
constitutional prohibitory amendment to a vote of the people,” in large part
because supporters of licensure and local option and “those who have tried to
deceive temperance people in the past, are the ones who advocate ‘resubmission.’
It is a hypocritical attempt to get rid of prohibition in Iowa.”481 And a year later
her counterpart, J. Ellen Foster, the superintendent of legislation at the non-
partisan WCTU of Iowa, told the group’s annual meeting in October 1894, that
the resolution had come about “through God’s providence who shall doubt? ...
The temperance people of the State did not petition for the resolution of
submission, but it is here.”482

More importantly, one of constitutionalization’s supposed chief
virtues—namely, that it would take prohibition out of politics—was losing its
plausibility among some Republican Party strategists. For example, Welker

481Fourth Annual Meeting of the Woman’s Christian Temperance Union of the State
of Iowa...October 3, 4 and 5, 1893, at 58 (1893). The other reason adduced by Burkhalter
was that in all the states where such votes had recently been held the “unscrupulous liquor
interest, backed by money and men of like faith in the entire United States,” had made it
“impossible to get the honest count of the votes cast.” Id.

482Twenty-First Annual Meeting of the Woman’s Christian Temperance Union of
Iowa...Held at Newton October 16-19, 1894, at 39 (1894).
Banning Tobacco Sales to Minors

Given, “the high priest of the mulct system,” asked: “What boots it to take another vote with a certainty that the river counties will go one way and the interior the other?” Nor, he pointed out, would the difficulty of enforcement in the former be alleviated if the latter counties’ pro-prohibition majority increased. Consequently, resubmission would merely bring the Republican Party “out the same hole it goes in. It would still be responsible for enforcement of prohibition and yet not allowed the necessary means.”

Iowa Finally Passes a No-Sales-to-Minors Law: 1894

[A] petition is circulated to present to the legislature asking that body to pass a law prohibiting the sale of cigarettes. This is a good move and we hope a very strict law will be passed and enforced. Give every citizen the right to “fatally kill” any brainless and consumptive youth found smoking the health-destroying cigarette.

Efforts to deny minors access to tobacco in Iowa long antedated 1894 and the formation of the WCTU. As far back as 1855, Representative Willet Dorland, in response to a petition from 130 citizens of Henry County, introduced a bill to prohibit the sale of tobacco to minors, which was, however, quickly tabled. The large majorities that the Iowa ban on tobacco sales to minors secured in 1894 in both houses of the legislature, to which numerous petitions were presented supporting the measure, suggested a lack of controversy. Even where the press noted that the bill had been “extensively discussed and passed without amendment,” it omitted mention of any details.

---

483“Mulet, Local Option, or High License,” CT, Dec. 31, 1893 (3).
484“Resubmission,” ET-R, Mar. 14, 1894 (1:2) (edit.). In fact, Given appears to have underestimated the creeping saloonification of interior cities. For mockery of Iowa prohibitionists’ proud boast that Des Moines was “the largest city in the world without a saloon,” see “Iowa,” American Druggist and Pharmaceutical Record: A Journal of Practical Pharmacy 25(5):211 (Sept. 15, 1894) (“50 saloons and the number is growing”); Frank McVey, “The Martin Mulct Law of Iowa,” Social Economist 8:156-63 (Mar. 1895).
486Journal of the House of Representatives of the State of Iowa 234, 313 (Jan. 11 and 17) (1855).
488“The Liquor Problem,” BH-E, Feb. 8, 1894 (1:3-4 at 4). See also “Bills Are Numerous,” Dubuque Times, Feb. 8, 1894 (1:5); “A New Liquor Bill,” Dubuque Times, Feb. 18, 1894 (1:1); “Up with the Lark,” BH-E, Feb. 18, 1894 (1:3).
Banning Tobacco Sales to Minors

even further toward downplaying the initiative by reporting: “Very little of
importance transpired in the legislature today. The house passed a bill to prevent
the sale of tobacco to minors under the age of 16 years...”  Without offering
any details of the debates, a small-town weekly remarked of it that “[o]ne bill of
general importance managed to slip through both houses during the past week.”

Nevertheless, despite these accounts, the appearance of the absence of
opposition was misleading. In fact, two attempts to pass a no-sales-to-minors bill
in 1890 and 1892 had failed altogether. In 1890, numerous petitions were
presented to the Senate, and on February 28 Senator Perry Engle introduced
S.F. 95, a bill under which “no person or persons in this state shall sell, buy for,
give, or furnish any cigar or cigarette, or tobacco in any of its forms, to any minor
under twenty years of age unless upon written order of parent or guardian” and
for violation of which a $25 fine was imposed. Engle (1840-1935), a prominent
physician and publisher and editor of the Newton Herald, had been a
Republican in the time of Lincoln, but joined the Greenback party in 1876, and
in 1889 was nominated by the Union Labor party (and endorsed by the
Democrats) for the state Senate. By 1891 he was a central committee member
of the People’s party in Iowa with a national profile, unsuccessfully ran for

489 “Each House Passes a Bill,” SCJ, Feb. 8, 1894 (1:3).
491 Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa
44, 205-10, 250 (1890).
492 Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa
98 (1890) (S.F. No. 95).
493 S.F. No. 95 §§ 1-2. Because the bill book was bound too tight to permit
photocopying, the State Historical Society of Iowa (Des Moines) transcribed the text. See
also “A Lower Interest,” DMWL, Mar. 20, 1890 (1:1-2 at 2).
494 Engle was in charge of the X-ray machine at the newly completed University of
Iowa Hospital in 1898 and the first lecturer in electrotherapeutics. Kenneth Dolan,
“History of the Department of Radiology at the University of Iowa,” American Journal of
495 James Weaver, Past and Present of Jasper County Iowa 1:425-26 (1912); Portrait
and Biographical Record, Jasper, Marshall and Grundy Counties Iowa 222(1894), on
http://www.usgennet.org/usa/ia/county/jasper/Biographies/E/engle_perry.htm; “Dr. Perry
Engle, Pioneer Newton Physician Dies,” Jasper County Record, July 4, 1935 (1:1, 4:2).
On the Union Labor party, which was founded in 1887 and united with the Greenback
party in 1890, see Fred Hynes, Third Party Movements Since the Civil War with Special
Reference to Iowa: A Study in Social Politics 206, 308 (1916).
496 [Secretary of State], IOR 171 (G. Burkit comp., 7th Year, 1892).
Banning Tobacco Sales to Minors

Congress in 1892, and was the sole Populist in the Senate in 1892, where he often held the balance of power in the evenly divided Senate by voting with the Democrats, but he voted independently and introduced notably progressive bills such as those for woman suffrage, the Australian ballot, and prohibition.498

A week after the bill’s introduction the chairman of the Public Health Committee (four of whose nine members were physicians—all of the physicians in the Senate), Timothy J. Caldwell, a Republican physician and wealthy capitalist,499 reported back to the Senate that the committee had recommended that the bill “do not pass.”500 This action did not, however, kill the bill: on March 17, the Senate engaged in a noteworthy and “lively” debate on S.F. 95, initiated by Republican Senator John Woolson, who favored “some law that would reach the complaint of tobacco using,” but opined that “20 years was most too mature a year to which the provisions of the bill should apply.” Consequently, he felt compelled to support the committee report. Republican physician and Public Health Committee member Josiah McVay opposed the bill’s substance: “No one denied the injurious effect of tobacco, especially upon the young, but he thought statutory provisions were not the way to work reformation. He opposed statutory provisions that would lead to trivial court actions or attempt to govern the appetites.”501 McVay also spoke against S.F. 95 on pedagogical grounds seldom adduced in public forums then or now: “He thought the youngsters of the state would more likely smoke cigarettes and chew tobacco if they had to run risks to get them. It was the policy of his father to allow his boys to do anything he did and the boys never used tobacco until they grew to be men.”502 When pressed by a Republican colleague to explain why this position did not conflict with his


499Caldwell “figured prominently in financial circles”: he was president of the bank in and railroad to his hometown, and “made extensive and judicious investments in property and in this way accumulated a comfortable fortune.” R. F. Wood, Past and Present of Dallas County, Iowa 409 (1907).

500Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 170 (1890) (Mar. 8). The committee consisted of five Republicans, three Democrats, and one Populist. The vote by member was not recorded in the Journal, but on the floor vote to refer, discussed below, four members voted for and four against, while chairman Caldwell was absent or did not vote; two of the four Republicans voted for and two of the three Democrats against.


principles concerning liquor prohibition, McVay, according to the Des Moines Leader, “thought there was a difference” between a ban on selling liquor and one on tobacco, but “was unable to explain the difference further than to say that there were more restrictions necessary about the sale of liquors because there were more habitual drunkards than habitual users of tobacco who suffered by the use of the articles.” In addition, he feared that passage of Engle’s bill would merely generate crime and disregard and disrespect for the law among youth.\textsuperscript{503}

Having gauged the distribution of attitudes, Republican Jefferson Clyde moved that instead of concurring in the Public Health Committee’s report that it not be passed, the Senate should refer the bill to the Committee on the Suppression of Intemperance. Although he agreed that the bill had been before the proper committee, he proposed re-reference “in order to get a substitute if possible....” Unfazed by Woolson’s and McVay’s objections, Engle, supporting the bill’s re-reference, argued that “there was more need for a bill prohibiting the sale of tobacco than for liquor, and there was just as much reason for one as the other.”\textsuperscript{504}

On the motion the Senate voted 24 to 17 to refer the bill to the Suppression of Intemperance Committee,\textsuperscript{505} where it died.\textsuperscript{506} The vote fractured along party lines: the Populist Engle was joined by 20 Republicans, one Independent, and two Democrats (one of whom, Erastus B. Bills, was a physician-member of the Public Health Committee) favoring referral, while 13 Democrats and only four Republicans opposed referral (five Democrats and four Republicans either being absent or not voting).\textsuperscript{507} It is difficult, in the face of such vigorous opposition, to credit the Burlington Hawk-Eye’s post-mortem analysis that a no-sales-to-minors law “would have been passed..., and probably by nearly a unanimous vote, had it not been for the complex condition of things growing out of the dead-lock and

\textsuperscript{503}“A Lower Interest,” DMWL, Mar. 20, 1890 (1:1-2 at 2). According to another account, McVay also argued that: “Prohibition of the liquor traffic removes the saloon from among us and takes away the temptation while in this matter we leave the temptation for the boys close at hand.” “A Blue Monday,” ISR, Mar. 18, 1890 (4:6).

\textsuperscript{504}“A Lower Interest,” DMWL, Mar. 20, 1890 (1:1-2 at 2).

\textsuperscript{505}Journal of the Senate of the Twenty-Third General Assembly of the State of Iowa 256 (1890) (Mar. 17).

\textsuperscript{506}The note in the weekly paper of the non-partisan Iowa WCTU that the “Senate committee on Medicine and Pharmacy recommended the indefinite postponement of the tobacco bill” was doubly incorrect since no such committee existed. “Editorial Notes,” Iowa Messenger 5(13):1:1 (Mar. 22, 1890).

\textsuperscript{507}Party membership is taken from IOR 72-73 (Frank Jackson, Secretary of State comp., 5th Year, Jan. 1890).
Banning Tobacco Sales to Minors

Advocates of tobacco control for minors brought the issue before the legislature again in 1892. In mid-1891, Burkhalter, the superintendent of the Legislation and Petitions Department of the WCTU of the State of Iowa, sent a letter to all 150 members of the state legislature expressing the belief that, since many other states had laws forbidding the use of tobacco to minors, “our Iowa law-makers will not wish to be behind in this matter, and that the case needs no argument. We simply ask, therefore, that you protect the boys of Iowa by enacting such a law.”

In 1892 Senator Edgar E. Mack, the chairman of the central committee of the state Republican party, who in 1890 had been one of only nine senators to vote to repeal the Senate restrictions on smoking in the Senate, introduced, “by request,” Senate File No. 222, which was identical to Engle’s S.F. No. 95 except that it drastically lowered to 16 the age at which minors were permitted to buy tobacco. It is unclear who made the request of Mack, who lacked Engle’s progressive political profile, but, since a month later, when the bill was stalled, he presented a memorial of the WCTU of Iowa supporting the bill’s passage, possibly it had been the requester. Numerous petitions urging passage of such
Banning Tobacco Sales to Minors

from 1890 to 1894 chiefly in his capacity as Republican state chairman, but none deals with this subject. SHSI, Manuscript Dept., Aisle 2, Cabinet 6, Drawer.

517 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa 207, 235, 419 (1892).

518 Journal of the House of Representatives of the Twenty-Fourth General Assembly of the State of Iowa 243, 244, 269, 271, 286 (1892).

519 “Sprung a Surprise,” DIO, Feb. 27, 1892 (1:7).

520 Journal of the Senate of the Twenty-Fourth General Assembly of the State of Iowa 387 (Mar. 9) (1892)

521 S.F. No. 222 (Mar. 9, 1892) (copy of file provided by SHSI DM).

522 S.F. No. 44 (Jan. 23, 1894); Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa 56 (1894) (Jan. 23). The bill authorized local governments to issue the licenses for annual amounts ranging from $100 for manufacturers to $25 for retailers. S.F. No. 44, §§ 1-2. The text of the bill was transcribed by the SHSI staff because the Senate bill book for 1894 was bound too tightly to photocopy.

523 Willis Hall, Biographical Sketches of the Twenty-Fifth General Assembly of Iowa, the State Officers and Iowa Members of Congress 26-27 (1894); Benjamin Shambaugh, Biographies and Portraits of the Progressive Men of Iowa 2:617-18 (1899); William Battin and F. Moscrip, Past and Present of Marshall County, Iowa 2:969-71 (1912); “Dr. A. B. Conaway, Father of Mayor Conaway, Dead,” Marshalltown Times-Republican, Feb. 25, 1925 (10:3); http://infused.org/genealogy/?m=family&id=14207 (visited Sept. 8, 2006); Portrait and Biographical Album of Mahaska County, Iowa (1887), on http://www.beforetime.net/iowagenealogy/mahaska/portraitandbiographicalalbum/pbco

A measure were presented to the Senate517 and House518 in the following weeks, and all the Des Moines public school principals appeared before the Senate Public Health Committee, to which the bill had been referred, advocating the prohibition of the sale of tobacco and cigarettes to minors under 16.519 A majority of the committee recommended passage, provided that the bill was amended to: (1) permit exemptions with the approval of a parent or guardian; (2) reduce the penalty from $25 to $10; and (3) strike section 3,520 which would have expedited the bill’s effective date. Referred back to committee.521 Senate File No. 222 died.

Significantly, the bill (S.F. 44) that Republican Senator Alpheus Barto Conaway, chairman of the Committee on Public Health, introduced on January 23, 1894, was even titled: “An Act to License Manufacturers, Wholesale and Retail Dealers of Cigarettes,” with the prohibition of their sale to minors under 16 tacked on.522 Conaway was a physician who in the 1880s had also been a professor of obstetrics and gynecology at Drake University in Des Moines; his political profile became sufficiently high during two sessions as a state senator that in 1895 he became a candidate for the Republican gubernatorial nomination.523 A “prohibitionist from principle,” he nevertheless voted for the
liquor mulct tax bill (H.F. No. 537), despite the fact that it was “repulsive to me to be compelled to vote for” it, because his constituents demanded it. \footnote{Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa at 568 (1894).} Although Conaway on February 1 reported out on behalf of his committee an amended version of the bill that eliminated manufacturers and wholesalers from the licensing regime, it continued to mandate local licensing of retailers. \footnote{S.F. No. 44, as amended (no date); Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa at 110 (Feb. 1, 1894). This version increased the retailers’ licensing fee to $100, which was also the fine for selling without a license and for selling to minors. Id., §§ 1-2. The text of the amended bill was also transcribed by the staff of the SHSI.}

The two bills introduced by Republicans in the House, lacking any licensure, straightforwardly prohibited the sale of any tobacco to minors under 16. \footnote{A Swedish-language weekly published in Des Moines, omitting any reference to cigarettes, reported that the bill passed by the House prohibited the sale of tobacco and cigars. “Från legislaturen,” \textit{Svithiod}, Feb. 15, 1894 (4:1).} H.F. No. 65, which imposed a fine of $20, \footnote{H.F. No. 65 (by Gurley, Jan. 23, 1894) (copy furnished by SHSI); Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 83.} was introduced by Zenas Hovey Gurley, Jr., a former Democrat and former apostle of the Reorganized Church of Jesus Christ of Latter-Day Saints. \footnote{\textit{AI}, 3d ser., 11(4):320 (Jan. 1914); http://www.sidneyrigdon.com/dbroadhu/UT/utahmisc.htm (visited Sept. 8, 2006); Willis Hall, \textit{The Iowa Legislature of 1896}, at 94 (1895). At the 1900 population census Gurley was returned as a deputy warden at Anamosa state prison.} H.F. No. 135, which prescribed a fine not exceeding $100, \footnote{H.F. No. 135 (by Nicoll, Jan. 25, 1894); Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 102.} was introduced by David Nicoll, who was a United Presbyterian Church minister and a farmer. \footnote{Biographical History of Crawford, Ida and Sac Counties, Iowa 278-80 (1893); B. Gue, \textit{Biographies and Portraits of the Progressive Men of Iowa} 400-401 (1899); “Rev. D. Nicoll Dies at Red Oak,” \textit{Ida Grove Record}, Oct. 10, 1929(clippings file, pioneers, SHSI, Iowa City); http://www.accessgenealogy.com/iowa/ida/bios4.htm (visited Sept. 8, 2006).} After the Committee on Suppression of Intemperance had recommended passage of H.F. No. 135, \footnote{Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa at 160 (Jan. 31, 1894).}
Banning Tobacco Sales to Minors

House Democrats, who occupied only 21 seats in the 100-member chamber, sought to weaken the law on the floor. One Democrat (Charles Robinson) sought to eliminate tobacco other than cigarettes from the ban on the grounds that the bill’s scope was too wide, making it unenforceable. After seven Republicans and one Democrat (D. H. Snoke) had argued against it, the amendment lost on a voice vote. Cyrus Ranck, who was the Democratic Party state central committee chairman, proposed an amendment that—like the New Jersey law—would have conditioned liability on “knowingly” selling to a minor. Despite the Democrats’ minority status, the amendment lost narrowly 37 to 45. Then Republican Samuel Van Gilder (who in March would vote consistently against the quasi-mulct liquor bill) offered an amendment that weakened deterrence and enforcement by specifying a minimum fine as low as five dollars and eliminating imprisonment as an alternative penalty, which the House adopted. Republican Charles Root’s amendment to raise the age limit from 16 to 18 failed on a voice vote. The full House then passed the bill by a vote of 81 to 13. The party-line character of this partial prohibition was signaled by the fact that House Republicans voted 74 to 1 for the bill, while Democrats opposed it 12 to 7. Passage inspired the Perry Bulletin to remark that “if a bill could be passed prohibiting the manufacture or sale of cigarettes in the state it would be a great benefit to the rising generation.

The Senate Committee on Public Health recommended that H.F. No. 135 be substituted for S.F. No. 44, and the full Senate adopted the recommendation and H.F. 135 without amendment. In the Senate, which the Republicans controlled 34 to 16, the vote was 31 to 3, with only four Democrats voting for the bill and ten not voting. Senator Warren Garst, merchant, banker, and future governor, opposed the bill on the grounds that it made it a misdemeanor for one boy to give tobacco to another. In contrast, Senators Conaway, Harsh, and Mattoon stressed

532 Secretary of State, IOR 30-33 (1895).
533 “Grinding Out Laws,” DIC, Feb. 7, 1894 (1, 4:6, at 5:2); Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 263-64 (Feb. 7) (1894).
534 Willis Hall, The Iowa Legislature of 1896, at 41 (1895).
535 N.J. Laws ch. 96, §1, at 112.
536 Journal of the House of Representatives of the Twenty-Fifth General Assembly of the State of Iowa 264 (Feb. 7) (1894); “Grinding Out Laws,” DIC, Feb. 7, 1894 (1, 4:6, at 5:2).
537 Bulletin (Perry), Feb. 10, 1894 (2:3) (untitled).
538 Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa at 230 (Feb. 17, 1894); IOR 29-30 (1895).
that Iowa educators were demanding its passage.\footnote{539}

Looking back two years later, the author of the general cigarette sales prohibition bill that was enacted in 1896, Republican Senator Julian Phelps declared on the Senate floor that “a bill was introduced in the senate two years ago, which purported to tax the retail sellers of cigarettes, but was really intended to prohibit the sale of them and was so mutilated in the house of its friends, that it was entirely satisfactory to the manufacturers themselves.”\footnote{540}

In the end, then, the new statute made it unlawful, subject to a fine ranging between five and 100 dollars, “for any person, directly or indirectly, by himself or agent, to sell, barter or give to any minor under 16 years of age, within this State, any cigars, cigarettes or tobacco in any form whatever, except upon the written order of his parent or guardian.”\footnote{541} How often the new law was enforced in Iowa’s many hundreds of communities is unknown, but almost as soon as the law went into effect, the nationally affiliated WCTU of the State of Iowa complained that it was “deficient in that it makes it nobody’s duty to prosecute violaters [sic], and thus it is clear that the law must be amended before it can be enforced.”\footnote{542} Some local unions of the organization tried to assist enforcement by printing the Nicoll law on cardboard and hanging it up where tobacco was sold and visiting dealers to remind them of the law.\footnote{543} That the strictness of enforcement may have left something to be desired was suggested by a case in Webster, where in 1895 a judge imposed the minimum fine on two businessmen who had been arraigned for having sold cigarettes to small boys.\footnote{544} In the meantime, the nationally affiliated WCTU resolved at its annual meeting in 1895: “That we recommend the young women of our state to assist in the suppression of the tobacco habit by refusing the company, as escort, of young men addicted to its use.”\footnote{545} And looking back from the vantage point of 1898, the non-partisan WCTU could boast that passage of the 1894 anti-cigarette bill had been aided by

\footnote{539}“Solons Rose Early,” \textit{DML}, Feb. 18, 1894 (5:3).
\footnote{540}“The ‘Coffin Nail’ Must Go,” \textit{DIC}, Feb. 1, 1896 (6:2).
\footnote{541}1894 Iowa Laws ch. 61, §§ 2, 1, at 63.
\footnote{542}Fifth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marion, Iowa, October 3, 4 and 5, 1894, at 69 (n.d.) (Report of Irene G. Adams, superintendent, Scientific Temperance Instruction Dept.).
\footnote{543}Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marshalltown, Iowa, October 9, 10 and 11, 1895, at 105 (1895).
\footnote{544}“A Lesson to Cigarette Venders,” \textit{DML}, Dec. 7, 1895 (3:2) (copy furnished by Merle Davis).
\footnote{545}Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marshalltown, Iowa, October 9, 10 and 11, 1895, at 33 (1895).
Banning Tobacco Sales to Minors

Iowa can also be viewed as a regulatory laggard since in the mid-1890s it had not even banned smoking by minors (and did not do so until 1909). As early as 1890, for example, New York, adopting language from a statute enacted the previous year in neighboring Connecticut, inserted into its Penal Code a provision making it a misdemeanor (punishable by a fine of not less than two dollars) for any “child actually or apparently under sixteen years of age” to “smoke or in any way use any cigar, cigarette, or tobacco in any form whatsoever in any public street, place, or resort.” That enforcement in New York—backed in New York City by a Board of Aldermen resolution requesting the police to enforce the law—was apparently successful.

---

546 Twenty-Fifth Annual Meeting of the Woman’s Christian Temperance Union of Iowa 68 (1898).

547 See below ch. 13. A document apparently prepared for tobacco litigation at the end of the twentieth erroneously stated that: “The first age restrictions governing the use of tobacco (as opposed to the sale of tobacco products) were enacted in Arizona in 1917; in Idaho in 1918; and in Illinois in 1921.” “Historical Developments Regarding Minimum Age Laws Governing the Sale or Use of Tobacco Products” (Jan. 28, 1998), Bates No. 2072554892.

548 1889 Conn. Pub. Acts ch. 80, § 2, at 45, 46 (imposing a maximum fine of $7 on persons under 16 who had smoked, or in any way used any form of tobacco “in any public street, place, or resort....” Even this ban on smoking by minors had its critics. The United States Tobacco Journal rejoiced that a minister had protested to the governor “against the disgraceful anti-tobacco bill....” Rev. John Collins had, inter alia, argued that the bill was “‘an encroachment on the rights and privileges of parents and religious teachers. ... I am sure that I know better how to deal with my boy for cigarette smoking, at all events, than the police. ... The infamy that will be attached to a boy, because of these police proceedings necessary in his arrest and punishment, will work him serious injury.... The proposed law is not fair to the boys. It will result in more smoking, for the boys will resent it. As soon as they get to be sixteen years old they will smoke anyway. I know human nature well enough to know that.” “A Common-Sense Protest,” USTJ, vol. 27, Apr. 13, 1889 (2:3). Susan Wagner, Cigarette Country: Tobacco in American History and Politics 44 (1971), erroneously stated that New York was the first state to enact such a ban.

549 1890 N.Y. Laws ch. 417, at 776, § 1 (Penal Code § 290). Connecticut and New York were, according to the WCTU, the only states punishing the child as well, a regime favored by the organization’s narcotics department. Minutes of the National Woman’s Christian Temperance Union, at the Seventeenth Annual Meeting, Atlanta, Georgia, November 14th to 18th, 1890 at 180, 186. However, the Society for the Prevention of Cruelty to Children in New York opposed enforcement because the law was “too severe.” “New York Gossip,” BDA, Sept. 3, 1890 (4:6).
enforce the law—was both perceived as necessary and taken seriously was revealed by The New York Times in 1894:

Brooklyn schoolboys who now appear upon the streets and in other places smoking nauseating and filthy cigarettes may think themselves lucky if they are not arrested by a policeman, carried to a station house, and locked up in a cell.

The alarming extent to which the pernicious and injurious habit of cigarette smoking has spread among schoolboys has caused the school authorities to appeal to the police to enforce the law.

There is no doubt that this will be done, and it is likely that some parents within the next few days may find their missing sons in police stations.

The necessity in New York for such a flanking measure against use was dictated by the fact—as familiar in the twenty-first as in the nineteenth century—that, in spite of compliance with the law against sales to minors: “The boys are too shrewd to be caught buying, and they get someone who is over age to buy the cigarettes for them. One young man can in this way furnish an entire school....”

But disputes over the efficacy of no-sales-to-minors laws were about to be superseded: in early 1895, Mrs. E. B. Ingalls, the National WCTU’s Superintendent of Narcotics, which chose “The cigarette must go” as its motto for the year, declared that “our people in some states are taking up the question of forbidding the manufacture and sale of cigarettes. Every W.C.T.U. ought to work for such a law.”

550 “After the Boys Who Use Tobacco,” NYT, Aug. 13, 1890 (2).
551 The first arrests under law, which went into effect Sept. 1, 1890, took place the next day. “Little Cigarette Smokers Warned,” NYT, Sept. 3, 1890 (8). A counter-account in an out-of-town paper stressing that the police displayed little enforcement zeal lest arrests of boys over 16 prompt complaints nevertheless reported that one policeman in the Bowery “knocked a cigarette out of lad’s mouth with a club,” and that “street urchins of tender age, who previously had gone about smoking cigarettes with evident pride, were careful to avoid ‘the cop’ when they smoked at all.” “New York Gossip,” BDA, Sept. 3, 1890 (4:6).
552 “No Cigarettes for Boys,” NYT, Dec. 6, 1894 (8).
553 “No Cigarettes for Boys,” NYT, Dec. 6, 1894 (8).
554 Mrs. E. B. Ingalls, “Narcotics,” US 21(6):12 (Feb. 7, 1895). To be sure, she added the hope that in pushing for such legislation “our women will...by no means neglect the opium habit” and in particular would “make known the dangers of using headache medicines, soothing syrups, etc.”
The Universal Prohibition of the Sale of Cigarettes: 1896

An editor in the neighboring state of Wisconsin gets off the following and then retires to be rubbed down. “The legislature of Iowa has passed a law against smoking cigarettes. Such a law is clearly inoperative. Only idiots smoke cigarettes and idiots are not responsible before the law.”

Iowa, having tired of half-way measures in dealing with the cigarette evil, has finally placed an absolute embargo on the manufacture and sale of all cigarettes of whatever material composed.

Iowa was ridiculed as a “hick state” because of that law.

Despite being a latecomer in regulating sales to minors, by enacting its total ban on the sale and manufacture of cigarettes in 1896 Iowa became a national leader. Only Washington State in 1893 and North Dakota in 1895 had preceded it, but by 1896 neither of those statutes was still on the books, and ultimately Iowa had a longer continuous experience (1896-1921) with a general sales prohibition than any other state. Moreover, by the mid-1880s, Iowa legislators,

---

1Marble Rock Weekly, May 21, 1896 (4:3) (edit.).
3George Mills, Rogues and Heroes from Iowa’s Amazing Past 169 (1972).
41893 Wash. Laws ch. 51 at 82.
51895 N.D. Laws ch. 32 at 31.
6Whereas the former was judicially invalidated, the latter was mysteriously ‘disappeared’ from the state code. On Washington, see above ch. 4 and below ch. 11; on North Dakota, see vol. 2.
7As early as 1910 these statutes from the 1890s had already been lost to journalistic memory: “The first states to enact anti-cigarette laws were Wisconsin and Indiana—six years ago. Then came Missouri, Nebraska, Illinois, and Michigan. In 1909 Iowa and Minnesota figuratively set their heels on the cigarette. None of the Eastern States have attempted to do more than prohibit its sale to children under sixteen. Probably more cigarettes are consumed in New York City than were in the eight States that have prohibited their manufacture or sale.” “The Cigarette and Its Users,” Harper’s Weekly, 54:25 (Sept. 17, 1910). Eugene Porter, “The Cigarette in the United States,” Southwestern Social Science Quarterly, 28(1):64-75, at 72 (June 1947), repeated these erroneous claims verbatim. The leading scholarly economic history of the industry asserted that in the latter half of the 1920s: “Laws prohibiting cigarettes were still on the books of Kansas, Iowa Indiana, and Mississippi.” Richard Tennant, The American Cigarette Industry: A Study

795
who had been banning smoking in their own workplaces since the 1830s, adopted permanent rules to that effect.  

The WCTU—whose strength, according to the Iowa organization’s socialist state president Marion H. Dunham, lay in the fact that “the wife of the millionaire and of the working man, the woman from the palace and the worker from the slums unite in truest comradeship in our ranks”—was not especially optimistic about the prospects of securing the passage of a cigarette prohibition measure in the new Iowa legislature. In early 1896, Frank Mace, a travel agent and member from Des Moines, wrote to the group’s national weekly, Union Signal, that it was “the most determinedly hostile to any temperance legislation, or indeed to any reform movement, including that for universal suffrage and the raising of the age of consent of any in the history of the state.” Complaining that the legislators were amenable to no influence but the dictates of the Republican party bosses, Mace observed that two years earlier Republicans had passed the mulct law, which (in his slightly exaggerated representation) “practically repealed prohibition and legalized saloons anywhere in the state,” and passed a resolution to submit a prohibitory amendment to the current session; unfortunately, from the WCTU’s perspective, the 1895 election campaign had been conducted on the basis of retaining the mulct law, defeating the amendment, and passing a law to authorize the manufacture of liquor in Iowa, which Governor Drake had pledged to sign. Moreover, the officials in charge of committee assignments, Lieutenant Governor-elect Matt Parrott, a “liquor sympathizer,” and House Speaker Howard W. Byers, a “tool of the machine,” would appoint members who would report out the bills that the Republican leaders wanted. Minuscule as their representation was, the Democrats, who favored a general license law, would cooperate with the Republicans. All in all, sighed Mace—who failed even to mention an anti-cigarette bill—“there is little chance for anything but backward movements” from

---

*See below ch. 18.

9Marion H. Dunham, “President’s Address,” *Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marshalltown, Iowa, October 9, 10 and 11, 1895*, at 39-51 at 41 (1895).

A formerly high-profile member of the non-partisan Iowa WCTU, Cordelia Throop Cole, a social activist, who together with her husband, William R. Cole, edited the *Dial of Progress*, the organ of the Iowa Prohibitory Amendment League, did give pride of place to the anti-cigarette bill. In “A Woman’s Plea to the Twenty Sixth General Assembly” Cole, reproaching the legislature for forcing women to “get dreadfully tired going through slush and sleet with petitions, pleaded with it “to give us the ballot to stop the sale of cigaretts...”!

If contemporaries in 1896 had sought to gain insight into the parties’ potential stances on anti-cigarette legislation during the upcoming session from their positions on liquor as articulated in their platforms in the summer of 1895, they would have learned nothing from the Iowa Republican state platform, which omitted any reference to temperance issues. Chastened by the brush with loss of the party’s long-term control of state government over the liquor issue, which had prompted the purging leaders to use “guarded phrases” to indicate the party’s jettisoning of its commitment to prohibition in the 1893 platform, leadership apparently preferred to avoid formulaic discussion of the issue altogether. Nevertheless, the public might well have logically concluded that, having just fought and won a major inner-party battle over liquor prohibition, the party professionals would scarcely be willing to jeopardize Republicans’ resuscitated dominance by permitting the party to plunge into yet another legislative campaign to ban adult consumption of a controversial commodity. In contrast, the Democratic state platform included one plank devoted entirely to liquor, objecting to the mulct law as “unfair as between communities, an immense

---

14[Iowa] Secretary of State, *IOR: Eleventh Year* 136-38 (1896). Indeed, the platform did not mention any Iowa issues at all.
16See above ch. 9.
hardship upon property owners, and compromis[ing] the honor of the state in declaring the sale of liquors a crime, and condoning the offense for a money consideration.” The party once again demanded a “local option high license law, and in behalf of commercial interests of the state...a law permitting the manufacture of liquors..., thus affording a market for the products of the farm and the labor of our people....”17 The Prohibition party attacked liquor regulation by means of license, mulct, or taxation as “complicity with the liquor crime and corrupting to public conscience,” and denounced the Republican party for having enacted the mulct law as a betrayal of the popular ratification of the prohibitionist constitutional amendment in 1882,18 but the Prohibition party lacked any legislative representation.

Dr. Joseph Emmert, the Iowa State Board of Health, and the State of Medical Understanding of the Impact of Cigarette Smoking

I sometimes remind these cigarette phobiacs that General Grant died of cancer produced by cigar smoking, [but] that no one ever heard of a cigarette causing “smoker’s cancer”....19

“JUST ONE MORE CIGARETTE”

The Pitiful Cry of Miss Minnie McCorkel While Dying

LaPorte, Ind, Feb. 12—Miss Minnie McCorkel, living near New Buffalo, Berrien County, is dying. Cigarette smoking is supposed to be the cause. Her brother, who was addicted to the cigarette habit, died a raving maniac. Miss McCorkel, it is said, smoked on average five boxes daily and now cries piteously in her delirium for “just one more cigarette.” She was considered handsome, but the ravages of the disease resulting from the habit to which she had been a slave, has reduced her body to a skeleton and dethroned her reason.20

As early as 1895 the Iowa State Board of Health began publicly demonstrating a deep interest in the dangers associated with cigarette smoking. That year Dr. Joseph M. Emmert, a 49-year-old “[r]egular” (i.e. non-

---

17[Iowa] Secretary of State, IOR: Eleventh Year 140 (1896).
18[Iowa] Secretary of State, IOR: Eleventh Year 144-45 (1896). The People’s Party state platform did not deal with liquor. Id. at 141-42.
homeopathic) physician from the small town of Atlantic who had been a Board member since 1892 and was especially interested in sanitation and public health, published a four-page article on “Cigarette Smoking” in its biennial report. An amalgam of pseudo-historical and scientific misinformation sprinkled with incisive political insights and some essentially accurate medical warnings, the piece faithfully reflected the stage of enlightenment of the non-religious branch of the anti-cigarette movement. Emmert asserted that cigarette smoking, “[l]ike many other crimes and filthy habits,... originated among the lower classes of Russia, Poland and France,” to which it was long confined, but was then “adopted by the better class of persons.” Once it was transplanted to and “flourished luxuriantly” in the United States, “students of social problems” recognized it as “one of the most dangerous, degrading and demoralizing evils,” which “demands the early attention of our legislators toward its arrest.” He bluntly declared that “the only way” to achieve this object was congressional prohibition of the manufacture and sale of cigarettes. Absent such national action, the second best solution was state prohibitory laws to protect “young men and boys....”

Word of the American Tobacco Company’s intervention in Washington State must have reached Iowa because Emmert, who suddenly turned sober when he discussed contemporaneous American politics, was constrained to characterize his own reform program as

easier said than done, for there is an immense amount of money and influence that will be used freely to cripple or arrest any effort in the line I suggested. Whenever a bill has been introduced into a State legislature or municipal council to interfere with the sale of cigarettes, the Cigarette Trust has had its lobbyists in swarms to buy, threaten and browbeat every officer who dared raise a voice against their nefarious business. Very few have any conception of the amount of money invested, and the number of persons engaged in the manufacture and carrying on of the business. The Cigarette Trust represents twenty-five million dollars. The firms...employ five thousand people in their factories. ... Some idea of the immense profit made can be had by the large amount of money expended in advertising, which is usually of the costliest kind. One method of advertising should be

---

21Eighth Biennial Report of the Board of Health of the State of Iowa for the Fiscal Period Ending June 30, 1895, at [no pagination (v)], 5-8 (1895). By his last year of membership in 1897, Emmert became Board president.


23See above ch. 4 and below chs. 11-12.
suppressed by every decent community—that of pictures of but partially clad, or nude, women, which are given away or hung in the show windows of tobacco stores.... These pictures appeal to and arouse the baser passions of boys, young men and girls, and many times no doubt are among the leading factors that cause their downfall.\textsuperscript{24}

Emmert’s segue from factual recitation of capitalist bribery to moralistic critique of pornographic advertising stimulation\textsuperscript{25} heralded his wildly exaggerated account of the composition of cigarettes. Inviting readers to “go with me into a close room or smoking car where a number of dudes are smoking cigarettes,” he assured them that “you will believe with me that a cigarette contains something that has the odor of rotten fish, cabbage and other garbage, that has lain in the sun for some time and then is mixed with the material of slaughter-houses and outhouses.” If this recitation by itself did not suffice to induce revulsion in his readers, Dr. Emmert, in a rare revelation of a modicum of epistemological humility (“If my information is correct”),\textsuperscript{26} served up the piece de resistance:

[M]any cigarettes are made from old cigar stumps and quids of tobacco culled from the gutters and sidewalks and cuspidors of large cities. This business is carried on in the slums and saloons and most degraded neighborhoods where people who make it a business live, and who are of the lowest strata of society: dirty, filthy, besotted and diseased. Every large city has an army of scavengers who make their living in this way. After a cigar is partly smoked and allowed to lay [sic] for some time it undergoes some kind of change, chemical or otherwise, which will produce nausea in the oldest smoker, showing that this change has a powerful effect on the nervous system, and must be detrimental to health. If this was all, it would not be so dangerous, but at least seventy-five per cent of the manufactured cigarettes on the market are impregnated with opium, arsenic, cocaine or some other enslaving drug.\textsuperscript{27}

Having laid a foundation for public health policy in the realm of what even


careful nineteenth-century empiricists could have determined to be fantasy. Emmert finally identified a relatively scientific basis for the struggle against cigarette smoking in the “method of smoking and its results” by focusing on inhalation:

If the cigarette was smoked like a cigar the damage would be but little greater than the smoking of a cigar;...but cigarette smokers are not satisfied to use the weed that way. They draw long whiffs into the mouth, and then by a reverse action of the muscles of the mouth and fauces fill their lungs with the result of combustion and carry the smoke into contact with the great absorbing surfaces of the lungs, where the noxious element passes at once into the circulation, traverses the entire system and exerts its morbid effects. The anatomical structure and physiological function of the mucous membrane of the lungs are such that the poison enters directly into the arterial circulation, exerting almost immediately its action upon any and all the organs.... Beside the poison absorbed we have a foreign material deposited upon the membrane that is not absorbed, but remains there to interfere with the normal functions of the lungs, to absorb oxygen and exhale carbonic acid gas [i.e. carbon dioxide]. The interference with this function soon locks up within the system an amount of this gas which interferes with and finally arrests the functioning of the different organs, beside starving the tissues because there is not a normal supply of oxygen.

28 The claim that manufactured cigarettes were drugged was common in the 1890s. See above chs. 2-3. For example, René Bache (1861-1933)—a direct descendant of Benjamin Franklin and “recognized by the world as the most talented exponent of popular science writing, as well as its originator”—whose articles were syndicated throughout the world, asserted in a lengthy syndicated newspaper article that an “expert tobacco buyer” had said that “nearly all cigarettes made in this country are drugged”; in particular, there was “no doubt” that opium and cannabis were “utilized to the largest extent. Each manufacturer may be said to create a special drug habit among those who smoke his brand, so that they are not satisfied with any other.” René Bache, “Brain Softeners,” MO, Aug. 14, 1892 (14:5-7 at 5). This article also ran, without Bache’s name, as “Three Billion a Year,” MJ, Aug. 27, 1892 (9:5-7). On Bache, see “Historical News and Comments,” Mississippi Valley Historical Review 22(2):335-48 at 336 (Sept. 1935).

29 J. M. Emmert, “Cigarette Smoking,” in Eighth Biennial Report of the Board of Health of the State of Iowa for the Fiscal Period Ending June 30, 1895, at 335-36 (1895). In fact, the then predominant forms of tobacco use (chewing tobacco, snuff, cigars, and pipes) delivered nicotine in a more alkaline state, which was absorbed through the nasal or oral mucosa; once new tobacco blends and curing processes made cigarette smoke mildly acidic, allowing much less nicotine to be absorbed through the mouth and nose, it had to be and could be inhaled through the lungs. Such pulmonary absorption was more efficient “because of the larger surface area of the lungs and because the nicotine can immediately (7-10 s) be transported to the brain via the carotid artery.” Gary Giovino, “Epidemiology of Tobacco Use in the United States,” Oncogene 21:7236-40 at 7327
Emmert then applied this understanding of the general impact of cigarette smoke to specific organs. Vaguely groping at what today is termed chronic obstructive lung disease, he focused on the “hyperaemic condition of the mucous membranes of the mouth, fauces trachea, bronchial tubes down into the smaller bronchioles and air cells—in fact the entire respiratory system. This constant irritated condition soon extends into the sub-mucous tissues and becomes chronic, and in a few months, or years at farthest, the victim has a chronic catarrhal condition throughout the entire respiratory tracts with all its distress and evil results.” Emmert’s account might seem to have become less scientific as he approached cigarette smoking’s contribution to heart disease, culminating in the charge that the weakness and irregularity of a “tobacco heart” caused cigarette smokers to be “in constant danger of sudden death.” However, even this claim was eventually corroborated when a century later the U.S. Surgeon General reported that: “Cigarette smoking might increase the risk of sudden cardiac death by increasing platelet adhesiveness, releasing catecholamines, causing acute thrombosis, and promoting ventricular ectopy (arrythmias). ... Evidence also indicates that nicotine affects the conductance of myocardial cell channels, providing a plausible mechanism for the putative association of cigarette smoking (and smokeless tobacco use) with arrythmias and sudden death... Cigarette smoking has been associated with sudden cardiac death of all types.”

(2002). Emmert was also describing the build-up of carboxyhemoglobin—which forms when carbon monoxide (which cigarette smokers plentifully inhale and whose affinity for hemoglobin is more than 200 times greater than oxygen’s) instead of oxygen bonds to hemoglobin—thus “reducing the oxygen-carrying capacity of the blood and subsequent tissue oxygenation....” U.S. Department of Health and Human Services, The Health Consequences of Smoking: Cardiovascular Disease: A Report of the Surgeon General 223, 222 (1983).


But whatever their overwhelming defects, these explanations were the very model of modern medical etiology compared to Emmert’s (and the overall anti-cigarette movement’s) pseudo-understanding of cigarette smoking’s “moral and physical effects upon the nervous system,” for which “clinical results” corroborated a “peculiar affinity....” Even boys who had been “models of honesty, trustfulness [sic] and integrity,” once they become “‘cigarette fiends,’” “soon” suffered mental impairment and fell behind in school and then “soon” dropped out of school “to become a street loafer or, what is worse, a criminal, pauper or idiot, and thereby a menace to society and a menace to the State.” Reflecting and reinforcing popular contemporaneous newspaper reports, Emmert descended to his lowest level of public misinformation by claiming that: “The effect of the poison upon the nervous system may develop any of the neuroses; one case developing a tendency to suicide, another to idiocy, another to insanity, another to epilepsy and so on throughout the entire line of nervous diseases.”

Interjecting a second and final dash of self-awareness of the possible limitations of late-nineteenth-century medicine, Emmert concluded with a clarion call to translate science into public policy and action: “If the above is a true statement of cigarette smoking (and clinical demonstrations and the appearance of the victim confirm it), is it not time for us to arouse the public mind to the fact that something must be done to arrest and overthrow this dire evil that is eating out the very heart’s core of our national existence?” Since the attorney general was an ex-officio member of the board, he was presumptively familiar with these arguments, which doubtless came to the attention of state legislators as well.

At the August 1, 1895 State Board of Health meeting, Dr. Emmert, a Democrat who became a state senator at the end of the 1890s, returned to the subject, presenting a paper on cigarettes, which the Board then published in its next biennial report in early 1898. (Three weeks earlier, Emmett had given the

---


35The Iowa Official Register for the Years 1909-1910, at 638 (23rd No., 1909); Dr. J. M. Emmert Dies at Atlantic,” *Register and Leader*, July 16, 1909 (3:2).
main address on cigarettes at a YMCA meeting on the topic at a Methodist Episcopal church in Atlantic, speaking “in very forcible language” of “the rapidity with which the cigarette was filling our insane and feeble-minded institutions.”

It appears that the talk, which barely ran a printed page, was largely a compressed version of the aforementioned article. Emmert introduced his paper by declaring that it was the board’s duty “in every possible way to help to educate the people in sanitation, including any practice that may...degrade or demoralize the individual.” Because he believed that “the laity are unconscious of the growing evil of cigarette smoking and that such matters “should at least be agitated by this Board,” he also proposed a resolution, which the members unanimously adopted: “Resolved, By the State Board of health, that in its judgment the habit of smoking cigarettes should be condemned because it is deleterious to health by producing nervous disease, lowering the moral tone, and checking the mental, moral and physical development, especially in the young.”

Significantly, the resolution focused on youth and ignored the cardiovascular and pulmonary diseases his earlier paper had discussed.

**Senate File No. 7 and Its Sponsor Julian Phelps**

Senator Phelps, of Atlantic, is the happiest man in Iowa today. His bill to prohibit the sale of cigarettes in this state only awaits the Governor’s signature to become a law. It offers no loop-hole for evasion...and it is safe to predict that now this nuisance will be suppressed.

Although later legal writers, presumably misled by a well-known U.S. Supreme Court decision upholding the 1897 Tennessee law, have (erroneously) tended to believe or create the impression that it was the first general state anti-

---

37. The report on the August 1, 1895 meeting stated that Emmert gave this talk, whereas the brief editorial introduction to the paper stated that the meeting had taken place in August 1896; however, the report on the Aug. 6, 1896 meeting noted that Emmert had discussed another subject. Ninth Biennial Report of the Board of Health of the State of Iowa for the Fiscal Period Ending June 30, 1897, at 3, 306 (1895).
40. Austin v. Tennessee, 179 US 343 (1900). See also below ch. 12.
cigarette prohibition, in fact Iowa’s 1896 statutory ban on the manufacture and sale of cigarettes was the first to survive beyond a few months. Remarkably, neither the legislative advocates nor the press mentioned that Iowa was in the process of enacting a nationally unique law. One reason may well have been that they were unaware that the 1895 North Dakota law—which made it unlawful to “sell or expose for sale any cigarettes of any kind or form” (but did not, like Iowa’s, ban their manufacture) and for this misdemeanor imposed a fine of between $10 and $50 and/or a maximum of 30 days’ imprisonment—had mysteriously ‘been disappeared’ from the same year’s revised state code.

At the 1896 session of the Iowa legislature two different anti-cigarette bills were introduced in the Senate and House by Republicans in chambers overwhelmingly dominated by them 43 to 7 and 79 to 21, respectively. The number of lawyers among the legislators in the 26th General Assembly exceeded that of any other session. While the press reported this presence as “fortunate” because their legal knowledge would facilitate work on the revision of the state code, on the specific issue of prohibiting the sale of cigarettes, the overrepresentation of lawyers may also have promoted doubts of its constitutionality in light of the plethora of court rulings on the so-called original package doctrine, a trivial, judge-made construct so divorced from the socioeconomic and political substance and reality of interstate commerce that only lawyers could take it seriously, let alone cherish it. Of 50 senators 22 were lawyers; of 100 representatives 27 were lawyers—second only to farmers, who numbered 29.

---

42On the Washington State law of 1893 and the North Dakota law of 1895, see above ch. 4 and below ch. 11, and vol. 2.
431895 N.D. Laws ch. 32, §§ 1-2, at 31.
44See vol. 2. That a federal judge had, almost immediately after it had gone into effect, declared the Washington law unconstitutional and that the legislature had replaced it in 1895 with a license law was nationally abundantly reported. See below ch. 11.
45[Iowa] Secretary of State, IOR: Eleventh Year 47-51 (1896).
47“Iowa’s Lawmakers,” LM, Jan. 31, 1896 (6:5). House members also included nine engaged in real estate, loans, and abstracts; seven merchants; six editors; three bankers; two physicians; two teachers; two druggists; two lumber dealers, and two farmer-bankers. This article inverted the data in asserting that nearly half the House and 20 percent of the Senate members were lawyers. Although the information was collected by the Secretary of State for inclusion in the Official Register, it was not published there. To be sure, a
On January 17, 1896, Senator Julian Phelps of Atlantic—a town of a little under 5,000 in southwestern Iowa—who represented Cass and Shelby counties, introduced Senate File No. 7, which was referred to the Committee on Public Health. The next day Phelps’s hometown newspaper in its account of the previous day’s proceedings observed that the “bill will be watched closely by the people of this state who have sons of their own or are interested in the boys of the state.”

Phelps (1838-1913) was born and had lived in Vermont—one of the very first states to enact liquor prohibition (1852) and one of the only states to retain it into the twentieth century—until after the Civil War, when he attended law school and emigrated to Iowa in 1867 to practice law. After he had served in the Iowa Senate (1893-97), President McKinley appointed him United States consul in Crefeld, Germany; after four years in that post he returned to Atlantic, but neither there nor during his final years in Hollywood, California, was he “actively engaged in anything.” During the 1894 legislative session Phelps had belonged to a group of Republican senators who consistently voted against all efforts to relax alcohol prohibition, and was one of only three senators who in addition to voting against the alcohol mulct bill in 1894 also voted for the anti-cigarette bill in 1896. (In 1894, he severely tested whatever progressive bona

much later, quasi-official compilation identified only 41 lawyers in 1896—23 in the Senate and 18 in the House—leaving the 26th session near but not at the top. Frank Stork and Cynthia Clingan, *The Iowa General Assembly: Our Legislative Heritage 1846-1980*, at 9, 11 (n.d.).


49*Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa* 39 (1896).


51In a self-confessed oversimplification, Ballard Campbell, “Did Democracy Work? Prohibition in Late Nineteenth-Century Iowa: A Test Case,” *Journal of Interdisciplinary History* 8(1):87-116, at 113 (Summer 1977), identified “Republicans[…] split between men who fought to retain prohibition as a universal code of behavior…and men who were willing to relax liquor regulation for the greater good of their party.”

52*Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa* 390-94, 399-403, 496-99, 566-67 (1894); *Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa* 115 (1896) (Feb. 1). The other two senators were William Eaton and William B. Perrin. Dr. Joseph Gorrell voted for the anti-cigarette bill after it had been amended by the House, but did not vote on the bill when the Senate first
fides to which he might legitimately have laid claim by being one of only nine senators to vote for a pseudo-freedom of contract amendment that would have gutted a House bill guaranteeing coal miners semi-monthly wage payment.\(^{55}\) Whatever fame he secured enduring beyond his four years in office was based on his authorship of Iowa’s anti-cigarette law.\(^{56}\) At the 1896 session he introduced, apart from the anti-cigarette bill, only a few measures, none of them especially important or ideologically pregnant. An explanation as to why Phelps assumed the leadership of the legislative campaign to suppress cigarette sales in Iowa never surfaced on the Senate floor or in newspapers.\(^{57}\) Perhaps he was influenced by his wife, who was “a tireless worker in the Sunday school and for the past ten years has been superintendent of the Congregationalist Sunday school at Atlantic.”\(^{58}\)

Phelps’s bill to prohibit the manufacture and sale of cigarettes read as follows:

\textbf{SECTION 1.} No one, by himself, clerk, servant, employee, or agent, shall, for himself, or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in the consideration of the purchase of any property, or of any services, or in evasion of the statute, or keep for sale any cigarettes, or cigarette paper, or cigarette wrappers, or any paper made or prepared for the purpose passed it. To be sure, not all senators served in both sessions. An additional 10 senators voted for both bills, while 4 voted against both and 1 voted for the mulct bill and against the cigarette bill. If the votes of representatives in 1894 who became senators in 1896 are included, the aforementioned four senate voting patterns encompassed 4, 14, 5, and 2 legislators, respectively.

\(^{55}\) The proposed amendment read: “Provided, That nothing herein shall prevent the employer and employees from contracting for payment at any specified time or times, or by any payment in goods or property, and such contract being enforced.” \textit{Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa} 676 (Mar. 29) (1894) (H.F. No. 37). The amendment was offered by Senator Finn, another militant Republican prohibitionist. See above ch. 9. On the class-based opposition to the bill, see E. Downey, \textit{History of Labor Legislation in Iowa} 69-71 (1910).

\(^{56}\) B. Gue, \textit{Biographies and Portraits of the Progressive Men of Iowa: Leaders in Business, Politics and the Professions} 1:471-72 (1899); \textit{Proceedings of the Nineteenth Annual Session of the Iowa State Bar Association} 38 (1913); “Julian Phelps Died Tuesday,” \textit{Atlantic News-Telegraph}, Feb. 28, 1913 (1:1).

\(^{57}\) The obituary in his hometown newspaper merely stated that he had been a life-long member of the Congregationalist church and “a consistent Christian always.” “Julian Phelps Died Tuesday,” \textit{Atlantic News-Telegram}, Feb. 28, 1913 (1:1).

\(^{58}\) Legislative Women,” \textit{Daily Telegraph} (Atlantic), Mar. 14, 1896 (2:3).
of making cigarettes, or for the purpose of being filled with tobacco for smoking; or own, or keep, or be in any way concerned, engaged or employed, in owning or keeping any such cigarettes or cigarette paper, or wrappers with intent to violate any provisions of this chapter; or authorize or permit the same to be done; and any clerk, servant, employee or agent, engaged or aiding in any violation of this chapter, shall be charged and convicted as principal.

Sec. 2. Whoever is found guilty of violating any of the provisions of the preceding section for the first offense shall pay a fine of not less than $25, nor more than $50, and costs of prosecution, and stand committed to the County jail until such fine and costs are paid; for the second and each subsequent offense, he shall pay upon conviction thereof a fine not less than $100, nor more than $500, and costs of prosecution, or be imprisoned in the County jail not to exceed six months.

Sec. 3. The finding of cigarettes or cigarette paper, or cigarette wrappers in the possession of one, except in a private dwelling house, which does not include, or is not used in connection with a tavern, public eating house, restaurant, grocery or other place of public resort, or the finding of the sale, in unusual quantities, in a private dwelling house, or its dependencies of any person keeping a tavern, public eating house, grocery or other place of public resort, shall be presumptive evidence that such cigarettes and cigarette paper and cigarette wrappers are kept for illegal use.

Sec. 4. This act, being deemed of immediate importance, shall take effect from and after its publication in the Iowa State Register and the Des Moines Leader; newspapers published at Des Moines, Iowa.59

Even if Phelps failed to explain why he of all legislators became the preeminent anti-cigarette advocate, he did tell the press “a good story of how he came to be interested at first in the matter.” To be sure, the rather trivial, coincidental, anecdotal, and second-hand origins of his interest, reinforced by scientifically incorrect information (to the effect that cigarette paper was more toxic than tobacco) and possibly urged on him by cigar dealers eager to eliminate an unprofitable competing commodity, stood in stark contrast to the measure that he introduced:

“An old German came to me...and said they had been having a little meeting down at a certain cigar store, and he wanted to see if I wouldn’t introduce a bill this winter. I thought ‘now he is coming at the liquor question, and what shall I say?’ But no, it was the cigarette business. The man had a pipe in his mouth while he was talking, but he wanted the deadly cigarette put out of the way of the boys. He and other men who spent time in cigar stores had seen little boys buying them, and larger boys buying for younger ones till he became thoroughly disgusted. In our town it has come to be something terrible. Several boys have

59Senate File No. 7.—By Phelps. The printed bill is found in the 1896 Senate bill book in the University of Iowa Law Library.
been utterly ruined by the cigarette habit. It does no good to prohibit boys of a certain age from buying them, because older boys will buy them for the younger ones. I have talked with physicians about the subject and they agree that the paper contains the worse poison, and that some of the paper sold as perfectly pure is as bad as the cheapest cigarette. So I am in favor of making it sweeping as the only sure way of preventing harm. I have canvassed the matter somewhat, and I am sure there can be no valid objection to the bill. Of course, there will be a lobby here to work against it, sent by the manufacturers. They are the only ones who are very much interested in having the trade carried on. The only trouble I can see now, is that the original package law may come in to allow the sale of cigarettes in the same way the Wilson law was passed. If that difficulty arises, I have arranged to have it treated the same way as the liquor law was."

This tenuous scientific knowledge base, which, interestingly, is bereft of any religious or even moralizing connotations, casts doubt on Phelps’s ability to be an effective galvanizing agent. Nevertheless, politically-economic he astutely recognized not only that the Tobacco Trust was the only oppositional force, but that it would seek to bribe some of his colleagues to frustrate his legislative proposal. To be sure, this insight does not appear to have prompted him to question the trustworthiness of his initial informant, whose cigar-store associates’ animus was directed against the Trust for forcing them into selling a commodity that was less profitable than, and might diminish demand for, cigars. Indeed, shortly after the legislature had passed the bill, the press reported claims that its enforcement would “not be so difficult as that of the prohibitory [sic] liquor laws, because the cigar and tobacco dealers who are the principal retailers of cigarettes will be rather glad of an excuse for getting rid of a branch of their business that has proven both annoying and unprofitable. It is a fact that the signatures of many of these dealers were upon the petitions presented in the house and senate asking for such a law.” Perversely, from the perspective of public policy formation, the tobacco dealers’ opposition to cigarettes was intertwined with the

---

60Ayres & Hollowell, Daily Telegraph (Atlantic), Jan. 24, 1896 (2:1) (untitled) (reprinted from undated issue of Iowa Capital). The article was also reprinted as “Senator Phelps’ Cigarette Bill,” Griswold American, Feb. 5, 1896 (2:3). Griswold is a town in Cass county, which Phelps represented.

61Our Des Moines Letter,” Sioux Valley News (Correctionville, IA), Mar. 19, 1896 (2:3). Tobacco dealers in other states frequently made such claims. See above Part I. The previous year a physician reported that the dealers from whom a chemist had obtained samples for analysis “had expressed their hope to him that he might find all kinds of narcotics in them. They explained that handling them was a nuisance to them; that all the profit accrued to the cigarette trust.” J. Mulhall, “The Cigarette Habit,” New York Medical Journal 62:686-88 at 686 (1895), Bates No. 2083034657.
defense of non-cigarette tobacco products, which may also have infected (pipe- and cigar-smoking) physicians’ allegations that cigarette paper could be more poisonous than cigarette tobacco.

On January 23, before the Senate had taken any action on S.F. No. 7, the *Daily Iowa Capital*, Des Moines’ Republican evening newspaper, published by Lafayette Young, a former state senator and progressive,\(^62\) editorially praised the bill as “radical, but...one that ought to be passed” because “the cigarette is annually taking thousands of young men to an early grave...”\(^63\) Like Phelps, Young’s *Capital*, eschewing religio-moral arguments and propagating a view of cigarettes’ lethality to youth with which science has still not caught up more than a century later, focused on the political economy of public health:

No man or set of men have the right to manufacture and sell a thing so poisonous and destructive as the cigarette. It is strange that the public will submit to it when they insist that diseased hogs shall not be thrown upon the public highways on account of the danger of the spread of disease. The cigarette is killing more people than all the diseased hogs of the earth.\(^64\)

Two days later, Phelps’s Republican hometown newspaper, the Atlantic *Daily Telegraph*, which favored prohibition of liquor,\(^65\) editorially touted the bill as attracting considerable statewide attention and prompting “general hope” of its passage in a form that would effectively prevent “the spread of the habit” and “suppress this vice” that detrimentally affected every community in Iowa.\(^66\)

**The Senate Debate**

Probably the law will remain a dead letter until the people enforce it. Being nobody’s particular business to do it, the law depends upon interested persons to put it in force. It remains to be seen to what extent the public will take hold of it. Here is a fine opportunity for the patriot who does not mind a little trouble for the benefit of humanity.\(^67^\)

---


\(^{63}\)DIC, Jan. 23, 1896 (4:1) (untitled edit.).

\(^{64}\)DIC, Jan. 23, 1896 (4:1) (untitled edit.).


\(^{67}\)“Town Talk,” DIC, June 30, 1896 (4:4).
On January 31, two weeks after the bill’s introduction, the Republican physician-chairman of the Public Health Committee, Dr. Joseph Gorrell,\textsuperscript{68} unanimously\textsuperscript{69} reported it out with the recommendation that it do pass with two amendments deleting: (1) the final clause of section 1 treating violating employees/agents as liable principals; and (2) section 4 making the law go into effect immediately on publication in the newspaper.\textsuperscript{70} As minimal as these deletions were, it seems improbable that Gorrell, who appears to have been much more oriented toward scientific progress than motivated by Christianity,\textsuperscript{71} would have countenanced similar modifications in an alcohol prohibition bill. (Indeed, for whatever reason, Gorrell failed to vote on the anti-cigarette bill in 1896.)\textsuperscript{72} His explanation of his vote against the alcohol mulct tax bill in 1894 was fueled by a controlled fury that found no echo in 1897 when the legislature added a mulct tax to the anti-cigarette law:

I believe the saloon is the legitimate home of vice and crime. I believe it to be the most potent lever the world has ever seen for evil. ... I am a believer in the law of evolution; it touches every domain, and it should never be forgotten that time is an important factor. Cataclysmic [sic] evolution has been so rare in the organic, ethical and social developments of humanity that neither the friends nor enemies of prohibition had a right to expect it to have redeemed the people of Iowa from the evils of the saloon in twelve years. Satisfactory results will yet be obtained if the law is not assassinated by this legislature. If the State of Iowa lose, or even relax its grip upon the greatest evil of the world, I believe incalculable woe will be the legitimate fruitage of such relaxation. If the saloon must continue to defy “the law of the survival of the fittest,” let it remain an outlaw.\textsuperscript{73}

\textsuperscript{68}Gorrell was returned as a physician at the 1900 population census; HeritageQuest. Gorrell (1835-1916), after his election as a Republican to the 25th and 26th General Assembly (1893-97), identified with Bryan, became a Democrat, and was elected as one to the 27th and 28th General Assembly. “Some Things About Dr. J. R. Gorrell Long Time Honored Newton Citizen,” \textit{Newton Daily Journal}, May 26, 1916 (1:3-4); \textit{Past and Present of Jasper County, Iowa} 2:777-80 (James Weaver ed. 1912); \textit{AI}, 3d Ser., 13(2):158 (Oct. 1921).

\textsuperscript{69}“After the Cigarette,” \textit{DML}, Feb. 1, 1896 (3:3).

\textsuperscript{70}\textit{Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa} 96 (1896) (Jan. 31).

\textsuperscript{71}B. Gue, \textit{Biographies of the Progressive Men of Iowa} 1:540-41 (1899).

\textsuperscript{72}\textit{Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa} 115 (1896) (Feb. 1). According to “Iowa’s Legislature,” \textit{Daily Telegraph} (Atlantic), Feb. 4, 1896 (2:2), he was absent rather than not voting.

\textsuperscript{73}\textit{Journal of the Senate of the Twenty-Fifth General Assembly of the State of Iowa} 499
The Senate adopted the committee report and Phelps’s motion passed to suspend the rules and consider S.F. No. 7 for passage on its third reading. The ensuing hour-and-a-half debate “created something of a sensation,” even though it was clear to the press that the bill would pass the Senate despite Democratic opposition. Phelps himself moved to reconsider the suspension so that he could offer an amendment to his own bill to strike an “objectionable” section. The provision in question was one of the bill’s most far-reaching—the evidentiary presumption (similar to one in the prohibitory liquor law) created in section 3 that unusual quantities of cigarettes were being kept for the illegal purpose of sale rather than for permissible personal consumption. Striking this provision perhaps eliminated both contentious objections over the meaning of “unusual quantities” and complaints that the bill came too close to prohibiting use by adults. These points were in fact almost immediately raised by Senator Lyman Ellis, but first Democratic Senator Cyrus Ranck of Iowa City moved to amend the penalty provision to reduce the maximum fine from $100 to $50, prompting Phelps to offer an amendment to the amendment to reduce the minimum to maximum range of fines to $10 to $50. Phelps’s amendment prevailed by a vote of 22 to 20, indicating possibly that almost half of the Senate took a sterner view of violations and enforcement than the bill’s author.

Ellis, from the Mississippi River town of Clinton, was the bill’s chief opponent. Indeed, according to the account of the proceedings in the Des Moines Leader, the bill had come close to passage on January 31 “before anybody was ready to start an opposition. Then Senator Ellis came to the rescue of the cigarette, and did such valiant service for the friendless coffin nail, whose cause he made that of personal liberty in general,” that the debate had to be continued the next day. Like Phelps, Ellis had been born in Vermont (in 1833), emigrated to Iowa in 1861 to practice law, and was a Republican party leader in the 1890s. During his first session as a senator (1894) he gained statewide publicity “for his memorable speech against woman’s suffrage” and was generally known for his “inflexible...views as to state policies....” In particular, he opposed alcohol...
prohibition, instead favoring local option and legalization of liquor manufacture.\textsuperscript{80} Less well known but just as memorable was one of his anti-liquor prohibition floor speeches in 1894 in the course of which he lauded, by literary allusion, secondhand tobacco exposure as a “beautiful illustration of compromise,” which he posited as the source of “[a]ll that is good and great in legislation, in establishing and perpetuating governments....”\textsuperscript{81}

Predictably, he “bitterly opposed” a ban on cigarette sales.\textsuperscript{82} In his first floor speech on the bill, Ellis incorrectly charged that S.F. No. 7 proposed criminalizing bringing into Iowa any materials for making cigarettes, which he regarded as an “unwarranted interference with the liberties of people”;\textsuperscript{83} moreover, since such regulation of the individual’s “habits” could never be enforced, he moved to recommit the bill, a motion that his ally in the struggle against prohibitory legislation, Democrat Thomas G. Harper, a lawyer from the Mississippi River city of Burlington, prevailed on him to withdraw until all other proposed amendments had been introduced. Interestingly, the report in the Republican Iowa State Register urged caution in analogizing to the alcohol prohibition controversy and conveyed the skepticism of those who were presumably Ellis’s principals over the tactical advisability of his libertarian rhetoric: “While some of the abstract principles underlie the bill which underlie the liquor question, its strength can not be interpreted to be an expression of the standing of resubmission or the bill for manufacturing. Some of the friends of manufacturing were rather surprised that Senator Ellis would endeavor to force upon the senate the question of personal liberties upon a question of no more importance than that before the senate.”\textsuperscript{84}

\textsuperscript{80}Wolfe’s History of Clinton County Iowa 2:867-69 (quotes at 868) (P. Wolfe ed., 1911). He had been elected and re-elected district attorney of the east central judicial district for many years in successions in the 1860s and 1870s. “Lyman A. Ellis of Clinton, Is Dead,” Clinton Advertiser, June 8, 1906 (1:1-2). Ellis left the Senate in 1897 because his law practice in Clinton had been harmed by his absence. Benjamin Shambaugh, Biographies and Portraits of the Progressive Men of Iowa 2:231 (1899).

\textsuperscript{81}“The Thirteenth Plank,” DIC, Mar. 15, 1894 (6:1). From Walter Scott’s Heart of Midlothian, Ellis rapturously cited the scene in which the “rector from the lowlands organized his church in the highlands: but the chieftain demanded that they be permitted to smoke during the service and the rector was obliged to yield, and so the fumes of tobacco mingled with the incense of the beautiful ritual and were wafted heavenward in the same breath.”

\textsuperscript{82}“In the Legislature,” Griswold American, Feb. 5, 1896 (2:4).

\textsuperscript{83}“After the Cigarette,” DML, Feb. 1, 1896 (3:4).

\textsuperscript{84}“The Iowa Legislature,” ISR, Feb. 1, 1896 (4:5-7 at 5). Resubmission referred to passage of a resolution to resubmit to the voters a constitutional amendment prohibiting
Republican Senator John Rowen corrected Ellis by pointing out that the bill did not interfere with the right to use cigarettes bought outside of Iowa, but when he added that “the possession of a bushel of cigarettes would be evidence of intent to violate the law,” Ellis rejoined: “‘Not at all. I can smoke a bushel of cigarettes myself.’” When Republican Senator John S. Lothrop, a lawyer from the Missouri River town of Sioux City, insisted that the new law “would probably be useless” because the existing law banning sales to minors under 16 was “obeyed nowhere,” Rowen responded that by such reasoning every criminal law would be struck from the statute book. Ellis exerted little persuasive force in drawing on familial experiences to paint a “sorrowful picture of the bereaved cigarette use[r]” under the proposed law, though his remarks did “create[] considerable amusement”: “‘All my relatives in Clinton and my wife’s relatives have been in the habit of vaporizing in this way the past ten years and if I vote to pass this bill I vote to make my own relatives criminals for they will smoke them whether this law is passed or not. They are the healthiest lot of people you ever saw and have yet to send for a doctor for the first time in many years. I am speaking in behalf of their personal liberties and the personal liberties of the people of Clinton county.’”

A Republican elected in a county that had given Democrats a 3,000-vote majority in the preceding election, Ellis, as the Republican *Waterloo Courier* snippingly noted, was motivated “by what might be termed a sense of self-preservation. He is elected from a cigarette smoking district and...is not so much in love with the pernicious little cigarette as he is with his seat in the senate. He felt that the occasion demanded the raising of his hand and voice away up above the crowd that he might be seen and heard by the hundreds of his constituents, who are victims of the awful habit.”

In the wake of Ellis’s clownery, Phelps finally cut to the chase by replying that taking “the coffin nails out of the stores entirely would assure the enforcement of the law,” which had been circumvented only because “the younger boys can get older ones to buy [cigarettes] for them.” This clear exposition of the instrumental structure of the total ban on cigarette sales nevertheless failed to offer a fully adequate justification for depriving adults of cigarettes for the sake of children, although the scientific, politico-moral, and

---

814 The Universal Prohibition of the Sale of Cigarettes: 1896

constitutional discourse of the day would have made it possible for Phelps to construct one. It is unclear why he did not consider it necessary to develop such an argument to refute Ellis’s view, but manifestly a large majority of his senatorial colleagues were as little bothered by its absence as Phelps.

The high point of the debate was Phelps’s very extended speech, which, fortunately, both the Atlantic Daily Telegraph and the Daily Iowa Capital printed in full. Phelps justified the need for an explanation of an otherwise self-explanatory bill by reference to “the fact that a bill was introduced in the senate two years ago, which purported to tax the retail sellers of cigarettes, but was really intended to prohibit the sale of them and was so mutilated in the house of its friends, that it was entirely satisfactory to the manufacturers themselves.”

(Another newspaper had Phelps saying that “his bill enacted by the Twenty-fifth general assembly prohibiting the sale of cigarettes to boys under 16 was ineffectual because the cigarettes are still for sale in the stores and can be easily obtained by minors. This proposed bill will stop all that....”) In the midst of his cascading passionate denunciations Phelps developed a rather startling empirical thesis:

There is [sic] said to be many million dollars invested in the making of cigarettes in the United States. The profits to the owners of this business are enormous. The loss resulting therefrom can not be reckoned in dollars and cents. A partial estimate of it may be arrived at when we consider the loss to our homes and to our country, of the bright young boys, which this nefarious business destroys.

The habit of cigarette smoking has worked its way into some of the best families in every town and city in our land—homes are darkened and hopes are blighted. Every cemetery has fattened on the victims of this habit. Our institutions for the feeble minded in our state, but has one or more boys between the age of eight and sixteen years, nearly imbecile; not made so by nature, for often they were our brightest boys; but because we have allowed this atrocious business to go on.

And what of our schools? All the lower grades are filled to overflowing with boys and girls, as cheery and bright as health and happiness can make them; and all preparing themselves for usefulness in the life to which they are looking forward. Here our boys occupy their share of the seats, and carry off their full share of the honors. When we reach the middle grades, we find that quite a majority of the seats are occupied by our girls, while some of the others are vacant. When we reach the High School the preponderance of girls is much greater; and anyone who has attended the graduating exercises of our high

---

91. “Wrangle Over Cigarettes,” CRDR, Feb. 1, 1896 (1:1). The bill was not Phelps’s. See above ch. 9.
schools for the last ten or fifteen years, cannot fail to notice the constantly decreasing proportion of the boys among our graduates. This has alarmed very few of us because we have been saying to ourselves, “It is because our boys are taken out of school to work.” But it is worse than useless to try to account for their failure in this way, for a walk through any of our towns during school hours would disclose the fact that many of them are lounging on the streets with cigarettes in their mouths, or perhaps in groups, teaching a younger boy the same practice. It is a crime against them, and the state, to longer disguise from ourselves the fact that in this beautiful state of Iowa, there are thousands of boys between the ages of eight and sixteen years, that are already slaves to the habit; destroying alike, both soul and body. Is it any wonder that now and then a grave opens, in each of our towns, to receive a victim? Does not candor and good judgment demand that we be honest with ourselves and acknowledge the enormity of this growing evil, and arouse ourselves to take some steps to arrest it? Otherwise we might as well make female seminaries of all our high schools.92

Scrutiny of Phelps’s claim that anyone attending high school graduations since the 1880s could attest to the shrinking proportion of boys may fall under Chico Marx’s epistemological guideline: “who you gonna believe, me or your own eyes?”93 However, as plausible as Phelps’s argument seems, it runs into the empirical problem that girls have accounted for a majority of high school graduates in the United States ever since records were kept. Nationally, girls’ share of high school graduates in the United States fluctuated between 56 percent and 58 percent from 1881 to 1891 and between 58 percent and 60 percent from 1891 to 1901.94 Regardless of what Phelps may have eyewitnessed, even the data for his own hometown, Atlantic, Iowa, failed to sustain his claim. In the academic year 1890-91, girls accounted for 62 percent of those attending high school, but only 54 percent of graduates, while boys’ shares were 38 percent and 46 percent, respectively; in 1891-92, the girls’ and boys’ shares were 70 percent and 62.5 percent and 30 percent and 37.5 percent, respectively.95 Three years later, in 1894-95, girls made up 61 percent of the town’s high school students but only 55 percent of its graduates, while boys’ shares amounted to 39 percent and

---

93Duck Soup (1933).
94Calculated according to Historical Statistics of the United States: Earliest Times to the Present: Millennial Edition tab. Bc258-264, 2:421-22 (Susan Carter et al. eds. 2006). Female high school graduates exceeded males in every year from 1870 to 1991; only in the very last year (1992) for which this source presents data did males surpass females by 3,000.
95Calculated according to Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1891, Appendix at 61 (1891).
By 1896-97, girls were 56 percent of students and 47 percent of graduates, while boys accounted for 44 percent of students and 53 percent of graduates. Overall, then, during the 1890s, none of these shares trended in any direction, but the one prominent constant was that boys as a proportion of Atlantic’s high school graduates always exceeded their share of high school students, whereas girls’ share of graduates always fell below their share of students. Thus, contrary to Phelps’s observations, boys did not constitute a constantly shrinking proportion of high school graduates and their graduation rates exceeded those of girls.

Most of the rest of Phelps’s speech consisted of extracts from numerous replies that he had received from “leading” Iowa educators and physicians in his hometown in response to letters that he had written to them soliciting their views on the impact of cigarette smoking. The common denominator of the educators’ opinions was concisely expressed by William Beardshear, the president of Iowa State College of Agriculture and Mechanical Arts (and the former superintendent of the West Des Moines schools): “In a period of over fifteen years[] school work I have never known the cigarette smoker to take first rank in his classes. The rule is that such a pupil ranks lowest.” The East Des Moines school superintendent shared with the legislators his judgment that cigarette smoking was “‘the greatest curse that has come upon the boys of this generation.’” The school superintendent of Ottumwa went both Phelps and Beardshear one better by asserting that: “‘It is next to impossible for a tobacco user to prepare himself for the high school. Indeed, I do not think one has ever entered.’” To be sure, he added that it was “‘not so serious’” if they began using tobacco later—precisely the disinformation that cigarette manufacturers were still disseminating a century later about cigarette smoking as an “adult custom.”

---

96 Calculated according to Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1895, Appendix at 74 (1895). The table contains an error: in 1895-96, the total of the 56 boys and 86 girls attending high school was listed as 144; the percentage mentioned in the text is calculated on the assumption that the correct total was 142.

97 Biennial Report of the Superintendent of Public Instruction of the State of Iowa: November 1, 1897, Appendix at 74 (1897).


99 In 1998, the chairman and CEO of Brown & Williamson Tobacco Corp. testified at a Senate hearing on the tobacco settlement with the state attorneys general that if he had to explain to a 12-year-old about smoking and health he “would explain that smoking is clearly an adult custom....” Tobacco (CEOs): Hearing Before the Committee on Commerce, Science, and Transportation, United States Senate 72 (105th Cong., 2d Sess.,
the proselytizing of the Anti-Cigarette League. Founded in 1899, its object was to “combat...the use of tobacco by boys, especially in the form of cigarettes....” The pledge that it sought from boys was to “abstain from smoking Cigarettes or using tobacco in any form, at least until I reach the age of twenty-one years.”

In addition to focusing on the greater injuriousness of cigarette smoking that resulted from almost universal inhalation, Atlantic’s physicians informed the Iowa Senate through Phelps that first among the toxic symptoms peculiar to the cigarette and presented by its victim was chorea or St. Vitus dance. The same Dr. W. Findley shared his experience of having seen a “‘strong healthy boy of sixteen transformed within a few months to a helpless imbecile.’” Less fancifully he alluded to addiction (“‘an irresistible [sic] desire’”) as “‘the chief consideration on the part of the producer and...the hope of his success.’” Offering a unique market analysis, Dr. J. Cannon claimed that “‘the greatest majority of them [cigarettes] are consumed by boys between the ages of eight and fifteen.’”

Finding his own voice again, Phelps added a labor-market dimension to the subtext for which he had laid the foundation in his remarks on education: to cigarettes—and not to a willingness to work for lower wages—was attributable the fact that “the majority of positions of responsibility which are equally well adapted to male and female workers, are today filled by our young women.” With “fidelity, honesty and honor, the three traits of character that make the services of the employe the most valuable to the employer,” but with “very few female forgers, embezzlers and defaulters,” banishing “this terrible curse” was the only way to still the “hue and cry that our young women are usurping places that should be filled by our young men...” Having disposed of his gender agenda, Phelps contrasted “the just indignation of the whole nation” over France’s imprisonment of John L. Waller, a black Republican former U.S. consul to Madagascar with ties to Iowa, with the nation’s “look[ing] calmly on and

Feb. 24, 1998) (Nicholas Brookes). Unsurprisingly, at this late date Brookes also refused to concede that nicotine was addictive on the grounds that the term “is so inclusive as to be almost meaningless” and should “more appropriately” be confined to “hard drugs and cocaine.” Id. at 65.

100The Boy 2(1): n.p. [2] (Jan. 15, 1901). No age limitation was placed on the pledge of the Girls’ Auxiliary, which did however extract the “promise never to admit a liking for the odor of tobacco...” Id. Lucy Page Gaston was the League’s general superintendent. See also above ch. 6.


The Universal Prohibition of the Sale of Cigarettes: 1896

see[ing] over three and one-half billion of cigarettes manufactured yearly in the country, whose only mission can be the enslavement of our boys. What a spectacle: a nation sitting quietly by and witnessing the destruction of debauchery of its own citizenship.”  

Phelps then concluded his oration with an assault on the American Tobacco Company (from which, to be sure, he was unable to disengage his bias against higher education for women):

It is said that all the manufactories of cigarettes in this country are located in a few large cities of the east and south; and are controlled by corporations which are united in one great trust. This is the way men who wish to be considered respectable, take to escape the responsibility of carrying on this accursed business, and when they have made their millions, some of them will ease their consciences by using a few thousand dollars of their ill-gotten gains for the endowment of colleges, for the education of our young men. While if there are enough of our boys with sound bodies and minds to fill the colleges, it will be because they have been blessed with parents and friends who, having been warned before hand, have been able to keep their children’s feet out of the traps and snares set by these millionaire manufacturers.

The protagonists’ failure to engage each other’s central argument was striking. The prohibitionists’ key claim was that boys’ uptake of cigarette smoking was rooted in “a desire to appear what they call ‘manly’” and facilitated by the “imitative faculty...and parental example is a potent factor in its promotion.” In other words, boys smoked because they saw men smoke. Given the brute fact of the demonstration effect of adult smoking as the most powerful (and cheapest) advertising the Tobacco Trust could ever want, so long as

---

108 *Scientific American* opined at the end of the 1880s that with “the use of cigarettes rapidly on the decline...[t]he manufacturers of these noxious things have been compelled to advertise largely to prevent the entire destruction of their business, and about the only people who can now be seen smoking the paper abominations are a few moon-faced juveniles who imagine that cigarette smoking gives them a literary aspect, or who ambitiously aim at appearing manly and graceful while poisoning the atmosphere about them....” “The Cigarette Doomed,” *Scientific American* 61(9):132 (Aug. 31, 1889). How the magazine divined the decline of cigarettes in the face of a more than fourfold increase
people above the legal age furnished boys with cigarettes, adequate enforcement of the no-sales-to-minors law was implausible. Consequently, prohibitionists advocated a total ban on the sale of cigarettes to adults primarily in order to prevent youth access and to preclude the creation and recreation of adult cigarette-smoking role-models. This structure differed fundamentally from that undergirding alcohol prohibition, which was primarily designed to protect men from themselves (and wives and children from the physical, emotional, and economic consequences of husbands’ and fathers’ drinking and drunkenness). Nevertheless, the anti-cigarette forces in the Iowa legislature did not even reveal this self-sacrificial character of their strategy, let alone try to justify it by meeting their opponents’ argument that they were depriving adult men of the freedom to smoke cigarettes. In turn, the opponents, ironically, failed to focus on the alleged need for and fact of this compulsory substitutionalist altruism, instead merely mouthing pious simplifications about the adequacy of no-sales-to-minors laws.

Following Phelps’s speech Republican William H. Berry, yet another lawyer, recounted a personal experience of a cigarette smoker “who was almost imbecile as a result of the indulgence of the habit,” and then offered an amendment to permit the manufacture of cigarettes for personal use but not for sale, which the chamber adopted unanimously.109 Democratic Senator Harper, continuing his party’s assault on blue laws, opposed the bill as an encroachment on personal rights and an attempt by the legislature to substitute enactments for the parents’ duty to raise boys so that “cigarettes will offer them no temptation.”110 Tweaking the collective noses of blue laws advocates, he proclaimed: “I am a Democrat. I do not have bad habits and do not need the benefit of such a law. For my Republican brethren it seems necessary.”110 Harper’s amendment to strike the enhanced penalties for second and third violations was defeated as was the amendment offered by Republican lawyer Nathan Marsh Pusey from the Missouri River city of Council Bluffs111 to make the minimum fine for a second offense $10. After Lothrop had urged that the bill be recommitted,112 Republican Senator Frederick Ellison—a lawyer from Anamosa who had been born in New York City

in production (from 533 million in 1880 to 2.4 billion in 1889) is unclear. Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298 (1934).

111Pusey became the grandfather of the like-named future Harvard University president.
in 1853—sought to subvert Phelps’s general ban by offering an amendment to make it illegal to sell cigarettes or tobacco to any minor and omitting all provisions relating to sales to persons older than 21. After Ellis had made one more speech, denying that cigarettes were worse than any other form of tobacco, asserting that liquor left “thousands,” including “lawyers, the very high priests themselves,” in an even worse condition than Berry’s cigarette smoker, and attacking enactment of yet another ineffective prohibitory law as “radically wrong” because it attempted to regulate individuals’ conduct and to make criminals of persons who were not “in the eyes of God and man,” the Senate adjourned until the next day, February 1.

When debate resumed on Saturday, the bill’s supporters denounced Ellison’s amendment as an obvious attempt to kill it. Senator Rowen, a “Minister of the Gospel,” came close to the nub of the tacit dispute over the justification for instrumentally curtailing adults’ freedom to smoke cigarettes in order to prevent minors from doing so by declaring that “society has the right to protect itself, even by the restriction, in some measure, of personal liberty.” However, instead of exploring this crucial thesis adequately, Rowen veered off into a comparison of Rome’s degeneration and “the degeneracy that he predicted must surely overtake the youth of America unless the cigarette is suppressed.”

Such contentions prompted Ellison to argue unequivocally for the “right” of those over 21—by which age “boys’ habits were pretty well fixed”—to smoke cigarettes or cigars. Claiming that his amended version would be better enforced and would protect boys, Ellison argued that the years from 16 to 21 were “the age when boys are in most danger. It is from 16 to 21 that the boy wants to imitate the man. I do not think we should say what form of evil he may indulge in; that he may smoke a cigar but not a cigarette; but we can say the whole evil of tobacco may be taken away from him. The reason the present law is violated is because the age is fixed at 16 and not 21. Are you going to correct

---

113 Ellison had served during the previous session in the House; later he became a state court judge. The Bench and Bar of Iowa 361-62 (1901); History of Jones County, Iowa: Past and Present 2:168, 171-72 (R. Corbit ed. 1910).
the morals of the men of Iowa? If you are, then right here in this senate is a good place to begin.\footnote{120 \textit{The Iowa Legislature}, ISR, Feb. 2, 1896 (13:3-6 at 4).} In fact, however, the state “could not follow its adult citizenship into all the private places of life, or correct tastes and natural propensities.”\footnote{121 \textit{Only a Few Opposed It}, DML, Feb. 2, 1896 (3:1-2 at 2).}

Taking the floor again, Rowen sought to undermine one of the arguments of the bill’s opponents by asserting that liquor prohibitionists would not admit that that ban either had been violated or was unenforceable; their vote for the mulct law in 1894 was not a concession of the law’s failure in their sections of the state, but a protest against its “unlimited violation in others.” His passionate flow was cut off when the chair upheld Phelps’s point of order that Rowen was not addressing the question\footnote{122 \textit{Only a Few Opposed It}, DML, Feb. 2, 1896 (3:1-2 at 2) (quote); \textit{“The Iowa Legislature,” ISR, Feb. 1, 1896 (4:5-7 at 6).}}—in spite of the fact that he was zealously advocating on behalf of Phelps’s bill.

Republican collectivists proceeded to speak up in favor of the ban. Senator William Eaton, a lawyer and a Methodist,\footnote{123 \textit{“The Iowa Legislature,” ISR, Feb. 1, 1896 (4:5-7 at 6).}} insisted that the law did not exist that was not based on a prohibition: “‘Every step of progress that has been made has been by yielding up something. The superstructure of society has come from the giving up of something by the individual to society.’” His colleague, editor Albert Hotchkiss, added: “‘The right of the individual ends where the welfare of the state begins.’”\footnote{124 \textit{“The Legislation,” DIC, Feb. 1, 1896 (3:1).}} And rather than absolutizing the family’s autonomy, he regarded it as the state’s duty to intervene to protect youth where the family failed to do so.\footnote{125 \textit{“Iowa’s Legislature,” Daily Telegraph} (Atlantic), Feb. 4, 1896 (2:2).}

Senator Ellis had been preparing lengthy remarks against the bill in order to extend his speech beyond the adjournment hour and thus to continue debate the following week, but he was stymied by a parliamentary move.\footnote{126 \textit{“Iowa’s Legislature,” Daily Telegraph} (Atlantic), Feb. 4, 1896 (2:2).} After quickly defeating Ellison’s amendment on a voice vote, the chamber passed the bill 31 to 11 with six of the seven Democrats voting Nay (and the seventh not voting). Six of the seven Democrats represented Mississippi River counties, while of the five Republicans voting Nay, three lived in larger cities on the Missouri or Mississippi rivers bordering on Nebraska or Illinois, while a fourth lived in a town near the Minnesota state line.\footnote{127 \textit{Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa} 115 (1896) (Feb. 1). The river city senators were Ellis (Clinton), Lothrop (Sioux City),}
bans were much less effective in border towns where smokers could lawfully buy cigarettes right across the state line.128 Moreover, in connection with liquor laws even Republicans admitted that prohibition could not be enforced within the borders of the river counties.129

The Senate’s passage of the bill—celebrated in one front-page headline as “Deadly Cigarette Goes”130—emboldened the Atlantic Daily Telegraph to predict that the House would follow suit “unless the trust can use its boodle to good effect.”131 The Iowa Capital, which vigorously supported S.F. No. 7, reported “general rejoicing throughout the state,” with mothers “generally praying” that the House might also pass the bill.132 In addition, the Capital devoted its lead editorial the evening after Senate passage to “The Boodle Is on Tap,” pointing out that the Tobacco Trust pushed no-sales-to-minors laws precisely because they went largely unenforced. By banning (in-state) sales to adults, Lafayette Young

---

128“Defy the Cigaret Law,” ICWR, July 22, 1896 (7:3) (discussing Sioux City).
129Dan Clark, “The History of Liquor Legislation in Iowa 1878-1908,” IJHP 6(4):503-608 at 586 (Oct. 1908) (specifically mentioning Dubuque, Clinton, Scott, Des Moines, Lee, and Pottawattamie counties). These counties recorded the largest majorities against the prohibitory amendment to the Iowa constitution in 1882. Official Register: Executive, Judicial and County Officers of the State of Iowa: January 1, 1889, at 207-208 (1889). A survey conducted by the state auditor in 1899 revealed that only one of the ten Mississippi River counties (Louisa) chose not to substitute the liquor mulct law for prohibition. In descending order, Dubuque (county seat: Dubuque), Scott (Davenport), Clinton (Clinton), and Des Moines (Burlington) counties recorded the greatest number of saloons in Iowa. Biennial Report of the Auditor of State to the Governor of Iowa: July 1, 1899, at 194-95 (1899). Similar results obtained in a survey conducted in 1906: the greatest number of saloons were recorded in Scott, Dubuque, Polk (Des Moines), Clinton, and Des Moines counties. The Iowa Official Register for the Years 1907-1908, at 574 (22nd Number, 1907).
131“Iowa’s Legislature,” Daily Telegraph (Atlantic), Feb. 4, 1896 (2:2). In spite of the widespread journalistic practice of reprinting articles from other papers, accurate information was not uniformly distributed. For example, right after Senate passage of the bill one newspaper reported that Iowa’s anti-cigarette law prohibiting manufacture or sale would be “like that of Minnesota.” The New Era (Humeston, IA), Feb. 12, 1896 (3:1) (untitled edit.). In fact, Minnesota had no such law and would not until 1909. See vol. 2.
The Phelps anti-cigarette bill has stirred the cigarette trust and given it more alarm than it has had for a long time. There is every prospect that the bill will pass both houses, as it ought to do. However, a member of the general assembly of the highest standing tells The Capital that an agent of the cigarette trust is in the city with all kinds of boodle and that he is approaching members who are attorneys proposing to “retain” them in a legal sense, which, of course, means bribery. There should be no compromise in this matter. It will be sought to amend the bill prohibiting the sale to persons under 21 years of age. When so amended the law would not be worth the paper it would be printed upon. It might as well be left as it is, for with that loophole every boy in Iowa who wanted a cigarette would manage to get it, but with a law totally prohibiting the manufacture and sale of these vicious articles there could be no evasion. The cigarette is annually killing more Iowa boys than all the diseased meats sold in the United States. Why are legislators willing to pass any sort of a measure to protect the people from diseased meat and they are unwilling to protect the rising generation against the poisonous and debilitating cigarette? ... There is something so fiendishly poisonous in the cigarette that the boy who becomes addicted to its use is debauched and debilitated with a natural tendency to all species and kinds of evil. The state of Iowa wants vigorous, manly, healthy mates for the bright-eyed and rosy-cheeked girls, and the general assembly of the state can do nothing better than to unanimously pass the Phelps bill and stamp out the cigarette as one would a venomous serpent that lies in the pathway to strike the innocent boy’s bare foot. No member of the general assembly can go home and explain in any rational way why he voted to continue to permit the sale of cigarettes in Iowa.134

Like Phelps himself, the Capital’s editorial combined a realistic assessment of the Tobacco Trust’s political machinations and uncritical circulation of scientifically

---

133 In 1963, when the cigarette oligopoly decided to withdraw advertisements from college newspapers, magazines, and football programs, George Allen, the president of the Tobacco Institute, said: “‘The industry’s position has always been that smoking is an adult custom.’” In announcing the decision not to broadcast cigarette advertisements on television or radio before 9 p.m. in Canada, John Devlin, the president of Rothmans of Pall Mall, added new dimensions to the concept of self-contradiction by asserting that the change was “meant to ‘keep youngsters from getting the idea that smoking is grown-up and the thing to do.’” “Most Cigarette Makers to Drop Ads from Campus Publications,” NYT, June 20, 1963 (1:4-5).

134 “The Boodle Is on Tap,” DIC, Feb. 1, 1896 (4:1) (edit.). The ellipsis represents several lines half of which cannot be read because the microfilmed copy was torn.
The Universal Prohibition of the Sale of Cigarettes: 1896

unverifiable claims of large-scale cigarette-caused youth mortality, which, ironically, even the bill’s opponents accepted as accurate.

In contrast, the Republican party’s leading newspaper, the Iowa State Register in Des Moines, adopting the Ellis-Ellison anti-prohibitionist position because that wing of the party had drawn the conclusion from election results since the late 1880s that strict statewide abolition was a strategic mistake, urged the House not to follow the Senate:

That anti-cigarette bill will stand about as much show of being enforced as a law enacted for the repeal of the man in the moon. That apparently innocent bill is liable to give the state more trouble than the cigarette itself. The most that can be said for it is that it shows an indignant contempt for one of the most disgusting habits of the times. Who is going to do the arresting and the fining? The legislature which enacts that law ought to provide also for a system of spying metropolitan police and at least one additional court in each county. The contempt that every man feels for the cigarette fiend is a much better corrective than the enactments of a legislature.

We believe that the house ought carefully to consider this foolish piece of legislation before it is finally passed and at least amend it so as to bring it within legal possibilities. We want no more prohibitory laws. One is about as enforcible as another. Laws must be practicable. The evil is serious, but do the men on the hill for one moment suppose that they can stop it by a legislative ipse dixit? The new law forbids a man rolling a piece of paper with tobacco inside of it and giving it to a friend—who is going to watch, Tom, Dick and Harry? Two years ago a law was enacted forbidding the sale of cigarettes to boys under 16. In no place in Iowa, as far as we have been able to ascertain, has there been an effort to enforce that law. Now they say that big boys buy and give to little boys. Nonsense. The little boys have been able to buy for themselves just as if there were no anti-cigarette law and after this blanket law has been spread over the state they will have no more respect for it for the simple reason that it is an utter impossibility to enforce such a law until you abolish tobacco and paper separately. We sincerely hope that the house will make the cigarette law at least a reasonable one. As it is it is so unreasonable that it is utterly useless on the statute books and it will simply multiply the evils of law violations instead of minimizing the evils of cigarette smoking. We have had experience enough with such legislation. The present legislature had better leave personal habits to personal judgment and parental responsibility and attend to the mass of business legislation which


136 See above ch. 9.
Unsurprisingly, the Republican *Clinton Herald*, published in an anti-prohibitionist Mississippi River town, opposed the bill, though purportedly more for reasons of impracticability. Divining that the proposed law probably intended to make the no-sales-to-minors law more effective, the newspaper speculated that it would have the reverse impact: men who supported enforcement of the existing law would oppose that of the more general law precisely because it “would hit them.” After arguing that it would be more effective to impose penalties on dealers than to “prevent traffic in everything that may be injurious to the user,” the *Herald* did an about-face, suggesting that a more “drastic” law punishing use as well might be more effective because some users would prefer to stop smoking cigarettes than to be break the law, while others would smoke much less if they had to do so in secret.\(^{138}\)

**House Action**

Mr. Porter received for presentation to the House a petition from residents of Centerville asking for the passage of the bill prohibiting the manufacture and sale of cigarettes. Among the signers was Jesse Jones, who, on the evening of the day he signed the petition killed his sweetheart, Lea Martia, and her mother, and then committed suicide. The testimony at the coroner’s inquest showed that Jones was an inveterate smoker of cigarettes.\(^{139}\)

Meanwhile, in the House, on January 29, two days before the Senate debate began, Republican Representative James D. Morrison of Reinbeck in rural Grundy County,\(^{140}\) a liquor anti-prohibitionist,\(^{141}\) introduced House File No. 69, is or ought to be before it.\(^{137}\)
The Universal Prohibition of the Sale of Cigarettes: 1896

which was referred to the Committee on Domestic Manufacturing, of which he was chairman.\textsuperscript{142} Morrison’s bill was more streamlined than Phelps’s:

\textbf{SECTION 1.} No person shall by himself, agent or employe, directly or indirectly, manufacture for sale, sell, barter[, ] give or keep with intent to sell, barter or give to any person cigarettes in any form whatever.

\textbf{SEC. 2.} Any person found guilty of violating any of the provisions of the preceding section shall for the first offense pay a fine of not less than ten nor more than one hundred dollars and the costs of prosecution and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense he shall pay a fine of not less than twenty-five nor more than five hundred dollars and the costs of prosecution, or be imprisoned in the county jail not less than thirty days nor more than three months.\textsuperscript{143}

On February 1, committee chairman Morrison reported the bill out with the recommendation that it pass with amendments: (1) adding cigarette paper and wrapper to the prohibited cigarettes; (2) reducing the maximum fine for a first offense to $50; (3) increasing the minimum fine for second and additional offenses to $100; (4) eliminating the minimum period of imprisonment; and (5) increasing the term of imprisonment to six months.\textsuperscript{144} Nevertheless, on February 6, after Morrison had successfully moved to substitute S.F. No. 7 for his own bill, Republican W. C. McArthur of the Mississippi River town of Burlington moved to refer S.F. No. 7 to the Committee on Public Health.\textsuperscript{145} Morrison opposed the motion on the grounds that the bill’s subject matter was largely embodied in H. F. No. 69, which his committee had thoroughly examined and recommended that it pass; consequently, the referral was in effect a recommittal. In addition to seeing no reason to rush the bill through the chamber, McArthur read a letter from a wholesale tobacco firm in Council Bluffs stating that the bill’s passage would seriously injure its business because it sold cigarettes in Nebraska, South Dakota, Kansas, and Colorado. Attorney Samuel Mayne, another Republican, from a small town near the Minnesota border, argued for referral to the Public Health Committee on the grounds that the bill’s supporters claimed that “the cigarette habit was detrimental to health.”\textsuperscript{146} Despite the close vote of 53 to 44 against

\textsuperscript{142}\textit{Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa} 93 (1896) (Jan. 29).

\textsuperscript{143}House File No. 69.—By Morrison of Grundy (SHSI DM).

\textsuperscript{144}\textit{Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa} 154-55 (1896) (Feb. 1).

\textsuperscript{145}\textit{Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa} 256 (1896) (Feb. 6).

\textsuperscript{146}“Manufacture by Mulct,” \textit{ISR}, Feb. 7, 1896 (8:2-3, at 7:3).
referral—48 Republicans voted against and 29 for, while 15 Democrats voted for and only 5 against\(^{147}\)—the Democratic *Des Moines Leader*, headlining its front-page report, “Cigarettes Are Doomed,” observed that, with the bill’s friends largely voting No, it was “deemed reasonably certain” that the House would pass the bill and that only the governor’s veto could prevent enactment.\(^{148}\)

In contrast, the *Register* editorialized that the bill was “getting hard blows from every side”\(^{149}\)—and for good reason:

The papers of the state are against the enactment almost as a unit. The bill strikes every thoughtful man as an extreme piece of legislation...which will interfere with the commerce of the state without in the least benefiting the morals of the people. After it has been enacted...the dealers of the state, who transact a legitimate business, supplying all wants, will be compelled to omit an article of ordinary commerce, and outside dealers will smuggle the goods into the state, reaping the profits which belong to Iowa houses. The objection would be at least worthy of consideration were it possible by such a law to prevent the use of the cigarette. No one can exceed The Register in contempt for the cigarette, nor exceed it in pity for the men, whether old or young, who are addicted to its use, but this feeling should not lead us to enact impracticable laws. Iowa cannot afford to isolate itself commercially. We are a part of the people and a part of commerce. As a matter of fact the use of tobacco, in any form, is deleterious, but we are not going to undertake to abolish its use by the enactment of laws.

We believe that the cheapness of the cigarette has much to do with its large consumption. For the price of one good cigar a man buys a dozen good cigarettes—if any cigarettes can be said to be good. If some way could be devised of taxing these goods—perhaps through the National internal revenue laws—we believe that the evil would be largely minified. But...we have no faith in prohibitory legislation as affecting such articles. There is not a member of the legislature who for one moment believes that after the bill is enacted...the consumption of cigarettes will cease in this state. There is not a member who reasons but will come to the conclusion that the law will be practically of no effect. It will be evaded in every community. It will not be but a few months until the people will have forgotten all about such a law. How many who read this knew, say yesterday, that there is now a law against the sale of cigarettes to boys under 16? No one has sought to enforce it. We must get at the cigarette evil by cultivating public contempt for it and by proper training of the boys against such evils. If the boys cannot be reached by these means, no law will reach them.\(^{150}\)

---

\(^{147}\) *Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa* 256 (1896) (Feb. 6). Party affiliation is taken from [Iowa] Secretary of State, *IOR* 48-51 (1896).


The Register’s framework-setting notion that Iowa had to facilitate the sale of cigarettes in order to remain a constituent link in the chain of U.S. commerce and part of the American people overlooked the role of state police powers. Its weak and implicit reference to the latter was forged by the preposterous claim that a ban on sales would be ineffective because no one would remember that the law existed. In fact, however, not only was the publicity surrounding the enactment of the 1896 statute overwhelmingly widespread and intense, but even moderate statewide enforcement activity would have constantly reminded residents of the larger cities—where the degree of compliance, even advocates conceded, was far lower than in small towns and rural areas—of its existence. The editorial’s future-looking support for denormalizing cigarettes (“cultivating public contempt”) and reducing consumption by taxation—oddly the editor appears to have been unaware that the federal government had been taxing cigarettes for years and that at that very time some in Congress were pushing for a vast increase in the tax—would have been excellent starting points for a control campaign, but nothing indicated that the Register was serious about the radical cultural and institutional steps that such a program would have entailed. Reduced to its capitalist core, the newspaper’s position was that Iowa businessmen were entitled to profit from the production and/or sale of any commodity available to their competitors in other states regardless of the health consequences. This race-to-the-bottom version of federalism implicitly but crucially hinged on what turned out to be a faulty prediction that the Iowa and U.S. Supreme Court would interpret the so-called original package doctrine in an expansive fashion to permit interstate commerce to trump the states’ exercise of their police powers to protect their citizens’ health. Much later, after those judicial rulings had swept away any such imagined constitutional obstacles to the valid enactment of cigarette sales bans, anti-prohibitionists would base their pleas for repeal on other claims such as consumer freedom and foregone state tax revenue.

That the Leader may have underestimated the degree and intensity of opposition emerged the following day when Republican Henry Nietert, a banker from a town near Cedar Rapids who had voted against referral the day before, moved to reconsider that vote. After a motion to table that motion lost 37 to 41, the House, reversing the previous day’s tally, voted 50 to 43 to refer S.F. No. 7 to the Public Health Committee after all. Not a single Democrat voted against referral, while the Republicans were divided with 43 Nays and 31 Yeas. This

---

151 See above ch. 9.
152 See below ch. 15.
153 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 260 (1896) (Feb. 7).
ominous sign prompted Florence Miller, the non-partisan Iowa WCTU’s superintendent of legislation, to report on the “tribulated time” the bill was having in the House.\textsuperscript{154} However, the vote failed to deter the Leader from continuing to report that the bill’s “friends are just as confident as ever of its passage.”\textsuperscript{155} This optimism may, in spite of the Republican speakers’ charges that the referral was obviously intended to delay the bill, have been a function of the parliamentary agreement that S.F. No. 7 would be reported back within 10 days and keep its place on the calendar. For good measure, Morrison and others declared that the only conclusion that the Public Health Committee could reach concerning the effect of cigarette smoking on those “addicted” to it was that it was “injurious and suspected of being the prolific cause of filling the asylums for the insane and the homes for the feeble minded.”\textsuperscript{156}

At this point in the course of the debate the Register weighed in editorially with a severe commerce-focused condemnation of the anti-cigarette bill:

If the cigarette bill is made a law it will drive from the state a large number of wholesale houses. It will drive from the state all those houses which do a business outside of the state. A wholesale house that cannot supply its customers with cigarettes will be avoided by retail dealers for the purchase of other goods. It is easier to send the whole order to some house which can fill it. A retailer in Nebraska will not buy his cigars from a Sioux City house or a Council Bluffs house if he cannot at the same time buy the cigarettes he needs in his business from the same house.

This is by some called the commercial view of a moral subject. But it is important. We believe that the bill in question is a pernicious one because it is an unwarranted interference with personal habits. It isn’t right. But even those who believe it is right and morally justifiable are bound to take into consideration the commercial argument. We cannot take from Iowa business men the privilege of doing business as business is done in other states. We cannot wantonly drive from the state all the wholesale tobacco houses which it now has. We all know that tobacco is injurious, in whatever form it is used, but we are bound to take into consideration that it is still an article of commerce and will continue to be such long after the Iowa legislature has forbidden it in this state.

If the Iowa legislature could stop the cigarette habit in the state, it might be different, but it cannot eradicate that. In some places the law might be a benefit, while it is enforced, but in most places the people would not be made aware of its existence on the statute

\textsuperscript{154}F.M., “Des Moines Correspondence,” \textit{Dial of Progress} 7(7):[5:4-5 at 4].


\textsuperscript{156}“The Iowa Legislature,” \textit{ISR}, Feb. 8, 1896 (5:3-7 at 6). For the claim that McArthur and his allies were motivated solely by the neutral, process-based goal of preserving the House custom of referring every Senate bill to the appropriate committee, see “General Assembly,” \textit{BH-E}, Feb. 8, 1896 (1:5), which nevertheless deemed the 50-43 vote an indication that the bill would a “hard time” gaining a majority.
books. The passage of the bill will simply mean the transference of a large business from Iowa soil. The surrounding states will supply Iowa with cigarettes, in the form of original packages, against which there is no National law, except as to liquors. Under these conditions we believe the bill ought to be defeated, unanimously so.157

The Register’s empirical argument was deeply flawed by unproven, unprovable, and disproven assumptions. The assertion that, if the prohibition of cigarette sales were enacted, most people would never find out that it existed and therefore compliance and enforcement would be impossible was bizarre—especially in light of the intense publicity that the legislative debates generated in the press throughout the state and the fact that during the quarter-century that the law would be on the statute books no one appears to have raised the issue of ignorance of the law, let alone that it was a cause of its violation. The claim that commerce in cigarettes would continue unabated thanks to the original package doctrine would also prove to be unfounded. Consequently, the Register’s opposition to the bill boiled down to the view that a race to the top with respect to health and morality would result in the loss of some revenue and profit to out-of-state businesses. The newspaper failed to lay out the arithmetic showing that these losses outweighed the advances in health (and morality).

The press reported in mid-February that the House Committee on Public Health had decided to report a substitute for the Senate bill that merely prohibited sale to minors.158 Of this committee’s 13 members, ten were Republicans and three Democrats.159 Four Republicans were physicians (Bowen, Davis, Lauder, and Prentis), three were lawyers (Brighton, McArthur, and Weaver), and the others a hardware merchant (Brady), banker (Haugen), and retired manufacturer (Bell); the Democrats were a merchant (Jay), banker (Jackson), and retired merchant (Sullivan).160 On February 18 five Republican and Democratic

---

158“The Iowa Legislature,” LM, Feb. 21, 1896 (2:6). This Republican weekly was reporting on events during the previous week. Perhaps such a report had prompted Florence Miller, the non-partisan Iowa WCTU’s legislative superintendent, to misinform the membership in the March newsletter that the cigarette bill had been amended so as “to be little else than the prohibition of the sale of cigarettes to minors.” F.M., “Notes,” W.C.T.U. Bulletin 1(4):[3].
159Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 74 (1896) (Jan. 22).
160Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa iv-vii (1896). For somewhat different occupational information, see http://www.legis.iowa.gov/Legislators/historicalInfo.aspx. Sullivan, according to the 1900 census of population, was a “capitalist.” After one more term in the Iowa House, Gilbert
representatives presented petitions from citizens requesting passage of S.F. No. 7. The same day the chairman of the Public Health Committee, Republican Daniel Bowen, a physician who represented Allamakee County, which borders both the Mississippi River and Minnesota, and had twice voted to refer S.F. No. 7 to his committee, reported out to the House a majority substitute prohibiting the sale of cigarettes to persons under 21, while a four-member minority, headed by Republican Percy L. Prentis, a 26-year-old physician and the youngest House member, who had also voted for referral twice, issued a report recommending passage of S.F. No. 7. Morrison’s motion that the substitute be made a special order for the next day passed by a vote of 56 to 22.

That morning the Register editorially intervened in the debate yet again. It recognized that the legislators, “confronted with an evil of great proportions,” desired “to do what is right morally and wise practically.” Hastily drawing conclusions from what would turn out to be incorrect predictions of how the courts would mold the original package doctrine as applied to cigarettes, the newspaper insisted that it was “generally admitted that the absolute prohibition of an evil like the cigarette is impossible of attainment. No Iowa legislature can prohibit what interstate commerce recognizes as an article of transportation, and sale, in the original packages. If the bill which is now pending shall become law it would simply inaugurate an era of the original package as applied to cigarettes.

Hugen was elected to Congress for 17 consecutive terms, becoming the longest serving House member.

161 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 420 (1896) (Feb. 18).
162 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 423, 426 (1896) (Feb. 18); “Liquor Vote Is Taken,” DML, Feb. 20, 1896 (1:7, at 4:5).
163 1900 population census (HeritageQuest); Willis Hall, The Iowa Legislature of 1896, at 115-16 (1895). Later Prentis moved to Chicago where he became the chief U.S. immigration inspector. 1910 population census (HeritageQuest); “After Chinese Opium Ring,” NYT, Sept. 8, 1913 (3).
165 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 426 (1896) (Feb. 18). One of the four minority members was Democrat Timothy Sullivan, the self-described “capitalist,” who otherwise voted against the Senate bill. The committee majority rejected the Senate bill on the grounds that it unconstitutionally interfered with interstate commerce because cigarettes were “sold in the original package.” “Iowa Legislature,” Monticello Express, Feb. 27, 1896 (6:6).
166 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 435 (1896) (Feb. 18).
The Wilson law, passed a few years ago, applied only to liquors in original packages; it is not likely that congress will enlarge the scope of that law on the application of the people of Iowa who are opposed to the cigarette.” Then stepping back and conceding that it had articulated only “one view of the question,” the Register added that, even in the absence of the original package doctrine, the paper would still not have supported the bill because it interfered with “personal habits which though they be offensive, must still largely be left to the individual or parents, or the guardians.” The newspaper favored the substitute reported out by Dr. Bowen—“one of the ablest and most conservative men in the present legislature”—as offering “a happy solution for this difficulty. The substitute...recognizes both the moral and the commercial obligations which are laid upon the members of the legislature.” The Register insisted that the substitute’s “severe” penalties were appropriate for the “altogether vicious” “cigarette habit,” as applied to which no law could be “too severe.” Consequently, if its penalties could not be made effective, the original bill’s could certainly not be. The paper pleaded the liquor law as a lesson to be learned from: successively higher penalties “only added to the number of violations, instead of diminishing them. When we have passed a sweeping prohibitory law in Iowa...we have not saved the boys.” As a consolation, the editorial suggested that in case of unenforceability, “we may still look for some other means to check the undeniable evils of the poisoned cigarette.”

On February 19, when the House took up the bill, Morrison offered a wholly new substitute, which radically deviated from the prohibitory approach underlying his own H.F. No. 65 as well as from the Senate bill by virtue of imposing a mulct tax higher than, but superficially along the same lines as, the $600 liquor mulct tax enacted in 1894. Specifically, the new section 1 assessed against anyone “engaged in selling or keeping with intent to sell at retail any cigarettes, cigarette wrappers or cigarette paper” and against any real property where they were sold an annual tax of $1,000 to be determined in the same way and devoted to the same purposes as the liquor mulct tax. Section 2 defined any sale of cigarettes valued at less than $25 as “retail.” Finally, section 3 subjected anyone giving away cigarettes, wrappers, or paper to a fine ranging between $10 and $50 for a first offense and $25 and $100 for additional offenses. Morrison’s measure was, in other words, unlike the local option liquor mulct, an


1681894 Iowa Acts ch. 62 at 63; above ch. 9.

169Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 448-49 (1896) (Feb. 19).
expansive statewide license tax. By “an overwhelming viva voce vote,” the House adopted the substitute, which was made a special order for the next day. The Chicago Tribune misinterpreted this action as meaning that the “prospects are believed to be good for the failure of the attempts at anti-cigaret legislation this session.” This assessment was based on the fact that while Morrison had put forward his measure as a corrective of the Senate bill flawed by its unconstitutional interference with interstate commerce, “[o]pponents of cigarette legislation contend that the Morrison bill is open to the same objection in that it imposes a tax which is practically prohibitive.”

On February 20, Morrison offered two amendments to his own substitute. First, he exempted from the definition of retail sales any sale valued at more than $25 if it was “accompanied by the immediate delivery and removal from the premises of the vendor, of all the goods covered by such transaction....” Second, he added a section 4, which imposed a fine of $10 to $50 for a first offense and $25 to $100 for every additional offense on anyone convicted of selling or giving away to a minor under 21 any cigarettes, wrappers, or paper. Republican Zenas Gurley, a real estate and insurance businessman, moved to amend Morrison’s...
The Universal Prohibition of the Sale of Cigarettes: 1896

substitute to include wholesalers as well as retailers. Republicans William Bell and Pardon Smith, editor and owner of the Scranton Journal, supported Gurley’s amendment, “taking the radical ground for the total extirpation of the business in the state.” Smith, whose passionate position appears to have been motivated by an acquaintance with a young man who had gotten delirium tremens from overindulgence in cigarettes and tried to kill his wife, “voiced the fixed convictions and the fullest endorsement of the whole state when he affirmed that they wanted the whole business stamped out of existence and swept into perdition. There was not a single moral reason, he claimed, upon which the manufacture or use of cigarettes could be defended.” After Morrison had opposed it on the grounds that it would interfere with the wholesale trade, Gurley’s amendment lost by a vote of 29 to 63, with only six Democrats joining 23 Republicans in favor, while 14 Democrats and 49 Republicans opposed it.

Morrison’s new initiative generated sharply divergent responses even within the Republican press. With growing impatience, the Iowa State Register expressed the hope that the legislature would waste no more time on what was “at best a piece of paternal legislation,” which merely afforded “sympathetic orators an opportunity to do a great deal of rhetorical weeping,” when what was needed was “solid business legislation....” After its predecessors had devoted 15 years to personal and sumptuary legislation, the current legislature had no need to re-debate “all the moral questions which have been agitating the human heart since the days of Moses.” The Register found Morrison’s substitute acceptable because it imposed severe penalties without violating “ordinary personal rights and ordinary rights of commerce” and was “one of the most drastic bills ever proposed in a legislative body regarding boys’ use of cigarettes.” Its enactment would put Iowa “morally far enough in advance of the rest of the states.”

The next day, in an editorial titled, “Crush the Cigarette,” the Marshalltown Evening Times-Republican embraced precisely the moral element that the Register had attacked. The Times-Republican outright rejected Morrison’s substitute because it merely restricted when prohibition “is what is wanted, and this is one of the prohibitions that can be practically enforced.” Morrison’s mulct tax, which would have merely confined sales to a smaller number of dealers, was

177Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 474 (1896) (Feb 20).
178http://iagenweb.org/boards/greene/biographies/index.cgi?read=80579
179“The Iowa Legislature,” ISR, Feb. 21, 1896 (5:3-7 at 6).
180Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 474 (1896) (Feb 20); Iowa Official Register 49-51 (11th Year, 1896).


“more in the interest of revenue than morality or health,” even though it was probably not so intended.182 The newspaper—which, ironically, in 1893 had single-handedly introduced the discussion of a liquor mulct regime in Iowa183—then offered additional empirical arguments:

Public sentiment is practically unanimous against the cigarette. A law is demanded that will effectually stamp it out and keep it out. Muleting the traffic will not kill it. Even in a city the size of Marshalltown some dealer would doubtless run the risk of selling enough cigarettes in a year to pay the tax of $1,000. Every boy who wanted a cigarette would find that dealer and patronize him. It would be but small inconvenience to consumers not to find cigarettes on sale in a third of the business houses in town. One place would do. Hence the real object of legislation...would be defeated.184

To those who argued that if a mulct tax was expedient for liquor, it could not be less so for cigarettes, the editorial replied that whereas liquor occasionally had some good in it and was, to boot, largely confined to adults, there was “not a single argument in favor of the cigarette, except the sordid one of revenue. Its mission is wholly evil. Its effects are the more pernicious because confined so largely to the young.” Since, in order to suppress this evil, “the temptation must be removed,” any intervention short of prohibition would be of “little practical benefit.” Consequently, the primary object of any cigarette enactment had to be “moral, not mercenary.”185

During the House proceedings two days later Prentis’s motion carried to refer the substitute back to the Public Health Committee subject to the requirement that it report the bill back in five days and that it retain its place on the House calendar.186 The press reported that the motion prevailed because the adoption of several amendments had left members in doubt as to the measure’s precise meaning. The Des Moines Leader interpreted this action as an infliction of yet “another body blow” on the anti-cigarette bill.187 Much more pessimistic was the reaction of the liquor-prohibitionist Dial of Progress, which found it “passing strange that any legislator” could hesitate to apply the same “heroic treatment of entire prohibition” to “this comparatively new and most deadly foe to citizenship,

183See above ch. 9.
186Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 486 (Feb. 21) (1896).
The Universal Prohibition of the Sale of Cigarettes: 1896

the cigarette....” Its editors could identify “no semblance of argument advanced for its continuance save that of the most barbaric greed that seeks to gather its gold from the acknowledged ruin of the bodies and souls of its victims. No known agency of destruction reaches its goal so rapidly, and consequently requires such an appalling number of victims as the Cigarette Trust.”

Another potential bad omen for enactment of cigarette sales prohibition emerged on February 27 when the legislature clearly rejected the resolution to submit to the electorate the proposed constitutional amendment to prohibit the sale of liquor in Iowa, to which the General Assembly had agreed in 1894 and which required the succeeding legislature’s agreement before submission to the people.

That the resolution faced virtually insurmountable barriers had become manifest three weeks earlier at a “decidedly sensational” meeting of the Prohibition Amendment League, which produced a blow-up between the group and several prohibitionist Republican legislators in attendance. Discussion of the presentation of a resolution “demanding the present general assembly carry out the pledges of the last general assembly to submit the pending prohibition amendment to the people of Iowa” prompted “considerable feeling,” expressed initially by four of the six legislators, who said both that they were “proud” of having voted in 1894 for the mulct law, which was “working well throughout the state” and that “they believed the prohibitionists should be satisfied with the situation as it is. They believed resubmission at the present time would be dangerous to this amendment.” Unsurprisingly, these assertions, especially that concerning the mulct law—under which 1,620 saloons were still operating (and

---

189See above ch. 9.
190To be sure, the WCTU of the State of Iowa, “remembering the flimsy technicality by which the [prohibitory amendment] voted in 1882 was declared null and void, [and] that during all these years the legislature has refused to re-submit, until now, when it has given the saloon a legal existence and intrenched it behind a revenue,” concluded at its 1895 annual meeting that “we can but feel that if submitted at this time, it is with the hope and purpose that it shall be defeated,” though the organization would work for the amendment if it was submitted. Sixth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa...October 9, 10 and 11, 1895, at 50 (1895). In contrast, the non-partisan WCTU of Iowa favored submission. Twenty-Second Annual Meeting of the Woman’s Christian Temperance Union of Iowa: Held at Toledo, October 22-25, 1895, at xiv, 2, 52 (1895).
191“In a Rough Wrangle,” CREG, Feb. 4, 1896 (2:2).
outside of which perhaps even more were selling liquor)—provoked two “prominent W.C.T.U. women,” Mrs. N. M. Smith and Mrs. M. J. Aldrich, into attacking the legislators for having passed the mulct bill and bitterly “brand[ing] the republicans as cowards and time-servers” who were now proposing to “go back on their pledges.” Several of the legislators took umbrage at having their motives impugned; in particular, James Funk, who had chaired the House Suppression of Intemperance Committee in 1894, walked out of the meeting, declaring “positively that he was through working for resubmission” and that he regarded the meeting as “the death knell of the last hope of resubmission.”

Although Funk and his two impugned colleagues wound up voting for the resolution, without discussion it suffered a “crushing defeat”: all 41 Yea's were cast by Republicans, while 18 Democrats joined 34 Republicans in voting Nay. What the WCTU called a broken pledge, the Republican Nay-sayers viewed differently: in 1894 the resolution was “passed under an agreement that some of the prohibition people vote for the mulct law. The agreement was kept on both sides and applied only to the legislature of two years ago.” In contrast, Republicans in 1896 “claimed and exercised the right to vote as they pleased, unhampered by the action of any former general assembly.” Whatever the source of the voting arithmetic, the anti-prohibition press delighted in predicting that the vote “settle[d] prohibition for five years at least in Iowa.”

On March 4, before the House heard committee reports, Republican lawyer Cassius Clay Dowell of Des Moines presented 12 petitions signed by more than 10,000 citizens of Des Moines and Polk County calling on the House to pass the

---


193 See above ch. 9.

194 “In a Rough Wrangle,” CREG, Feb. 4, 1896 (2:2).


197 *Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa* 531 (Feb. 27) (1896). H.J.R. No. 1 had been introduced by Doubleday on Jan. 28. Id. at 83-84.

198 “Resubmission Dead,” BH-E, Feb. 28, 1896 (1:5).

199 “Resubmission Bill,” Dubuque Daily Herald, Feb. 28, 1896 (1:5). The same day that the House killed the amendment, the Senate ordered passed on file and then never acted on the committee majority report without recommendation on and the minority report recommending passage of S.J.R. No. 4 (introduced by Perrin). *Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa* 54, 376-77 (Jan. 20, Feb. 27) (1896).
anti-cigarette bill, which had been pending for five weeks. Dowell was one of only five House members (the others being Finch, Himman, Spaulding, and St. John) who had voted against the liquor mulct bill (H.F. No. 537) on March 16 and 21, 1894, and then for S.F. No. 7 in 1896. He was just at the beginning of a long legislative career, which encompassed four years in the Iowa House, ten in the Iowa Senate, and a quarter-century in Congress, ending with his death in 1940. Biographical Dictionary of the United States Congress: 1774 to the Present, on http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000468.

Public Health Committee chairman Bowen then reported to the House that a majority of the committee recommended that the substitute for the substitute for S.F. No. 7 do pass with certain amendments. Largely identical with Morrison’s substitute bill, the new measure made it a misdemeanor to refuse to pay the tax and to sell or give away cigarettes, wrappers, or paper. Of special importance was the imposition of a fine ranging from $10 to $50 for a first offense and $25 to $100 for further offenses for selling or giving away cigarettes, wrappers, or paper to any minor under 21. The committee had, reportedly, been evenly split on the issue of reporting out the bill, but one Republican member, attorney Henry Brighton, who was said to favor it, “neglected or declined to attend” committee meetings, “thus giving the opponents of the bill a questionable majority of one.” This “radical” new committee measure thus substituted for an across-the-board prohibition a mulct tax combined with a ban on sales to minors, which, in the view of one Republican newspaper, would have “so emasculated the bill as to render it harmless to the dealers in cigarettes.” Prentis again submitted a minority report (this time on behalf of five members), recommending that the majority substitute do not pass and that S.F. No. 7 do pass with this proviso added: “that the provisions of this act shall not apply to sales by jobbers doing an interstate business with customers outside of the State of Iowa.”

Later that same day, when the House took up the substitute for the substitute for S.F. No. 7, Morrison moved that the committee report be adopted, but Prentis moved to adopt the minority report. By a vote of 58 to 24 the motion to adopt the minority report’s version of S.F. No. 7 prevailed. Remarkably, 10 Democrats

---

200“The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7 at 6). Dowell was one of only five House members (the others being Finch, Himman, Spaulding, and St. John) who had voted against the liquor mulct bill (H.F. No. 537) on March 16 and 21, 1894, and then for S.F. No. 7 in 1896. He was just at the beginning of a long legislative career, which encompassed four years in the Iowa House, ten in the Iowa Senate, and a quarter-century in Congress, ending with his death in 1940. Biographical Dictionary of the United States Congress: 1774 to the Present, on http://bioguide.congress.gov/scripts/biodisplay.pl?index=D000468.

201Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 621-22 (Mar. 4) (1896).

202“The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7 at 6). Nevertheless, Brighton did vote to adopt the minority report on the floor vote that day.


204Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 622 (Mar. 4) (1896).
joined 48 Republicans in favoring the prohibitory measure, while 21 Republicans (including Morrison) and only three Democrats opposed it.\textsuperscript{205}

Debate then began on the third reading, and the House was on the verge of voting “when it found itself in a parliamentary muddle.”\textsuperscript{206} Republican O. O. Tibbitts moved to amend the new amendment exempting interstate jobbers by adding sales by in-state manufacturers to out-of-state customers.\textsuperscript{207} Fellow Republican Pardon Smith, opposed it on the grounds that it would weaken the bill. In turn, Republican Marcellus Temple, a lawyer from Osceola who had been a conservative Democrat until 1882 when he joined the Republicans in support of a state constitutional amendment to prohibit alcohol,\textsuperscript{208} rehearsing claims that would be repeated in the Senate a week later, argued that the bill in its current form was unconstitutional under \textit{Leisy v. Hardin}\textsuperscript{209} and that it was doubtful that Congress would enact a law to overcome the original package doctrine as it had with respect to liquor. The internal Republican debate intensified when another lawyer, William S. Allen, declared that \textit{Leisy} was inapplicable to cigarettes, which “have no place as a legitimate article of traffic.”\textsuperscript{210} Those who differed over whether prohibition, licensing, or local option was the best way to deal with “the drink evil” all agreed that intoxicating liquors were legitimate objects of commerce and had their proper place in medicine and the mechanical arts. In contrast: “Who will say that the deadly cigarette...is a legitimate object of barter and trade in the sense that the other is, if at all?” If not, then why would the state under the police power not have the

\textsuperscript{205} Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 627-28 (Mar. 4) (1896).

\textsuperscript{206} “House Was Tied Tight,” DML, Mar. 5, 1896 (4:5).

\textsuperscript{207} Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 628 (Mar. 4) (1896).

\textsuperscript{208} Benjamin Gue, \textit{History of Iowa: From the Earliest Times to the Beginning of the Twentieth Century}, vol. 4: Iowa Biography 260 (1903).

\textsuperscript{209} On \textit{Leisy v Hardin}, 135 U.S. 100 (1890), see below ch. 12. The (incorrect) claim that under \textit{Leisy}, “the ‘deadly cigarette’...is a recognized article of commerce and may be brought into the state and sold to old and young in the ‘original package’” had surfaced in Iowa as soon as \textit{Leisy} was decided in 1890. C. E. Brown, “The Deadly Cigarette,” BH-E, May 11, 1890 (6:7-8). The argument culminated in the assertion that the decision “practically nullifies all state laws regulating the sale of articles of inter-state commerce which are considered deleterious to the health of the people or opposed to the social order of the states. It takes the police powers out of the hands of the state and is...the hardest blow ever given the doctrine of states rights....” Davenport Morning Tribune, May 13, 1890 (1:1) (untitled).

\textsuperscript{210} “House Was Tied Tight,” DML, Mar. 5, 1896 (4:5-7 at 6).
right to determine whether to permit “‘this class of sales so destructive of human life and happiness?’” Allen concluded with this admonition: “‘You might as well say that Iowa would have no right to prohibit by statute the shipping over into our state from Illinois of mad dogs to work their terrible havoc and ravages among our people.’”

Republican William Martin, who had played a major part in passing the diluted liquor mulct bill in 1894, added the syllogism that since the constitution did not prevent keeping diseased cattle out of state and everyone agreed that cigarettes were deleterious, they “should be kept out the same as diseased cattle.” Smith and Gurley pointed out that there were no cigarette factories in Iowa and that Tibbitts’s amendment would defeat one of the bill’s principal objectives—“the exclusion of the cigarette from Iowa.” They then astutely observed that “now was the opportune time to pass the law, as to do so at a time when there were no factories in the state would work no financial hardship upon anyone.”

---

211“The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7, 5:5-6 at 5).
212See above ch. 9.
213“House Was Tied Tight,” DML, Mar. 5, 1896 (4:5-7 at 6).
214“The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7, 5:5-6 at 5). In fact, according to the (U.S.) Commissioner of Internal Revenue there were cigarette factories in Iowa, which, to be sure, produced very small quantities constituting a minuscule proportion of total national output. For calendar years 1895, 1896, 1897, 1898, and 1899, the production amounted to 451,300, 194,700, 370,100, 108,800, and 52,300, respectively. The only two of these years for which the number of cigarette factories was identified separately from the number of cigar factories were 1898 and 1899, when there were two and one, respectively. Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1896, at 35 (H. Doc. No. 11, 54th Cong., 2d Sess. 1896); Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1897, at 44 (H. Doc. No. 11, 55th Cong., 2d Sess. 1897); Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1898, tab. 2 at 55 (H. Doc. No. 11, 55th Cong., 3d Sess. 1898); Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1899, at 46 (H. Doc. No. 11, 56th Cong., 1st Sess. 1899); Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1900, tab. 3 at 44 (H. Doc. No. 11, 56th Cong., 2d Sess. 1900). By the time of the 1901 report with data for 1900, Iowa was no longer listed among the states producing cigarettes. Annual Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1901, tab. 2 at 42 (H. Doc. No. 11, 57th Cong., 1st Sess. 1901). Thus, in spite of the prohibition of manufacturing cigarettes that went into effect in mid-1896, cigarettes were manufactured in Iowa in 1897, 1898, and 1899. Since machinery by this time was capable of producing more cigarettes in a day than Iowa was producing in a year, these factories were presumably not mechanized or were operating only part-time.
After Tibbitts’s motion was “overwhelmingly rejected,” extended parliamentary wrangling ensued when Dr. John Lauder, a Republican reported to be “almost perniciously active in opposition to the bill,” raised a point of order to the effect that after S.F. No. 7 had been rejected and a substitute recommended, it was out of order to adopt the committee report recommending S.F. No. 7. When the bill’s supporters insisted on a vote, House Speaker Byers observed that if the records bore out Lauder’s point, considering S.F. No. 7 would in fact be out of order. The speaker’s request for time to decide the point led to adjournment until the next day. The minority members of the Public Health Committee, according to the Des Moines Leader, which (correctly) predicted that Byers would rule in Lauder’s favor and that, in response, Prentis would offer a new bill embodying S.F. No. 7 and an amendment, acknowledged that they had committed a procedural error in having reported S.F. No. 7 for passage instead of a new substitute bill. The Register saw little reason to doubt that the House would pass the bill by a “huge majority”: with supporters amounting to more than a two-thirds majority, all they needed to do was to continue standing together.

By the time debate resumed on March 5, the advocates for S.F. No. 7 had “prepared to meet the emergency of an adverse ruling” by drafting a substitute that differed “only in the slightest degree....” Speaker Byers, “in the midst of a silence and suspense that could almost be heard, as it was certainly felt,” ruled the point well taken, determining that the substitution of S.F. No. 7, even with the amendments offered by the minority report, was out of order. The unraveling

---

215 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 628 (Mar. 4) (1896); “The Iowa Legislature,” ISR, Mar. 5, 1896 (4:5-7, 5:5-6 at 5) (quote).
216 “The Iowa Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-4 at 4).
217 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 628 (Mar. 4) (1896); “House Was Tied Tight,” DML, Mar. 5, 1896 (4:5).
219 “The Iowa Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-5 at 3).
of this parliamentary “tangle,” according to the Democratic Leader, was the achievement of the Speaker, to whom the bill’s supporters were indebted inasmuch as he had “abstained from declaring the bill out of order until they had time to form their plan of action.” Had Byers declared it out of order the previous day, the whole matter would have been thrown out of the House and an entirely new start would have become necessary. In the event, Senator Prentis was ready with his response to move to reconsider the vote adopting the minority report.\textsuperscript{222} The 70 to 17 vote adopting his motion was along party lines with Democrats accounting for 15 of the Nays (Public Health Committee chairman Bowen being one of only two Republican Nays) and only four of the Yeas. The minority report having been declared out of order, the parliamentary guerrilla warfare continued with Morrison’s successful motion to adopt the majority report. The bill’s advocates then hurriedly consulted to determine their course of action in case Byers ruled against them, and Prentis countered with a substitute for the bill, which contained the aforementioned proviso.\textsuperscript{223} Morrison then renewed the point of order that Lauder had raised the previous day: “Immediately consternation arose in the camp of the friends of the substitute bill, and while they gathered in little knots about the chamber to excitedly canvass the matter, Speaker Byers proceeded to calmly compare the two bills, and after a short delay ruled”\textsuperscript{224} that the point was not well taken that Prentis’s substitute was out of order because it was identical with S.F. No. 7.\textsuperscript{225}

After Prentis’s bill had been substituted for the committee substitute by a vote of 55 to 23, “[t]he fight between the two factions,” according to the Daily Iowa Capital, “was now nothing more nor less than a contest to get before the house a bill corresponding as nearly as possible in detail with that adopted by the senate. Its enemies tried to defeat the bill by adopting the bill which was favored by the majority report, as it was different from that adopted by the senate.”\textsuperscript{226} These parliamentary moves were dictated by the fact that it had been “an open secret for two weeks that should the bill as it came from the senate be subjected to unusual amendment in the house, it could not be gotten through the former body again.” Consequently, the bill’s supporters in the House were trying to formulate and pass

\textsuperscript{222}“Big Bills Go Through,” DML, Mar. 6, 1896 (4:5).

\textsuperscript{223}Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 638-40 (Mar. 5) (1896); “Big Bills Go Through,” DML, Mar. 6, 1896 (4:5-6).

\textsuperscript{224}“The Iowa Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-5 at 3).

\textsuperscript{225}Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 639-40 (Mar. 5) (1896).

\textsuperscript{226}“The Legislature,” DIC, Mar. 5, 1896 (3:1).
a bill “as nearly identical” to the Senate “as possible under the circumstances,” while House opponents were striving to “load the measure down with amendments..., hoping, as a last resort, to secure its defeat in the senate.”

In the event, on the final vote, the House passed the Phelps-Prentis bill 71 (or 69) to 21 (or 23); the Democrats reverted to form, with 13 of 21 voting Nay and only 5 voting Yea. In the end, then, only 9 or 10 Republicans voted against the prohibitory bill, with even Morrison abandoning his mulct tax and joining the majority. Several members’ explanations of their votes are worth noting. One Republican who believed that the law unconstitutionally interfered with interstate commerce nevertheless voted for it because “the people are demanding a law along this line....” Democrat Francis Benedict Manahan, a Catholic who opposed all sumptuary laws, nevertheless voted Aye because he realized that “the need for legislation against this terrible evil is so great....” His announcement of this conversion caused the House to “burst into spontaneous applause, which became infectious and extended from the members to the spectators, and continued until the speaker rapped for order.” Another Democrat who favored a law eliminating “the evil of the nefarious cigarettes” voted No because he believed the bill to be unconstitutional and thus “practically inoperative for suppressing” the evil. And finally, House Speaker Byers, stating that he would vote for a bill banning the sale of cigarettes to minors (without explaining why such a bill was necessary after enactment of one in 1894), declared that, since cigarettes had been recognized as a “legitimate article of commerce,” S.F. No. 7

---

227“The Iowa Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-5 at 3).
228Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 641 (Mar. 5) (1896). The House Journal tallied the vote at 71-21-7, but the actual names listed totaled 69-23-7. Newspaper accounts tallied the vote at 69-21-9, listing two river city members, Democrat Nolan and Republican McNulty, as having been absent/not voted rather than as having voted Nay. E.g., “General Assembly,” BH-E, Mar. 6, 1896 (2:4); “No Coffin Nails,” DMDN, Mar. 5, 1896 (1:1. 5:2). Two Republicans voting Nay represented the border river cities of Burlington (McArthur) and Sioux City (McNulty), while two others represented counties bordering Minnesota (Mayne from Kossuth and Bowen from Allamakee). On two intervening test votes on Prentis’s substitute the clear majority of Democrats were absent or did not vote. Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 641 (Mar. 5) (1896).
229Willis Hall, The Iowa Legislature of 1896, at 105-106 (1895).
230Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 642 (Mar. 5) (1896).
231“The Iowa Legislature,” ISR, Mar. 6, 1896 (4:5-7, 5:3-4 at 3).
was unconstitutional. The temperance weekly Dial of Progress saluted the legislature for being “on the side of humanity” in saving many of “our dear boys...from the madhouse and some from suicide.”

### Back to the Senate

Iowa prohibited the sale and manufacture of cigarettes—total prohibition at last achieved without controversy!...

During the week between passage of the bill in the House and renewed debate in the Senate, the press reported that “a number of Senate lawyers have come to the conclusion that tobacco is a legitimate article of commerce, and as such the sale of original packages of cigarettes cannot be prohibited under inter-State commerce laws.” Conveniently for the American Tobacco Company, these lawyers opined that: “The most that can be done is to prohibit the sale to minors and of adulterated goods.” On March 9 this constitutional question was to be considered by the Senate Code Revision Committee. Republican Senator James Trewin, who was the leading figure on this committee, none of whose members had played a prominent part in support of Phelps’s bill, had incorporated those two prohibitions in a bill that he believed would get around the constitutional issue. The press not only did not mention the possibility that the

---

232 Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 642 (Mar. 5) (1896).

233 “They Protect Our Boys,” Dial of Progress 7(11):[4:5] (Mar. 12, 1896) (erroneously believing that the legislature had enacted the law before the Senate’s final action).


236 “The Legislature,” DIC, Mar. 9, 1896 (3:2-3 at 3)


238 Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 35 (1896) (list of committee members).

239 “The Legislature,” DIC, Mar. 9, 1896 (3:2-3 at 3) (quote); “The Iowa Legislature,” ISR, Mar. 10, 1896 (4:5). It is unclear why the Code Revision Committee would have had jurisdiction over this issue; the press appears not to have reported on the meeting. The
Tobacco Trust had instigated this belated interest in constitutionality, but styled Trewin a “consistent and earnest supporter of the anti-cigarette legislation.”\footnote{The Legislature,} In the version disseminated by his hometown newspaper, he was promoted to a “deadly enemy of the cigarette,” who “wants to do all that can be done to knock out the cigarette, but as a lawyer he is convinced this is all the legislature can do.”\footnote{F. W. Bicknell, “Legislative Letter,” LM, Mar. 13, 1896 (8:2).} Proponents of S.F. No. 7, however, would soon cast doubt on Trewin’s bona fides on the Senate floor. In any event, the Marshalltown Evening Times-Republican sensationalized this intermezzo with the misleading front-page headline: “Coffin Nails Stay.”\footnote{“Coffin Nails Stay,” ET-R, Mar. 9, 1896 (1:3).}

When the Senate took up the House-amended S.F. No. 7 on March 13, Phelps asked that a vote be taken immediately,\footnote{Reappoints Brewer,” BH-E, Mar. 14, 1896 (1:5-6 at 6).} but, as predicted, Senator Trewin, who had been “in an oratorical mood the last two or three days, took the floor to oppose it.”\footnote{“Is Intensely Partisan,” DML, Mar. 14, 1896 (4:5-7, 5:4-6, at 4:7).} Trewin (1858-1927), who had been closely linked to the passage of the liquor mulct law when he was in the House in 1894,\footnote{See above ch. 9.} was a lawyer from the Mississippi River town of Lansing across from Wisconsin and also maintained a branch office in Cedar Rapids. He was to remain in the Senate until 1903, having been a prominent candidate for the Republican gubernatorial nomination in 1901.\footnote{Benjamin Shambaugh, Progressive Men of Iowa: Biographies and Portraits of the Leaders in Business, Politics and the Professions 2:622-24 (1899); “James Trewin Dies of Heart Disease,” DMT, Mar. 21, 1927 (20:2); Proceedings of the Thirty-Third Annual Session of the Iowa State Bar Association 149-52 (1927).} (In 1894 he had also been a bête noire of President Marion Dunham of the more progressive WCTU of the State of Iowa, who, because he bore “the heaviest responsibility” for “the infamy of preventing the age [of consent for
females] being raised to fifteen years,” decreed that he “should [n]ever be permitted to again disgrace the halls of legislation”—a sentence that it was “safe to say” would be meted out to him if the ballot were in the hands of the women of his county.)

Trewin’s chief point was the bill’s alleged unconstitutionality. The original package doctrine that had defeated Iowa’s efforts to ban the sale of liquor brought in from other states would, in Trewin’s view, apply to the proposed anti-cigarette law, which he did not anticipate Congress rescuing from interstate commerce restrictions as it had in the case of the liquor law (in 1890). He therefore proposed that the bill be sent to the Judiciary Committee for amendment. In place of S.F. No. 7 he read aloud his own bill, which, in prohibiting the selling or giving of cigarettes or materials to make them to minors and banning the importation, manufacture, or sale of “adulterated” cigarettes, exercised as much power as the state possessed. He also charged that the bill under debate was fatally weakened by the lack of a prohibition on giving away cigarettes, because it would not prevent giving them away to the boys who were the bill’s special object of protection.

Senator William Perrin launched the main attack against Trewin. The biography of Perrin, who together with his colleagues Phelps and William Eaton had voted most consistently in favor of anti-alcohol and anti-cigarette measures in 1894 and 1896, was uncannily similar to Phelps’s: born in Vermont a year after Phelps, he too fought in the Union Army, entered the same law school (in Albany) in the same year, and emigrated to Iowa about the same time. His ultra-militant mindset is nicely captured by the bill he introduced in 1896 to empower town councils to grant licenses to buy intoxicating liquor in saloons complying with the 1894 mulct law. Perrin justifiably denounced Trewin’s proposal as “just the thing that would please the cigarette trust,” but that would not amount to anything, let alone accomplish the result that “the real advocates of the legislation wanted.” Perrin wanted the bill at least to get a chance in court.

---

247 Fifth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Marion, Iowa, October 3, 4 and 5, 1894, at 11.


249 http://iagenweb.org/chickasaw/biographies/biosp.htm

250 The license was to cost $2, the fine for a violation $10, and any saloon keeper who sold to an unlicensed drinker was to forfeit all rights under the mulct law; finally, councils were prohibited from granting a license to anyone whose parent, spouse, sibling, or child over the age of 14 filed a written protest. S.F. No. 21 (by Perrin), in 1894 Iowa Senate bill book in University of Iowa Law Library; Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 45 (Jan. 18) (1896) (last action).
and rejected the argument based on “personal liberty” as a mere “shield for such evils as the cigarette,” especially as used by Trewin, who was “assuming the garb of a saint to serve the devil.” Perrin also found it “queer” that Trewin (who had earlier voted for S.F. No. 7) was just discovering the bill’s unconstitutionality, which was a “mere subterfuge.” After Trewin’s motion to refer the matter to Judiciary Committee had failed and he had been denied the opportunity to offer any amendments, the Senate passed the bill 34 to 10 with all seven Democrats voting Nay.

Press Reactions to Passage

If there are any who believe still that the crusade against the cigarette is a hobby, or a fad, or a fit subject for complacent derision, their immediate duty is to open their eyes to some of the thousand object lessons they have been blind to and listen to the testimony that is piling up in defense of the children’s lives. The weakness of human nature that makes the child the victim and the parent incapable of combating the foe leaves the only remedy that can be used—that of legislation. Two states are making the experiment, and though the laws enacted are crippled by injudicious and too lax provisions there is a fair promise that they can greatly lessen the evil. An effort is being made in each to declare the laws unconstitutional, and it is needless to say the men who find their occupation menaced are the instigators.

The Iowa press offered diverse assessments of the measure’s future. True to form, the Iowa State Register predicted that manufacturers would flood the state with original packages of cigarettes, prompting court tests, whose outcome would, without any doubt, render the law of no effect. Faced with such irrationality, the Register could only complain that the bill had been passed not “in obedience” to

---

252“The Iowa Legislature,” ISR, Mar. 14, 1896 (7:3-4 at 3).
254Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 545 (Mar. 13) (1896). Of the five Republicans who had voted Nay earlier, one (Lothrop) voted Yea, three (Ellis, Ellison, and Gilbertson) were absent or did not vote, and only one (Pusey) voted Nay again. The two new Republican Nays, who had previously votes Yea, were Senators Trewin and Upton, who lived in Cresco very close to the Minnesota border.
255“The Cigaret Must Go,” CT, Mar. 25, 1896 (6) (edit.). Presumably the other state alluded to was North Dakota.
members’ best judgment, but, rather, to “what they believed to be the moral sentiment of their communities. Many members voted for it, and stated it was simply because they were afraid to vote otherwise.”

If it were actually enforced, wrote the *Sioux Valley News*, its effect would be to “expel the cigarette from the state.” But other papers, reproducing arguments voiced during the legislative debates, reported shortly after the bill’s passage that “some lawyers” claimed that the bill was “unconstitutional because tobacco has been held to be a legitimate article of commerce” and the states were not empowered to interfere with the interstate traffic in such goods. Consequently, cigarettes would thenceforth “be sold in original packages, as liquor was, in ounce bottles before the Wilson bill made it subject to police regulations of the State. Congress would not be likely to help the State out in this way in its crusade against the cigarette....” Senator Trewin’s hometown weekly observed of the sales of cigarettes in original packages that there was “already talk of this sort of evasion of the law in the town of Albia.” In contrast, the bill’s supporters argued that Supreme Court jurisprudence did not apply to cigarettes because—prophetically anticipating the language of the Tennessee Supreme Court two years later—“cigarettes are wholly bad and have no good use.”

The *Register* declared that the governor would certainly not veto the bill: “That is what he meant when he made his campaign last fall and told the people that he would not veto what was properly done by the legislature in the exercise of its legislative functions. Some of the extreme moralists at that time believed Gen. Drake was making a mistake, but now, no doubt, they are comforted by the fact that he took that position. It turns out to be favorable to them in the matter of this cigarette law.” Perhaps in order to determine whether the General Assembly had in fact been properly exercising its legislative functions, on April 2, before signing the anti-cigarette bill, Republican Governor Francis Drake requested an opinion from Attorney General Milton Remley as to its

---

258 “The State of Iowa,” Anamosa Eureka, Mar. 26, 1896 (7:6). This piece, as was the journalistic wont of the time, appeared in many papers.
262 On Remley, who was attorney general for six years, see Edward Stiles, *Recollections and Sketches of Notable Lawyers and Public Men of Early Iowa* 780-81 (1916).
The Universal Prohibition of the Sale of Cigarettes: 1896

constitutionality. Two days later Remley issued his five-page opinion, which was published in full in the Iowa State Register.263

Attorney General and Governor Approve

Now that the cigarette bill has been passed and only awaits the Governor’s signature to become a law, we hope that every man and woman in the state, who is a friend to humanity and who has the welfare of the coming man at heart, may use every means in his or her power to blot out the stain that mars the fair name of our beloved state by assisting in carrying out the provisions of this righteous law.264

Remley, who, as an ex-officio member of the Iowa State Board of Health since 1895, was presumably familiar with Dr. Joseph Emmert’s aforementioned critical exposes of cigarette smoking,265 began by stressing both the undisputed power of the states to restrain and burden persons and property to protect public health and the fact that the anti-cigarette bill was precisely such a proper exercise of the police power.266 Opponents’ sole objection to the bill was that it conflicted with Congress’s power to regulate interstate commerce—not that S.F. No. 7 in any respect was unconstitutional as it applied to “property which has commingled with the mass of property” already situated within the state. From this objection opponents concluded that the U.S. Supreme Court’s decision holding unconstitutional Iowa’s prohibition of the importation of liquor in original packages (Leisy v. Hardin) both meant that any similar ban on the importation of cigarettes in original packages was unconstitutional and rendered the whole anti-cigarette statute unconstitutional. While Remley was ultimately prepared to concede the possibility that the first claim might be correct, he denied the second. In reaching these conclusions he admitted that under the relevant U.S. Supreme Court decisions, “the police power of a state and the power of Congress to regulate interstate commerce impinge so hard against each other that there


264 Daily Telegraph (Atlantic), Mar. 25, 1896 (3:2) (untitled) (reprinted from West Liberty Index).


266 Annual Report of the Attorney-General of the State of Iowa 75 (1898).
appears to be in some instances a direct conflict of power; or at any rate, it is
difficult at times to distinguish which power should prevail." However, he
believed that the “application of the doctrine that, because of the constitutional
 provision empowering congress to regulate interstate commerce, articles of
commerce which the state has condemned as injurious to the health, prosperity
and welfare of the state, may, notwithstanding state laws, be imported and sold
within the state, seems to have reached its high tide in the case of Leisy v. Hardin.
The trend of the decisions seems to be the other way. And in any event,
although it was “a debatable question whether” the anti-cigarette law applied to
the importation and sale of cigarettes in original packages, a ruling that it was
inoperative in that sphere in no way voided its operation in any other respects.

The controlling statement of future state policy was Remley’s conclusion that
even if the federal constitutional interstate commerce power rendered the law
unconstitutional in part, “there is no question that enough remains therein to
control traffic to a great extent within the state and to operate upon all the citizens
in the state engaged in selling cigarettes or cigarette paper, which have become
a part of the general mass of the property of the state.” In other words, under
the new law, the American Tobacco Company, if it continued to want to sell its
cigarettes lawfully in Iowa, would be limited to those that it shipped in their
“original packages.” As an empirical legal and practical matter, Remley, as he
would reveal in the months leading up to and following the statute’s July 4
effective date, would take the position that, since the appropriate “original
package” for this product was the package of 10 cigarettes in which they were
actually sold, compliance with this requirement would simply be so burdensome
and costly that it would render the only method of lawful importation of cigarettes
into Iowa for sale unprofitable; consequently, such importation would be minimal
and the law would essentially achieve its purpose. To be sure, one practical
exception remained: individual non-merchants who wanted to buy the cigarettes
for personal consumption could lawfully buy them from sellers in other states and
have them shipped into Iowa in their original packages. Though an undeniable
inroad, this method was thought to require too much effort to become widespread
and, above all, to exceed the financial, logistic, and long-range planning
capacities of the vast majority of youth, whose initiation into and maintenance of
cigarette smoking was too opportunistic and happenstantial to sustain such
systematic interstate purchasing programs. As a result, to whatever minimal

267 Annual Report of the Attorney-General of the State of Iowa 76 (1898).
The Universal Prohibition of the Sale of Cigarettes: 1896

extent such interstate commerce-based exceptions reduced the scope of actual exercise of state police power regulation, Remley advised Drake that “there would be sufficient remaining to preserve the integrity of the act as a whole.”

As soon as he received Remley’s opinion, Governor Drake, on April 6, signed Iowa’s anti-cigarette law, which read as follows:

SECTION 1. No one, by himself, clerk, servant, employe, or agent, shall, for himself or any person else, directly or indirectly, or upon any pretense, or by any device, manufacture, sell, exchange, barter, dispense, give in the consideration of the purchase of any property, or of any services, or in evasion of the statute, or keep for sale any cigarettes, or cigarette paper, or cigarette wrappers, or any paper made or prepared for the purpose of making cigarettes, or for the purpose of being filled with tobacco for smoking; or own, or keep, or be in any way concerned, engaged or employed, in owning or keeping any such cigarettes or cigarette paper, or wrappers with intent to violate any provisions of this chapter; or authorize or permit the same to be done.

SEC. 2. Whoever is found guilty of violating any of the provisions of the preceding section for the first offense shall pay a fine of not less than $25, nor more than $50, and costs of prosecution, and stand committed to the county jail until such fine and costs are paid; for the second and each subsequent offense, he shall pay upon conviction thereof a fine not less than $100 nor more than $500 and costs of prosecution, or be imprisoned in the county jail not to exceed six months; provided, that the provisions of this act shall not apply to the sales of jobbers doing an interstate business with customers outside of the state.

271. Annual Report of the Attorney-General of the State of Iowa 79 (1898). In 1907, two years after Wisconsin had prohibited cigarette sales, the speaker of the Wisconsin Assembly, Herman Ekern, declared that big tobacco companies were violating the spirit of that law by teaching children how to obtain cigarettes outside of Wisconsin. “Must Smoke in Private,” USTJ, May 18, 1907 (7:2). The first day that the law went into effect United Cigar Stores Co. in Chicago published a large advertisement in the chief Madison newspaper announcing that consumers could have cigarettes delivered to them by return mail at less than store prices. Wisconsin State Journal, July 1, 1905 (3:4-7). On advertisements by ATC in Portland, Oregon, in newspapers in Washington State in 1893 offering to send cigarettes into Washington, see below ch. 11.

272. Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 791 (Apr. 6) (1896). See also “No Realty for Aliens,” CT, Apr. 7, 1896 (4).

273. 1896 Iowa Acts ch. 96 at 96, 97.
The Cigarette Trust Already Initiates Plans to Evade the New Law

Same Old Poison in New Form. The Cabbage and Opium to Be Wrapped in Tobacco Leaf, Which is Expected to Evade the Law.\footnote{Dodge Cigarette Law,” \textit{DML}, Apr. 29, 1896 (1:5) (subheads).}

More than two months before the prohibition on selling cigarettes was set to go into effect the press already revealed the Tobacco Trust’s plans to undermine it. At the end of April the \textit{Des Moines Leader} reported that the “Tobacco Trust Has a New Cigarette to Evade the Prohibition”—an ordinary cigarette with a bit of tobacco leaf as a wrapper instead of paper. Since the statute prohibited the sale of “cigarette paper” and “cigarette wrappers,” the \textit{Leader} concluded that a “reading of the new law suggests that attempts...to evade the law will be futile; but they will be made, nevertheless.” In particular, the American Tobacco Company was “in the field early with a substitute...warranted to superinduce as much heart failure, sallowness, yellowness of the index finger, and general wretchedness to the human family, as any ge\[n\]uine article.” The Trust sent large consignments of these “little cigars” to local dealers in Iowa accompanied by a circular “stating that no charge would be made for the first consignment, as it was...an “experiment, to see whether cigarette smokers would like the substitute, and requested that a reply be sent, indicating what smokers thought of them. It was also requested that they be distributed free to cigarette patrons.” And, as was only to be expected given the lopsided power relationship between the Trust and the dealers, ATC’s “wish expressed in the circular was “being carried out to the letter by the dealers last evening.” The circular also assured the dealers that ATC was “willing to indemnify dealers against losses until a test case can be made, should the authorities undertake to bring the substitute under the ban of the cigarette law; and they use language that evidences their anxiety to secure a test case.” Initial reports indicated that cigarette smokers found the leaf-covered cigarette “as easy to inhale” and as going “just as far in satisfying the craving.” Always attuned to the profitability associated with achievement of economies of scale, the Tobacco Trust announced that “if the substitutes prove satisfactory they will be manufactured in large quantities for the Iowa market and any other states that may see fit to legislate against the sale of cigarettes.”\footnote{Dodge Cigarette Law,” \textit{DML}, Apr. 29, 1896 (1:5); also reprinted as “Will Dodge It,” \textit{Davenport Leader}, Apr. 30, 1896 (6:2); “The Cigarette Law,” \textit{CREG}, Apr. 30, 1896 (8:3). The \textit{Centerville Journal}, May 14, 1896 (5:5) (copy furnished by Merle Davis), reporting on such shipments to Burlington and other wholesale towns, was convinced that the evasion was lawful. See also “We Must Be Good,” \textit{DMDN}, June 30, 1896 (4:3).}
The Universal Prohibition of the Sale of Cigarettes: 1896

Public Comment on the General Prohibition of Cigarette Sales

The anti-cigarette bill had a hard fight for life.\textsuperscript{276}

Looking back at the legislative struggle in July, when the law was already under judicial attack, the Democratic \textit{Des Moines Leader}, which in April had, unsurprisingly, called the measure “purely moral” and “manifestly unwise” because it unnecessarily stretched the legislative function,\textsuperscript{277} observed that the Phelps bill, which “was bitterly opposed” and one of the session’s “sensational bills,” had been “the outgrowth of an active opposition to the cigarette habit, which was both moral and sanitary in its object. There had been formed in the schools and churches of Iowa anti-cigarette leagues, the members of which were boys who pledged themselves not to use tobacco in any form. This opposition was the result of rapid growth and the obvious effects of the use of cigarettes upon the young.” To be sure, the steep rise in consumption was not confined to boys: both men and women smoked them, and “anyone who will take the pains to watch the tobacconists’ counters long enough will see that men who formerly smoked pipes and cigars, have taken to the more convenient little package.” This convenience lay in the fact that whereas pipes could not be carried in a vest pocket and had to be periodically knocked out and cleaned, “[a] man can take two or three whiffs of a cigarette and fling it away,” especially since it was so cheap. The proliferation of cigarette smoking among minors as young as ten was, moreover, promoted by the diluted form of tobacco—“which never satiates”—which did not call forth the nausea associated with cigar smoking. Neither the \textit{Leader} nor anyone else in the nineteenth century may have had what by later standards would qualify as a scientific grasp of cigarette smoking’s manifold health impacts, but the newspaper did understand one aspect: it was the “narcotic principle which is the seductive secret of the drug”; and that drug was nicotine: “men smoke tobacco all over the world for nicotine that is in it.”\textsuperscript{278}

Following enactment of the anti-cigarette law the so-called non-partisan WCTU of Iowa (which had disaffiliated from the national organization)\textsuperscript{279} at its

\textsuperscript{276}Twenty-Third Annual Meeting of the Woman’s Christian Temperance Union of Iowa 37 (1896).

\textsuperscript{277}“The Work of the Legislature,” DML, April 12, 1896 (12:2) (edit.).

\textsuperscript{278}“Still There’s No Light,” DML, July 26, 1896 (5:5-6).

\textsuperscript{279}Oddly, the four-page report of the Legislative Department of the nationally affiliated
annual meeting expressed its “gratitude” to the legislature “for strengthening the moral forces of the state....” Nevertheless, the organization was stone sober about the difference between enactment and enforcement:

To forbid the manufacture and sale of cigarettes in a great state is an advance in moral and sanitary lines. The good to be secured under the law depends upon the vigilance and determination of good citizens to secure its enforcement.

Steady, persistent, unyielding vigilance is the price of any advancement. Dauntless courage is required to hold the fort against the encroachment of evil in its many devices for foothold in society and government.

A year hence the battle will all be to fight over again....

As would later be de rigueur in the newspapers of other states on the day their cigarette bans went into effect, Iowa’s press, too, could not refrain from a mock “Good Bye Cigarette” conveying the wails of “[t]housands and thousands” of its “lovers”:

Dear cigarette good bye, good bye, thou hast been unjustly accused of bringing little boys to an early grave, of driving young men to the insane asylum, consuming the gray matter in the brain, of destroying the digestive organs, of breaking down the nervous system, of entering a sound body and a sound mind and leaving body and mind utterly wrecked, but for all that dear cigarette we love them still and weep every mother’s son of us, when we think that after today their delicious odor shall never more be felt in our broad prairies or in our carpeted halls. Little cigarette, sumptuary laws may be right when it comes to prohibiting the use of sauerkraut and onions but these articles are dangerous and highly injurious to the palate, but then cigarettes takes [sic] the place of the doctor, of the concert hall, of the court jester, of the fool, for who will deny that thou can heal, can drive away evil thoughts, can produce sleep and sweet dreams and call up the past. Dear cigarette, good bye, good bye.  

WCTU of the State of Iowa to its annual convention in October 1896 failed even to mention the anti-cigarette law, focusing instead on “our bill” to raise female’s age of protection to 18. The previous year’s convention had voted to circulate four legislative petitions, the other three relating to a compulsory reformatory for females, suffrage, and compulsory education. *Seventh Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Boone, Iowa, October 14, 15 and 16, 1896*, at 73-76 (1896).

*Twenty-Third Annual Meeting of the Woman’s Christian Temperance Union of Iowa xiv* (1896).

*Twenty-Third Annual Meeting of the Woman’s Christian Temperance Union of Iowa* 38 (1896).

Why Did the Republican Legislature Pass Cigarette Sales Prohibition at the Same Time that It Was Perforating Its Liquor Prohibitory Law?

In 1894 the Iowa Republican Party leadership finally prevailed over its liquor-prohibitionist wing when the legislature passed a so-called mulct tax that was widely viewed as the introduction of de facto local-option licensure. By appropriating enough of Democrats’ anti-prohibitionist position to propitiate Mississippi and Missouri River city ethnic voters who had threatened decades of Republican control of state government by voting Democratic, the party’s symbolic, official, and real abandonment of statewide liquor prohibition helped secure not only a reinforced majority during the 1896 session, but additional decades of Republican supremacy. The question then arises as to why, after having just struggled through years of intense and debilitating inner-party turmoil over liquor prohibition, Republicans about-faced in 1896 and passed a ban on cigarette sales.

The pithiest (partial) answer may, surprisingly, have been furnished four

---

283See above ch. 9.

284Noteworthily, anti-prohibitionist efforts during the 1896 session to relax prohibition even further by passing bills permitting the manufacture and (wholesale) sale of intoxicating liquors all failed. In particular, the Senate Committee on Suppression of Temperance substitute bill (for three more far-reaching bills) was defeated by a vote of 22 to 27. Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 741-42 (Apr. 2) (1896). The text of the substitute for S.F. No. 8, 203, and 324 was attached to the text of S.F. No. 8 in the 1894 Senate bill book at the University of Iowa law Library. Significantly, a Democratic attempt to substitute for this committee bill a more radical bill that made it lawful to manufacture and sell spirituous, malt, and vinous liquors (including on the manufacturing premises provided that sales were in quantities not less than four gallons and that the liquors “not be drank [sic] upon the premises”) was defeated by a vote of 7 to 31, all of and only the Senate’s Democrats voting Yea. Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 738-41 (Apr. 2) (1896) (S.F. No. 149, by Hipwell of Davenport). The House defeated by a vote of 43 to 46 a motion to make a special order of the committee substitute for three individual manufacture bills (H.F. 30, 82, and 106), which it later indefinitely postponed. Journal of the House of Representatives of the Twenty-Sixth General Assembly of the State of Iowa 818-19 (Mar. 20) (1896). The committee’s minority report, signed by James Funk and six other of its 19 members, recommended indefinitely postponing the three bills and the substitute because to “authorize the manufacture and wholesaling of an article of which the sale by retail is nowhere [sic] legalized in the state involves a manifest and palpable absurdity.” Id. at 819.
years earlier, when the Chicago Tribune, which reported systematically and in depth on the Iowa legislature’s prohibition-related actions, observed in an editorial: “Democrats will drink, and the Republicans ought to perceive by this time that they cannot hinder them. ... The Republicans have tried for nearly ten years to make the Democrats quit drinking. They have failed hopelessly.” In sharp contrast, no one in 1896 would have warned cigarette sales prohibitionists off on the grounds that they would never succeed in making Germans, Catholics, or any other subpopulation stop smoking cigarettes. Unlike saloon drinking, cigarette smoking was not identified with any ethnic, religious, class, or even age group, whose discrete electoral decisions might have subverted Republican state political control. Moreover, whereas collective drinking in saloons embodied significant cultural and political practices with pervasive group cohesion-generating social-psychological consequences, cigarette smoking was much more likely to be an individualistic, solitary activity: a tobbaconist’s store, in any event, in no imaginable way fulfilled the saloon’s multifarious functions. Greater willingness to enact a cigarette than to uphold a liquor sales ban was also rooted in the disparate economic challenges that the two industries represented, which, in turn, were in large part a function of the fact that (manufactured) cigarettes accounted for a minuscule proportion of all tobacco use, whereas the ban on intoxicating liquors encompassed virtually the whole market. These vastly different supply and demand conditions meant, for example, that whereas a ban on the sale of intoxicating liquor was per se a death sentence for saloons, prohibiting cigarette sales put hardly any establishment out of business because among the various kinds of merchants selling tobacco products not even the most specialized, tobacconists, were heavily reliant on cigarettes for their profits; indeed, in various states tobacco sellers welcomed cigarette sales bans because they were low- or even no-profit commodities that the cigarette quasi-monopolist American Tobacco Company foisted on them. Thus, attacking the Cigarette Trust’s economic interests not only did not harm local businesses, but earned the attackers the applause of anti-trust forces and, sometimes, even appeared as the chief purpose of the prohibition. Whatever the relations of dominance between

285“Iowa Republicans and the Schmidt High License Law,” CT, Feb. 9, 1892 (4) (edit.).
286On one purported exception in another state (Russian immigrants in North Dakota), see above ch. 2. In contrast, there was no tobacco-related counterpart to some churches’ sacramental use of wine—for which the law provided an exemption.
287See above Part I.
288For example, on the background of the 1893 Washington State cigarette sales ban, see above ch. 4.
the Whisky Trust and large breweries, on the one hand, and local saloons on the other, they did not rise to the level of the Cigarette Trust’s economic power. And, finally, with regard to the comparative health impacts, many Republicans—as Representative Allen’s House floor speech underscored—whatever their position on alcohol, simply did not classify it as a wholly illegitimate article of commerce as they did the “deadly cigarette.”
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court: McGregor v. Cone (I)

The American Tobacco Co., and the Cigarette Trust were behind McGregor.¹

Buck [James B. Duke], however, wasn’t over-disturbed. In every eruptive circle of anti-cigarette agitation, he hired lawyers and lobbyists and fixers and discovered the sweet use of fat sums, properly applied.²

With the General Assembly’s action in 1896, Iowa became the only state in the country with a functioning statewide statutory prohibition of selling cigarettes to adults (as well as to children). Its existence was intolerable to the Nicotine Trust’s need for market expansion unimpeded by such gross government interference with addicted customers’ easy access to the American Tobacco Company’s commodities. In order to eliminate this threat in Iowa and thwart the legal model’s replication in other states, ATC choreographed an elaborate commerce clause-based constitutional strategy to invalidate the law, which it had already launched against a similar Washington State act three years earlier in federal court and was in the midst of honing in litigation attacking cigarette license laws enacted in West Virginia and Montana.

The Tobacco Trade’s Business Response to Iowa’s General Cigarette Sales Ban

Cigarettes have been openly placed on sale in Des Moines this week. The risk is considerable notwithstanding the partial release from the law afforded by recent decisions. If attacked under the ruling of the State Attorney General, the costs would eat up a long line of profits, if a judgment did not follow.³

As soon as the sales prohibition law went into effect on July 4, 1896, supporters and opponents began their enforcement and dismantlement efforts, respectively. Even before the effective date, the non-partisan Iowa WCTU urged its members to “visit all dealers” in their districts and leave them copies of the law. Legislative superintendent Florence Miller also advised them to insure its

The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

publication in the local press “so there may be no lack of knowledge as to the law.” On the opposite side, the Iowa State Register reported on the Tobacco Trust’s machinations to fit its shipments of cigarettes to Iowa within the U.S. Supreme Court’s “original package” doctrine so that it could take advantage of constitutionally protected interstate commerce to trump the exercise of otherwise legitimate state police powers. At the same time, ignoring the nature of the power relationship between the Trust and dealers, the paper observed that tobacco sellers were not mourning the disappearance of cigarettes from the market:

The big cigarette companies of the country are experimenting with all kinds of wrappers for cigarettes which will enable them to get around the law. One concern is putting a cigarette wrapper in a tobacco leaf on the market, but the traffic in the nasty little coffin nails is not very profitable to the retailers and it is not thought that the manufacturers will be given much encouragement. The cigar dealers are glad that the law has gone into effect, for it kills off a traffic which has not been worth having and opens up a chance for an increase in the sales of respectable smoking tobaccos.

But at the same time many retailers, recognizing that the prohibition was legally valid, disposed of their stocks. One dealer in Des Moines, for example, gave away 1,200 packs of cigarettes shortly before midnight of July 4. Iowa City dealers reportedly sold out their stocks “as rapidly as possible before the Fourth of July, and almost gave them away in job lots, the night of the 3d.” With “Spartan firmness,” the Iowa City Weekly Republican observed with some indeterminable measure of hyperbole, dealers “honor the law, and in no way, shape or manner will they encourage any would-be cigaret-smoker to override the law.” Acknowledging that cigarettes were “still much seen on our streets” because “users of the little coffin nails find it very difficult to give up their death-dealing habit,” the paper surmised that they were “probably the last of a few thousand (purchased in job lots) that we will see here.” (Conversely, a week later, the same paper confidently predicted that if Judge Sanborn’s ruling in ATC’s favor were upheld, “the coffin-nails will doubtless be seen in the hands of their Iowa City victims as conspicuously as of yore.”) Near the end of July the


\[7\] “Defy the Cigaret Law,” *ICWR*, July 22, 1897 (7:3).

\[8\] “Cigaretts Win,” *ICWR*, July 29, 1896 (8:3).
The Tobacco Trust's Attack on the 1896 Statute in Federal and State Court

Register noted that the law “has been rather rigidly enforced. There is said to be but one place in Des Moines where they are sold.”

While compliance in towns in Iowa’s interior was apparently effective, border cities experienced considerably greater (and in part even lawful) accessibility of cigarettes. In the small Nebraska town of Covington, across the Missouri River from Sioux City, for example, dealers had witnessed “a noticeable increase in their trade since the law went into effect. As soon as a ‘fiend’ learns that some friend is going across the river he, together with several others, will form a pool and the friend who crosses the Big Muddy will return with an arm load of coffin nails.”

In Cedar Rapids the press reported on the eve of the law’s effective date that “retail dealers will not make any attempt to violate the law, probably. They say the trade doesn’t amount to anything, and that if cigarette smoking is shut off the smokers will turn to cigars so it will not make much difference.” According to the Cedar Rapids Evening Gazette, the law would be enforced if “the people” wanted it: “The manufacturers will no doubt make an effort to get around it and sell their goods as original packages. If the people kick the retailer will let the business alone.” And the prescribed fines and imprisonment would, in the newspaper’s view, make leaving it alone “the best policy....” ATC was inducing dealers to stock the small cigars “on the representation that Maryland passed a similar law and that it was recently declared unconstitutional....” Yet the Cedar Rapids Daily Republican reported that the Maryland measure, a high ($1,500) license law, was not like the Iowa statute in any respect.

This professed indifference of many tobacco dealers to the legal fate of cigarettes, rising in many cases and various states to support for a ban, also found formal organizational expression. In 1893, when the Tobacco Trust accounted for 82.8 percent of cigarettes manufactured, retail dealers of cigars and tobacco in New York City formed a “mutually-protective and anti-cigarette trust association” to deal with their complaint that “cigarette manufacturers compel

---

861 "Cigarettes Cannot Be Sold," ISR, July 24, 1896 (7:5-6).
10a "Defy the Cigaret Law," ICWR, July 22, 1896 (7:3) (quoting the Sioux City Tribune).
12a "To Test the Law," CRDR, July 10, 1896 (3:2). It is unclear what Maryland law the paper meant. In 1890 Maryland imposed a $50 license fee for selling cigarettes, which was reduced to $10 in 1896. 1890 Maryland Laws ch. 91, at 75; 1896 Maryland Laws ch. 439, at 750, 751. See above ch. 4. An 1895 West Virginia law that imposed a $500 license fee was judicially invalidated in 1895, 1896, and 1897. See below this ch..
them to buy their stock of cigarettes through jobbers and that the latter make 40 cents on each 1,000 cigarettes which they handle, thus leaving the dealers a very narrow margin of profit.” The keenness of their sense of oppression was intensified by the fact that “the consumption of cigars has been steadily decreasing, while that of cigarettes has been increasing.”

Even cigar industry workers advocated state intervention to ward off the potentially employment-displacing impact of the increasingly competitive commodity. As early as 1889 a resolution was introduced at the annual convention of the Cigar Makers’ International Union in New York declaring:

Whereas, The practice of cigarette smoking seriously affects the growth of the trade which we represent and has served to demoralize and injure the youth of the country, injuring their health, impairing their mental faculties, and rendering them unfit for any useful purpose; be it

Resolved, That we recommend the passage of a law in the various State Legislatures which shall prohibit the manufacture of cigarettes.

And the following year the president of the North American Cigar Machinery Company caused a bill to be introduced in the New York State Assembly that would have required cigarette sellers to be licensed and conferred a private right of action on parents to prosecute anyone who sold or gave away cigarettes to their minor child.

The Tobacco Trust’s General Counsel—Williamson Whitehead Fuller

Within a few days of its initial report, the Cedar Rapids Evening Gazette was

---

14. “Grievance of Retail Cigar Dealers,” NYT, Apr. 21, 1893 (9).
15. “The Cigarmakers,” NYT, Sept. 21, 1889 (9). The Committee on Resolutions reported favorably on it, but the resolution was tabled, although “a considerable number of delegates voted no.” “Cigarmakers’ Wants,” NYT, Sept. 26, 1889 (2); “The Cigarette Is Safe,” USTJ, 28, Sept. 28, 1889 (2:5) (quote). This kind of non-global attack on one form of tobacco was not confined to economically affected organized actors. For example, in 1905, in reaction to a New York Times editorial criticizing the newly enacted anti-cigarette law in Indiana as based on prejudice, a letter to the editor commented that cigarette smoke was “an unmitigated nuisance to a very large majority...an insult to a good cigar, and a pernicious pestilential outrage upon the general public from which there seems to be no possible escape unless the Legislature [sic] of the other States follow the example of Indiana.” W. Hallock, Letter to the Editor, NYT, Apr. 20, 1905 (8).
able to explain in greater detail just how strategically the Tobacco Trust—which during the 20 years of its existence before its court-ordered dissolution in 1911 accounted for between 80 percent and 94.7 percent of cigarettes sold\textsuperscript{17}—had been preparing its litigation against the ban on the sale of its main commodity:

It is probable that the new anti-cigarette law...will be assailed desperately in the courts in the near future by the general counsel of the American Tobacco company, which is known as the tobacco trust. W. W. Fuller, general counsel for the trust, has been here [Des Moines] and at Iowa City, the home of Attorney General Remley, for several days and has just left for the east. He has been investigating the law and believes it can be set aside. Mr. Remley does not admit that this is possible, but has misgivings.

The plan of the trust is to get some dealer to violate the law and make a test case. Every dealer in the state has been assured by the trust of its protection in case he is called up for violating the law and selling the substitutes of cigarettes, which have been prepared and extensively sold by the trust, and which consists of the ordinary cigarette filler with a wrapper of light tobacco.\textsuperscript{18}

Fuller had gone to Des Moines to try to identify a “loop hole...through which the cigarette products can be placed on the market in Iowa towns,” although local lawyers were unanimously of the opinion that sale of the small cigar substitute would violate the law.\textsuperscript{19}

Williamson Whitehead Fuller (1858-1934) was the Tobacco Trust’s general counsel from 1895 until 1912, the year after the U.S. Supreme Court ordered it dissolved, when he retired a millionaire “capitalist residing at 1072 Fifth Avenue, New York,”\textsuperscript{20} based in part on his large stockholdings in the ATC. At the 1920 census Fuller was returned as living at the same address with his wife, four children in their 20s and 30s, two grandchildren, and a cook, butler, kitchen maid,


\textsuperscript{18}“Will Fight the Law,” \textit{CREG}, July 8, 1896 (2:3). Unfortunately, what Fuller did in Iowa City and the substance of any discussions he had with Remley may have been lost to history. The Iowa City newspapers in July did not report on Fuller’s presence or meeting with Remley.

\textsuperscript{19}“To Test the Law,” \textit{CRDR}, July 10, 1896 (3:2). This alleged unlawfulness was based on the (incorrect) claim that the Iowa law “has a special reference to the sale of substitutes or articles calculated to evade the law.” \textit{Id}.

\textsuperscript{20}Fuller-Hurd Nuptials,” \textit{USTJ}, vol. 87, Apr. 4, 1917 (7:4).
parlor maid, two laundresses, and three maids (the nine servants being black, mulatto, Irish, and Swedish). 21

Son of a corporate lawyer in North Carolina—a slave-owner 22 who had himself been the leading lawyer for the W. T. Blackwell & Company, internationally famous for Bull Durham smoking tobacco 23—through whom “he was introduced without wearisome waiting into the practice of the law,” in 1890 Fuller became counsel in Durham, North Carolina of W. Duke Sons & Company, at which time he “cooperated in the organization of The American Tobacco Company.” Its head, James B. Duke, called on Fuller to advise him so frequently during the next five years that in 1895 Fuller “was asked, and consented, to move his residence to New York City.” 24 During the first half of the 1890s, Fuller, in New York and Washington, was “in legal combat with the first lawyers of the greatest cities in the country, and it is in such combats that the rich men of the American Tobacco Company came to know his great ability and capacity for difficult and important legal work.” 25 As early as 1891, for example, Fuller in Durham, in tandem with the New York firm of Evarts, Choate, was already defending Duke in federal court in Charlotte in a suit brought by the Bonsack Machine Company, whose cigarette-making machine had transformed the industry. 26 By the time he left North Carolina “he undoubtedly had achieved the most lucrative practice” in the state. For the next 17 years “he devoted himself

21 Department of Commerce—Bureau of the Census, Fourteenth Census of the United States: 1920—Population, Series T625, Roll 1213, Page 195 (HeritageQuest). Interesting light is cast on potential census overcounting of the rich with multiple residences by the fact that Fuller and the same family members (but without servants) were also returned as living in Ossining, Westchester County. Department of Commerce—Bureau of the Census, Fourteenth Census of the United States: 1920—Population, Series T625, Roll 1276, Page 152 (HeritageQuest). Fuller did not appear in the 1910 census; in 1900 he was living on West 69th Street in Manhattan with his wife, six children, and three black servants. Twelfth Census of the United States: Schedule No. 1—Population, Series T623, Roll 1102, Page 72 (HeritageQuest).

22 “Ex-Slave Wills Cabin to W. W. Fuller, Former A.T. Co. Counsel,” USTJ 99(7):2-17-1923 (5:3-4) (William James McAllister’s wife had “belonged to” Fuller’s father, and after the civil war it had been his pleasure to be near the Fuller family to “bring an intimacy between me and Mr. Willie, then a small boy”).


to the service of The American Tobacco Company." 27 On hearing of Fuller’s ascendency, the Raleigh News and Observer reported that: “It goes without saying that the acceptance of this responsible relation to this great corporation will give Mr. Fuller a princely income and national reputation.” 28 While the North Carolina paper placed that princeliness in the range of $25,000 to $50,000 for the man “who has for several years been in receipt of the largest income received by any lawyer in the State,” 29 The New York Times settled on—and as far away as Oregon a newspaper picked up—the higher figure. 30 Soon after his arrival in New York he again joined forces with Joseph Choate to defend ATC in the “continuous litigation” in which it had been engaged since its formation. Defending Duke and other officers and directors in 1896 who had been indicted under a New York State anti-trust law—the principal recurring charge against it “in all cases” focused on its contracts with jobbers and wholesalers binding them not to sell below a certain price or to use other firms’ goods—Fuller exhibited an exquisite sense of chutzpah in seeking to deflect the charge of monopolization by alleging that ATC “was only following in the line of legislation in many States when it limited the supply of cigarettes.” 31 Very much a man of his time and place, he was eulogized by the chief justice of the North Carolina Supreme Court as having “remained in spirit an heir of the noblest traditions of the Old South.” 32 One of those traditions was instantiated in 1923, when William McAllister, a 94-year-old ex-slave, whose wife had “belonged to” Fuller’s father, made “Mr. Willie” his sole heir; Fuller bought stock with the proceeds from the sale of McAllister’s “little home” and used them to provide Christmas gifts to Fayetteville “Negroes.” On the first such occasion in 1926, Fuller, his son Thomas S. Fuller, who later also became general counsel of ATC, his grandson,

---

28 Judge Winston’s Resignation—Mr. Fuller Goes to New York,” N&O, Feb. 12, 1895 (4:1) (also stating that his law firm “enjoys the most lucrative practice” in the state).
30 “To Get a Salary of $50,000 a Year,” NYT, Feb. 12, 1895 (6:6); “Persons Worth Knowing About,” MO, Feb. 21, 1895 (4:5).
and greatgranddaughter, gathered in a bank directors’ room in Fayetteville, and “saw the old Negroes assemble...and smile their thanks as each received his ‘Chris’mas gif’."33

Fuller, who represented the company before the U.S. Supreme Court in the case, was himself one of the original 29 individual defendants named by the government in 1907 in the antitrust suit that eventually led to the break-up of the ATC.34 In the wake of the court-ordered dissolution of the Tobacco Trust, Fuller, who had been “one of the controlling owners” of the ATC, retired as general counsel and was replaced by Junius Parker, who had been his co-counsel in numerous anti-cigarette cases.35 In retirement he privately published a book combining a hagiography of his ex-boss James Buchanan Duke and poetry.36

Among the most prominent services he performed for the Trust involved systematic litigation attacking various state anti-cigarette laws. As Parker, his partner in that campaign, explained to the North Carolina Supreme Court in 1935 on the occasion of a presentation to it of Fuller’s portrait:

A temporary but widespread and vehement objection to the consumption of cigarettes, which found expression in statutes passed in several states to prohibit their sale, carried him into many courts throughout the country in cases that involved the constitutional boundary between the police power of the state and the exclusive power of the federal government to regulate interstate commerce.37

Tantalizing Data on Cigarette Sales for Des Moines Compared with Other Fragmentary City- and State-Level Data

The total number of male persons in the United States between the ages of 18 and 44 were returned by the last census [1890] as 13,230,000; but adding those above 44...and making allowance for the increase in population since 1890, it is safe to say that there are 18,000,000 men and boys of “smoking age” in the United States, and this would give an average of 200 cigarettes for each man and boy in the republic every year, provided, of course, that cigarette smoking was general instead of being, as it is, restricted to a very

33W.W. Fuller Dead; Retired Attorney,” NYT, Aug. 24, 1934 (15); “W.W. Fuller Left $2,150,667 Estate,” NYT, Sept. 1, 1937 (17).
36By-Paths: A Collection of Occasional Writings of Williamson W. Fuller (1926).
It would seem that there is in every male human being an inborn desire to smoke something, a desire that in most of us manifests itself at a very tender age. [T]here is not an authentic case on record where rational smoking injured anyone.39

Fuller may not have visited Des Moines merely to read legal documents. As a fascinating article in the Iowa press later in July revealed, the Tobacco Trust had also been canvassing Des Moines for a candidate to contest the validity of the new statute. That prospect was German-born Frederick W. Youngerman, a wholesale and retail cigar and tobacco merchant in Des Moines.40 The article is of especial interest not only for the light it shed on how ATC may have sought to induce tobacco dealers to spend time in jail for the Trust’s benefit, but also because it contained unique fragmentary and tantalizing data on cigarette sales in Iowa.41

---

38“The Billions of Cigarettes Used,” Call (San Francisco), June 7, 1896 (24:7).
40R. L. Polk and Co.’s Des Moines City Directory: 1895, at 629 (1895). He was returned as a cigar manufacturer at the 1900 population census. 1900 Census of Population, Series T 623, Roll 453, Page 184 (HeritageQuest). His first name was revealed in 1920 Census of Population, Series T625, Roll 507, Page 123 (HeritageQuest). His advertising could be found on the front page of the Iowa State Register next to the banner proclaiming, in a black-bordered box: “F. W. Youngerman. The most popular Cigar Manufacturer in the West. It is his cigars that done it.” ISR, Nov. 21, 1900 (1).
41There appear to be no extant local or state-level data on cigarette sales for Iowa or anywhere else in the United States before Iowa’s imposition of a tax in 1921. After 1895 all sales of all the branches of the American Tobacco Company were made through the central selling department at ATC’s central office at 111 Fifth Avenue in New York City, which was “so organized as to secure a high degree of efficiency.” Report of the Commissioner of Corporations on the Tobacco Industry, Part I: Position of the Tobacco Combination in the Industry 257 (1909). ATC devised a tracking system under which it put a number on every package of cigarettes and assigned a number to each consignee (which at least on “some of the principal brands”) was also put on each package “so that if we find them in any part of the country we know whom we consigned the goods to and if there is anything wrong with them...we know who it was that got them and who is responsible.” Although James B. Duke denied that the company could trace each package from the time it left the factory until it got to the consumer, George Whelan, a competitor who had sued ATC, testified that ATC was able to trace the purchase of cigarettes, for example, to Cleveland through the consignee or jobber number. Report and Proceedings
A short time ago the agent of the cigarette trust, a man named Fisk[,] was in Des Moines trying to get up a case to test the constitutionality of the cigarette law, says the Capital. He was very anxious to get F. W. Youngerman into the scheme and told him it would be a great advertisement for him. Mr. Youngerman replied that he did not want any of that kind of advertising. “Ninety-five per cent of the people of the state are against the cigarette, and I am, too,” he said, “and am willing they should stay away. The retail trade is not worth anything anyway. The manufacturers make all the profit. The agent of the trust complained that Des Moines was a poor cigarette town, and that Iowa was hardly worth fighting for; he wasn’t sure they would make a fight for it. He said that a city the size of Des Moines in the east would sell twice as many cigarettes as we do here. That would be enormous, for I think it safe to say that 500,000 cigarettes are sold every month in Des Moines during the cigarette season, the summer months.” Think of it! Half a million cigarettes a month, and that regarded as only half what the more civilized east would consume! The cigarette trust is one of the most powerful and profitable in existence. The cigarettes are made by machinery, some machines making 500,000 a day. The dealers pay $4.15 per thousand for them, and then in six months they get a rebate of 35 cents per thousand. This rebate is kept back six months as security against the violation of the agreement that they will not sell below a certain price.42

42. "A Cigarette Trust," DWL, July 31, 1896 (5:2). The article was presumably taken from the Daily Iowa Capital, but no such article was found in that newspaper during the month of July; to be sure, the only extant (microfilm) copy of the paper is not complete for that month.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

To provide some sense of the comparison of scale in relation to Des Moines, fragmentary figures, adventitiously mentioned in newspapers, on roughly contemporaneous sales by dealers in the larger cities of Baltimore (about 8.7 times larger in 1890), Philadelphia (21 times larger in 1890), Kansas City, Missouri (about 2.6 times larger in 1894), Boston (about nine times larger in 1895) and Chicago (about 26 times larger in 1898) may be analyzed. In connection with a bill that the Maryland legislature passed in 1890 requiring cigarette sellers to pay $50 for a license, the press reported that in the previous year 70 million had been sold in the state, almost 50 million of them in Baltimore. The ratio of Baltimore’s population to Des Moines’ was almost exactly the same as the ratios of their cigarette sales. The stray mention in 1891 in a San Francisco newspaper that a “Philadelphia capitalist says that 35,000,000 cigarettes were consumed in that city last year” generates what seems to be an outlier—a city 2.4 times as populous as Baltimore buying only 70 percent as many cigarettes. In order to gauge the impact of a proposed bill, pending in the

---

43In 1893, without mentioning any source, let alone numbers, the Los Angeles Times claimed that: “Statistics show that San Francisco ranks third on the list of cities in the United States in the consumption of cigarettes.” “The Deadly Cigarette,” LAT, Sept. 4, 1893 (4) (edit.). The following year the Washington Post quoted the owner of one large cigar store in Washington, D.C. as asserting that he alone sold 125,000 cigarettes a week, but leaving it up to the newspaper to figure out how many the 300 other cigar stores and host of drug stores sold. “Estimating a Bad Habit,” RMN, Dec. 9, 1894 (18:4) (reprinted from Washington Post). A very early estimate of local consumption stemmed from yet another tobacco dealer whose back-of-the-envelope calculation of sales amounted to 150,000 cigarettes smoked monthly in Milwaukee. “Cigarettes,” Sentinel (Milwaukee), Jan. 7, 1883 (6:2). The annualized consumption of 1.8 million for 1882 would have created a good statistical fit inasmuch as it would have amounted to 0.3 percent of total production of 599 million, while the city’s population was about 0.25 percent of total U.S. population. U.S. Bureau of the Census, Historical Census of the United States: Colonial Times to 1970, Part 1, Ser. A 6-8, at 8 (Bicentennial ed. 1975); Campbell Gibson, “Population of the 100 Largest Cities and Other Urban Places in the United States, 1790: 1990,” (U.S. Bureau of the Census, Population Division Working Paper No. 27, June 1998), on http://www.census.gov/population/www/documentation/twps0027/twps0027.html; Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298 (1934).


45“The Cigarette Law in Maryland,” DP, Apr. 26, 1890 (3:3) (reprinted from Baltimore Sun).

Missouri legislature in 1895, to prohibit cigarettes sales to minors, a Kansas City newspaper calculated, based on information from various large wholesalers and retailers, that 900,000 cigarettes were “burned” in that city every week or 46,800,000 annually.\textsuperscript{47} The number of males 16 years of age and older residing in Kansas City in 1894 was about 58,322,\textsuperscript{48} whose per capita consumption, had they all smoked cigarettes, would have been about 15 per week or 802 per year. However, since only a very small proportion of males did smoke them at that time,\textsuperscript{49} per capita consumption by those cigarette smokers would have approximated that of a much later period.\textsuperscript{50} In any event, monthly sales there would have been about 3,900,000 or 7.8 times as many as in Des Moines and three times as many per male 16 and over. If the underlying sales data for both cities were reliable, then either consumption was in fact much lower in Des Moines, or Kansas City served a market encompassing a considerable population resident outside the city limits, or minors consumed more than the one-fifth to one-third estimated by sellers.\textsuperscript{51}

In 1895 the Boston Globe reported that:

One of the largest dealers in Boston sells 1,000,000 [cigarettes] each week, there are three more that sell 500,000 each, five that dispose of 100,000 each, and two that sell 250,000 per week. This makes a grand total of 3,500,000 sold each week by these 11 dealers.

Naturally not all of these are sold in Boston, but the greater part of them are sold in

\begin{footnotes}
\item[47]“Many Cigarettes Smoked,” \textit{Kansas City Daily Journal}, Feb. 3, 1895 (3:1).
\item[48]Calculated according to data in U.S. Census Office, \textit{Report on the Population of the United States at the Eleventh Census: 1890}, Part 2, tab. 8 at 122 (1897); U.S. Census Office, \textit{Census Reports}, Vol. II: \textit{Twelfth Census of the United States, Taken in the Year 1900, Population}, Part II, tab. 9 at 133 (1902). Males aged 15 were assumed to make up 20 percent of the population aged 15-19; the figure for 1894 was linearly interpolated from the population for 1890 and 1900.
\item[49]In 1888, when cigarette production amounted to about half of output in the mid-1890s, a newspaper, based on interviews with dealers, estimated that 40,000 people or one-fifth of Milwaukee’s whole population smoked cigarettes and that 16-22 year-olds, whose average daily consumption was 20 cigarettes, bought the most cigarettes. “Smoked by Many,” \textit{MS}, June 10, 1888 (11:3). Such a global prevalence rate appears to be wildly implausible, especially since the article did not purport to have any aggregate sales data.
\item[50]If 10 percent of adult males smoked cigarettes, then those 5,832 men would have consumed 154 cigarettes per week or 22 per day.
\item[51]Wholesale grocers handling 100,000 to 150,000 cigarettes per week stated that their sales were principally made out of town. “Many Cigarettes Smoked,” \textit{Kansas City Daily Journal}, Feb. 3, 1895 (3:1).
\end{footnotes}
The Tobacco Trust's Attack on the 1896 Statute in Federal and State Court

towns close by and are undoubtedly smoked by people who are employed in the city. This would make every year the sum sold reach 182,000,000, which would give every individual in the city of Boston one cigarette each day in the year and still have a reserve fund.\textsuperscript{52}

Thus according to these figures, alone one store in Boston was selling eight times as many cigarettes weekly than were sold in all of Des Moines (125,000); the 11 stores combined sold 28 times as many cigarettes. Similarly, a single drug store on State Street in Chicago was selling half a million cigarettes a month in 1898.\textsuperscript{53}

Finally, a press report about sales in a city smaller than Des Moines raised more questions than it answered. In 1891 the Chicago \textit{Inter Ocean} published the following brief piece, which then ran unchanged or abbreviated in numerous papers throughout the country. Significantly, unlike the other articles about other places, it was the only one that purported to be based not on information provided by local sellers, but on national producers with a national overview:

Cigarette manufacturers say there are more cigarettes sold in Texas than in any two other States in the Union. In San Antonio one retail firm alone has a standing order for 100,000 cigarettes a week, and this is frequently doubled. Fifteen hundred thousand cigarettes of one brand alone are sold in San Antonio every month in the year, and the total sales of cigarettes amount to about 2,000,000 a month. The cigarette smoking of the Mexicans in the city is not included in this estimate because they buy tobacco and paper and make their own cigarettes.\textsuperscript{54}

Though intriguing, these figures are highly implausible. To begin with, since alone in absolute numbers, the population of Texas in 1890 was less than 20

\textsuperscript{52} “Good Stories for All: Cigarettes by the Million,” \textit{Boston Globe}, July 20, 1895 (8). This article was reprinted without indication of date of original publication, in \textit{Ninth Biennial Report of the Board of Health of the State of Iowa for the Fiscal Period Ending June 30, 1897}, at 305 (1897).

\textsuperscript{53} “Windy City,” \textit{CREG}, Aug. 16, 1898 (5:3-4 at 4). The store sold 25,000 five-cent boxes (of 10 cigarettes) every two weeks.

percent of that of the two most populous states, New York and Pennsylvania,\textsuperscript{55} it is unclear why per capita sales would have been more than five times greater in Texas than in those states. This improbability is reinforced by the fact that while contemporaries stressed that cigarette smoking was largely an urban phenomenon, the urban proportion of population (defined as living in places with a population of 2,500 or more) in Texas was only 16 percent compared to 47 percent and 65 percent in Pennsylvania and New York, respectively;\textsuperscript{56} moreover, whereas 26.5 percent Pennsylvania’s population and 45.2 percent of New York’s lived in cities of more than 100,000, no Texas city even approached that marker.\textsuperscript{57} The population of San Antonio, the state’s second largest city, was only 37,673 (and almost as large as Dallas’s at 38,067).\textsuperscript{58} Thus a population only 75 percent as large as Des Moines’ purportedly bought more than four times as many cigarettes—a ratio that must have been significantly higher since San Antonio’s considerable Mexican population was excluded from consumers of manufactured cigarettes.\textsuperscript{59}

A somewhat different perspective is offered by Washington State in 1892, where, according to a member of the state House of Representatives—a wholesale tobacco dealer who sold 10 percent of all the cigarettes in the state and divulged this information during a debate in 1893 leading to the enactment of the country’s first state general ban on selling cigarettes—over 40 million cigarettes were sold.\textsuperscript{60} The newly admitted state’s sparse and largely rural population in 1892


\textsuperscript{59}The Census finding that only 2,671 persons in San Antonio had been born in Mexico seems understated. [U.S.] Department of the Interior, Census Office, Report on Population of the United States at the Eleventh Census: 1890, Part 1, tab. 34 at 670 (1895).

\textsuperscript{60}“Anti-Cigarette Bill,” SP-I, Feb. 17, 1893 (1:7, at 2:1). See above ch. 4. Of the 40,000,000 Tacoma accounted for 10,000,000. “Rejoicing in Tacoma,” MO, Mar. 3, 1893 (3:4). In 1890, Tacoma’s population of 36,000 accounted for a little more than one-tenth of the state’s population of 349,000. Department of the Interior, Census Office,
accounted for about 0.6 of the national population, while the state’s share of the total number of cigarettes produced nationally and not exported was about twice as high. Per capita sales in Washington for the entire population was 103 compared to 48 for the population nationally.\textsuperscript{61}

The population of Des Moines rose from 50,093 in 1890\textsuperscript{62} to 62,139 in 1900,\textsuperscript{63} and was, by linear interpolation, 56,116 in 1895; the comparable figures for Iowa were 1,912,297, 2,231,853, and 2,072,075, respectively.\textsuperscript{64} Thus at mid-decade Des Moines accounted for about 2.7 percent of Iowa’s population, which in turn represented about 3.0 percent of total U.S. population (69,850,000),\textsuperscript{65} of which Des Moines accounted for 0.08 percent. In fiscal year 1896 (which ran from July 1, 1895 to June 30, 1896, and corresponded most closely to the figures that Fisk and Youngerman had) about four billion cigarettes were manufactured in the United States (exclusive of 628 million that were exported).\textsuperscript{66} Although, unfortunately, the number of cigarettes sold in Des Moines during the non-summer months is unknown, annual sales had to have been below 6,000,000; at 6,000,000, Des Moines would have accounted for 0.15 percent of total national

\textsuperscript{61}U.S. Bureau of the Census, \textit{Historical Census of the United States: Colonial Times to 1970}, Part 1, Ser. A 6-8 at 8, A 195-209, at 36 (Bicentennial ed. 1975) (linear interpolation of about 400,000); \textit{Report of the Commissioner of Internal Revenue for the Fiscal Year Ended June 30, 1893}, at 27, 30 (H. Ex. Doc. No. 4, 53d Cong., 2d Sess. 1893) (3,176,693,700 cigarettes taxed in fiscal year 1892-93 (excluding exports) and 3,282,001,283 cigarettes manufactured in calendar year 1892 (presumably including exports)). A Tacoma jobber estimated that 10,000,000 cigarettes were sold weekly in Washington. “To Dodge the New Law,” \textit{TDL}, Apr. 14, 1893 (2:1). This wildly inflated figure would have generated a totally absurd per capita annual average of 1,337 and meant that Washington State had accounted for 16 percent of all cigarettes in the United States. In 1894, 60,000,000 (or 50 percent more) cigarettes were sold in Colorado, whose population was about 15 percent higher than Washington’s in 1892. See above ch. 6.


sales, while at half that consumption (3,000,000), Des Moines’ share of the total would have been 0.075 percent, or almost exactly the same as Des Moines’ share of total national population. If cigarette sales in similarly-sized towns in the East were twice as great, and Des Moines’ per capita annual consumption was about average for the whole country (53 and 57 respectively), then presumably per capita consumption in rural areas was much lower than average. Under these circumstances largely rural Iowa would have accounted for an even smaller proportion of total national sales than its population bore to total national population (3 percent). This small market sliver might make plausible the claim by Fisk, the Tobacco Trust’s agent, that “Iowa was hardly worth fighting for....” Yet, in fact ATC did fight for Iowa, and rather vigorously, expending considerable legal resources. Presumably, then, that fight was not so much over current sales in a rural state—though rural, Iowa’s population was not small: in 1900 it was the tenth largest state—but over the principle of fending off all legal restrictions on cigarette sales, which could spread to other, larger markets, in addition to curtailing sales in states such as Iowa where prevalence rates and per capita consumption might increase in the future. In any event, the systematic and nationally centralized struggle that ATC did conduct in Iowa and elsewhere belies later authors’ view that such laws were feckless jokes, which were never enforced and had no impact on sales. That the Trust would have devoted such concerted attention to defeating, preempting, preventing, invalidating, and repealing legislation bereft of any practical commercial effect on its sales or profits would have been profoundly counterintuitive.

If only males 15 and older bought cigarettes in Des Moines, then those approximately 20,105 people bought on average only about 25 cigarettes a month in the cigarette season or less than one a day. If like-aged women are added, these 40,577 people bought on average only 12 cigarettes a month; and if

---

67U.S. Bureau of the Census, Historical Census of the United States: Colonial Times to 1970, Part 1, Ser. A 195-209, at 24-37 (Bicentennial ed. 1975). To be sure, Iowa then became the only state whose population declined in the first decade of the twentieth century, and its population growth fell far below that of the rest of the country for the rest of the twentieth century.


69Males in Des Moines 15 and older numbered 22,263 in 1900; assuming that the age structure did not change and that their population in 1895 bore the same ratio to their counterparts in 1900 that underlay the linear interpolation used above, they numbered 20,105 in 1895. U.S. Census Office, Census Reports: Vol. II: Twelfth Census of the United States, Taken in the Year 1900, Population, Part II, tab. 9 at 128 (1902).
The cohort born between 1890 and 1894 reached 4.45 percent in 1917, at which time the earliest birth cohort surveyed (1885-89), recorded a prevalence of 3.82 percent. Because the National Health Interview Survey did not begin to be conducted until 1964, the prevalence rates are subject to error resulting both from faulty memory of events that had taken place as many as 75 years earlier and from the fact that a higher proportion of smokers than nonsmokers in the early cohorts had presumably died. In the birth cohort over the age of 65 in 1955 and thus born before 1890, 4 percent of males began smoking before the age of 15 and 13 percent before the age of 18, while fewer than 0.5 percent of the females began smoking before 18. William Haenszel, Michael Shimkin, and Herman Miller, Tobacco Smoking Patterns in the United States, App. III, tab. 1, at 56 (U.S. Department of Health, Education, and Welfare, Public Health Monograph No. 45, 1957); John Pierce and Elizabeth Gilpin, “A Historical Analysis of Tobacco Marketing and the Uptake of Smoking by Youth in the United States:1890-1977, Health Psychology 14(6):500-508 at 501-502 (1995).

The earliest National Health Interview Survey birth cohort of white males (1885-89) recorded a current smoking prevalence rate of 9.96 percent in 1901 and 8.85 percent in its thirteenth year. To be sure, once this cohort reached its 20s, its smoking prevalence rose sharply toward one-half, but this level was not reached until shortly before U.S. entry into World War I. The National Cancer Institute, Changes in Cigarette-Related Disease Risks and Their Implication for Prevention and Control, App. tab. 13 at 81, tab. 9 at 69 (1997). Although older cohorts born before 1885 (and not surveyed in the 1960s) may well have had higher cigarette smoking prevalence rates than adolescents already by the mid-1890s, they may, since cigarette smoking was still in an exploratory phase, not have been significantly higher; moreover, the higher the adult males' prevalence rates, the lower and hence less plausible the per capita consumption.
The Tobacco Trust's Attack on the 1896 Statute in Federal and State Court

The Tobacco Trust’s Litigation Strategy: Relying on Recently Choreographed Litigation in Washington State, West Virginia, and Montana and the Original Package Doctrine

Attorney General Remley returned this morning from St. Paul, and he reports that the anti-cigarette law and its foes had had a one-round fight at St. Paul yesterday, and the little “dude-killers” won.72

The press revealed that the Tobacco Trust would contend that “an ordinary 5-cent package of cigarettes is an original package,” prohibition of the sale of which would unconstitutionally interfere with interstate commerce. The American Tobacco Company’s hope apparently lay in the perception that the Iowa Supreme Court had “gone further than any other court in the country in the direction of original packages” because it had ruled that a bottle of beer shipped into Iowa in a case or barrel was still an original package after it had been removed from that case or barrel; consequently, if its sale could not be prohibited, sale of a package of cigarettes would “probably” also be constitutionally protected. Attorney General Remley, according to the Evening Gazette, “says that if he is called on to argue the case he will plainly say that the court must recede from the former decision or this law will be invalidated.”73

Already on July 10 Fuller had set the machinery in motion to test the law’s constitutionality. That day Donald C. McGregor,74 a “leading tobacconist” of Cedar Rapids75 with the wholesale tobacco company of McGregor and Sailor, who had been selling cigarettes there for many years,76 was arrested and charged with having violated the week-old cigarette law. McGregor, who was arraigned but made no defense, “was accompanied by W. W. Fuller of New York, counsel for the American Tobacco Company, otherwise known as the tobacco trust.”77 McGregor pleaded guilty and was fined $25 and assessed court costs of $4 on two separate counts by Linn County justice of the peace Julius Rall, who committed

72“Cigarets Win,” ICWR, July 29, 1896 (8:3).
73“Will Fight the Law,” CREG, July 8, 1896 (2:3).
74McGregor appears not to have appeared in the 1900 population census, but was listed in the 1896 city directory. The Cedar Rapids Evening Gazette’s City Directory of Cedar Rapids, Marion and Kenwood 202 (Dec. 1896).
76Appellant’s Abstract of Record: Petition for a Writ of Habeas Corpus at 3, McGregor v. Cone, 104 Iowa 465 (1898).
him to county jail for seven days for failure to pay the fine.\textsuperscript{78} The deputy sheriff who filed the information against McGregor signed it at Fuller’s request. The fines were not paid and although the tobacco trust did not initially announce its line of defense, the \textit{Evening Gazette} speculated that a writ of habeas corpus would be probable as the quicker method of securing a decision\textsuperscript{79}:

Mr. Fuller came here with the expectation of finding a court in session which would have jurisdiction in the matter, but the superior court which he had in mind, has nothing to do with criminal actions. If the cases are appealed they cannot be reached in the district court before next term, which will be held in October.\textsuperscript{80}

Fuller, representing “the cigarette interest,”\textsuperscript{81} immediately applied for a writ of habeas corpus in federal court in St. Paul, Minnesota.\textsuperscript{82}

In seeking the writ on one count in state superior court in Cedar Rapids and the other in federal court in St. Paul,\textsuperscript{83} Fuller and the Tobacco Trust were pursuing the same legal strategy that they had seemingly successfully implemented in 1893 against Washington State’s sales ban and in 1895-96 against West Virginia’s $500 annual cigarette sales license law (but unsuccessfully in 1897 against Montana’s 1895 $10 monthly license law). In particular in Washington State ATC had developed an elaborate panoply of stage directions to simulate compliance with the federal judiciary’s antiquated conception of the so-called original package, state interference with the sale of which would trigger a finding of contravention of the federal Constitution’s commerce clause. However, close scrutiny of the Washington case reveals that jurisprudentially the Tobacco Trust failed to attain its objective, although the legislature soon repealed the law.

\textbf{Washington State}

Whatever the Tobacco Trust’s shortcomings as lobbyist in Washington in

\begin{footnotes}
\footnote{Law Is Valid,” \textit{CREG}, July 24, 1896 (7:1) (publishing Judge Giberson’s decision).}
\footnote{Fight for Its Life,” \textit{CREG}, July 11, 1896 (2:3).}
\footnote{Cigarettes Cannot Be Sold,” \textit{ISR}, July 24, 1896 (7:5).}
\footnote{The Sale of Cigarettes,” \textit{ISR}, July 28, 1896 (6:4-5).}
\footnote{Cigaret Law Good,” \textit{CREG}, Jan. 25, 1898 (3:1).}
\end{footnotes}
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

1893, it was willed to rid itself of the statute after the fact and immediately “opened its batteries on the Roscoe act.” Many of the state’s leading wholesale and retail dealers may have been reducing their stocks and preparing for compliance—in Pullman, for example, local dealers not only all signifed their intention of living up to the act’s requirements, but “each one commend[ed] the law”—but the “cigarette trust..., which has no desire to see so large a market for its wares suddenly shut off, will not rest quietly.” On June 5, four days before the law’s effective date, when “a big branch of the tobacco business will be to a great extent destroyed” unless it was contested and held unconstitutional, a Tacoma newspaper reported that George Burbank, probably that city’s largest dealer, had informed it that whereas many other dealers had disposed of their stock, he still had 25,000 cigarettes. He then went on to administer a lesson in the kind of blind obedience on which the Tobacco Trust must, to some extent, have relied to maintain its monopoly at the retail level by fracturing economically dissatisfied dealers’ united front by availing itself of individual retailers who, for whatever reasons, were not forced to carry cigarettes as loss leaders or a customer accommodation, but actually profited from their sale:

“I have been expecting an order from the American Tobacco company of New York city which practically controls the cigarette business of the country and has a capital stock of $5,000,000, to continue the sale after the law takes effect. If the order comes I shall continue to sell and if arrested will take the case to the supreme court. I would not undertake it alone, and as the city dealers do not favor combining to test the law, nothing will be done except upon the New York company’s order. The papers for a contest are prepared and it will take but a short time to decide the matter. The original package will be the point of contest. The law will be tested by Seattle dealers if not here, and we expect there will be little trouble in having the law declared unconstitutional. Many of the dealers are glad that the law was passed, but my profits are about $100 a month. The effect of the law will be to send large amounts of money to Portland and other cities on the state’s borders and if a law to prevent the sale to boys were enforced it would be much better than the present one. The only good effect of the bill will be stop the sale to the younger boys,

84 On passage of the Washington State law, see above ch. 4.
86 MO, June 7, 1893 (4:3) (untitled). Contrary to all previous press reports, three days later the same newspaper asserted: “There is no doubt that an effort will be made by the wholesalers to break down the law.” “In the Two States,” MO, June 10, 1893 (6:1). The article went on to confirm that “retail dealers generally show a disposition to obey the new law.”
87 “No More Cigarettes,” Pullman Herald, June 9, 1893 (2:1) (edit.).
88 “The Law May Be Tested,” TDL, June 5, 1893 (4:3).
and I think this could be done without total exclusion.”

Two days later, ATC leaked to the press its plan to bring a “test case” that day in which “every artifice of legal learning will be used to have it declared unconstitutional.” Indeed, a preview of virtually the entire legal choreography was placed in the public domain:

Arrangements have been completed, presumably at Vancouver, by which a local retail dealer, at the instigation of a wholesale house, will violate the law. The manner of procedure will be a writ of habeas corpus from the judgment of the lower court to the United States court. The point to be raised is that it is a violation of the interstate commerce act [sic] prohibiting the sale of cigarettes in original packages. The intention is to have the court say what an original package is. A description of a package intended to be sold will be furnished. Information will be prepared in the superior court from such description and as soon as the law goes into effect sales will be made and arrests will follow. Probably conviction will be secured in the superior court, resulting in commitments to jail. From that information a writ will be brought to the United States court at Tacoma. Anticipating such a test of the law, Assistant Attorney General Haight today expressed oppition [sic] that the law is constitutional.

According to plan, on that date, the sheriff of Clarke County, pursuant to a warrant of commitment issued by a superior court judge, arrested 33-year-old M[artin] L. Coover, a retail tobacco dealer in Vancouver, Washington, where his brother practiced law, on “eight different charges, covering all the points

89.”The Law May Be Tested,” TDL, June 5, 1893 (4:3).
90.”MO, June 7, 1893 (4:3) (untitled). The WCTU also reported that: “Representatives of the American Tobacco Trust maintain that the law does not prevent the sale of cigarettes in this state in original packages, and so there will be an effort made to evade it. Retailers will be urged to continue the sale.” Etta Jones, “Western Washington,” Union Signal and World’s White Ribbon 19(24):11 (June 15, 1893).
91.”The Cigarette Law,” MO, June 8, 1893 (3:1).
92.Coover was apparently a person of some means, owning race horses and being a partner in a race track. “Will Not Conflict,” MO, Jan. 28, 1892 (8:1); “City News In Brief,” MO, Apr. 23, 1892 (5:1). At the Population Census of 1900 Coover was returned as a 40-year-old living in Vancouver doing watch repairs. At the 1880 census he appeared as an artist and in 1920 an optician, when his first name was finally used. As early as 1887 Coover was a watch maker and in 1890 was, according to Portland, Oregon directories, a jeweler in Vancouver. http://boards.ancestry.com/thread.aspx?mv=flat&m=1230&p=localities.northam.usa.states.oregon.counties.polk (visited Dec. 16, 2009).
93.”The Anti-Cigarette Law,” VC, June 16, 1893(4:3). Every week for an extended period of time E. E. Coover published an advertisement on the front page of a local
which may arise in the enforcement of the anti-cigarette law. 

Because the defense offered no evidence, Coovert was found guilty of each offense; when he failed to give the $250 bail—Coover’s lawyer “Mr. Woods [sic]” gave notice that the defendant would give no bail but would appeal to the Federal Court at Tacoma for a writ of Habeas Corpus because ATC’s constitutional litigation strategy required imprisonment in order to trigger federal habeas corpus proceedings—the court commanded the sheriff to receive Coovert into his custody. A local Vancouver weekly sought (with only partial success) to evaluate the Trust’s plan of judicial attack:

A number of cigarettes were shipped to Coovert in various sized packages done up in various styles, some in the manner that cigarettes are usually shipped, others in plain pasteboard boxes, and others in an ordinary shipping case with no wrapping around them, the object, the object of this to make the courts decide which is an original package....

... If the motion is lost the case will be immediately appealed to the Supreme Court of the United States, and as Mr. Woods [sic] has already taken steps to have it heard there as soon as possible it would seem he has little faith in the motion. The Tobacco Co. will not rest until they can get a decision of the Supreme Court in their favor, as they say without that the retailers will not handle their goods.

There is hardly a possibility but that the Supreme Court will declare at least one of the packages as sold by Mr. Coovert an original package so the evil will only be remedied in as much that [sic] it will take a little more capital to lay in a supply.

The following day, June 10, C. E. S. Wood of the Portland, Oregon law firm of Williams & Wood, filed a petition with the U.S. Circuit Court for the District of Washington for eight writs of habeas corpus requiring the sheriff to produce
Coover in federal court in Seattle. This first lawyer ever to represent a cigarette-selling nominal client on behalf of the Tobacco Trust—seeing through this subterfuge, the *Tacoma Daily Ledger* correctly reported that Wood “represents the *American Tobacco company,*” which “controls nearly the entire cigarette output in the country”—in its challenge to the first statewide cigarette sales ban was, ironically, not only the son of the first surgeon general of the U.S. Navy, but also a corporation lawyer and land agent for Lazard Freres, who defended the likes of Emma Goldman, Margaret Sanger, and the Wobblies, though he did not turn to a radical political legal practice until after the turn of the century. Before he became a lawyer, this West Point graduate (its oldest by the time of World War II) had become a dissident anti-imperialist as a result of his participation in the Army’s Nez Perce campaign in 1877 and his acquaintance with the tribe’s chief, Joseph. Later, however, Charles Erskine Scott Wood

---


101 Perhaps Wood used the occasion of a Decoration day speech he gave in Vancouver shortly before filing suit to meet with his client. “Eloquent Address,” *Sunday Oregonian* (Portland), June 4, 1893 (20:1-2).

102 “Will Test the Law,” *TDL*, June 13, 1893 (8:3).


105 *Assembly* 1(3): 7 (1942).

106 *History of the Bench and Bar of Oregon* 250 (1910); Edwin Bingham, *Charles Erskine Scott Wood* 7-9 (1990); Robert Hamburger, *Two Rooms: The Life of Charles Erskine Scott Wood* (1998); telephone interview with Robert Hamburger, New York City (Dec. 19, 2009). Although he supposedly had already been admitted to the bar of
C.E.S. Wood dared to be himself. He had a passion for freedom and justice and in this he followed the paths of Tom Paine, Walt Whitman, and Mark Twain. He hated the intolerant, the bigoted, the privileged, the ignorant. He was a non-conformist and an iconoclast who nevertheless served with dignity and great force the very institutions of society which he so often chastised and revolted against.

Washington Territory in 1879, four years later he received degrees in law and political science from Columbia University. *History of the Bench and Bar of Oregon* 250 (1910). After having received in 1918 a million-dollar commission for the sale of a wagon-road grant to James J. Hill’s son, Wood retired, left his wife and Portland for a life of poetry with a poet. *Id.*

882 (1852-1944) “loved to proclaim himself an anarchist”107 and wrote for the radical magazine *The Masses.* By 1893 Wood was one of Portland’s foremost corporate attorneys and among its most prominent civic and cultural leaders.108 The central self-contradiction running through Woods’s life is bluntly captured more than a century later on the website of Wood Tatum, the law firm that still bears his name:

The central self-contradiction running through Woods’s life is bluntly captured more than a century later on the website of Wood Tatum, the law firm that still bears his name:

C.E.S. Wood dared to be himself. He had a passion for freedom and justice and in this he followed the paths of Tom Paine, Walt Whitman, and Mark Twain. He hated the intolerant, the bigoted, the privileged, the ignorant. He was a non-conformist and an iconoclast who nevertheless served with dignity and great force the very institutions of society which he so often chastised and revolted against.109

---

107 Erskine Wood, *Life of Charles Erskine Scott Wood* 93 (1991) (quote). According to his son, while calling himself an anarchist for the “shock” value, Wood was in fact a “philosophical anarchist like Prince Kropotkin” and believed, like Jefferson, that “that government is best which governs least.” *Id.* “The real meaning of the word [philosophical] anarchist,” according to Wood, “is one who believes that the ideal form of society is that in which self-interest, guided by intelligence, is the basis of action rather than a law made by a few, or a majority, and enforced upon all. For example, the anarchist would disbelieve in an enforced tax in order that the children of some might have collegiate educations in high schools and universities.” C. E. S. Wood, “Anarchy and Anarchists,” in *Pacific Monthly* (Feb. 1904), reprinted in Edwin Bingham and Tim Barnes, *Wood Works: The Life and Writings of Charles Erskine Scott Wood* 107-12 at 107 (1997). While opposed to government ownership, Wood supported socialism as “preparing the way for anarchism.” Similarly, although corporate privilege and monopoly made labor unions necessary, the “union is full of tyranny of its own—full of ignorance... The whole thing is wrong. Out of one stupid injustice comes another.” C. E. S. Wood, [“Why Strikes?”], in *Pacific Monthly* (Oct. 1907), reprinted in Edwin Bingham and Tim Barnes, *Wood Works: The Life and Writings of Charles Erskine Scott Wood* 124-27 at 127 (1997).

108 C. E. S. Wood may have been the most influential cultural figure in Portland in the forty years surrounding the turn of the nineteenth century into the twentieth.” Tim Barnes, “C. E. S. Wood (1852-1944), *Oregon Encyclopedia*, on http://www.oregonencyclopedia.org/entry/view/c_e_s_wood/. See also E. Kimbark McColl, *Merchants, Money and Power: The Portland Establishment, 1843-1913*, at 313 (1988).

And one of his biographers identified the underlying drive of Wood’s service to capitalist clients:

Woods was combatively critical of the social and economic inequalities spawned by the so-called “Gilded Age”.... He despised what he called “feudalism” in all its forms: organized religion, monopolist enterprise, plutocratic government, militarism, imperialism, and the authoritarian silencing of dissident voices. ... But he also had a passion for good living.... All this cost money—far more than Wood earned. As a result, this eloquent critic of the status quo spent much of his adult life struggling to pay off sizable debts to the very banks and investment houses he criticized. Though he openly supported the forces of radical and progressive change, he earned his living in the service of some of the most powerful financial interests in America. ... Torn between irreconcilable pursuits, Wood maintained two offices. In one he conducted his legal practice, representing some of the most powerful business interests in the country. In the other, his private office, he met with radical labor leaders, anarchists, suffrage activists, and others who challenged fundamental aspects of the American system.110

The services that the rebel Wood performed for the Cigarette Trust quintessentially belonged to the lucrative luxury consumption-financing segment of his dichotomous law practice. That ATC chose this Oregon lawyer to represent it in Washington State litigation reflected the fact that, according to one of Wood’s biographers, based on his education (a Columbia University law degree), the legal services he performed for such entities as Lazard Freres and James J. Hill’s Great Northern Railroad, his social connections, and Portland’s commercial pre-eminence in the Northwest, he had become the “go-to” attorney for East Coast corporations in that region.111


111Telephone interview with Robert Hamburger, New York City (Dec. 20, 2009). Wood had been counsel to Lazard Freres and Hill between 1884 and 1887 before he even joined Portland’s leading law firm. http://www.woodtatum.com/history/ceswood-2.html (visited Dec. 23, 2009). It remains, in light of the fact that Wood’s law firm threw out the files of Wood’s legal cases many decades ago and that none of the archives that hold his papers has relevant documents, a research desideratum to determine what role Wood played in devising ATC’s litigation strategy. Telephone interview with John Mercer, Wood Tatum Portland (Dec. 23, 2009); John Miller, former paralegal at Wood Tatum, Portland (Dec. 26, 2009); email from Peter Blodgett, curator of Western American History, Huntington Library (Aug. 27, 2010). The choice of an Oregon lawyer was all the more curious since ATC had a relationship with a corporate lawyer in Seattle, former New York Assembly Speaker Fremont Cole, who also successfully lobbied for the Trust for repeal of the Roscoe law in 1895. See above ch. 5.
The first habeas petition that Wood filed in Coovert’s name alleged that the dealer’s arrest and detention for having sold a package of Vanity Fair cigarettes, “being ten paper-wrapped cigarettes enclosed in a paste-board slide box,” was unlawful because the underlying law itself was unconstitutional on the grounds that it abridged the privileges and immunities clause of the 14th amendment and that “its effect is to prohibit and regulate commerce among the several States” in contravention of article 1, section 8.  The Trust sought to reach this conclusion by means of the “original package” doctrine:

The said cigarettes were sold in Oregon to your petitioner by the American Tobacco Company, doing business in the State of New York, and said cigarettes were manufactured in New York and were not shipped to your petitioner in pasteboard boxes.

But the said package was, with one hundred and forty-nine other such packages, shipped by said American Tobacco Company from the State of Oregon, enclosed in a common pine shipping case, only being merely a packing case for the protection and safety of the goods in transportation, and that theretofore, to wit, April 6, 1893, the honorable the Commissioner of Revenue of the United States decided that such a package...containing a statutory quantity of cigarettes and properly stamped and cancelled and bearing the caution label and number of the manufacturing district and State and the number of cigarettes contained therein, was an original package as contemplated by United States law and regulations, and that the repacking of said packages in additional coverings of wood, paper, etc., was optional with the manufacturer.  

Doubtless in contemplation of this very litigation, ATC, less than a month after the governor had approved the law, had, as part of its careful stage-management, submitted to the commissioner of Internal Revenue a sample package of cigarettes, “inquiring as to the necessity for a re-enclosing in an additional covering of paper, wood, or other material in placing the same upon the market.”  To be sure, the Trust sought to confuse judicial decision-makers by

---


113[Petition for writ of habeas corpus] (June 10, 1893), in Transcript of Record at 2-3, Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coovert, 164 US 702 (1896).  Wood and the county prosecuting attorney agreed to a stipulation on the dimensions of the pine box—namely, that it was 16” x 10” x 4”—and that Coovert had opened it before making the sale of the package of 10 cigarettes in question, which was not opened in Coovert’s store.  Id. at 6 (June 22, 1893).

114Commissioner John W. Mason to American Tobacco Company (Apr. 6, 1893), Exhibit No. 5, in Transcript of Record, Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coovert, 164 US 702 (1896).  The language in
conflating the commissioner’s statutory use of “original package” with its unrelated meaning developed by U.S. Supreme Court precedents dealing with the congressional interstate commerce clause. The local press inferred “from the fact that the form of complaint has been printed...that similar action will be taken to defend all agents of the American Tobacco Company,” which manufactured the cigarettes in question.115

The judge in charge of the federal habeas corpus proceeding was Republican116 Cornelius Holgate Hanford (1849-1926) of the U.S. Circuit Court for the District of Washington, who was also the only federal judge in the state for the first 15 years of statehood after having been the last chief justice of territorial Washington.117 His boast, in a publication that he himself edited, that the fact that denunciations by “newspapers and assemblages angered by his decisions” had never “detract[ed] from the esteem” in which “the business community” held him was a scrupulously correct admission against interest in contrast to the falsehood a few lines later that he had retired from his judgeship.118

In fact, in 1912 he was impelled to resign in the midst of impeachment proceedings, which revealed just how corrupt his business relations were. The immediate trigger for Hanford’s forced departure was his cancellation of the naturalization certificate of Leonard Olsson, a Swedish immigrant who was a member of the Socialist Labor Party. Hanford claimed that Olsson had perpetrated a fraud on the federal court in order to secure citizenship because, although he knew that the Constitution forbade the deprivation of property without due process of law, the SLP “‘has for its main object the complete elimination of property rights in this country.’” From naturalization “‘[t]hose who believe in and propagate crude theories hostile to the Constitution are barred,’” quotation marks is from Mason’s paraphrase of ATC’s letter of April 3, which was not included in the Transcript of Record. It is unclear whether ATC had prompted Mason’s reference to “original package” by using the term in its letter.

115”‘Original Package,’” SP-I, June 13, 1893 (5:1).


117Seattle and Environ, 1852-1924, at 3: 396, 398 (C. H. Hanford ed. 1924). Hanford had also been assistant U.S. attorney and Seattle city attorney.

118Seattle and Environ, 1852-1924, at 3: 390 (C. H. Hanford ed. 1924). The fact that he was only 63 years old when he was forced to give up his position meant that he was “not entitled to retire on pay.” H. Rep. No. 1152: Report (To accompany H. Res. 576) in the Matter of Impeachment of Cornelius H. Hanford United States Circuit Judge for the Western District of Washington 12 (62d Cong., 2d Sess. 1912) (testimony of A. A. Nordskog).
especially when their propaganda “is to create turmoil and end in chaos.” 119
Victor Berger, the sole socialist in Congress, immediately advocated Hanford’s
impeachment on the grounds of abusing the power of his office, 120 but in offering
a formal House resolution for impeachment three weeks later, in June 1912,
Berger charged that in addition to being “an habitual drunkard.” Hanford had also
issued “a long series of unlawful and corrupt decisions.” 121 (Public outcry over
Hanford, which culminated in mass meetings, calls for his impeachment, and his
being hanged in effigy, had already erupted in 1911, when he issued an
injunction, inimical to the position of the Seattle citizenry, fighting for a five-cent
street-car fare.) 122 Berger cited newspapers, monthly magazines, and public mass
meetings as authority for the charge of “invariably rendering his decisions in
favor of corporations and against the people. He is a disgrace to the bench and
a parody on justice.” 123 That very month a muckraking magazine called Hanford
the last resort of corporations distressed by legal necessities.” 124 Berger was
animated to press his claim by a letter from President Taft’s attorney general that
he had “notified that United States attorney that upon the facts stated by Judge
Hanford in his decisions, the department [of Justice] was of the opinion that a
gross injustice had been done to Mr. Oleson [sic] in cancelling his certificate of

119 “Judge Explains His Decree,” NYT, May 15, 1912 (3).
120 “Socialists to Fight Hanford’s Decision,” NYT, May 15, 1912 (3).
121 CR 48:7799 (June 7, 1912). Many of the charges against Hanford appear to have
derived from a sworn affidavit by John H. Perry, a lawyer in Seattle admitted to practice
in Hanford’s court, which was presented to the House of Representatives. In addition to
charging that Hanford was a “grossly immoral and dissolute man,” a “libertine,” and a
“moral bankrupt by night and a judicial pervert by day,” Perry alleged that Hanford had
violated his judicial oath to “do equal right to the poor and to the rich” inasmuch as “he
is a tool of corporate wealth and privilege seeking corporations, and looks with scorn and
hatred upon the struggle of the great masses of mankind for better conditions and a more
eQUITABLE distribution of this wealth which labor by its toil creates....” H. Rep. No. 1152:
Report (To accompany H. Res. 576) in the Matter of Impeachment of Cornelius H.
Hanford United States Circuit Judge for the Western District of Washington 1515, 1516,
122 “Hanford Resigns; No Impeachment,” NYT, July 23, 1912 (18).
123 “Moves Impeachment of Judge Hanford,” NYT, June 8, 1912 (3). To be sure,
Hanford’s conduct, in Berger’s account, did not deviate radically from that of federal
judges at large, who were “generally considered by the people to be the last resort of the
corporations and railroads and of all kinds of plutocratic evil-doers whenever they are in
straits.”
Refuge for the Interests,” Everybody’s Magazine 26(6):829-41 at 840 (June 1912).
naturalization.”\footnote{125}

The Judiciary Committee report on Berger’s resolution recommended to the full House that the committee be directed to inquire and report whether House action was required concerning Hanford’s official misconduct “and say whether said judge has been in a drunken condition while presiding in court; ...has been guilty of corrupt conduct in office; whether the administration of said judge has resulted into injury and wrong to litigants in his court and others affected by his decisions; and whether said judge has been guilty of any misbehavior for which he should be impeached.”\footnote{126} In fact, a subcommittee traveled to Seattle, where it took testimony for three weeks, which filled more than 1,700 printed pages. The narrative of Hanford’s customary nocturnal bar crawls by a Burns detective who had shadowed him for weeks culminated in an account of the inebriated judge’s urinating on a public sidewalk in Seattle.\footnote{127} More to the point was testimony by an official of the Northern Pacific Railroad, combined with Hanford’s correspondence on official court stationery, showing that the judge’s deal with the company to acquire large land tracts (for his Hanford Irrigation and Power Company)\footnote{128} had “hung fire for a year, but was rapidly completed” after Hanford had issued a decision in a case considerably cutting the railroad’s tax liability.\footnote{129} Other evidence showed that “Judge Hanford and his crowd”\footnote{130} had

\footnote{125}“Seeks to Impeach Federal Judge,” CT, June 6, 1912 (1).


\footnote{128}On the company, see Clinton Snowden, History of Washington: The Rise and Progress of an American State 5:30 (1911). Since Hanford was an advisory editor of this volume, he presumably wrote or prepared the 27-page hagiographic entry on himself that opened it. Seattle and Environs, 1852-1924, at 3: 396, 398 (C. H. Hanford ed. 1924). Hanford, his three brothers, brother-in-law, “and a number of leading citizens of Seattle and Tacoma” organized the company “for utilizing the power of Priest Rapids in the Columbia river in generating hydro-electric power and for irrigating sagebrush land in that region. The corporation installed machinery and constructed a power plant... a pumping station for elevating water from the river, an electric transmission line and ditches constituting an irrigation system, put those works in operation for service to land owners and located the town of Hanford.... The works endure, although the corporation passed into the hands of eastern capitalists who wrecked it.” Seattle and Environs, 1852-1924, at 3: 396 (C. H. Hanford ed. 1924).

\footnote{129}“Railroad Sold Judge Land,” NYT, July 22, 1912 (16).

\footnote{130}H. Rep. No. 1152: Report (To accompany H. Res. 576) in the Matter of
“successfully mulcted the school fund of the State by purchasing land worth $500 an acre for $10 an acre at a sale obscurely advertised and held without competing bids in a small town....”131 The press also revealed that “some Seattle attorneys and railroads were largely responsible for inducing”132 Hanford to submit his resignation (which Berger interpreted “as an admission of guilt”)133 and that “the threatened revelations by a newspaper editor of facts not favorable to Hanford were an accelerating factor.”134

At the June 13 hearing before Judge Hanford, Wood—whom the local press without circumlocution reported as having instituted the action “on behalf of the American Tobacco company...for the purpose of testing the validity of the law”—argued that the five-cent, 10-cigarette package sold by the retailer to the customer was the manufacturer’s original package, the sale of which for that reason could not be abridged by state law, as had already been decided by “the Iowa liquor cases” holding that a bottle of beer was an original package. Venturing off into an entirely unrelated issue, Wood dwelt on the alleged ambiguity of the term “cigarette” in the law: because various dictionaries and Internal Revenue decisions defined a cigarette as a little cigar and it might be made entirely of tobacco, he contended that it would be “an unjust discrimination to say that a large cigar might be sold, and that exactly the same materials in the same form and different only in being smaller should not be sold.” In contrast, Clarke County prosecuting attorney C. D. Bowles contended that the manufacturer’s original package, as far as commerce was concerned and the only package in which it sold the goods, was the carton containing 50 such boxes.135 After having heard these arguments Judge Hanford granted the petition and issued eight writs of habeas corpus requiring the sheriff to produce Coovert in federal court in Seattle on June 22.136 Although, as the press observed, Hanford gave the

---

131 “Railroad Sold Judge Land,” NYT, July 22, 1912 (16).
132 “Hanford Resigns; No Impeachment,” NYT, July 23, 1912 (18).
134 “Hanford Resigns; No Impeachment,” NYT, July 23, 1912 (18).
135 “The Writs Granted,” SP-I, June 14, 1893 (8:5).
136 [Order for writ of habeas corpus] (n.d. [June 13, 1893]), in Transcript of Record at 5-6, Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coover, 164 US 702 (1896). Perhaps preparation for these court appearances explains why Wood wrote to his son (on law firm letterhead) in mid-June that he was “very busy....” C. E. S. Wood to Erskine Wood (June 16, 1893), in Charles Erskine Scott Wood and Erskine Wood Family Papers, Box 3:11, Lewis & Clark College Special Collections and
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

anti-cigarette law a “black eye,” he did not pass on the merits of the case; instead, he granted the writs because doing so was the only way this important case could be reviewed by a higher court. The proceedings, as the state attorney general later noted, had been “instituted for the purpose of securing an early decision” from the U.S. Supreme Court and Hanford had granted the writs “pro forma” in order to facilitate the process. Editorially the Post-Intelligencer was persuaded that there was “little doubt” that the U.S. Supreme Court would rule against ATC’s contention that an individual package of cigarettes was an original package for purposes of interstate commerce and thus vindicate the bill.

From the perspective of The New York Times, the ruling’s legal soundness was a matter of indifference because this “kind of legislation” was in itself “ridiculous”:

The smoking of cigarettes may be objectionable, as are many other foolish practices, and it may be more injurious than other modes of smoking tobacco, but it is an evil which cannot be remedied by law, and it is not the kind of evil to the community at large that is a legitimate subject for legislative action. That kind of law is pretty sure to be evaded, and it begets a contempt for law in general and for public authority that is more pernicious than selling cigarettes or even smoking them.

The judgment that Hanford issued on June 22 ordering Coover to be discharged from imprisonment was based on a very narrow, fact-specific ruling, which, while failing even to use the term “original package,” let alone to offer the slightest substantive analysis of constitutional jurisprudence, nevertheless conclusorily gave ATC the practical result that it had sought:

[T]he said law of the State of Washington prohibiting the sale of cigarettes...is in contravention of article 1 of section 8 of the Constitution of the United States and null and void in so far as it prohibits or attempts to prohibit the selling, giving, or furnishing to any one by the importer of a slide pasteboard box of containing ten paper-wrapped cigarettes.

---

Archives.

137“The Writs Granted,” SP-I, June 14, 1893 (8:5). Since ATC with certainty would have sought U.S. Supreme Court review had Hanford ruled that the statute did not interfere with interstate commerce, the judge could have achieved the same purpose of insuring and expediting higher review whichever way he decided the case.


139SP-I, June 15, 1893 (4:2-3) (untitled edit.).

140NYT, June 15, 1893 (4) (untitled edit.).
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

said box having upon it the U.S. internal revenue stamp and caution notice required by
law, also number of manufacturer’s district and State, which box was received by the
importer from without the State of Washington, enclosed with other similar boxes in a
common pine shipping case....

Asked by the press the evening that he issued the judgment whether cigarettes
could now be (lawfully) sold in Washington, Hanford replied that “he could not
discuss the force and effect of one of his own decisions.” Underscoring the pro
forma character of his role, he pointed out that because he had understood that the
case would be appealed to the U.S. Supreme Court, “he had simply got the case
in a position to be readily appealed.”142 The judge’s self-exegetical modesty
passed some dealers, at least in Tacoma, right by, with the result that the next
day:

The smoke and stench of the cigarette is again abroad in the land and the thousands
of “inhalers” took their fill yesterday after the opinion of Judge Hanford had given the
dealers the courage to again place the “youth killers” on their counters for sale. Many of
the tobacco men have been quietly selling cigarettes since the law took effect. A number
of the dealers had not returned their stock left on hand on June 7th and consequently
profited by the compliance of the other dealers with the law. These, however, have
ordered stocks and will be selling as usual today.143

Soon, even ATC would be publicly teaching dealers a different lesson, but for the
time being the press knew enough to report that some arrests might be made
because there was no right to sell cigarettes until the U.S. Supreme Court so
ruled.144

What Hanford had failed to deliver in terms of elaborating original-package
docctrine to conform to ATC’s alleged interstate cigarette shipping practices the
U.S. Supreme Court—to which Washington State Attorney General William C.

141[Judgment] Petition for Writ of Habeas Corpus, (U.S. Cir. Ct. for the Dist. of
Washington, 9th Cir., June 22, 1893), in Transcript of Record at 8–9, Supreme Court of
(1896). See also “Ross Can Now Build,” SP-I, June 23, 1893 (5:4). To the extent that the
underlying fact patterns differed somewhat regarding the other seven writs, the language
of Hanford’s judgment varied correspondingly. Hanford also ordered Coovert to enter into
a $250 recognizance to secure his appearance to answer the judgment of the appellate
court.

142“It Is Null and Void,” TDL, June 23, 1893 (8:1).

143“Cigarettes on Sale Again,” TDL, June 24, 1893 (4:2).

144“Cigarettes on Sale Again,” TDL, June 24, 1893 (4:2).
Jones the very next day petitioned Hanford to allow an appeal, which the judge immediately did—would, at least pursuant to the Tobacco Trust’s strategic vision, obligingly furnish. Because the anti-cigarette law’s federal constitutionality was in dispute, the state attorney general was entitled to and did appeal Hanford’s rulings directly to the U.S. Supreme Court, thus by-passing the circuit court of appeals in San Francisco. Ten days after the judge had handed down his decision the press was already reporting that it was “understood” that ATC’s lawyers and the attorney general would “unite in a motion to advance the case on the docket as early as possible.” Moreover, until the judicial system produced a final decision, “the sale of cigarettes by dealers in Washington will not be sanctioned by the tobacco company” and, pursuant to the attorney general’s instructions to all district attorneys, “if sales are made in the state the dealers will be arrested.”

In fact, Attorney General Jones notified all of the state’s prosecuting attorneys that Hanford’s decision “was merely pro forma and may be reversed.” In his letter he informed them that:

I am authorized to advise you that the proceedings heretofore taken in the circuit court of the United States with reference to the discharge on writ of habeas corpus of one M. L. Coover, who was arrested for selling cigarettes in violation of the act of March 7, 1893, were not designed or intended to suspend the enforcement of that law, but only for the purpose of enabling the questions presented by the petitions in these cases to be speedily determined in the supreme court of the United States upon appeal.

I am also authorized to advise you that the writ will not be awarded in any other case that may arise on account of a prosecution for the violation of that law. You will therefore enforce that law and prosecute all violation thereof the same as though such proceedings

---


147 “The Cigarette Case,” SP-I, July 3, 1893 (1:4). See also “Cigarette Case Appealed,” TDL, July 4, 1893 (1:4). Curiously, both articles’ dateline was Portland, suggesting perhaps Wood as the source. On Attorney General Jones’s appeal of the eight writs, see “News of the Northwest,” MO, July 2, 1893 (4:7).

ATC appeared to play along with this understanding. In Vancouver, for example, where it had staged the Covert escapade, on July 5—the first possible date in the wake of the agreement—it began placing rotating advertisements on the front page of one and an inside page of the other local weekly for shipment by mail or express, “Charges All Paid,” from Portland of three of its brands. Interestingly—because it made a mockery of ATC’s mendacious future litigational stage directions calling for shipment of individual cigarette packages to dealers—the minimum volume was five packages (50 cigarettes), which cost 25 to 50 cents, depending on the brand, which could be paid for by draft, postal money order, postal note, or postage stamps. In the *Vancouver Independent* the ads ran on the front page every week through November 1, while the *Vancouver Columbian* published them through March 16, 1894. To be sure, Vancouver and Portland were separated only by the Columbia river, but the marketing technique strongly indicated that ATC was complying with the sales ban in Washington. In fact, as early as June 3, that is, almost a week before the law went into effect, the Trust had begun running the very same ads on the front page of a newspaper in Tacoma, located about 80 miles from the Oregon border. What is unknown (but a research desideratum) is the extent to which this lawful leakage of original packages in interstate commerce directly shipped to individual consumers was able to compensate for the in-state prohibition. The fact that ATC pushed for and secured the law’s repeal and vigorously opposed all such laws in other states suggests that direct mail was a poor substitute for retail store sales. Immediately upon repeal of the ban in June 1895, ATC began running front-page ads in the *Independent* announcing that the same cigarettes were “again on sale by all progressive dealers.”

In the event, despite the alleged joint effort at fast-tracking, more than three years passed before the Supreme Court decided the case. The fault did not lie with the appellant State of Washington, whose brief was (together with the transcript of record) filed on April 3, 1894 and lived up to its name, its

---

150*VI*, July 5, 1893 (1:2-3); *VC*, July 7, 1893 (7:1).
151*TDL*, June 3, 1893 (1:3-4).
152*VI*, June 12, 1895 (1:4). The ads appeared through Dec. 5 and then again on Jan. 9 and 16, 1896. The same ads began appearing in the *Vancouver Columbian*, June 14, 1895 (8:5). Coverage was not limited to border towns: the same ads also appeared in the *Seattle Post-Intelligencer*, for example, Oct. 9 (2:5) and Dec. 18, 1895 (4:5).
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

The jurisprudential core spanning barely seven small pages. The upshot of the five pages that Jones devoted to describing and recapitulating the eight scenarios that the Trust had choreographed was that “in every case the package in which the goods were shipped into the state was broken open, and a portion only of the contents disposed of at retail.” (This fact was salient because it formed the foundation of the argument that ATC failed to satisfy the central requirement of the original package safe harbor.) Jones then alerted the Court to the fact that it was

apparent from the ingenuity displayed in slightly varying the circumstances attending the sale in each case, that the American Tobacco Company is desirous of securing the advice of this honorable court as to how it may violate the laws of the State of Washington with impunity, and still enjoy the protection of the constitution and laws of the United States under the federal power to regulate commerce between the states, and that it is anxious to know which of these sales, if any, was the sale of an “original package” within the scope of the doctrine announced in *Leisey* [sic] v. *Hardin*, 135 U.S. 100.

---

153 Brief on Behalf of the State of Washington, Appellant, In the Matter of M. L. Coover, Habeas Corpus, Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coover, 164 US 702 (1896). The brief was file stamped Apr. 3, 1894, while the same date was printed on the Transcript of Record.

154 Brief on Behalf of the State of Washington, Appellant, In the Matter of M. L. Coover, Habeas Corpus at 8 (Apr. 3, 1894), Supreme Court of the United States, Oct. Term, 1893, No. 1175, State of Washington v Coover, 164 US 702 (1896). Jones calculated that in each of the first six scenarios Coover had sold one 10-cigarette package, in the seventh five, and in the eighth 50; for the first seven scenarios the number of 10-cigarette packages shipped together (in a pine shipping case or, in one scenario, in a paper wrapper bound with strong cord) ranged between 20 and 150. However, in the eighth scenario—which involved the sale of a box of 50 packages of 10-cigarette enclosed in paper and tin-foil wrappers and shipped in wooden packing cases, which were, in turn, enclosed in pine shipping cases—Jones did not indicate (because the petition for the habeas corpus writ did not state) how many such wooden packing cases were shipped in each pine shipping case. If only one wooden packing case of 50 packages was shipped in a pine case, then Coover would have sold to one person the entire contents of the shipment and would therefore have satisfied that requirement of the original package doctrine. [Petition for writ of habeas corpus] at 2 (June 10, 1893), in Transcript of Record, Supreme Court of the United States, Oct. Term, 1893, No. 1182, State of Washington v Coover, 164 US 702 (1896).

The attorney general argued that under none of the eight scenarios had Coovert’s sale of cigarettes been protected because the “utmost limit” to which *Leisy* carried the original package doctrine was that “the citizen of one state had the right to import any legitimate subject of commerce into another state and there dispose of it by himself or agent in the original package of transportation unbroken and as a whole.”

In *Leisy*, a partnership whose members lived in Illinois made beer there, which was shipped in 122 quarter barrels, 171 one-eighth barrels, and 11 sealed cases to an agent in Iowa, who offered for sale and did sell them all in those receptacles unbroken and unopened. The Iowa Supreme Court in 1889 reversed the lower court’s decision that the Iowa statute prohibiting the sale of beer, which the sales had violated, was unconstitutional. However, the next year the U.S. Supreme Court reversed that decision, ruling that the plaintiffs, who had sold beer in Iowa “in original packages,” “had the right to import this beer into that State, and...the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time, we hold that in the absence of congressional permission to do so, the State had no power to interfere by seizure, or any other action, in prohibition of importation and sale by the...non-resident importer. Whatever our individual views may be as to the deleterious or dangerous qualities of particular articles, we cannot hold that any articles which Congress recognizes as subjects of interstate commerce are not such, or that whatever are thus recognized can be controlled by state laws amounting to regulations, while they retain that character; although, at the same time, if directly dangerous in themselves, the State may take appropriate measures to guard against injury before it obtains complete jurisdiction over them. To concede to a State the power to exclude, directly or indirectly, articles so situated, without congressional permission, is to concede to a majority of the people of a State, represented in the state legislature, the power to regulate commercial intercourse between the States, by determining what shall be its subjects, when that power was distinctly granted to be exercised by the people of the United States, represented in Congress, and its possession by the latter was considered essential to that more perfect Union which the Constitution was adopted to create.”

To be sure, the precise question that the State of Washington was raising in *Coovert* had not been contested in *Leisy*—namely, whether the beer barrels, kegs,
The Tobacco Trust's Attack on the 1896 Statute in Federal and State Court

or cases were original packages. To resolve this question, Jones analyzed various cases that had focused on determining whether importers/agents had been “selling this importation by the original unbroken package in which it was imported.”

The attorney general concluded that under none of the eight scenarios had Coovert even made an “attempt to bring himself within [this] condition, unless the allegation that the...commissioner of internal revenue has decided that a five cent package of cigarettes is an ‘original package’ so far as his office is concerned, can be considered such an attempt. But as we are unable to see how the decision of the commissioner..., who has nothing whatever to do with interstate commerce, can have any bearing on this case, we refrain from any further allusion to it.”

With the exception of an Iowa Supreme Court decision that Jones dismissed on the grounds that it had been decided before the U.S. Supreme Court decision in Leisy and another Iowa case that was decided on the


161 Collins v Hills, 77 Iowa 181 (1889). The court in effect abolished the original package doctrine: “The...packing of the bottles in boxes and barrels was a mere matter of convenience in the sale and shipment of the property. When defendant purchased one hundred bottles of either beer or whiskey, he in effect purchased that number of packages of the article, and when he sold by the bottle the transaction was of the same character. The fact, that, as a matter of convenience in handling during the transportation of the property, the bottles were packed in boxes and barrels, can make no difference as to the character, in law, of the transaction. If he had the right to bring the liquor within the state, and to sell it here, he had the right to adopt such means and mode of shipment as best suited his convenience or interest; for...there is no regulation upon the subject of either state or national enactment. The right to buy and sell in such quantities as he chose is necessarily included in the right to buy and sell in any quantity. The right to bring it within the state by the car-load is as certain as the right to bring it in by the single bottle or other package. If his interest or convenience would be better served by shipping into the state in cars fitted up with tanks, or other vessels attached to the cars, and from which the liquors must be drawn at the end of the voyage, he had the right, in the absence of statutory regulation, to adopt that mode of transportation. But in that case the liquors on their arrival within the state, would of necessity be placed in other vessels than those in which they were brought within the state; and the result of the distinction would be that, while he had the right to bring them within the state for the purpose of selling them here, yet, having brought them here in the exercise of that right, he had no right to sell them because he had
basis of the first—both of which “lend some countenance to petitioner’s contention that the packages sold by him were ‘original packages’” because they deemed individual bottles taken out of a barrel or a package with other bottles to be “original packages”—he cited a series of recent state and federal cases, with which the two Iowa cases were “violently at variance,” that unambiguously rejected such ruses as protected by the federal interstate commerce clause, holding multi-bottle boxes to be the original packages and not the bottles sold singly. And, finally, where a federal court determined that each bottle of liquor

adopted a mode of transportation which, although perfectly lawful, required their removal from the vessels in which they were transported. The unsoundness of the attempted distinction is shown by the absurd results to which it would lead. If he had the right to sell the liquors in the state because the transaction of their purchase and transportation was one of national, rather than state, jurisdiction, it follows necessarily that he had the right to make the sales in whatever form or quantity he saw fit. Any other holding, it seems to us, would lead to results and conclusions which, owing to their absurdity, would be shocking alike to legal judgment and the common sense of mankind.” Id. at 183-84.

State of Iowa v Coonan, 82 Iowa 400, 401 (1891). Jones was remiss in failing to point out that by the logic of this opinion virtually no shipment of alcohol would not have qualified as an original package since the court ruled that 24 beer bottles placed in 24 separate compartments of open-frame boxes that were taken out individually and sold were, “there can be no doubt,” original packages.


Of the three cases cited by Jones the last was especially pertinent: In re Harmon, 43 F. 372 (C. C. N.D. Miss. 1890); Smith v State, 54 Ark. 248 (1891); Keith v State, 91 Ala 2, 7-8 (1890): “In this case, the bottles, separately wrapped in paper, were shipped in a box, and sold singly. Merely labelling each bottle ‘original package,’ did not make it one, if it was not really an original package. The term...package is a bundle or bale made up for transportation. It may consist of a single article; but, when separate articles are placed together, and prepared for transportation in a bundle, or bale, or box, or other receptacle, they do not form as many separate and distinct packages as there are articles, though they may be wrapped separately. The case, or box, or bale, in which separate articles are placed together for transportation, constitutes the original package in the commercial sense. ... Had the boxes been covered and nailed, or otherwise secured, it would not have admitted of serious question, that they formed the original packages. The purpose of securing a box with a fastened cover is the protection of its contents against loss by theft or otherwise, and for convenience for handling. A distinction between a box securely covered and one uncovered, in respect to its character and status as an original package, is a distinction without a difference, unsupported by principle or reason. The mode of shipment adopted was manifestly a mere contrivance to evade the consequences of a violation of the State
had been shipped separately in a box and not packed with others in a shipping case, Jones agreed that it had properly held them to be original packages. The alacrity with which he jumped to that conclusion revealed that the doctrine was in flux: within a few years even the U.S. Supreme Court would reject the view that per se ratified as an original package an individually packaged and sold commodity and adopted the position that courts had to examine the commercial reality of the shipment to control for subterfuges such as shipping individual five-cent packages of cigarettes.

Almost a year after Attorney General Jones had filed the State’s brief, Judge Hanford’s younger brother, Republican Representative Frank Hanford—who, in addition to owning an insurance business, was “interested in many enterprises in and about Seattle, and... Vice President of the Myers Packing Company, one of the largest salmon canneries on the North Pacific Coast”—filed a bill in the House
that would more effectively accomplish ATC’s agenda of eliminating the prohibitory law and its exemplary model for other states than his brother’s ruling, which had been in legal limbo for a year and a half. Ten days before Hanford filed his bill, however, Republican Senator William P. Sergeant (by request) had filed Senate Bill No. 240 to repeal the 1893 act.\footnote{S.B. No. 240 (Feb. 15, 1895, by Sergeant) (copy furnished by Washington State Library); Senate Journal of the Fourth Legislature of the State of Washington 218 (1895).} It was referred to the Committee on Medicine, Dentistry, Hygiene and Surgery, which on Feb. 22 recommended its indefinite postponement, which the Senate adopted the next day.\footnote{Senate Journal of the Fourth Legislature of the State of Washington 303 (1895).} Intriguingly, the press interpreted this action in the following context, which echoed the aforementioned newspaper accounts of the legislature’s motivation for passing the 1893 bill: “While it is believed that as many cigarettes are smoked now as before the enactment of the present law, there is a disposition among members to prevent the American Tobacco Company operating openly in cigarettes in the state.”\footnote{Id. at 693.}

That sharply antagonistic forces were impinging on any decision to retain or repeal the sales ban was sketched out by the \textit{Morning Oregonian} and the \textit{Post-Intelligencer}:

\begin{quote}
There has been no measure enacted into law by the Washington legislatures that has attracted so much attention as the Roscoe cigarette law. Cigarette “fiends” raised an awful howl when it first went into effect, but it was not long before cigarettes were shipped into the state and the smokers’ appetite appeased. Roscoe, who is not a member of the present legislature, has been here working against the repeal of his law, but seemingly without effect.\footnote{“The Cigarette Law,” \textit{MO}, Mar. 10, 1895 (3:3). With minor variations the same text appeared as “Only Five Days Left,” \textit{SP-I}, Mar. 10, 1895 (1:3).}

This narrative, too, (non-conclusively) suggested that the ban had not been a dead
\end{quote}
letter—that while the law was still being enforced, in conformity with the attorney general’s aforementioned instructions to the district attorneys, leakage had occurred in the form of (lawful) direct importation by consumers themselves for their own personal use, which could not, under the Supreme Court’s original package doctrine, be suppressed unless either Congress voted to exclude cigarettes from the reach of constitutional interstate commerce jurisprudence as it had done in 1890 for liquor or Oregon enacted its own sales ban.

On February 25, 1895, Hanford filed House Bill No. 558, which, although designed to convert the universal ban on cigarette sales into a mere licensing law for sales to all those 18 and older, he nevertheless styled “An Act to provide for the better protection of the public health in relation to the manufacture and sale of cigarettes.” The bill, which required anyone intending to sell cigarettes to obtain a license, added the cosmetic and meaningless requirement (which functioned largely as government-sponsored public relations for the beleaguered cigarette industry) that an applicant for a license make an oath that “the cigarettes intended to be sold do not contain any injurious drug, narcotic or other deleterious matter” and that “he will not knowingly sell” such cigarettes. H.B. 558 created a decentralized system by authorizing city councils and boards of county commissioners to draft the licenses, which cost retailers $10 and wholesalers $25 annually, contingent on endorsement by five “reputable” local

---

172 See below this ch.
173 See below this ch. Even had Oregon done so, the exclusion from such a law of jobbers engaged in interstate trade with out-of-state customers would have permitted the trade with Washington consumers to continue. See below this ch.
174 The new law did not expressly repeal the old one; curiously, the final section of the bill, which provided that “[a]ll acts or parts of acts inconsistent or in conflict with this act are hereby expressly repealed,” did not appear in the enactment, although the legislative history, as embodied in the House Journal and Senate Journal, included no amendment to strike it. House Bill No. 558 (by Hanford, Feb. 25, [1895]), § 8, State of Washington, Printed Bills of the Legislature, Fourth Sess., House 1895 (copy furnished by Washington State Library). The compiler of the unofficial annotated state code of 1897 noted that he had omitted the former as “superseded” by the latter. Ballenger’s Annotated Codes and Statutes of Washington, § 2949, at 1:751 (1897).
175 H.B. 558 (Feb. 25, 1893).
176 H.B. 558, § 1 (Feb. 25, 1893).
The Tobacco Trust's Attack on the 1896 Statute in Federal and State Court

residents. The penalty for the misdemeanor of selling or giving away cigarettes without a license was $50 or 60 days' imprisonment, the same penalty applying to anyone with or without a license who sold or gave away cigarettes to a minor under 18 years old. In order, presumably, to avoid the aforementioned fatal interference with interstate commerce, the law also penalized those selling cigarettes not in an “original and full package...” The local licensing government was required to revoke the license of anyone convicted of violating the act and was prohibited from granting such a person another license.

The bill was referred to the House Committee on Commerce and Manufactures, of which, conveniently, Hanford himself was chairman. The very next day his committee, consisting of five Republicans, recommended passage of the bill without any amendments. On March 9 the full House took up H.B. 558. Republicans had widened their majority in the House to an “overwhelming” 54 of 78 seats, leaving Democrats with only 3, while the Populists significantly increased their presence from 8 to 21. After the adoption of several minor floor amendments and hearing Hanford urge passage

---

178 H.B. 558, § 3 (Feb. 25, 1893). The license fees were to be retained by the local government. § 4.

179 H.B. 558, § 5 (Feb. 25, 1893). The parent of a minor under 18 to whom cigarettes had been sold or given away was authorized to prosecute a civil action against a violator for a $250 penalty. Id.

180 H.B. 558, § 6 (Feb. 25, 1893).

181 H.B. 558, § 7 (Feb. 25, 1893).


186 The most significant further diluted the already meaningless oath that the cigarettes to be sold contained no deleterious ingredients by inserting “to the best of his knowledge and belief.” Another amendment marginally strengthened the mandatory licensing by making express the unlawfulness of selling cigarettes before obtaining a license. House
on the grounds that the existing law “had proved ineffectual” and needed to be replaced by “practical legislation,” the House passed the de facto repealer by the overwhelming vote of 55 to 7, two of the four Democrats, but only three Republicans and two Populists voting No. Of the nine House members who cast votes on H.F. 236 and H.F. 558, only one voted consistently by opposing the ban in 1893 and supporting its repeal in 1895, while eight inconsistently voted for the ban and its repeal. The press observed that passage in the Senate was “probable,” thus making the Roscoe law a “dead duck,” and four days later, that chamber, which 26 Republicans controlled against only 5 Democrats and 3 Populists, followed suit, but by the much closer margin of 21 to 10. All three Populists voted against the universal sales ban repealer together with six (of 23 voting) Republicans and one Democrat. Of the 13 senators who cast votes on H.F. 236 and H.F. 558, only three voted consistently—that is, for the ban in 1893 and against its de facto repeal in 1895—while 10 voted inconsistently by voting for the ban and its repeal. Although the governor’s approval inflicted a major

---

This article erroneously stated that the bill passed unanimously.


188The one consistent voter was Populist carpenter Frank Baker. Counted among the eight switchers was attorney R. C. Washburn, who also switched from the House to the Senate. The occupational data were taken from Clarence Barton, Barton’s Legislative Hand-Book and Manual: 1893-1894, at 288, 290 (1893).

189“Only Five Days Left,” SP-I, Mar. 10, 1893 (1:3).


191Senate Journal of the Fourth Legislature of the State of Washington 693 (1895).
Populist Senator J. W. Range “entered his protest against the passage of this bill,” but neither the Journal nor the press revealed the grounds. Id. Unfortunately, the Seattle Post-Intelligencer provided no coverage of the Senate floor debate on the bill at all, merely noting that it had passed without even indicating the vote. “The Land Bill Passed,” SP-I, Mar. 14, 1895 (1:2). It did, however, print the entire text of the law. “New State Laws,” SP-I, Mar. 16, 1895 (3:1).

192All three who voted consistently (Easterday, Gilbert, and Kellogg) were Republicans; of the 10 who switched eight were Republicans and two Democrats.

The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court


18961895 N.D. Laws ch. 32, at 31. See vol. 2.

195“Good-Bye Cigarettes,” Grand Forks Daily Herald, Feb. 10, 1895 (1:3).


197“Joseph Hodges Choate Dies Suddenly,” NYT, May 15, 1917 (1). The “Statement” was apparently written by Choate’s law partner, Charles Beaman.


appeals or file a consent to their dismissal.\textsuperscript{200}

Instead of explaining why it did not file a reply brief during the almost 12 months between the time when the State of Washington had filed its brief and the approval of the 1895 act or of accepting any responsibility for its reckless disregard of its briefing obligations, the Tobacco Trust imputed all the blame to the State of Washington (whose only apparent shortcoming was failing to request that the Court sanction the appellee for not having filed a reply brief): “Neither the counsel for appellee nor the court having heard from the attorney general of Washington...it is suggested that the Court, of its own motion, dismiss the appeals because of the repeal of the law upon which the opinion of the Court is sought.” If the Court refused to dismiss, Choate requested the opportunity to file briefs and make oral argument.\textsuperscript{201}

Since the overarching point of the Trust’s litigation was to secure a ruling from the U.S. Supreme Court that would unequivocally invalidate the Washington cigarette sales ban and also discourage all other states from following suit by putting them on notice that such statutory approaches were per se constitutionally foreclosed, it is unclear why ATC abandoned the litigation for almost three years and, in the end, wanted it mooted and dismissed. To be sure, the 1895 enactment served its immediate practical purposes in Washington, but by October 1896, both North Dakota and Iowa had passed similar prohibitory laws, the latter of which the Trust was energetically seeking to overturn by the same litigation strategy with which it had experimented in \textit{Coovert}. The existence of fresh U.S. Supreme Court precedent striking down the Washington law would have immensely simplified its legal burden in attacking the Iowa law, which it ultimately proved unable to carry. The Supreme Court made up for ATC’s dilatoriness: just 10 days after Choate’s “Statement” had been filed, it did precisely what he had asked it not to do in issuing a per curiam decision without opinion reversing Hanford’s order and remanding the case with directions to discharge the writs and dismiss the petitions. The Court acted “on the authority” of a line of precedent,\textsuperscript{202} wholly unrelated to the question of interstate commerce, that “except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the State; and, even after such final determination in those courts, will generally leave

\begin{itemize}
\item \textsuperscript{200}Statement in Behalf of Appellee at 2-3, in Supreme Court of the United States, Oct. Term, 1896, Nos. 90 to 97, State of Washington v Coovert, 164 US 702 (1896).
\item \textsuperscript{201}Statement in Behalf of Appellee at 3, in Supreme Court of the United States, Oct. Term, 1896, Nos. 90 to 97, State of Washington v Coovert, 164 US 702 (1896).
\item \textsuperscript{202}State of Washington v Coovert, 164 US 702 (1896).
\end{itemize}
the petitioner to the usual and orderly course of proceeding by writ of error from this court.”

The consequence of this decision reversing Judge Hanford’s order (which was merely apodictic and lacked any substantive basis) was that his ruling in Coover constituted no kind of precedent whatsoever either holding an individual package of cigarettes to be a so-called original package or invalidating a state anti-cigarette sales statute as an unconstitutional interference with interstate commerce. The issue may have become moot in Washington State since the legislature in the meantime had dismantled the universal ban anyway, but if ATC’s strategy was to manufacture a nationally applicable Supreme Court ruling ready made to strike down the next such statute to be enacted anywhere in the United States, by the time the Supreme Court issued its actual decision in November 1896, Hanford’s ruling represented no hindrance to any court’s upholding Iowa’s newly enacted prohibition. (Nevertheless, such logic failed to make an impression on the Portland Morning Oregonian, which in connection with the WCTU’s renewed efforts to secure passage of a similar bill in Oregon, opined in January 1897 that “[i]t is hardly worth while to pass an anti-cigarette law in Oregon, after seeing the fate of the Washington law in the federal courts.”)

Moreover, the Tobacco Trust had not even succeeded in crushing its opponents in Washington itself, as the following sketch reveals. In 1897 the House passed H.B. 72, which had been introduced by J.C. Conine—a Populist whose party controlled a majority of the chamber’s seats—and once again prohibited the sale of cigarettes, by a vote of 64-11 in spite of the press’s prediction that it “will probably be killed” as a result of vigorous opposition in

---


204 “Multiple News Items,” MO, Jan. 15, 1897 (4:4). On the WCTU cigarette sales ban bill that died after having passed its second reading in 1895, see “To Kill Off Cigarettes,” MO, Jan. 31, 1895 (5:4); “To Save the Youth,” MO, Dec. 23, 1896 (8:7). On the WCTU’s proposed bill for 1897, see “To Keep Out Cigarettes,” MO, Dec. 27, 1896 (20:5); “Caucus for Senator,” MO, Jan. 15, 1897 (1:2-3); “After ‘Coffin Nails,’” MO, Jan. 29, 1897 (10:3).

205 For a more detailed analysis, see vol. 2.


207 House Journal of the Fifth Legislature of the State of Washington 208 (Jan. 26) (1897).

208 “Three More Votes,” MO, Jan. 23, 1897 (1:5-6 at 6).
the Senate on constitutional grounds. 209 The bill’s few opponents (led by another Populist) argued that the 1893 Roscoe ban law had been “entirely inoperative, and caused trade of this nature to be driven from the state to Portland and other adjacent cities,” while others regarded it as unconstitutional. Supporters attacked the 1895 licensure law on the grounds that imposition of a tax was “useless in preventing minors from procuring cigarettes, and that the sale of both cigarettes and cigarette paper had largely increased during the last two years, since the prohibition was repealed.” 210 The initiative to reinstate a general sales ban, stalled, however, for a decade when the bill died in the Senate after the Committee on Education had recommended limiting the ban on sales to persons under 21. 211

In 1907 the legislature initiated a new cycle of cigarette control by making it unlawful to “manufacture, sell, exchange, barter, dispose of or give away, or keep for sale any cigarettes...” The penalty for a first offense ranged from $10 to $50; for later offenses the range of fines was increased ten-fold with a maximum imprisonment of six months in the alternative. Excluded from the statute’s reach were sales of jobbers engaged in interstate business with customers outside Washington State. 212

At the next legislative session in 1909 the penal code was amended to make it a misdemeanor for anyone to “manufacture, sell, give away or distribute, or have in his possession any cigarettes...” 213 This spectacular anti-smoking provision was actually enforced, socialist Big Bill Hayward being only the most prominent violator to be arrested and fined. 214 In adjudicating challenges to arrests of others a state superior court judge in Aberdeen ruled that the law applied only to cigarette sales and did not prohibit smoking, 215 while another in Tacoma held the law unconstitutional on the grounds that it interfered with interstate commerce. Although the prosecuting attorney in that county (Pierce) announced that he would cease prosecuting cigarette smokers until the supreme

---

210 “To Try Another Man,” MO, Jan. 27, 1897 (1:4).
211 Senate Journal of the Fifth Legislature of the State of Washington 573 (Mar. 4) (1897).
212 1907 Wash. Laws ch. 148, at 293.
213 1909 Wash. Laws ch. 249, § 294, at 890, 978. At the same time § 198 made it a gross misdemeanor to sell, give, or permit to be sold or given any cigarettes. Id. at 947.
214 “Bill’ Haywood, Socialist, with the ‘Makin’s,’ Arrested for Smoking Cigarettes,” SP-I, June 17, 1909 (1:3-4); “Haywood Pays $2.50 Fine for Smoking Cigarette,” SP-I, June 18, 1909 (sect. 2, 2:6).
court had passed on the question, arrests continued to be made elsewhere in the state. Support for continuing the smoking ban was reflected in the defeat, inflicted six weeks after those judges had invalidated it, on an amendment offered in the House—whose rules prohibited smoking in the hall or lobby during session or recess—at the extraordinary legislative session in August to repeal it.

Even as the penal code was making its way through the legislature to the governor, the need for intensified control efforts targeting minors gained prominence in the press: the Seattle Post-Intelligencer ran a lengthy article announcing that “Big Percentage of Boys Smoke,” which various school officials estimated at 33.3 to 60 percent.

But vigorous police enforcement (and presumably widespread violation) of the 1907 general prohibition were also visible. Thus the Post-Intelligencer announced under the front-page headline, “Arrests Made for Selling Cigarettes,” that a policeman in “citizens’ clothes” had arrested a tobacconist for selling him two packages of cigarettes; the alleged violator posted bail before appearing in police court, while the police seized his entire stock of cigarettes valued at $100 from under the counter.

Finally, at the following session in 1911 the cycle came to a permanent close in Washington when the legislature repealed the recently enacted misdemeanor provision in the penal code. The new orientation of tobacco control in Washington was set by the provision making it a misdemeanor for anyone under 21 to purchase or have in his or her possession any cigarette or other tobacco or intoxicating liquor.

---

216 Centralia Daily Chronicle, July 10, 1909 (1:3).
220 “Big Percentage of Boys Smoke,” SP-I, Mar. 11, 1909 (3:2).
222 1911 Wash. Laws ch. 133, § 2, at 649, 650.
223 1911 Wash. Laws ch. 133, § 1 at 650.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

West Virginia

In February 1895 the West Virginia legislature—whose lower house had resolved at the beginning of the session “That no smoking be allowed in the hall of the House of Delegates while the House is in Session”224—by overwhelming majorities amended the state code to require persons to have a state license to sell or offer for sale any paper wrapper cigarettes or cigarette paper.225 The imposition of a $500 license fee on the retail sale of cigarettes226 was designed effectively to prohibit their sale (though when one dealer in Parkersburg nevertheless took out a license, the press joked that “the undertakers of that town are resting easy”).227 A few days after the law had gone into effect on May 23, when “[n]ot a single retail dealer” had taken out a license, a “cigarette famine” broke out, forcing “fiends...to send to Ohio and Pennsylvania for their supply.”228 Since it was immediately “announced that the American Tobacco company of New York (the cigarette trust) ha[d] decided to test the constitutionality of the law” and a hearing date had already been set for June 20,229 the Wheeling Intelligencer concluded that it was “not probable that any of the Wheeling dealers will attempt to sell without license or taking out a license. The consequence is that no cigarettes are being sold here.” The “cigarette fiends” may have been unable to buy them in the state’s largest city, but a “short street car ride” across the Ohio river enabled them to get all they wanted in Bridgeport, where the cigarette business was “booming”: “At the Ohio end of the back river bridge a

224Journal of the House of Delegates of the State of West Virginia, for the Twenty-Second Session: 1895, at 6 (Jan. 9) (1895).
225The vote on S.B. 39 was 21 to 2 in the Senate and 52 to 2 in the House. Journal of the Senate of the State of West Virginia, for the Twenty-Third [sic] Session: 1895, at 101 (Jan. 24) (1895); Journal of the House of Delegates of the State of West Virginia, for the Twenty-Second Session: 1895, at 584-85 (Feb. 20) (1895). An effort in the House to reduce the license fee to $250 failed. Id. at 562a-563a (Feb. 19). No information was unearthed concerning the motivation of Senator John B. Finley to introduce the bill; he was not even mentioned in the two detailed histories of the county he represented. See Homer Fansler, History of Tucker County, West Virginia (1962); Cleta Long, History of Tucker County West Virginia (1996).
227Lima Times Democrat, June 5, 1895 (2:1) (untitled).
228“Cigarette Famine,” FWN, May 30, 1895 (10:5).
229“Cigarette Famine,” FWN, May 30, 1895 (10:5). This account mistakenly alleged that the grounds for suit was the law’s discrimination between wholesale and retail dealers.
The law, for the time being at least, “virtually killed the cigarette business” in West Virginia.231

On the very day that the law went into effect ATC already staged an illegal sale by “back[ing]” 19-year-old tobacconist Frank Minor in Martinsburg, who “openly violated the law” by failing to obtain a license.232 In this case,233 on May 23 ATC shipped to Minor 50 ten-cigarette packages “in the original packages, without case or covering of any kind about any of the packages, each being loose and separate from every other....” Minor, who sold one of the packages that same day,234 was arrested (in a scenario that Fuller copied from the Coovert case in Washington in 1893 and replicated in the federal branch of the McGregor case in Iowa in 1896), and by July 10 Fuller, who had filed an application for and been granted a writ of habeas corpus from the federal court in Martinsburg, had already secured a ruling in In re Minor from circuit court judge Nathan Goff, Jr.—the leading West Virginia Republican politician and a man of great inherited wealth,235 who was a property-respecting conservative with the typical “view point toward the ‘masters of capital’” and a repeatedly demonstrated willingness to issue injunctions against labor organizers236—voiding the law as applied to Minor on the grounds that it violated the commerce clause of the constitution.237 (Just a month after Goff had handed down this decision, The New York Times editorially rebuked him regarding another case as a former “intense partisan” who

---

231 “Decision Rendered,” BDWC, July 20, 1895 (3:3).
232 “Cigarette Smokers,” WI, May 31, 1895 (3:4). According to the 1900 Census of Population, Minor was born in September 1875 and in 1900 was a dry good salesman. HeritageQuest.
233 For a summary, see “The Cigarette Law,” WI, July 19, 1895 (1:1).
234 In re Minor, 69 F. 233, 234 (D. W. Va. 1895). In an otherwise identical alternative scenario, ATC also shipped to Minor, “at his request, on consignment to be sold at retail by him, as the agent of said company,” 50 10-cigarette packages one of which he sold to the same person. Id. at 234. It is unclear how in 1895 cigarettes shipped on May 23 from New York City to Martinsburg were sold there on the same day.
235 Nathan Goff, who had been U.S. Attorney for West Virginia (1868-81), Secretary of the Navy (1881), and a member of the House of Representatives (1883-89), was a U.S. Circuit Court judge (1892-1913) before becoming a U.S. Senator (1913-19). “A New Secretary of the Navy,” NYT, Jan. 7, 1881 (1); “The West Virginia Senatorship,” NYT, Nov. 12, 1894 (5); “Ex-Senator Dies of Paralysis,” NYT, Apr. 24, 1920 (15).
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

The chief factual difference between Coover and Minor lay in the Potemkin village shipping scenario: indeed, despite the utter implausibility of this simulated physical commercial transaction, Goff did not even bother to explain how the shipping company kept these 50 “loose and separate” packages together and knew where to deliver them. This overreaching sham—which worked well enough with Goff, but which the U.S. Supreme Court five years later would treat with the contempt it deserved—was presumably dictated by the Tobacco Trust’s desire to fashion an arrangement that would pass muster as giving rise to an “original package.” The reason that ATC’s litigational ploy succeeded was that Goff never even recognized as an issue whether these loose packages in fact constituted a legitimate transaction, but, rather, unreflectingly assumed that they were “original packages.” Instead, he rejected as “without merit” the state’s argument that the law was a proper use of its police power on the ground that that power did not extend to interstate commerce: it inhibited Minor’s sale (unless he paid the tax for the privilege) of the “original packages” that he had imported from New York while they were “still articles of [interstate] commerce.... The right to purchase in one state carries with it the right to sell the article...in another state, regardless of state laws, and independent of local interests and jealousies.”

Despite Judge Goff’s ruling, state and county authorities in West Virginia continued undeterred to “push the matter to the last.” In February 1896, for example, a tobacco trade magazine reported that a grand jury in Morgantown had found indictments against upwards of 60 people, who had apparently been “emboldened” by the federal court decision, for selling cigarettes without a

---

238“Opinions of a Political Judge,” NYT, Aug. 12, 1895 (4) (edit.). The only hint that Goff gave of political views transcending the original package doctrine was his ironic but anti-realist observation that: “The suggestion that it was the intention of the legislature to restrict the sale of cigarettes within the state of West Virginia is foreign to the case before me. The state makes no effort to prevent the importation or to prohibit the sale of cigarettes; on the contrary, it invites the one and protects the other, claiming from those who accept the privilege tendered the payment of revenue for its own purposes.” In re Minor, 69 F. 233, 236 (C.C. D. W. Va. 1895).

239On Austin v Tennesseee, see below ch. 4.


license.\textsuperscript{242}

Perhaps in an effort to secure a court’s express rather than implied imprimatur for its alleged original packages, the month after Goff issued his ruling, in August 1895 ATC cooked up another case with a slightly different scenario by shipping to another unlicensed dealer, Charles Goetze, a druggist in Wheeling, a consignment of “a number of” 10-cigarette packages, but this time packed in a large wooden box. (One of the two brands shipped, Sweet Caporal, was advertised in the \textit{Wheeling Intelligencer} as “more sold than all other brands combined.)\textsuperscript{243} For selling two packages Goetze, too, was arrested, and then tried and convicted in November; this time Fuller obtained a writ of error to state circuit court on June 23, 1896,\textsuperscript{244} less than two weeks before the Phelps law went into effect in Iowa. (This choreography found its twin in the state court branch of the McGregor case in Iowa.) Republican Circuit Judge John Campbell of Ohio County\textsuperscript{245} ruled that the law burdened interstate commerce in violation of the commerce clause of the federal constitution. To be sure, the rigor of his reasoning left so much to be desired that even ATC could not have been entirely satisfied with the opinion as distinguished from the result: “This court will not undertake to give the various decisions of the authorities from which it deduces the conclusion that packages that are essentially retail packages, as these are, are yet protected as being original statutory packages. It cannot escape the logic of congressional legislation and judicial interpretation thereof, that if a package of one hundred is a statutory package, and hence protected under the commerce clause of the constitution, a package of ten is likewise a statutory package and likewise protected.”\textsuperscript{246} Failing to understand that a “statutory package” for constitutional interstate commerce purposes did not exist and that selling one package out of a box containing 10 might be as illegitimate a simulation of an original package as selling one out of a 100, at least one editorial voice prematurely viewed Campbell’s decision voiding the West Virginia law as

\textsuperscript{242}“West Virginia Cigarette License Law,” \textit{WTJ} 22(46):1 (Feb. 24, 1896). Choosing to disregard the possibility that the legislature actually intended the license fee to be prohibitory, the industry asserted that: “There is too much revenue in it for them to give up without a fitting struggle.”

\textsuperscript{243}\textit{WI}, Jan. 25, 1895 (3:4) (printed adjacent to article mentioning Finley’s bill).

\textsuperscript{244}State v. Goetze, 43 W. Va. 495, 496 (1897). The circuit case was unreported, but was affirmed by the West Virginia Supreme Court of Appeals on Apr. 24, 1897.

\textsuperscript{245}Geo. Atkinson and Alvaro Gibbens, \textit{Prominent Men of West Virginia} 463-65 (1890).

\textsuperscript{246}“Cigarette Sales,” \textit{Steubenville Herald}, June 24, 1896 (4:1) (lengthy excerpt forming the concluding portion of the unpublished opinion).
“practically nullifying all laws imposing a license or special tax on cigarette sales” if it came to be “generally accepted as correct.”

To be sure, Campbell’s decision enjoyed formally somewhat greater credibility by virtue of its affirmance by the West Virginia Supreme Court of Appeals in April 1897, but the latter, hoodwinked by and regurgitating the same sham arguments that the Tobacco Trust had launched in Coovert, was hardly more persuasive:

Were they sold by the original package, or should the defendant have sold the entire contents of the wooden box, without opening the same, in order to constitute the sale by the original packages? We cannot say the wooden box constituted the original package, any more than we would say, if these paper boxes had been wrapped in thick paper and tied with twine, or packed in a barrel, for convenience in shipping, that the paper parcel or the barrel should be considered the original package. As the cigarettes came from the hands of the manufacturer, they were in paper boxes, each containing ten, for the convenience of their customers; and, whether they sold one box or a thousand, these paper boxes must be regarded as original packages. These packages...had upon them the label giving the name of the cigarettes, the caution notice, the number of the factory, the number of the revenue district, the name of the state in which they were manufactured, the name of the manufacturer, and the internal revenue stamp for ten cigarettes, duly canceled, pasted across the end of each package, so as to seal the same, in accordance with the requirements of the act of congress and the internal revenue laws governing the packing, shipment, and sale of cigarettes, all of which is required by law to constitute a package of cigarettes ready for shipment and sale; and, when these things are done, the package may be regarded as an original package. None of this indorsement or stamping is required to be placed upon the pine box or barrel or paper parcels in which these packages might be shipped, and opening the box, barrel, or parcel for the purpose of taking out the paper boxes cannot be considered as breaking the original package. These packages are, moreover, required to be put up in this particular manner by the act of congress, and a penalty is prescribed for a failure so to do. Rev. St. § 3392, contains the following provision, to wit: “That every manufacturer of cigarettes shall put up all the cigarettes that he either manufactures or has made for him, and sell or removes for consumption or use, in packages or parcels, containing ten, twenty, fifty, or one hundred cigarettes each, and shall securely affix to each of said packages or parcels a suitable stamp denoting the tax thereon, and shall properly cancel the same prior to such sale or removal for consumption or use under such regulations as the commissioner of internal revenue shall prescribe.” And section 3381 of said Revised Statutes, on the same subject, provides that “he shall neither sell nor offer for sale any tobacco, snuff, or cigars, except in original or full packages, as the law requires the same to be prepared and put up by the manufacturer for sale, or for removal for sale or consumption, and except such packages of tobacco, snuff and cigars as bear the manufacturer’s label or caution notice and his legal marks and

247“Cigarette Sales,” Steubenville Herald, June 24, 1896 (4:1).
brands and genuine internal revenue stamp which had never been used.”

So infinitesimal and fleeting was the opinion’s resonance that when, nine months later, the Iowa Supreme Court issued the second decision to cite *State v. Goetze*, it’s critique, foreshadowing the position that the U.S. Supreme Court would soon adopt, helped insure that no other court would ever cite it again:

Appellant contends that the internal revenue department has declared the small package sold by him to be “an original package,” and that this is conclusive. We do not so regard it. The package referred to in the letter from the internal revenue department is the one recognized by that department for the purposes of taxation, and has no reference to the unit of commerce which is protected by the federal constitution. The commissioner of internal revenue, in his letter heretofore set forth, says that “the repacking of said packages in additional coverings is optional with the manufacturer, and does not concern this bureau.” In the case at bar the “original package,” the unit of commerce, was broken, the contents exposed to sale, and one of the small packages was sold. Such sale was, as it seems to us, of an article which had lost its distinctive character as an import, and was therefore in violation of law. In this respect it differs from most of the cases to which our attention has been called, for in all but one of them it appears that the sales were of original and unbroken packages. See *In re Minor*, 69 F. 233; *State v. McGregor*, 76 F. 956; *Sawrie v. Tennessee* (U. S. Cir. Ct. Tenn.), 82 F. 615. The one case, and the only one, which we have been able to find holding to a contrary doctrine, *State v. Goetze*, (W. Va.) (43 W. Va. 495, 27 S.E. 225), fails to recognize the distinction between the original package of commerce and that recognized by the internal revenue department of the general government for the purposes of taxation.

The Cigarette Trust did not leave the lawful availability of the West Virginia market to judicial interpretation: at its 1897 session the legislature almost unanimously amended the licensure law to repeal the inclusion of cigarettes that it had enacted in 1895. Although the back-stage machinations were thoroughly

---

248*State v. Goetze*, 43 W. Va. 495, 497-98 (1897).

249Shepherdizing reveals that the only other opinion ever to cite it did so in dictum—the case dealt with alcohol—erroneously assuming that it had correctly stated that the Revised Code prescribed what an original package was for interstate commerce purposes. *Guckenheimer v. Sellers*, 81 F. 997, 998 (C.C. D. S.C. 1897).

250*McGregor v. Cone*, 73 NE 1041, 1044 (Iowa 1898).

2511897 W. Va Acts ch. 39 at 95, 96 (striking cigarettes). The Senate, in which Republicans outnumbered Democrats 21 to 4 (with one seat held by a Populist), passed S.B. No. 54 (which had been introduced by Republican U. G. Young) by a vote of 22 to 0, three of the four Democrats and the Populist supporting it. *Journal of the Senate of the State of West Virginia, for the Twenty-Third Session: 1897*, at 88 (Jan. 19), 165-66 (Jan.
consistent with ATC’s modus operandi, the source of their revelation was remarkable. The state’s Democratic press delighted in reporting\textsuperscript{252} on “[t]his infamous conspiracy between the Tobacco Trust and the Republican leaders”\textsuperscript{253}

[Republican House] Speaker [Samuel] Hanen let the cat out of the bag when he stated, in the heat of debate on the question of taxation in the Constitutional Committee, that the Tobacco Trust contributed a large sum of money to the Republican campaign fund in this State last year upon the condition that the party, if successful, would repeal the tax on the sale of cigarettes. Other Republicans of the Committee saw that the Speaker had made a serious blunder in thus revealing party secrets, and made an effort to whistle him down or get him to change the subject. They tried to treat it as a joke, and squirmed and twisted in their seats. They wanted to make it appear that possibly the speaker did not mean what he said, but he reiterated the statement and impressed upon his party associates that he meant what he said and knew what he was talking about.

Speaker Hanen is considered very high authority in the Republican party, and his statements will be accepted as true, ...

Everybody is...aware of the fact that the bill repealing the tax on cigarettes was smuggled through each house of the Legislature last winter under a false title—“A bill to amend the license law,” a title in which cigarettes, the subject of the bill, was not mentioned. The one thing which the people would like to know is, how much did the Republican campaign get for the job.\textsuperscript{254}

It may not have been a secret, editorialized the Charleston Daily Gazette, which broke the story, that “the trusts, the great corporate interests, the gold gamblers, the stock jobbers, the tariff barons and the banks” had “leagued together” in 1896 to “purchase the Presidency and put the Republican party in power in State and Nation,” but not until Hanen “informed us of the fact...was it known officially to which trust was assigned the duty of purchasing West Virginia for the Republicans.” And now that West Virginians knew that their state had been “mortgaged to the Tobacco Trust,” the Democratic paper hoped

\textsuperscript{27} (1897). The vote in the House was 53 to 1. \textit{Journal of the House of Delegates of the State of West Virginia, for the Twenty-Third Session: 1897}, at 248 (Feb. 4) (1897).

\textsuperscript{252}The Republican Wheeling Intelligencer published an article about the Constitution Committee’s meetings almost every day between May 20 and the beginning of June, but nowhere mentioned Hanen’s revelations. For a compressed account, see “Alleged Trust Bribery,” \textit{NYT}, June 3, 1897 (2).

\textsuperscript{253}“Telling Party Secrets,” \textit{Wheeling Register}, June 2, 1897 (4:2) (edit.).

\textsuperscript{254}“Speaker Hanen’s Break,” \textit{CDG}, June 1, 1897 (1:5) (also reprinted as “Speaker Hanen,” \textit{Wheeling Register}, June 2, 1897 (3:1)). Hanen had, inter alia, been a county school superintendent and farmer before being elected to the legislature. Geo. Atkinson and Alvaro Gibbens, \textit{Prominent Men of West Virginia} 598 (1890).
that they would drive Republicans from power at the next election.\textsuperscript{255}

\textit{Montana}

Goff’s ruling was quickly rebuffed. In 1895, the Montana legislature imposed on everyone “engaged in the business of selling cigarettes, cigarette papers or material used in making cigarettes, except tobacco,” the requirement of paying a $10 monthly license.\textsuperscript{256} Even this modest intervention antagonized the Tobacco Trust, which staged yet another act of made-for-litigation disobedience, this time in the form of the failure on the part of Helena cigarette retailer Robert May to apply for or pay the prescribed license. In this scenario, May, “as the agent” of ATC, bought “a number of packages of cigarettes,” which ATC had shipped to him from New York City “placed in a larger box for convenience of shipment...to be by him sold, as the agent of said American Tobacco Company,” one of which 10-cigarette packages he sold on June 3, 1897.\textsuperscript{257} The person to whom May had sold the package immediately filed a complaint with a justice of the peace, who that same day issued an arrest warrant, pursuant to which May was arrested, tried, found guilty, fined one dollar plus costs, and committed to the constable until he paid those sums. The nominal fine underscored the pro forma character of the proceeding, which statutorily could have been set at as much as $500 or six months’ imprisonment.\textsuperscript{258}

Handing down a decision just two months after May’s arrest, Harvard Law School graduate and former territorial supreme court justice Hiram Knowles, the federal judge for Montana,\textsuperscript{259} was confronted with the Trust’s habeas corpus petition claim that the license contravened Congress’s constitutional interstate commerce control because the right to ship cigarettes from Montana to New York

\textsuperscript{255}“The Republicans and the Tobacco Trust,” CDG, June 1, 1897 (4:3).

\textsuperscript{256}Montana Code, § 4064.15, at 347 (1895). In addition, owners of fixed-site sales businesses were also required to pay a business license scaled from one dollar a month for businesses with sales of less than $400 per month up to $75 for those with monthly sales of $100,000 or more. \textit{Id.}, §§ 4064.1-.12; In re May, 82 F. 422, 423-24 (C.C. D. Montana, 1897).

\textsuperscript{257}In re May, 82 F. 422, 423 (C.C. D. Montana, 1897). May, who is not found as living in Montana at the 1900 Population Census, also “sold one package of those purchased by himself in New York....” This variation in the scenario was not further reflected in the opinion.

\textsuperscript{258}In re May, 82 F. 422, 423-24 (C.C. D. Montana, 1897).

\textsuperscript{259}http://www.fjc.gov/history/home.nsf (visited Jan. 3, 2010).
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

In re May, 82 F. 422, 424-26 (C.C. D. Montana, 1897).

Knowles went on to state that he was “sure” that Goff’s position that “‘only by the sale of the imported article’” did it become “‘mingled with the other property within the state’” “cannot be maintained.” Rather, the cigarettes sold by May had “become a part of the mass of the property of the state” once they “had reached their destination and were exposed here for sale.” Id. at 426.

“carries with it the right to sell the same in Montana in original packages.” Straightaway, Knowles not only acknowledged that there was, under Leisy v. Hardin, “no doubt but that this is the established doctrine of the federal courts,” but prematurely assumed, relying on Goff’s ruling, that “[u]nder the authorities in the federal courts it is established that a box holding 10 cigarettes...is an original package” (when in fact such a conclusion hinged, even within the confines of the cramped doctrine, on how it was shipped). Unwilling or unable to attack the doctrine head on, Knowles devised a different approach to denying to the Tobacco Trust yet another habeas corpus writ. The hook was the manifest absence of any discrimination in the license law “against any business because it pertains to articles shipped from any other state or foreign country. The license for engaging in the business of selling cigarettes pertains to the same, whether the said cigarettes are manufactured in Montana or elsewhere.” Within this framework Knowles would find little difficulty determining that the license law did not interfere with interstate commerce inasmuch as it did not discriminate in favor of Montana citizens or against non-Montanan goods or persons. To be sure, he still felt compelled to distinguish away In re Minor, which, he “confessed,” was “very much like” the May case.260 The most that Knowles was willing to concede (hypothetically) was that “[i]f” the effect of the West Virginia statute was, as Goff opined, not to tax the property imported by the cigarette seller as it did “‘other property within its limits by a general and uniform tax rate,’” but, rather, “‘for the privilege of selling the imported articles, and is as to them special and additional,’” then Goff’s position was supported by the U.S. Supreme Court’s decisions. However, Knowles did “not believe the statute of Montana can be considered as a special tax imposed for the privilege of selling the imported article”; rather, the “tax imposed is upon the business of selling cigarettes, whether manufactured within the state or in another state.”261

Modified Choreography for Iowa

A letter was read [to the Wisconsin Senate] from the secretary of state of Iowa saying the law was very well observed. A business man told Mr. Bird that he saw no cigarettes in

260 In re May, 82 F. 422, 424-26 (C.C. D. Montana, 1897).
261 In re May, 82 F. 422, 425-26 (C.C. D. Montana, 1897). Knowles went on to state that he was “sure” that Goff’s position that “‘only by the sale of the imported article’” did it become “‘mingled with the other property within the state’” “cannot be maintained.” Rather, the cigarettes sold by May had “become a part of the mass of the property of the state” once they “had reached their destination and were exposed here for sale.” Id. at 426.
Unlike Fuller and ATC, Attorney General Remley, who had not anticipated that the Iowa case would first be heard in federal court, was uncertain as to what he would argue there since he would not be in a position, as he would have been before the Iowa Supreme Court, to urge a change in the interpretation of the original package doctrine by the state’s court of last resort.263

Substantively, however, it was clear to the Cedar Rapids Evening Gazette that the American Tobacco Company would attack on the same “original package” grounds that had been used in the alcohol prohibition cases. Fuller modified his successful West Virginia stage directions in the Iowa performance only in combining the tests of the two sub-branches of the original package doctrine in one dealer. The charges against McGregor stemmed from two differently structured shipments. One contained a number of boxes of cigarettes in packages usually sold for a nickel. The other was a consignment in which single boxes of cigarettes were done up in one package:

The manner in which these cigarettes are delivered by the manufacturers to the express companies is a novel one. The cigarette boxes, as retailed, are taken to the express offices, thrown loosely into express wagons, from which they are shoveled into baskets and delivered to the express company, which is left to ship them in any manner it sees proper. By this means the tobacco trust hopes to have the courts hold that each five cent bunch is an original package.264

The count involving the loose packages Fuller filed in federal court because he could rely on his victory in West Virginia; the count involving the packages packed together in a box he filed in Iowa state court, presumably because he knew that Iowa Supreme Court precedents had already vindicated the original-package status of alcohol bottles shipped in this manner. Nevertheless, Linn County Attorney John M. Grimm,265 whom Iowa Attorney General Milton Remley would be assisting, did not doubt that the law was constitutional because he did not believe that judges would ever hold a five-cent, 10-cigarette pasteboard box to

265Grimm was also an attorney in private practice in Cedar Rapids at Rothrock and Grimm. The Cedar Rapids Evening Gazette’s City Directory of Cedar Rapids, Marion and Kenwood 120 (Dec. 1896).
be an “original box.”

Yet another ploy devised by the Trust was to guarantee to defend from prosecution retail dealers who kept for sale “the substitute for cigarettes, called cigars, and which are made of cigaret tobacco with a thin wrapping of tobacco leaf instead of paper. However, local lawyers unanimously opined that the ruse would violate the statute, which “had a special reference to the sale of substitutes or articles calculated to evade the law.”

Conflicting Decisions in Federal and State Court

The better legislation is the banishment of the manufactories entirely. Iowa has done this. There was a big fight as to the constitutionality of the law, and the judges and courts were puzzled over the original package clause, but the law still stands.

On July 14 Fuller returned to Cedar Rapids to conduct the defense of McGregor, whom J. P. Rall had ordered confined in county jail, where he was “now serving his time, although he is far removed from the classic precincts of Marion’s select boarding house.” Already at this early time the Evening Gazette knew that the test case would be “fought through to the supreme court in order to establish the constitutionality of the law.”

Already on July 18 the Evening Gazette reported that McGregor, who had been in prison since his arrest about a week earlier, had again been released from jail under a writ of habeas corpus, this time by Superior Court Judge Giberson in Cedar Rapids. Previously he had been released pursuant to the same writ issued by the federal court in Minnesota; he had also been released on a bond filed with Justice Rall on appeal to the district court: “By this means the tobacco trust has three separate strings to its kite. One is hitched onto the United States district court, another to the district court and the third from the superior court to the supreme court of Iowa.”

---

266“Fight for Its Life,” CREG, July 11, 1896 (2:3).
269“That Cigaret Case,” CREG, July 14, 1896 (3:5). The Linn County jail was located in Marion, which was the county seat until 1919.
270“No End of Remedies,” CREG, July 18, 1896 (5:3). According to “Holds It Invalid,” CRDR, July 24, 1896 (8:3), McGregor had also appealed Justice Rall’s ruling to state district court, but the outcome of this appeal is unknown.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

The day after the July 22 hearing on the petition U.S. Circuit Judge Walter Sanborn ordered that the prisoner be “discharged from detention and imprisonment...”\(^{271}\) In an initial reaction to sketchy press reports from St. Paul\(^{272}\) that the court had found the statute unconstitutional “in line with the original package decision rendered under the prohibitory law several years ago,” the Evening Gazette cited an unnamed “prominent lawyer” as characterizing this ruling as “carrying the principle of centralized power entirely too far.” Adopting a states rights position and fearing that the decision heralded the end of state authority, the lawyer opined that holding each five-cent package of cigarettes to constitute an original package “carried the principle to a ridiculous extent. ... It would be just as reasonable to name a spool of thread or a single package of chewing gum and original package.”\(^{273}\)

Whereas the Iowa State Press mistakenly concluded that Sanborn’s opinion “practically settles the question” of the application of the original package doctrine to cigarettes,\(^{274}\) the Iowa State Register was not persuaded of the

---

\(^{271}\)State of Iowa v McGregor, 76 F. 956 (Cir. Ct. N.D. Iowa, 1896). No opinion was delivered but only the judgment. According to “May Smoke Cigarettes,” Saint Paul Pioneer Press, July 23, 1896 (8:3), Sanborn had already held the law unconstitutional and ordered McGregor released on July 22.

\(^{272}\)Although the national newspaper of record failed to report the event, at least the New-York Daily Tribune devoted a brief albeit error-ridden filler to it a week later. N-YDT, July 29, 1896 (6:6) (untitled).

\(^{273}\)“Declared Unconstitutional,” CREG, July 23, 1896 (5:4). The lawyer’s claim that “[t]he courts have held that there is practically no restriction upon states in the prerogative of police regulations” had not been true since the U.S. Supreme Court decided Leisy v. Hardin, which declared a single bottle of beer to be an original package. Similarly outdated in that light was the anonymous lawyer’s claim that a box of cigarettes in which an ordinary shipment was consigned was an original package but not a little paper box of 10 cigarettes.

\(^{274}\)“Law Is Laid Low,” ISP, July 29, 1896 (5:3). For an especially obtuse knee-jerk vindication of the original package doctrine, see “Reform in Iowa,” WP, July 27, 1896 (6) (edit.). Three months later the same newspaper reversed itself, becoming a champion of state police powers and protesting their “humiliating belittlement.” Although, because it opposed “superseding parental responsibilities,” it did not agree with banning cigarette sales, the editorialist opined that the law’s “merits or demerits” were “not a matter of legitimate concern to anybody outside of Iowa.” But then reverting to its uncritical judgment of the jurisprudential vitality of the original package doctrine, the newspaper insisted that the Tobacco Trust was engaged in a “safe proceeding” in sending 5-cent original packages to Iowa because, “as the precedents now stand, the law is not worth shucks against the ‘original package’ device.” To avoid this “needless belittlement of a State,” Iowa would have to persuade Congress to enact a law declaring that cigarettes were
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

significance of Judge Walter Sanborn’s decision. All that it accomplished, in the newspaper’s view, was to permit dealers to sell cigarettes in single five-cent packages if they were consigned, shipped, and received in that form without covering or boxing. However: “Fortunately cigarettes can not be so shipped and practically the decision...is worthless to dealers and cigarette consumers.”

Iowa Attorney General Milton Remley was not in Des Moines when Sanborn’s decision was handed down, but the Register, tracking him down in Iowa City, telegraphically asked for his interpretation, prompting this reply:

“It will not affect the sales in the state because there are no cigarettes shipped in that manner and from the nature of things cannot be.

The experience of shipping one 5 cent box by itself without other wrapping or other boxes of cigarettes contained within it in a larger package would eat up the profits.

Railway express companies cannot reduce their rates on cigarettes without making like reductions on other articles.

I am confident there is not a box of cigarettes in the state which can lawfully be sold under Judge Sanborn’s decision.”

As far as the newspaper was concerned, the opinion of the attorney general—who, it reported, would appeal to the U.S. Supreme Court—“settles the matter.” That Remley did not appeal the decision was presumably a function of his judgments that: (1) the shipment of individual packages was commercially implausible; (2) the state could not prevail on the issue anyway in the face of Supreme Court precedents; and (3) practically it was vastly more important to litigate the question of whether the original package doctrine was implicated when the Tobacco Trust shipped cigarette packages in their normal commercial manner inside larger packages, which Fuller had presented before a
The Tobacco Trust's Attack on the 1896 Statute in Federal and State Court

When this statute was pending in the legislature, the Republicans suggested both the unconstitutionality and impracticability of the measure, but we did it, we confess, with very little enthusiasm, because the cigarette habit is one of the most contemptible of all vices, and we did not want to seem to even appear to defend it. There is no doubt that the use of cigarettes is extremely pernicious. The cigarette is a pernicious thing in itself and the cheapness of the thing places them within the reach of every kid who can command a few pennies. But law is law, and as long as there is any profit in them, they will be sold and used to a greater or less extent. To our notion, this matter properly comes under the head of parental responsibility. The man who said if he couldn't keep his boy from using cigarettes he'd kill him, had the proper spirit, and we believe that if every parent would make up his mind to see to it that his child kept away from the death dealing quintessence of nastiness, as much or more could be accomplished than through the workings of any prohibitory law. ... Business men can also add their influence. They can refuse to employ cigarette fiends. They ought to do this for their own protection, for a youngster who uses up a box of cigarettes a day isn’t worth the ashes of a straw. Fight the cigarette in a practical manner.280

In the immediate wake of Sanborn’s ruling, confusion reigned. On July 24 the Des Moines Leader described a semi-euphoria among cigarette smokers:

There was joy among the cigarette fiends last evening when they read the announcement contained in the press dispatches to the evening papers to the effect that Judge Sanborn had decided the Iowa anti-cigarette law unconstitutional.... Judge Sanborn was more popular among the sallow-cheeked, watery-eyed fiends last evening than Judge Caldwell ever dreamed of being in a populist convention and there was strong talk of organizing a new personal liberty party and nominating him for president. The chappies were out in force as soon as the news could be spread and besieged the cigar stores with inquiries for cigarettes with which to appease the appetite that has suffered low [sic] these many days, but the cigarettes were not forthcoming. The dealers had been taken by surprise and when the announcement came to them it was so late in the day they had not time to stock up.

A reporter followed a trio of the stoop-shouldered lovers of coffin nails in their search. They went first to Gabio’s and asked for cigarettes. Gabio replied that he had not stocked up yet and probably would not until he was assured the decision was a sure go. ...

Conrad Paul...told them he didn’t have any cigarettes and didn’t care whether he ever

sold them again, because there was no money in them. 281

Nevertheless, on July 26 the Leader light-heartedly noted that: “The cigarette is still in search of itself. ... One thing certain is that it can’t be bought in the state, at least not with any comfort; and there are several hundred thousand of its devotees who anxiously await a determination that will relieve their suspense.” 282

Two days later the Leader reported that: “The cigarette is again being sold in Des Moines, but not generally. It was learned yesterday that large bundles, containing 50 of the small 5 cent packages, in original packages, are being sold in several places in the city.” The Leader’s belief that there was “no question of their being original packages” was as accurate as its claim that dealers and consumers were still waiting for Attorney General Remley’s “explanation of the legal status of the matter....” 283 Once Remley’s reaction was publicized, the Register found that:

Cigarettes are not being sold in Des Moines as a general thing for the reason that the dealers, having read the opinion of Attorney General Remley that the law was constitutional, are rather loath to open up the trade. There are two places in this city where cigarettes are being sold and have been sold contrary to law ever since it went into effect and those people who are on the inside have had no trouble in procuring them. Those dealers are not selling to strangers, of course, but they are supplying their old time customers whom [sic] they know can be trusted not to give them up.” 284

In contrast, in Council Bluffs (across the Missouri River from Omaha), dealers had reportedly been selling cigarettes in the days since Sanborn’s ruling. The Register found that in that city, which had sent “the strong lobby” to the 1896 legislative session to work against passage of the law, it was highly probable that dealers had the encouragement of interested parties in making sales. However: “From no other section of the state is there any knowledge that sales are being made openly.” 285

(Ironically, however, almost a decade later Council Bluffs provided strong evidence that Iowa’s law was in fact being enforced and having some impact. In the immediate aftermath of Nebraska’s enactment in 1905 of its own anti-
cigarette statute, the United States Tobacco Journal reported: “Iowa has a similar law in force and the cigarette smokers of Council Bluffs have long been dependent on Omaha for their supplies. In future, of course, this source will be cut off and they will have to turn to Illinois, and other distant and unchastened States.”  

Just two days after U.S. Circuit Judge Sanborn’s ruling in St. Paul, in a writ of habeas corpus proceeding in Superior Court in Cedar Rapids for which Fuller had applied, Judge Thomas Giberson, found that the Iowa cigarette sale prohibition law did not contravene the federal Constitution because the five-cent package was not an “original package” within the meaning of the Constitution, having been put up in that form merely for the retail trade’s convenience and purpose. A Democratic politician who had been admitted to the bar in 1879 and served two terms as alderman in Cedar Rapids, Giberson also conducted an insurance business. Giberson had in fact already prepared his decision before news of Sanborn’s ruling reached Iowa, but nevertheless “decided not to change it...” Giberson’s orientation was underscored by his ruling that: “That the protection of the public health, order and morals demands the restriction or prohibition of the sale of cigarettes, cannot be questioned.”

The parties, according to Judge Giberson’s decision, agreed on the fact that McGregor had bought in Illinois from ATC a number of packages containing 10 cigarettes manufactured by it in New York; these packages had been placed for shipment and delivery to McGregor in Cedar Rapids in a common pine box. On its arrival, McGregor opened the box and sold one of the packages. Because it was not simply or mainly the origin of the goods, but also the nature of McGregor’s business—which was “purely local and in no sense interstate”—that was relevant, Giberson reasoned that the form of the package was for the convenience of the retail trade; the package, once removed from the box, mingled with the plaintiff’s stock and became a part of the common mass of his stock: “Certainly it [the individual package] cannot be shipped in its present form.

289The Cedar Rapids Evening Gazette’s City Directory of Cedar Rapids, Marion and Kenwood 113-14 (Dec. 1896).
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

Therefor large numbers of these packages are put into boxes like other merchandise and in this manner shipped and received by the plaintiff at his place of business....” Because the claim that interstate commerce was involved was “a mere pretext and an attempt to evade the just penalties of the statute,” he denied the writ of habeas corpus. Admitting that his conclusion was not free from doubt, Giberson held that it was the judicial rule to favor a statute’s constitutionality in such circumstances.291

Following the issuance of the two discrepant decisions—each dealing, to be sure, with a different structure of shipment and “original package”—two appeals avenues became available to the Tobacco Trust: to the federal circuit and Supreme Court on the one hand and the Iowa Supreme Court on the other.292 Giberson’s ruling, according to the Evening Gazette generally met with approval by lawyers in Cedar Rapids, who viewed the original-package decisions as “strained interpretations of the constitution and...unnecessary interference with the police power of the state.” More significant was that “[a] number of Cedar Rapids dealers are watching the progress of these cases with much interest. They say that they are heartily sick of the cigaret business and hope that they will not again be forced by virtue of competition into selling them.”293

With the federal court having ruled that the five-cent package shipped by itself was an “original package” and the state superior court having ruled (and state attorney general having argued) that it lost that status if shipped inside a box, the Des Moines Leader predicted that the anti-cigarette law could be “knock[ed] out” on the grounds that in the liquor prohibition cases the Iowa Supreme Court had construed “original package” to include a small one shipped into Iowa in a larger one and then taken out. However, the newspaper detected a hope for the court’s reversing itself: since the court had decided those cases

---

291“Law Is Valid,” CREG, July 24, 1896 (7:1-3). See also “The Sale of Cigarettes,” ISR, July 28, 1896 (6:4-5). Four years later, in connection with issuance of the U.S. Supreme Court’s decision in Austin v. Tennessee, the Iowa press reported that: “It is known that a few years ago after the anti-cigarette law went into effect this corporation sent cigarettes to retail dealers in bulk. That is, instead of selling in lots of 500 as had previously been the case cigarettes were sold in lots of ten, or by the box, to the retailer. If he ordered a thousand cigarettes, they would come in sacks or baskets, but ten being fastened together. It was said this was the original package....” Cigarettes Doomed,” DDL, Nov. 23, 1900 (1:3) (citing Des Moines Leader).

292“Law Is Valid,” CREG, July 24, 1896 (7:1-3). It is unclear how the Trust could have appealed Judge Sanborn’s decision since McGregor had prevailed. It is also unclear whether his decision had any legal consequences or prompted any appeal.

after Congress had enacted the Wilson Act exempting liquor from federal constitutional interstate commerce restrictions on state police powers—so that Iowa “could enforce its own prohibitory anyhow”—the court had defined “original package” very broadly, but in the interim it had “manifested a disposition to retreat” from that broad definition in patent medicine cases.

Despite Sanborn’s ruling, in mid-August the press was still reporting widespread enforcement—subject to the well-known caveat that importation for personal consumption from towns across the border in states lacking a prohibitory law undermined Iowa’s law, at least in Iowa border towns, without, however, always violating it. In an article headlined, “The Cigarette Law: Acts As a Bonanza for Our Trans River Neighbors,” the Davenport Daily Leader related that:

The cities and towns strung all along across the Iowa border are rejoicing at the Iowa state anti-cigarette law. Consequently the sale of the obnoxious coffin nail has increased two fold in those fortunate localities.

The better the law is enforced here in Davenport, the more rejoiced will be our Rock Island and Moline neighbors. They already notice a substantial and profitable change in their sales, and what is worse for us there appears to be no abatement in the consumption of the deadly rice-paper cigarettes. In inter state towns the young men are forming clubs and send out agents to purchase the cigarettes in quantities. By this method the law is evaded and Iowa merchants are deprived of the profits which otherwise would accrue to them.

In the face of the dueling federal and state court decisions and the anticipation of the outcomes of appellate litigation, sporadic news accounts also suggested

---

294 The Wilson Act (or Original Packages Act) provides that: “All fermented, distilled, or other intoxicating liquors or liquids transported into any State or Territory or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory be subject to the operation and effect of the laws of such State or Territory enacted in the exercise of its police powers, to the same extent and in the same manner as though such liquids or liquors had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.” Act of Aug. 8, 1890, 26 Stat. 313, ch. 728 (codified as 27 USC § 121).

295 “Still There’s No Light,” DML, July 26, 1896 (5:5).

296 Whereas traveling to Illinois and buying cigarettes and bringing them back to Iowa to consume them oneself did not violate the statute, a nondealer who traveled to Illinois and brought back cigarettes that smokers had requested and for which they paid him did violate the law, although proving the existence of such transactions would have encountered much greater evidentiary obstacles than those taking place in stores.

that at least in some cities cigarettes continued to be sold either openly or by subterfuge. At the end of November dealers in Des Moines received “large shipments” from New York and sold them in their original five-cent packages; the authorities did not try to stop the sales and it was reportedly “understood” that no effort would be made to do so “anywhere in the state.”

Whereas they had been selling cigarettes “on the quiet, and at greatly advanced prices,” they now began selling them “boldly and above board.” Consequently, in December the Polk County grand jury was investigating cigarette sales, prompting rumors that it would return several indictments. In Burlington, retailers had recourse to a “new method of evading” the law: ATC “shipped dealers...cigarettes in bushel baskets with a cover, they agreeing to make good any loss in transit. The dealers in turn place the baskets on their counters and the purchaser picks out what he wants direct from the original package.” Little wonder that at least part of the press expressed the hope that the special session of the legislature in January 1897 would make it difficult for such dealers to close out their stock unless they did so very quickly.

Senator Phelps himself weighed in at the beginning of December to correct a “wide spread [sic] and perhaps very natural misunderstanding” as to the status of the Anti-Cigarette Law. Echoing Attorney General Remley’s legal analysis from the summer, he insisted that even if its enemies succeeded in having it held invalid (as Judge Sanborn had done), it would suffer little impairment because “it would be impracticable for any one [sic] to engage in the business of selling cigarettes when he must sell the package unbroken as he shipped it into the state”—unless the cigarettes “cross[ed] the state line in five cent packages alone, unenclosed with other packages.” Consequently, he warned that: “If any tobacco dealer in this state is now displaying cigarettes in his show case and offering them for sale, he is violating the law...and I believe that it is safe to say that he is in league with or in the employ of the cigarette trust of New York.”

By the same token, he corrected the equally erroneous impression that he intended to introduce
an amendment to his own law, explaining that he knew of no defects in it to remedy.305

The out-of-state press also took great interest in Iowa’s unique anti-cigarette law, often judging it to be a failure. In December the Macon Telegraph—judicial news apparently took months to travel from Iowa to Georgia—commented that the “decision which declares that the Iowa law for the suppression of the cigarette to be...void, will doubtless cause rejoicing among the members of the ‘coffin tack’ brigade, but it is safe to say the general public will learn of the decision with sincere sorrow...”306 In Massachusetts, the Springfield Republican declared that, as the U.S. Supreme Court’s original packages decisions had done with Iowa’s prohibition liquor laws, the new act had “come to naught.” In November it reported that “the tobacco trust has notified dealers in the state that it will defend cases brought against them, and will meanwhile ship cigarettes into the state in five-cent ‘original packages.’ As the precedents now stand, the state law may be ignored with impunity.” The only chance the newspaper identified for reviving the law’s validity was congressional removal of cigarettes from the articles of legitimate interstate commerce: “The blundering original-package decisions is [sic] going to cost a lot of trouble before it is reversed, if it ever is.”307

The Unsuccessful Initiative to Eliminate the Courts’ Original Package Doctrine Obstacle to State Anti-Cigarette Legislation by Passing a Federal Wilson Law for Cigarettes

The question of “constitutionality” is almost as insidious as the cigarette itself and has such an air of weight and legal respectability that it may arrest the energy of the more timid. It is a question that is foreign to this crusade. It would not be raised, no one would dare to raise it, were any poison under discussion whose effects are more immediate, and it has no standing even when the lives of thousands of human beings are at stake. Constitutions are for the welfare of States, not their destruction. ... The most drastic measures that can be devised are needed to crush it out of existence, as far as children at least are concerned. Laws must be made so flawless that no chance of the poison leaking through will be possible, and that is the slogan that should be shouted by every man or woman who ever had a child or ever hopes to have a child.308

305“Senator Phelps’ Opinion,” CREG, Dec. 11, 1896 (7:2).
306Macon Telegraph, Dec. 4, 1896 (4:3) (untitled edit.).
308“The Cigaret Must Go,” CT, Mar. 25, 1896 (6) (edit.).

926
By the end of July the Iowa press reported that: “Already anti-cigarette people are planning to go before Congress and ask for a law which will protect the State in its legislation against the cigarette.”

Anti-cigarette activists from other states and especially the WCTU had already done the advance work. Presumably as a result of the adverse court decisions pertaining to the Washington State anti-cigarette law and the West Virginia license tax law, a bill was introduced in Congress by Arkansas House Democrat William Leake Terry on January 15, 1896, which was designed to preempt such judicial challenges by conferring on states the same freedom from constitutional interstate commerce constraints with regard to cigarettes that the Wilson Act had created regarding liquor:

That all cigarettes transported into any State or Territory, or remaining therein for use, consumption, sale, or storage therein, shall upon arrival in such State or Territory, be subject to the operation and effect of the laws of such State or Territory, enacted in the exercise of its police powers, to the same extent and in the same manner as though such cigarettes had been produced in such State or Territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise.

Two days later Terry expressed his confidence to William Christian, a Washington-based North Carolina reporter, that the bill would pass if it left the committee “all right....” Anticipating the criticism that opponents would soon levy, the reporter noted “the fact” that Terry’s “brief, harmless-looking little cigarette bill” “would be helpful to” North Carolina’s “growing cigarette interests” and asked Terry what had prompted him to introduce it. Candidly replying that his purpose was to discourage rather than foster the cigarette industry, Terry pointed out that “the sentiment in Arkansas was against the vile

309“Around a Big State,” LM, July 31, 1896 (7:3).
310 See above this ch.
311For information about his career, inter alia, as Little Rock city attorney and Arkansas Senate president that sheds no light on his anti-cigarette campaign, see the obituary in Proceedings of the Twenty-First Annual Session of the Bar Association of Arkansas 121-22 (1918). Leake was a Catholic convert. http://www.encyclopediaofarkansas.net/encyclopedia/entry-detail.aspx?entryID=343 (visited Apr. 22, 2010). Unfortunately, Terry’s rather thin correspondence files for the years 1894-96 at the University of Arkansas at Little Rock Archives & Special Collections contains nothing relevant to cigarette legislation. Email from Jennifer McCarty, archivist, to Marc Linder (Apr. 29 and May 11, 2010).
312 See above this ch.
The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court


In 1891, 1893, and 1895, as discussed earlier, at least one chamber of the Arkansas legislature had passed anti-cigarette sales bills. Nevertheless, his bill would “only give” the states the “local option” to deal with “the cigarette problem, without the bugbear of the ‘original package’ idea standing in the way....” For example, the bill would enable West Virginia “to carry out her wishes to tax cigarettes out of the State, if the State so desired, and...this was equally true of Arkansas and other States.” Ominously, the reporter closed by adding that it was “quite likely that there will be a heavy lobby against the bill.”

Christian may have revealed the identity of one lobbyist two days earlier when, in connection with publishing the full text of Terry’s bill, he interviewed W. W. Fuller, ATC’s general counsel, who was in Washington for a day or two, and was reminded of the Wilson bill. Christian was apparently conveying Fuller’s thought in reporting that passage of Terry’s bill would “subject the cigarettes of the American Tobacco Company to State taxes,” from which Judge Goff’s decision in the 1895 West Virginia cigarette sales license fee case had exempted cigarettes sold in “original packages.”

In the second half of February, when Terry told Christian that the Ways and Means Committee had reported his bill favorably, the reporter accurately predicted that “[i]t will no doubt be strongly fought.” Two months later, Christian reported from Washington that “according to my information,” North Carolina Republican Congressman Tommy Settle “is the only man standing in the way of the Terry cigarette bill.” Terry had told him that Settle’s friends had asked him to wait awhile with his cigarette bill because it would hurt Settle’s reelection. Christian, a Democratic enemy of Settle, asked: “Is he trying, as is alleged, to impede the Terry cigarette bill as an attorney for a trust, or as a Congressman?”

In fact, Settle, a political confidant of Benjamin N. Duke, arranged in general for the passage of legislation desired by ATC. On January 19, 1896, Settle wrote Duke that he had seen Fuller the previous week: “You are perhaps aware

---


320B. N. Duke to J. B. Duke (Nov. 10, 1894), in BNDP, Box 65, RBMSCL.
of the bill introduced by Mr. Terry subjecting cigarettes to the police power of the various states. It is now before the Judiciary Committee. I think I can manage it all right. I will have a conference with Gen. Henderson, chairman of the Committee[,] tomorrow, and hope to pigeon-hole it, or refer it to the Committee on Commerce. Cant [sic] you come up for a few days. I would like to see you and talk matters over."  

Settle’s active intervention had been manifest back in February when Terry revealed that Settle had requested to be heard before the Ways and Means Committee. Christian did not reveal why Terry, an anti-cigarette Arkansas Democrat, would be beholden to a pro-Tobacco Trust North Carolina Republican. Later, in the course of Settle’s unsuccessful reelection campaign, his opponent raised the issue of his “Cigarette Trust activity.”

A few days later the press reported that the Judiciary Committee had decided to report H.R. 4057 adversely. On December 14, 1896, the committee did report Terry’s bill, a majority claiming that, despite its title (“A bill in relation to cigarettes and to limit the effect of the regulation of commerce between the several States and with foreign countries in certain cases”), the bill neither had nor was intended to have anything to do with such regulation. Rather, putting it bluntly:

The bill is not in the interest of or intended to be in the interest of the public or of individuals addicted to the use of cigarettes, but is intended to injure the tobacco growers and manufacturers in certain localities and promote the interests of certain tobacco manufacturers in other sections. Your committee has nothing to say in favor of the use of cigarettes by individuals. We prefer that adults and minors let this article severely alone, and so recommend; but there is no reason for selecting out this one article and providing by law that it be subject to the operation and effect of the laws a particular State may see fit to enact in relation thereto when manufactured outside the State.

For the committee it sufficed that states retained police powers regarding retail sales once cigarettes had become part of the common mass of property within the

---

321 Thomas Settle to B. N. Duke (Jan. 19, 1896), BNDP, Box 7, RBMSCL. It is unclear whether Settle’s uncertainty meant that ATC lawyer Fuller controlled the Trust’s lobbying to such an extent that ATC director Benjamin Duke in Durham might have been unaware of what Fuller was doing or that his brother, ATC President James B. Duke in New York, was the one who was centrally involved in such initiatives.


324 “Will Not Stop Cigarettes,” DIO, Apr. 29, 1896 (5:3).

The Tobacco Trust’s Attack on the 1896 Statute in Federal and State Court

In its drive against alleged sectional legislation, the committee majority purported not to be contesting the wisdom of prohibiting the importation, manufacture, sale or use of cigarettes or liquor or others the abuse of which was injurious to the citizenry’s health. Its criticism was directed to the alleged fact that the bill did “not propose to subject cigarettes transported into a State...and remaining therein for use, consumption, sale or storage to the operation” of the state’s laws to restrict such activities with respect to cigarettes manufactured in that state; instead, the bill sought to discriminate in favor of in-state production and to “build up and promote cigarette trusts and monopolies in a State.”

Although two Iowa Republicans (including the chairman and soon-to-be House Speaker, David Henderson) were committee members, both were from anti-sumptuary legislation Mississippi River towns and neither voted to recommend the bill. A five-member committee minority (including, in addition to Terry, two Democrats from Texas, one from Missouri, and New Hampshire Republican Henry Baker), insisted that the bill, “designed to place cigarettes upon precisely the same footing” as liquor under the Wilson Act, served the same moralistic-medical purposes:

Cigarette smoking by the youth of our land, especially by boys of tender age, is a vast and growing evil, and the States should be left to the full and unimpeded exercise of all their police powers to deal with and counteract the same.

Many religious bodies, and notably the Women’s [sic] Christian Temperance Union, have passed resolutions deploiring this mighty evil and asking for legislation to check it, and reputable physicians all over the land testify to the deadly effects of the cigarette habit upon the health and strength, the minds and bodies if its wretched victims. Congress should lend a helping hand to stay its ravages....

---

328 Henderson was from Dubuque and Thomas Updegraff from McGregor. The only two major tobacco-growing states whose representatives were members of the committee were Tennessee and Kentucky. David Canon et al., Committees in the United States Congress, 1789-1946, Vol. 1: House Standing Committees 659 (2002). On Henderson’s role as speaker of the house in enforcing that body’s nosmoking rule, see below ch. 18.
A few days before the House Judiciary Committee issued its report, Senator Phelps had declared that if a supreme court determined his law to be unconstitutional, Congress could cure that defect by enacting a counterpart to the Wilson bill. In addition to implementing the advice from E. B. Ingalls, the superintendent of the Anti-Narcotics Department of the National WCTU, to “urge all Iowa to write to our [congressional] members at Washington and urge them to support this bill,” M. G. Davenport, the superintendent of the Hygiene, Heredity and Narcotics Department of the WCTU of the State of Iowa, acted on the suggestion by Senator Harlan to ask the Iowa legislature, which was in session, to pass a resolution requesting that Congress pass the Terry bill. She then secured the cooperation of Mary Butin McGonegal—a WCTU member who lived in Des Moines and in 1890 had initiated the call to preserve the nationally affiliated Iowa WCTU and was briefly appointed president pro-tem of the new organization—to set the legislative action in motion. Then the Iowa legislature’s two anti-cigarette stalwarts, Phelps and Representative Dr. Prentis, succeeded in passing a concurrent resolution at the extra session in 1897 urging Iowa’s congressional delegation to support the Terry bill. At the beginning of February Phelps declared that if the courts declared the anti-cigarette law unconstitutional, “we” would ask Congress “for an extension of the police power of the state that will allow us to suppress this evil.” Expressing the mistaken belief that Representative William Hepburn—an Iowa Republican who was chairman of the Interstate and Foreign Commerce Committee—was preparing, if he had not already introduced, such a bill, Phelps overoptimistically...
added that there was “‘little doubt it will pass.’”\textsuperscript{335} On April 23, Phelps offered this resolution, which, after quoting the bill, continued:

\begin{quote}
WHEREAS, the people of this State are greatly interested in said bill and its passage through Congress; therefore, be it

\textit{Resolved by the Senate of the State of Iowa, the House concurring,} That the members of both branches of Congress from this State be requested and urged to support said bill and do all in their power to further the passage of said bill through the present Congress; and be it further

\textit{Resolved,} That copies of this resolution be forwarded by the Secretary of State to each member of Congress from this State....\textsuperscript{336}
\end{quote}

The same day Prentis offered the resolution in the House, which, suspending the rules, immediately voted 36 to 8 for adoption.\textsuperscript{337} On April 27, when Phelps called up his resolution, Code Revision Committee chairman Carpenter interjected that Congress had indefinitely postponed the bill,\textsuperscript{338} but Phelps and his Republican colleagues merchant and banker Warren Garst\textsuperscript{339} and lawyer James Carney, who was “identified with the business interests” of Marshalltown,\textsuperscript{340} argued that “the resolution ought to pass anyway, to express the sentiments of the legislature and to ask congress to remove the obstacles to the enforcement of the law of Iowa.”\textsuperscript{341} The Senate then adopted Phelps’s motion to adopt the House concurrent resolution, which it adopted 24 to 1, only Senator Ellis, the adamant opponent of prohibition in 1896, voting Nay. All 24 Yea votes were cast by Republicans; all seven Democrats either were absent or did not vote.\textsuperscript{342} A skeptical press opined that passage of the Terry bill would “bring the

\begin{footnotes}
\textsuperscript{335}“The Cigarette Is Down,” Des Moines Weekly Leader, Feb. 4, 1897 (2:1). The index to the \textit{Congressional Record} reveals no such bill introduced by Hepburn.

\textsuperscript{336}Journal of the Senate, Extra Session, Twenty-sixth General Assembly of the State of Iowa 975-76 (Apr. 23) (1897).

\textsuperscript{337}Journal of the House of Representatives, Twenty-Sixth General Assembly, Extra Session 865 (1897) (Apr. 23).

\textsuperscript{338}“Stops Sunday Ball,” BH-E, Apr. 28, 1897 (1:4). In an alternative account, the resolution “was passed in the face of the explanation that the national house has killed the measure.” “Legislative Proceedings,” SCJ, Apr. 28, 1897 (3:3).

\textsuperscript{339}Willis Hall, \textit{The Iowa Legislature of 1896}, at 58 (1895).

\textsuperscript{340}Willis Hall, \textit{The Iowa Legislature of 1896}, at 49-50 (1895).

\textsuperscript{341}“Stops Sunday Ball,” BH-E, Apr. 28, 1897 (1:4).

\textsuperscript{342}Journal of the Senate, Extra Session, Twenty-sixth General Assembly of the State of Iowa 1010-11 (1897) (Apr. 27). As a concurrent resolution it did not require a constitutional majority. “Stops Sunday Ball,” BH-E, Apr. 28, 1897 (1:4). The two
\end{footnotes}
cigarette under the police laws of the State, which would give the Phelps law new life and make it operative beyond any doubt."343

The National WCTU, which was the driving force of advocacy behind the Terry bill—its 1897 convention authorized a memorial to Congress “To protect State anti-cigarette laws by providing that cigarettes imported in original packages on entering any State shall become subject to its laws”344—in no way intended to discriminate against certain states or encourage other producers. As Ingalls explained at the 1898 annual meeting: “This Department has worked very faithfully the past year to secure an inter-state commerce law. As our laws now stand, no State can forbid the importation of cigarettes. Mr. Terry, of Alabama [sic], introduced, in the last Congress, a bill covering this point, and petitions were sent to Senators and Legislators from every State and Territory in the United States.” Although Ingalls took hope from the fact that the chairman of the Judiciary Committee (George Ray of New York), who had held the bill because he was opposed to its wording, promised to introduce a bill at the next session that was “agreeable” to him,345 in fact he did not. The various state WCTU organizations continued to present petitions to their congressional representatives346 and Terry reintroduced the same bill in 1897 and 1899, but Congress took no action on it.347 In an effort to subvert Terry’s bill during the 1897-98 Congress, the Cigarette Trust circulated a letter348 to the press claiming that the Chicago board of health’s analysis of 14 brands of cigarettes had found no injurious drug in them except nicotine. In order to undermine this campaign resolutions were identical except that the House version lacked “therefore” at the end of the last “whereas” clause.

344Report of the National Woman’s Christian Temperance Union: Twenty-Fourth Annual Meeting...Oct. 29 to Nov. 3, 1897, at 51 (1897).
345Report of the National Woman’s Christian Temperance Union: Twenty-Fifth Annual Meeting, Held in People’s Church, St. Paul, Minnesota, November 11 to 16, 1898, at 246 (1898). Somewhat confusingly, Ingalls told the membership that the bill “does not ask Congress to pass an anti-cigarette law, only to so regulate the inter-state commerce laws that States may govern the cigarette trade.” Id. at 246-47.
346“Fighting Cigarettes,” MO, Jan. 25, 1898 (8:4).
347H.R. 55, 55th Cong., 1st Sess. (Mar. 15, 1897); H.R. 93, 56th Cong., 1st Sess. (Dec. 4, 1899). Republican Senator John Gear, former governor of Iowa, introduced a stripped down version of the Terry bill: “That whenever any State forbids the selling to minors of cigarettes or of all forms of tobacco, imported tobacco on entering such States, whether in original packages or otherwise, shall at once become subject to said State laws.” S. 4455, 55th Cong., 2d Sess. (Apr. 25, 1898). No action was taken on the bill.
348AD, Feb. 8, 1898 (2:2) (untitled).
Ingalls secured a letter from Cass L. Kennicott, the former Chicago city chemist to whom the analysis had been attributed, stating that the interviews that the press credited to him had not been authorized and were “published to advertise.”

At this time, in the immediate wake of the first imperialist expansion by the United States, the WCTU of the State of Iowa was not so obsessed with prohibition campaigns as to have lost sight of this world-historical development. In her presidential address in October 1898, socialist Marion Howard Dunham declared that:

To deal justly with millions of people of another nationality, race, temperament, language, customs and prejudices, with an almost entire lack of education, as we understand the word...; to give to these people a just, stable government, free schools and a free church; to put an end to the oppressive taxation by which they have been so long plundered, to lead them...to where they can be left to their own self-government, and the development of their own resources in their own way...demands the wisest and most unselfish statesmanship,...backed by a strong hand, that the piratical forces which have wrought such shipwreck here shall not be allowed to seize upon these fair and fruitful fields.

We have little reason to hope for this, for the trusts and syndicates of the nation have already turned their covetous eyes toward them, and new enterprises under the specious pretense of developing the country, are being planned...; and the Hawaiians, the Cubans, Porto Ricans and Phillippines [sic] will find that with change of masters, while they will no longer suffer some forms of cruelty perpetrated by the Spanish government and they will have a certain measure of freedom never before enjoyed, they will still have to yield up, though of course by strictly legal forms, the larger share of the profits of their labor for the benefits of others. They and the people of this country will together pay all the expenses of the war,...but the monopolies will reap practically all the benefits.

At a time when “[t]he class line was never more sharply drawn,” Dunham was able to detect a silverish lining in this pitch black imperialist cloud:

The American people struck on behalf of the Cubans, just as the railroad employees of Chicago in 1894 struck on behalf of the helpless Pullman employees, and the war was as truly a “sympathetic strike” as that one. That it has commanded the sympathy of those who

---

349 “Official Communications: Anti-Narcotics,” US 24(5):12 (Feb. 3, 1898). See also US 24(7):1 (Feb. 17, 1898) (untitled). On Kennicott’s role as Chicago city chemist in analyzing cigarettes for the presence of glycerine, which was prohibited by the 1897 city ordinance, see above ch. 6.

350 Ninth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Waterloo, Iowa, October 11, 12, 13 and 14, 1898, at 29 (1898).

351 Ninth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Waterloo, Iowa, October 11, 12, 13 and 14, 1898, at 31 (1898).
condemned the other, was because it was a war with arms against a foreign power, instead of an assertion of the rights of labor to a living wage, and so lessening the profits of a great capitalistic power.

But that this nation is yet capable of a sympathetic strike in behalf of the oppressed of another race and an alien language, is one of the most hopeful signs of the times, one of the brightest spots in the wide spread selfishness of our national life, and the one thing that gives us hope for the future.  

In 1901 this same exuberantly anti-imperialist WCTU of the State of Iowa made two appeals to congressmen urging their support for the ““Terry Bill.”” At the end of 1905 temperance societies were still “pressing a national interstate anti-cigarette law...to crush this evil.” And that year and again in 1905 and 1907, Kentucky Republican Don Edwards, who according to the United States Tobacco Journal, was “extremely hostile to the use of cigarettes,” introduced the identically same bill, but it too died without any further action.  In 1906 and 1907 a more radical bill was introduced by Republican James Watson of Indiana, which incorporated Edwards’ approach but also made it unlawful to cause to deliver or mail, or for any common carrier to deliver, cigarettes or cigarette paper to a state in which it was illegal to manufacture, sell, or give them away. At that point this perennially unsuccessful initiative appears to have run its course and such bills ceased being introduced. In 1908, in the course of a House floor debate on a bill to impose a license fee for cigarette dealers in the District of Columbia, conservative Illinois Republican William Wilson suggested that it would be a “good idea” for the Committee on the District of Columbia to consider prohibiting the sale of cigarettes. But his Illinois Republican colleague James Mann (eponymous author of the White Slave act), after noting that the committee chairman was “[o]f course...aware that in some States of the Union the sale of cigarettes is absolutely prohibited,” belittled the bill under discussion for

---

352 Ninth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Waterloo, Iowa, October 11, 12, 13 and 14, 1898, at 30 (1898).
353 Twelfth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Shenandoah, Iowa, on October 2nd, 3rd and 4th, 1901, at 81 (1901).
proposing a mere one dollar a month license fee “for the privilege of selling coffin nails.” 358

The 1897 Code Amendment Imposing a $300 Punitive Mulct Tax on the Prohibited Sale of Cigarettes and the Tobacco Trust’s Failed Judicial Strategy to Invalidate It

“Mulct” is only another name for fine....

As state legislatures convened in the winter of 1897 and considered bills to prohibit the manufacture or sale of “the great foe of American youth” or at least to impose quasi-prohibitory license fees, the “campaign against the drugged, poison-laden, memory-destroying, corrupting cigaret” had, according to the Chicago Tribune, “attained national proportions.” In at least 15 states bills were pending that met one or the other of those criteria. In contrast, Iowa, the only state with a judicially approved general ban on cigarette manufacture and sale, was facing the possibility of its legislative repeal. Even before the Iowa legislature convened, the press had complained both that the “agitation” that passage of the Phelps law had injected into the subject of smoking by young boys had “but advertised it and resulted in its increase” and that “the publicity given the non-enforcement of this much-needed law has resulted in the disastrous increase of this habit among our young boys.” In the event, the $300 punitive tax that the legislature, adapting a related but nevertheless functionally radically different 1894 alcohol mulct tax, enacted in 1897 in order to reinforce the already existing outright sales ban was sufficiently counter-intuitive that many prosecutors and law enforcement agents either actually misunderstood or opportunistically pretended to misunderstand it as overriding the sales prohibition.

---

1“Push War on Cigaret,” Muscatine Journal, Jan. 5, 1897 (1:2) (copy furnished by Merle Davis).

2“A century later the misunderstanding persisted. Rivka Widerman, “Tobacco Is a Dirty Weed: Have We Ever Liked It? A Look at Nineteenth Century Anti-Cigarette Legislation,” Loyola Law Review 38:387-423, at 400 and 400 n.98 (1992), hopelessly misunderstood the chronology and misconceived the statutory purposes of the 1897 cigarette sales mulct tax when, after incorrectly asserting that the Iowa law of 1896 was
The 1897 Mulct Tax Amendment

The Legislature Passes a Mulct Tax on Top of the Sales Ban

Cigarettes at Des Moines are getting cheaper, as the time for the new law against them draws near. Their cheapness can never equal their cussedness.6

On January 19, 1897 Republican Governor Francis Drake called the Iowa legislature into extra session primarily to revise the state code,7 which had not been officially revised for a quarter-century. Against the background of the legal uncertainty concerning the constitutionality and validity of the new anti-cigarette statute created by the tension between the federal and state court decisions in the American Tobacco Company/McGregor case, the legislature was faced with several initiatives to revise, strengthen, or repeal the Phelps law. As early as November 1896, statehouse intelligence had been circulating that Phelps was “coming to Des Moines with another bill to prevent the sale of cigarettes. He is said to have devoted some days to the preparation of this bill, and it will probably be accompanied by a guarantee from Senator Phelps as a lawyer that it is constitutional.”8 The day after Drake’s action Senator Phelps, illuminating the federal-state context of his decision to file his bill in 1896, declared that he did not intend to raise the cigarette question during the special session because:

“The present law is as good a law as we can ever get...and it would do no good to pass another law until congress does something to prevent the original packages from being sent into the state. If we could get a law like the Wilson original package law[,] that would make our law effective. I was assured such a bill would be introduced before I introduced this one last winter. ... I am not sure, however, but it will be better to wait and go in for a tax entirely prohibiting cigarettes. Nothing can be said in defense of it and I am sure if the matter were called to the attention of the people of the country there would be no question about the popular sentiment in regard to it. I find that the law is very well enforced in the small towns of the state and everywhere it has resulted in reducing the sale of cigarettes. It has exerted a good and wholesome influence.”9

“[t]he first anti-cigarette law,” she confusedly observed: “Interestingly, Iowa did not explicitly repeal an earlier law that taxed the sale, barter, or gift of cigarettes....”

6CREG, Sept. 11, 1897 (4:1) (untitled).
7Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa 5-6 (1897) (Jan. 19).
9DIC, Jan. 21, 1897 (4:5) (untitled). This same piece was published verbatim in Daily Telegraph (Atlantic), Jan. 23, 1897 (2:1).
The leading newspaper in Phelps’s hometown of Atlantic (pop. 5,000) shed interesting light on his claim that cigarettes, at least in small towns, were not being sold: on 47 days between October 12 and December 14, 1896, it sported, mostly at the top right of the front page, a large illustrated advertisement for ATC’s best-selling brand, Sweet Caporal, hawking free buttons with each package. The same ad also ran in other Iowa papers, but appears to have been terminated by the end of 1896.

A few days later Phelps warned—and Attorney General Remley concurred—that it was a “mistake to believe that the coffin nail has knocked out” his law; on the contrary, cigarettes would “yet be banished from the borders of Iowa.” Without explaining whether he was referring to an enforcement mechanism or a ban on sale altogether, Phelps stressed that: “‘We will not attempt any further legislation by way of strengthening the present law.’” This legislative self-restraint was paired with the expectation that the courts would still “‘so construe the law that it can be enforced.’” Phelps drew some solace from the fact that Judge Sanborn’s decision merely decided what an “original package” was without referring to the Iowa law. His most revelatory comment dealt with compliance with the law seven months after it had gone into effect: “‘[T]he law has accomplished much good. It is true cigarettes can be bought in these cities, but in the small towns they cannot. The law has caused a sentiment against them that has accomplished much. Dealers in tobacco would prefer not to handle cigarettes, as they make almost no profit on them; they would rather sell cigars and tobacco, and except in a few cities they are not handling cigarettes.’” In fact, as he was presumably not yet aware, he and his allies would (successfully) attempt further legislation to strengthen the Phelps law—namely, the imposition of a $300 mulct tax on the unlawful sale of cigarettes, which was designed to help enforce the law in Iowa’s large cities.

---

10Daily Telegraph (Atlantic), Oct. 12, 1896 (1:5-6); Dec. 14, 1896 (4:5-6). To be sure, the fact that ATC paid for all these ads does not prove that the cigarettes were actually for sale in Atlantic.

11E.g., Carroll Sentinel, Oct. 17, 1896 (2:1-2); Dubuque Herald, Oct. 11, 1896 (6:6-7); Spencer Herald, Oct. 28, 1896 (7:5-6); WDC, Oct. 30, 1896 (3:1-2). A computerized search of the voluminous database of Iowa newspapers for this time period on Newspaper Archive found no such ads in 1897.

12a“The Cigarette Is Down,” DMWL, Feb. 4, 1897 (2:1).

13See below (especially Phelps’s speech of April 27).
Senate Debate

On February 11, the Fourth Division of the House Code Revision Committee, to which House File No. 85, devoted to crimes and punishment, had been referred, reported it back with the recommendation that the Phelps anti-cigarette law be inserted.\textsuperscript{14} The whole House then adopted this amendment and overwhelmingly passed the whole bill.\textsuperscript{15}

On April 1, the Senate Committee on Code Revision met to discuss H.F. No. 85. The 15-member committee, chaired by Republican Charles Carpenter, a lawyer representing the Mississippi River counties of Louisa and Muscatine,\textsuperscript{16} was composed of 13 Republicans and two Democrats,\textsuperscript{17} none of whom had been a prominent anti-cigarette advocate during the regular session in 1896. The two Democrats (Ranck and Harper) and three Republicans (Pusey, Lothrop, and Gilbertson) had voted against the Phelps bill. Only seven senators attended the meeting on April 1 in addition to chairman Carpenter: the two Democrats, two of the anti-Phelps bill Republicans, Pusey and Lothrop, and Republicans Abraham Funk, Alva Hobart, and J. M. Junkin.\textsuperscript{18}

Included among the amendments to the House bill that the committee recommended to the Senate in its report of April 2 was striking “cigarette” from the 1894 no-sales-to-minors law, presumably because cigarettes were already subsumed under the prohibition on selling or giving “tobacco” to them, although “cigars” remained expressly mentioned in the law. After offering this minor change, the committee proposed a radical undoing of the Phelps law in ways that must have profoundly satisfied the Tobacco Trust, if their agents did not draft the measure themselves. First, the substitute would have repealed the general ban on cigarette sales, replacing it with a meaningless and bogus ban on selling cigarettes with non-tobacco-related toxins; and second, in line with cigarette manufacturers’ position (then and now), it shifted exclusive attention to minors, raising the age...
from 16 to 18, below which it would have been unlawful to sell cigarettes to minors, and criminalizing smoking by minors under the same age:

Sec. 7. “Any person selling or giving away any cigarettes containing any injurious drug or other deleterious matter or substance foreign to tobacco except the pure paper wrapper, and pure gelatinous adhesive substance required to enclose the same, shall be deemed guilty of a misdemeanor, and shall, upon conviction thereof, be fined not less than fifty nor more than one hundred dollars for each offense, or be imprisoned in the county jail not exceeding thirty days, and any person, who sells or gives away any cigarette or cigarettes of any kind whatsoever to a minor under the age of eighteen years shall be deemed guilty of a misdemeanor.”

Sec. 8. “In addition to the penalty in this act provided any person who shall by himself or agent sell or give away any cigarette or cigarettes to a minor under the age of eighteen years shall forfeit and pay the sum of one hundred dollars for each sale so made, which sum may be recovered in a civil action prosecuted in the name of the parent or guardian of such person...one half of which sum so recovered shall go to the plaintiff, and the remainder to the treasury of the county wherein suit was brought....”

Sec. 9. “Any minor under the age of eighteen years who shall smoke, use, or have in his possession any cigarette shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined for each offense not less than five, nor more than twenty dollars, and may be committed to the county jail until such fine shall be paid, not exceeding, however thirty days, but if such minor shall disclose to the magistrate before whom he is arraigned or tried, at any time before conviction, the name or identity of the person from whom he obtained such cigarette or cigarettes, such proceeding may...be dismissed, but no evidence so taken shall be used against the minor in any prosecution for a violation of the provisions of this section.”

Sec. 10. “It shall be unlawful for any dealer in cigarettes to sell any package of cigarettes containing any picture, photograph, button or other article than the cigarettes with wrapper; or for any person whomsoever to sell or give to any minor under the age of eighteen years, any picture, photograph, button, or other article designed to advertise cigarettes, or induce the purchase thereof. Any person violating the provisions of this section shall be deemed guilty of a misdemeanor.”

The next day the Des Moines Leader commented that the “new cigarette law” that the committee was contemplating was designed to replace the one that had been “knocked out by the courts.” The Cedar Rapids Evening Gazette (mistakenly) regarded the new effort to secure the “extermination of the gay and

---

19The 26th General Assembly, Extra Session, Senate Committee on Code Revision, Minutes, Apr. 1, at 92-94 (SHSI DM). The text is also found in Journal of the Senate, Extra Session, Twenty-Sixth General Assembly of the State of Iowa 720-21 (1897) (Apr. 2).

20To Print Its Own Code,” DML, Apr. 3, 1897 (1:5).
The 1897 Mulct Tax Amendment

festive cigaret” as necessarily based on “some knowledge as to the ruling which the supreme court will make in the cases taken up on appeal from the city and county.” More significantly, the paper confirmed the view of Phelps and other supporters of the old law concerning the geo-demographic pattern of compliance and enforcement under it: “[U]ntil some law is passed which is declared to be incontestable the dealers in the larger towns and cities will supply the demands of their trade. It is understood that in only a few of the smaller towns can cigaretts be purchased.”

On April 27, when the Senate resumed consideration of H.F. No. 85, Code Revision Committee chairman Carpenter moved to amend on the basis of the committee report. After the Senate had agreed to striking out the word “cigarette” from the no-sales-to-minors law, a lengthy debate ensued on the principal committee substitute, at the close of which the Senate rejected the amendment, repassed the Phelps anti-cigarette law, and added a mulct tax. The Iowa State Register summarized the proceedings:

The cigarette bill occupied the afternoon. The code revision committee had up a substitute for the present Phelps law on the ground that it is inoperative and unconstitutional. The substitute provided that cigarettes should not be sold to minors and should contain no injurious substance. Senator Phelps made a long speech in which he denounced the cigarette lobby and declared the wool had been successfully pulled over the eyes of the ministers of Des Moines who had been induced to petition the senate for the passage of the committee substitute. He declared his law was operative in most of the towns in the state and it had not been given a fair test as yet in the courts. The committee substitute was defeated. Senator Trewin then got an amendment through fixing a mulct tax of $300 for the sale of cigaretts in addition to the other penalties of the bill.

Fortunately, in the absence of verbatim transcription of state legislative proceedings, the Register (caused, for reasons unknown, to be made and)
published such a transcript of one of the most important legislative debates in the history of cigarette sales bans.\textsuperscript{25} Phelps took the floor to oppose the Code Revision Committee substitute. As in 1896, Senator Phelps gave by far the longest speech, which was so replete with information otherwise unavailable on nineteenth-century struggles over the regulation of cigarettes that it deserves to be quoted and read in full. In particular, Phelps’s remarks on the lobbying tactics of the Tobacco Trust—“Phelps Scalps the Lobby” read one sub-headline\textsuperscript{26}—reveal suggestive similarities to those of the Tobacco Institute and Philip Morris in Iowa (and elsewhere) a century later.\textsuperscript{27} At the time, the attack—which the \textit{Gazette} condensed into the sub-head, “Boast of Trust Agents Will Not Be Made Good by Hawkeye Solons”—“caused considerable of a sensation....”\textsuperscript{28}

In my remarks I wish to be understood as not in the least criticizing a single member of the committee who made the report; for I do not know nor do I believe that any one whose acts I shall criticize has ever met this committee. On the contrary, I believe that their work has been done under cover and through others whose motives are the best, and not by approaching the committee directly.

When it is known all over this state that this general assembly has been infested from its beginning with lobbyists, wise and otherwise, honest and dishonest, I can see no longer any occasion for keeping silence on the subject.

That there is a place for an honest lobbyist in legislation no one doubts; but when corrupt trusts, the object of whose existence is the manufacture and sale of a certain article, send their emissaries into this state to suggest to us the best methods of suppressing the sale of this very article, they must not blame us if we do not attribute to them the highest motives.

One of the questions involved in this amendment is whether the senate is going to be run by the tobacco trust of New York, or whether we intend to run our own business in our own way.

I know whereof I speak when I say that the American Tobacco Trust is at the back of the movement to change the law, and has been at work among the members of this general

\textsuperscript{25}Phelps read his speech and presumably gave a copy to the press; why and how the \textit{Register} came to transcribe the other senators’ shorter speeches is unknown. The \textit{Daily Iowa Capital} printed virtually the identically same speech, though the paragraphing was somewhat different; its account of the other senators’ speeches did not purport to be direct quotations, but they were in part more comprehensive than the \textit{Register}’s. “The Cigarette Is Doomed,” \textit{DIC}, Apr. 28, 1897 (8:3-6).

\textsuperscript{26}“Cigarette Mulct Law,” \textit{DML}, Apr. 28, 1897 (1:7). Unfortunately, the incompetent microfilming of this issue left little of the rest of the article intact.

\textsuperscript{27}See below Part VI.

\textsuperscript{28}“The Lobbyists Are Attacked,” \textit{CREG}, Apr. 28, 1897 (1:5).
assembly ever since it convened.

When I say the bill known as the anti-cigarette bill, which was introduced before this body at its last session, had hardly been reported from the committee when there appeared upon the scene a would-be philanthropist, sent here all the way from Long Island, New York, by the American Tobacco Trust, whose proposed mission it was to see that a bill should be so framed as to best protect the youth of this state from the effect of this accursed traffic—I am speaking from personal knowledge.

He, too, like the author of this substitute reported by the committee, thought the best way to control the business was to allow the manufacturers of New York to place the cigarette on sale in all our shop windows, and then prohibit the sale to minors under 18 years of age, and fine the boy who bought or smoked them. This gentleman from New York, who honored our capital city with his presence a year ago, soon learned that New York methods in legislation were not indigenous to the prairie soil of Iowa and hied himself away to more congenial climes.

Again, senators, I weigh my words and know whereof I speak when I say that another gentleman from New York has spent the last eight weeks at one of the leading hotels of this city, he, too, claiming to be an agent of this same trust, and the avowed object of his visit is the modification of this law among the line of the proposed committee substitute.

I repeat what I said in the beginning, that one of the subjects of discussion on this proposed substitute is whether this general assembly proposes to codify the laws of this state or turn this particular part of it for codification over the tobacco trusts of this country.

I believe that it is high time that these freebooters in politics, these corruptors of legislation, these warts on humanity, these leeches on society, these paid emissaries of corrupt trusts, were notified that they are not needed at the sessions of the general assembly of the state of Iowa.

These gentlemen are not novices in their work, for we learn that we are not the only ones who have been honored or dishonored by their attentions. They openly boast that they have greatly assisted in similar legislation in other states.

The state of Washington is said to be the proud possessor of a very beneficent law upon this subject, very similar to this committee substitute, whose passage through the legislature of that state was aided by one of these same philanthropists.

This New York gentleman has related to men in this city, who are interested in this subject, how he procured the modification of the Washington law. He convinced a few leading Christian men of the capital city of that state that his bill was much better and would be much more effective than the statute they had then; then the ministers and other Christian men took hold and created public sentiment in favor of his measure and he had no trouble at all in procuring its passage through the legislature of that state. And now, senators, I want to ask you if you have observed any of his tracks over this city in the last few days?

But this is only a verification of the prophecy of our Savior just before his departure, that after him would come anti-Christ who would deceive the very elect.

He fooled the legislature of the state of Washington, for which, perhaps, it was not to blame; but if we, with our eyes open, allow him to impose upon us we alone are responsible.

And now, gentlemen of the senate, I believe that we in Iowa should show ourselves
free men and untrammeled by their dictation.

It seems to me that the services of these gentlemen are no longer needed here, and that they might be allowed to return to New York for the present, and if they are needed here at the next regular session they will be duly notified.

The main reason, Mr. President, why I am opposed to the committee substitute, is that similar laws are on the statutes of nearly every state of the Union, some placing the age limit at 14, some at 16 and some at 18 years of age; and so far as I have been able to learn they are universally a dead letter.

When you allow the cigarette to be placed on sale and provide that sales shall not be made to minors under a certain age, it is a very easy matter for boys above that age to purchase them for those under that age.

But we are told that the present law also is a dead letter. I want to say right here that in the city of Atlantic, a city of nearly 5,000 inhabitants, a place which I am pleased to call my home, I am informed, and believe, that there is not a cigarette on sale. And I have heard other members of this senate say that the same state of facts exists as to the cities in which they live.

In the large cities of this state the law is probably openly violated.

The tobacco trusts have shipped these cigarettes into the state, and have promised these tools of theirs, who handle them, immunity from the penalties of this law in case they are prosecuted.

They openly violate the law, and then offer its violation as a reason why it should be repealed; and the citizens of this state are so short sighted as to join them in the cry.

The law under consideration has never been declared unconstitutional by any court of last resort, either state or federal. That it will be so declared, so far as it prohibits the sale in original packages by the importer, some good lawyers believe.

While, on the other hand, just as good lawyers contend that the courts of this land have gone farther in this direction than they will ever go again.

There are a great many intelligent people who can not see why every state of this Union should not be allowed to make and enforce its own police regulations.

But, Mr. President, if the courts should declare that this law contravenes the interstate commerce law, in so far as it prohibits sales in original packages by the importer, and is, therefore so far unconstitutional, then it can be cured in the same manner that our law governing the sales of intoxicating liquor was cured by what was known as the Wilson bill, which passed congress after the delivery by the United States Supreme Court of its decision, known as the original package decision. And the Terry bill is such a provision.

If this law on our statutes does not curtail the sale of cigarettes in the state of Iowa, why does the tobacco trust keep a man here all winter to work for its repeal or modification?

I have on my desk a brief on the subject of the constitutionality of the present law, prepared by the attorneys of the tobacco trust, which brief cites a West Virginia case; and if any lawyer will take the trouble to read the that case he will be forced to the conclusion that if the law now on our statutes is unconstitutional the committee substitute is subject to the same objection.

The one prohibits the sale of all cigarettes because they are drugged and deleterious to the health of those who use them.
The 1897 Mulct Tax Amendment

The other prohibits the sale of all cigarettes which are drugged and are therefore harmful to those using them.

If the West Virginia case announces the correct rule of law, which I do not believe, then both the present law and the proposed law are unconstitutional—in fact, according to that decision, any law that curtails the sale of this little pest is unconstitutional because it deprives the importer of the sacred right of selling his unwholesome wares in the original package.

According to that decision, any law which taxed the traffic in the original package in the least would be unconstitutional.

If this is to be the holding of the courts in this country, the sooner we find it out the better; and it will never be discovered by changing the law as often as the tobacco trust asks us to do so.

So far as I am concerned, I want it understood right here and now that I can answer to the roll call on the subject of this amendment without the aid or advice of any paid agent or attorney of the tobacco trust.

Again, Mr. President, in order that the American Tobacco Trust may never again have cause to complain that the cigarette prohibitory law of Iowa does not prohibit, we have prepared an amendment, which I believe will help greatly to enforce this law in the large cities of this state. And then, gentlemen of the senate, this man from New York, when he returns to his principals, can have the pleasure of saying to them that his mission to the wild and wooly West has not been vain, but that he has accomplished what he was sent here for, an amendment, to the Iowa anti-cigarette law.

And in return, his masters may say to him: “Fremont, you succeeded in fooling the ministers of the gospel, and came within one of fooling the superintendents of the schools of the great state of Iowa assembled at her capital; and in so far we want to say to you, ‘Well done, good and faithful servant.’ But candor compels us to say, Mr. Fremont Cole, on the whole you have made a bad mess of it this time for sure.”

And now, fellow senators, I hope that this committee substitute will be defeated, and then I understand that an amendment, which has been published in the papers and is known as the “Trewin amendment,” will be offered, and I shall support it and hope that it will prevail.

I understand also that Senator Carney will offer an amendment, fining the boys found smoking or carrying them. I shall also support this amendment and hope it, too, will prevail. In short, I am in favor of doing anything and everything that can be done to destroy the cigarette.

It has not a friend on earth, except those who make money out of it, and the human being who has been so unfortunate as to have become its slave.29

The Fremont Cole (1856-1915) to whom Phelps referred as the Tobacco Trust’s successful lobbyist in Washington State (in 1895) and unsuccessful

lobbyist in Iowa (in 1897)\textsuperscript{30} was a lawyer from western New York, who had been a Republican member of the state Assembly from 1884 to 1889, serving the final two years as speaker,\textsuperscript{31} before getting caught up in a political scandal—as a result of which his “career was blasted and his prestige destroyed”\textsuperscript{32}—and losing the Republican nomination for state senator in a failed effort to vindicate himself.\textsuperscript{33} Nevertheless, immediately after this defeat \textit{The New York Times} profiled him as a “brilliant and brainy young lawyer...who is more than likely to be heard from later on.”\textsuperscript{34} After the press had reported in June 1890 that he had been appointed the Northern Pacific Railroad’s resident attorney in Seattle,\textsuperscript{35} he was in New York City briefly in September “settling some business for New-York parties who are interested in enterprises in the new State of Washington” (which had not joined the Union until November 1889). Whether in that connection the American Tobacco Company became familiar with his legal/business skills is unknown, but Cole then moved to Seattle, where he at once “acquired a partnership in one of the oldest and best-known law firms” in Washington State. Although the \textit{Times} reported that he would “devote himself exclusively to his practice,”\textsuperscript{36} by 1893 it referred to him as a “businessman.”\textsuperscript{37} In 1894, when he was engaged in legal practice,\textsuperscript{38} he unsuccessfully ran as a Republican for a seat in the state senate,\textsuperscript{39} in the course of which contest the aforementioned scandal (accusing him of having been a “political ‘jobber’” while Assembly speaker) caught up with him.\textsuperscript{40} On October 3, 1895, the night before Cole left Seattle permanently “to take a lucrative position in the employ of the American Tobacco Company,” the

\textsuperscript{30}The identity of the Tobacco Trust’s unsuccessful lobbyist in 1896 is unknown.
\textsuperscript{31}\textit{American Legislative Leaders, 1850-1910}, at 135-36 (Charles Ritter and Job Wakelyn eds. 1989).
\textsuperscript{33}“Fremont Cole’s Defeat,” \textit{NYT}, Oct. 10, 1889 (1);
\textsuperscript{34}“Ex-Speaker Cole at Home,” \textit{NYT}, Oct. 27, 1889 (9).
\textsuperscript{35}“News from the Sound,” \textit{MO}, June 21, 1890 (2:1).
\textsuperscript{36}“Fremont Cole in Washington,” \textit{NYT}, Sept. 12, 1890 (5).
\textsuperscript{37}“Fremont Cole’s Rosy Views,” \textit{NYT}, Sept. 15, 1893 (9).
\textsuperscript{38}\textit{Hubbell’s Legal Directory: 1895}, at 1166 (1895). His listing suggested that he was in solo practice, but according to “Fremont Cole,” \textit{SP-I}, Oct. 15, 1894 (5:1-2), he was associated with two other men, who were not listed in \textit{Hubbell’s}.
\textsuperscript{39}“The Republican Ticket,” \textit{SP-I}, Nov. 6, 1894 (4:1). He lost by a vote of 564 to 777. \textit{SP-I}, Nov. 8, 1894 (3:7).
\textsuperscript{40}“A Lie About Fremont Cole,” \textit{SP-I}, Nov. 6, 1894 (2:3).
creditors of the “well-known attorney” attached the furniture of his residence. As far away as California the press reported that “much of his time is to be spent in the lobby of Congress.” Cole did return to New York, opening an office in New York City for what became “an extensive practice, reaching across the continent,” in which he engaged until his death in 1915. In fact, that office at 1 Madison Avenue (the Metropolitan Life Insurance Company building) housed “the prince of professional lobbyists,” Frederick S. Gibbs, another former New York State legislator, who was a key national Republican operative. On the death of Gibbs, whose “employee” Cole had been, the latter took over his office and occupation.

Whether Cole played a part in the Tobacco Trust’s effort to thwart Washington State’s passage of the country’s first general statewide ban on cigarette sales in 1893 is unclear. That statute made it unlawful to “manufacture, buy, sell, give or furnish to any one cigarettes, cigarette paper or cigarette wrapper.” Contemporaries entertained no doubts as to the Tobacco Trust’s impact on the passage of the ban, which became national news. Nine-tenths of the legislators who voted for the bill, according to The New York Times, “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...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 Trust intended to subvert passage, but turned out to be

---

42“Attached at Seattle,” Call (San Francisco), Oct. 6, 1895 (5:6).
43A Biographical Record of Schuyler County New York 251 (1903). Although this paid-for hagiography stated that his “distinctively representative clientage...connect[ed] him with much of the important litigation tried in the courts of the Empire state” (id. at 252), a search of the Lexis legal database found no case mentioning his name after he left Washington.
44“Ex-Speaker Cole Dead,” NYT, Nov. 16, 1915 (14). This obituary stated that he returned to New York City in 1895, but the 1900 Census of Population returned him as living again in western New York. Twelfth Census, 1900, Series T623, Roll 1161, Page 49 (Heritage Quest). By 1910 he was returned as living in Queens. Thirteenth Census, 1910, Series T624, Roll 1065, Page 111 (HeritageQuest). According to the obituary, he lived in Little Neck (Long Island).
461893 Wash. Laws ch. 51, at 82. See above ch. 11.
an incompetent lobbyist.\textsuperscript{47}

Phelps’s account suggested that Cole’s role may have been limited to the amendatory process in 1895, when the Trust succeeded in undoing the severe damage of the original strict enactment.\textsuperscript{48} The bill that the legislature did enact in 1895 was well worth ATC’s investment in procuring its adoption: the new law, which made it unlawful to sell or give cigarettes to minors under 18, required sellers to obtain a license—which local governments were authorized to issue for a $10 fee for retailers—for which they had to make the meaningless oath that to the best of their knowledge the cigarettes that they would be selling did “not contain any injurious drug, narcotic or other deleterious matter....”\textsuperscript{49}

The day after Phelps had delivered his speech, the \textit{Des Moines Leader} published a very odd article that sounded as though it might have been planted in this anti-prohibition paper by the Tobacco Trust as part of a last-minute political disinformation campaign designed to thwart reenactment of the Phelps law and enactment of the mulct tax. Without naming the legislative gossipers, it alleged that it was a matter of common gossip that the worthy senator [Phelps] was not always thus inflamed at the particular lobbyist [Fremont Cole] to whom he referred and whom he afterward named. Indeed, it is told on good authority that the lobbyist in question visited Atlantic, the home of Senator Phelps, before the beginning of the session and that the visit was not wholly unsolicited: that for some time thereafter he was in active correspondence with the “wart on humanity,” and that he cordially asked him to come to Des Moines: furthermore that the letters of Senator Phelps to this lobbyist, couched in terms of great friendliness, were in the possession of another senator at the time Senator Phelps delivered his phillipic [sic] and that the senate narrowly missed having another “sensation.”\textsuperscript{50}

The \textit{Leader} wondered why, if the reports were true, the public should not have access to this correspondence.\textsuperscript{51} The next day the paper repeated the insinuation in the formal editorial column, charging that if “Phelps had been in affectionate and friendly correspondence with the cigarette trust, and if the lobby came here

\textsuperscript{47}\textit{Fighting the Tobacco Trust,” NYT, Mar. 17, 1893 (10).} See above ch. 4.

\textsuperscript{48}\textit{Curiously, the extensive contemporaneous press reporting on the 1893 and 1895 bills in Washington did not identify Cole as a participant.} See above chs. 4 and 11.

\textsuperscript{49}\textit{1895 Wash. Laws ch. 70, §§ 1-3, 5 at 125, 126.} See above ch. 11.

\textsuperscript{50}\textit{“Would Like to Read It,” DML, Apr. 29, 1897 (2:5) (copy furnished by Merle Davis).}

\textsuperscript{51}\textit{“Would Like to Read It,” DML, Apr. 29, 1897 (2:5) (copy furnished by Merle Davis).}
on his invitation, he should favor the public with a glance at the letters.”

52 But, unanswered, the allegations, which were, at the very least, inconsistent with Phelps’s long-term active commitment to the anti-cigarette campaign, appear to have vanished as quickly as they had surfaced.

A rather different perspective appeared in the editorial column of the Cedar Rapids Sunday Republican, which opined that Phelps’s speech against “[t]hat dirty little thing, the cigarette” had “poured hot shot” into it “until its stench was as bad as it is when smoked and that is mighty bad.”

53 The first senator to speak against Phelps’s view was Republican Senator Ellis, who had been such a prominent opponent of the bill in 1896.

54 I do not believe the senate desires to devote its time to the consideration of any lobbyist no matter what interest he may represent. I opposed this bill last session on the ground that it was sumptuary legislation. I have not changed my mind. If cigarette smoking is an evil I believe we can regulate it by preventing their sale to minors and preventing the placing of injurious substances in them. We all favor promoting the morals of the state. The only difference is as to the means to be employed. I favor the committee amendment because it prevents sales to minors and adulteration. I am in favor of it because it is the kind of law that it is. It is a wholesome law which controls the manufacturer, the dealer, and the consumer. Let us regulate and control it if we cannot have absolute prohibition.

55 Republican Senator (and Code Revision Committee member) Joseph Junkin, who was responding to Ellis’s claim that every lawyer to whom he had spoken expressed the belief that the law would be declared unconstitutional, took a contrarian position:

I am in favor of any legislation that will restrict the sales of cigarettes and prevent their being used by the youth of this state. It is said the Phelps law is unconstitutional. That is incorrect. Our constitution says nothing about it. But it does conflict with the Federal interstate commerce laws. If we cannot prevent outsiders coming in and selling to adults we cannot prevent them selling to minors by legislative enactment. If it is decided a legitimate traffic I say we cannot pass a law making it a crime for any one to use them. If we cannot prevent the sale we cannot prevent the consumption. You might as well say that a baker shall not sell bread to a minor. A man has a right to use that which he buys.

52 DML, Apr. 30, 1897 (4:3) (untitled edit.).
53 “Capital Clatter,” Cedar Rapids Sunday Republican, May 2, 1897 (1:3).
54 See above ch. 10.
56 “The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 4).
The 1897 Mulct Tax Amendment

committee substitute is just as unconstitutional as the Phelps law. If one is unconstitutional so is the other. Let us stand by the Phelps law and pass the high license amendment to be introduced by Senator Trewin.57

Republican Senator James Carney, an attorney (who had drafted Welker Given’s liquor mulct bill in 1893-94),58 taking the same position as Junkin,59 argued that:

Some regulations as stringent as possible should be adopted to prevent this evil. I believe that an addition can be made to the Phelps law which will be useful. I shall offer an amendment if the committee substitute does not carry. The Phelps law was tried before Judge Sanborn in St. Paul. I understand the attorney general is not satisfied with the trial of the case which was submitted on an agreed statement of facts. I do not believe the case was a fair test or that it has ever had a fair test. I do not believe the committee measure emanated from the tobacco trust. I have seen the trust bill. It is a high license law.60

After Carney had added that school superintendents had insisted that the legislature should authorize the arrest of minors who used cigarettes, Republican John Rowen declared that “[h]is views had been changed not by the agents of the tobacco trust, but by the educators and ministers.”61 He went on to charge that Phelps’s law did not even prevent cigarettes from getting into children’s hands:

I am as much opposed to the use of cigarettes as the senator from Cass but all any one has to do is to go down in the streets of Des Moines and see the small boys smoking cigarettes to know that the Phelps law is a failure. Out of conscientious motives, because I believe the Phelps law is a failure I intend to support the committee amendment. Within the last two hours I talked with one of the leading ministers of Des Moines. He said the Phelps law was an absolute failure in Des Moines. He asked us to give them something so they could be kept away from the small boys. The committee measure will some good at least.62

57. “The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:4-5). Junkin’s characterization of the $300 penalty as a “high license” was an early example of the confusion, fostered perhaps by the misleading resemblance to the 1894 liquor mulct, surrounding the mulct’s function.

58. See above ch. 9.


60. “The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:5).


Instead of refuting Phelps’s allegations concerning Fremont Cole’s lobbying, Senator Carpenter lambasted the new law as useless in general and doing “no good whatever in large cities,” where its defiance bred contempt for law:\textsuperscript{63}

There has been lots of talking. Some of it has surprised me. When I heard the senator from Cass [Phelps] I wondered where he got all his information. I have never claimed on this floor that I was incorruptible. I do not care to defend myself or my committee. I do not apologize for my position or that of my committee on this bill. I have never had to get up here and warn the members of this senate against a lobby in the fear that the members of the senate have not sense enough to know how they want to cast their own vote. When my committee came to consider the law we were confronted with the general belief that the Phelps law is useless. Judge Sanborn declared it illegal. Since then their sale has spread over the state and is on the increase. This morning the senate acknowledged the Phelps law was illegal by passing a resolution to ask congress to help us. Physicians agree that cigarettes stultify the growth of the youth but they may not injure the adult. You cannot convict a man for selling to a minor under the Phelps law because the whole law has been declared invalid. The whole intention of the committee has been to give the state a law that will remedy the evil to the greatest extent possible until congress can gave [sic] us a right to make the prohibition total.\textsuperscript{64}

Despite his refusal to defend the Code Revision Committee, Carpenter did just that by claiming that the committee amendments had been “made at the suggestion of Superintendent Hiatt. If this amendment is wrong it has been a mistake of the head and not of the heart.”\textsuperscript{65}

Senator Pusey echoed Carpenter’s remarks: “I do not rise to hurl vituperation at any lobbyist or to accuse the legislature of the great state of New York of being salable. The Phelps law is inoperative. The senator from Cass himself concedes his law is ineffective. His confession is here before this senate in the shape of the resolution he got passed this morning to memorialize congress. I favor the report of the committee because it has some force and some life while the Phelps law is dead and incapable of enforcement.”\textsuperscript{66}

Republican Frederick Ellison, who had filed an amendment to kill the Phelps bill and was the only non-border Republican to vote against it in 1896,\textsuperscript{67}
nevertheless opposed the committee amendment because “he thanked god he was not one of those individuals who was not willing to see the light.” In addition to having found that the law was enforced in his vicinity, the light that he had seen was “two boys, sons of widowed mothers, lose their reason from smoking cigarettes. He did not propose to favor any measure which contained a shadow of a backward step along such lines.”

Moving in the opposite direction, Republican A. C. Hobart stated that “he voted for the Phelps bill but he had changed his mind as to the wisdom of the vote. Last year two of the strongest speeches made against the Phelps bill on the ground that it was unconstitutional were made by the senators from Allamakee and Jones (Trewin and Ellison). To-day they are pleading for it although they have seen their prophesies fulfilled. If they are not selling cigarettes to-day in the town the senator from Jones hails from it is only a question of time until they do for they have the right to sell them.”

He supported the committee amendment because it proposed a good way out of the “dilemma” (of trying to enforce a law that people commonly believed to be unconstitutional with the result that “throughout the state cigarettes were being sold open and above board”) by focusing on protecting “children of immature years” rather than men.

Carpenter then brought this part of the debate to a close by reminding the Senate of “Ellison’s eloquent speech last session against the Phelps bill and his attempt to get an amendment passed to simply prohibit the sale to minors.”

On the roll call vote, the committee amendment lost 16 to 27. All six Democrats (including the two committee members) who cast a vote supported the de facto repeal of the Phelps law. Republicans split 10 to 27; five of the six Republican members of the committee who attended the April 1 meeting voted for the amendment, the only exception being the contrarian Junkin. Of the seven Republican members who did not attend that meeting, three (Gilbertson, Rowen, and Waterman) also voted for the amendment, while four (Berry, Carney, Craig, and Trewin) opposed it. This voting record underscored the skew in committee composition that made its amendment possible in the first place.

---

73. *Journal of the Senate, Extra Session, Twenty-sixth General Assembly of the State of Iowa* 1020 (1897) (Apr. 27).
74. Unsurprisingly, Senator Ellis, the veteran foe of the Phelps bill, also voted for the amendment.
The 1897 Mulct Tax Amendment

Senator Trewin then offered his amendment to impose an annual $300 tax, superficially similar to the $600 liquor mulct tax, on all cigarette dealers:

There shall be assessed a tax of $300 per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct tax, and shall be a perpetual lien upon all property both personal and real, used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state.

Unlike the liquor mulct, which was optional in localities and—because payment of the tax barred prosecution of the liquor seller under the prohibition law—effectively a license, the cigarette mulct was statewide and mandatory, and its payment left cigarette sellers liable to prosecution under the Phelps prohibitory law.

In support of his amendment Trewin, who lived in Lansing (population 1,566) in a rural northeastern county (Allamakee), declared that the law had “practically stopped the sale” of cigarettes in both places. “result[ing] in the saving of a fair young man who was one of his best friends and it made him sorry that he had not voted for the Phelps bill in the first place.” Exhibiting a convert’s zealous fervor, Trewin declared that: “‘What we want...and none have disputed it, is to destroy, so far as may be, this cursed cigarette habit.’” The point of applying the principle of the mulct law to cigarettes was to “take the most

---

75Iowa Code § 2432 at 856-57 (1897). Paying the liquor mulct tax did not “protect the wrongdoer from any penalty now provided by law, except as provided in the next section” (§ 2447 at 860), which conferred local option powers on cities (§ 2448 at 860).
76“The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:5).
77The Iowa Official Register for the Years 1909-1910, at 821 (William Hayward comp., 23rd Number, 1909) (state census of 1895). To be sure, the fact that Lansing was on the Mississippi across from Wisconsin from which cigarettes could easily be imported suggests that the law was exerting some prohibitory effect.
78“The Cigarette Is Doomed,” DIC, Apr. 28, 1897 (8:3-6 at 5).
79“The Afternoon Senate Session,” ISR, Apr. 28, 1897 (4:7, 8:5).
extreme measures to cut off the sale of this damnable stuff.”

By a large majority of 32 to 6 the Senate adopted Trewin’s amendment, Republicans casting all 32 yes votes; only Code Revision Committee chairman Carpenter and Pusey joined four Democrats in opposition. The Iowa press generally viewed the mulct tax as making the anti-cigarette law “stronger than ever” by imposing “an additional penalty for sale.” The *Dubuque Daily Times* observed that “the cigarette in Iowa is doomed,” while the *Shelby County Republican* ventured the prediction that: “This ought to completely annihilate the trade in the little coffin nails.”

Republican Senator Carney then offered the amendment that he had mentioned in his floor speech and that was almost identical with section 9 of the committee amendment criminalizing smoking by minors. Republican Senator Thomas Healy—who at the party’s state convention in 1893 had introduced “the famous thirteenth plank” on liquor prohibition—opposed Carney’s amendment. Healy refused to “favor any law that would result in small boys being torn from their mother’s apron strings by the brawny hands of big policemen and borne off to the police station.”

Before the Senate could vote on the amendment, Republican Thomas Cheshire, a lawyer from Des Moines who had twice voted for Phelps’s bill in 1896 and voted in favor of Phelps’s Terry bill resolution in 1897, offered an
amendment to delete the reference to minors under 18, thus “mak[ing] it a crime for any one to smoke a cigarette. He said he could not vote for any measure that would make a criminal out of a boy that would not make it out of a man who performed the same act.”92 Cheshire’s proposal, which was presumably designed as a killer amendment—which was too radical even for Phelps, who had announced three months earlier that the anti-cigarette forces would not be seeking to strengthen the law—to derail the criminalization of youth smoking, served as a gauge of Senate Republicans’ attitudes toward the seriousness of the cigarette problem and the use of penal methods to control it. (Presumably, Cheshire did not expect that his amendment would become law, because either the Senate or House would reject it or the governor would veto it; alternatively, if it were enacted, perhaps he anticipated that the failure to enforce it would bring it and anti-cigarette legislation generally into disrepute.) Following Healy’s declaration that “he could not conceive of the liberality of the purpose which made a boy a criminal unless he wanted to become an informer,” Cheshire observed that “a boy would go to jail before he told where got the cigarettes. You would send him to such a place as the Polk county jail, which...ought to have been condemned years ago and...was a disgrace to the community.”93 Astonishingly, Cheshire’s amendment lost by the very narrow margin of 18 to 20. While four Democrats voted for it and none against, Republicans split 14 to 20. Several veteran opponents of anti-cigaretteism (such as Senators Ellis, Harper, and Lothrop) voted for the amendment, but no prominent anti-cigaretteists did; conversely, opposition to the total ban on use attracted both some of the latter such as Phelps and several high-profile opponents of strict regulation such as Carpenter.94

The Carney amendment itself lost on the even closer vote of 21 to 21. All seven Senate Democrats voted against the criminalization of cigarette smoking or possession by minors under 18, while Republicans split sharply, with 14 supporting it 21 opposing it. Phelps kept his word and supported the amendment,
but the question manifestly cut across earlier staked-out positions, jumbling protagonists and antagonists; for example, Phelps’ political twin, Perrin, joined Ellis, Pusey, and the Democrats in opposition, while Carpenter aligned himself with Phelps.  

**House Debate**

On April 30, a substitute was offered in the House for the Senate substitute embodying Trewin’s $300 mulct tax. Its author was Walter Hayes, who had been elected to represent the Mississippi River county of Clinton in a special election to take the seat of Democrat Nathaniel Merrell, who had died. Hayes, also a Democrat, had had a long career in public office, having been U. S. Commissioner for Iowa, a state district court judge, and a member of Congress. He was best known for having ruled as a judge, on narrow technical grounds, in 1882 that the newly added liquor prohibition amendment to the Iowa Constitution was invalid. In his private legal practice Hayes prominently represented large midwestern railroads and was himself a stockholder and director of several banks. During the brief election campaign the local Clinton newspapers depicted Hayes as a politician whose “only stock in trade...for sixteen years has been the liquor question” and who could be relied on to vote to legalize liquor manufacture. Not only did he vote for it, but at the end of February he had offered an amendment to the committee amendment of the relevant section of the proposed code that would have radicalized the committee’s approach to legalizing the manufacture of intoxicating liquors. Soon after Hayes’s substitute had lost by a vote of 37 to 59, the arch-Republican *Iowa State Register* editorialized that the liquor mulct tax had saved all the prohibition that was enforcible, and that unless the legislature permitted liquor manufacture, prohibition’s opponents

---

95 *Journal of the Senate, Extra Session, Twenty-Sixth General Assembly of the State of Iowa* 1022 (1897) (Apr. 27).
96 *The Special Election,* *Tri-Weekly Herald* (Clinton), Jan. 21, 1897 (4:2).
98 *The Iowa Supreme Court upheld the ruling. See above ch. 9.*
99 *The Bench and Bar of Iowa* 48-49 (1901).
100 *A. P. Barker - Why He Should be Elected,* *Tri-Weekly Herald* (Clinton), Jan. 16, 1897 (4:2) (edit.).
101 *The Special Election,* *Clinton Morning Age*, Jan. 17, 1897 (2:2-3) (edit).
102 *Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa* 336-47 (1897) (Feb. 26).
would repeal it and enact a general license law. Contending that the people would not consent to go through another experiment—one in a generation or two sufficed—the paper argued that in 1897 statewide prohibition could not come within 100,000 votes of prevailing. On April 2, chairman Perrin reported out the recommendations of the Senate Committee on Suppression of Intemperance, which also legalized the manufacture of intoxicating liquors. On April 14, Perrin, Phelps, and 22 other Republicans opposed it, but when 18 Republicans joined all seven Democrats in supporting it, the Senate adopted the amendment 25 to 24. After the House, by a larger majority, had concurred in the Senate amendment on April 21, the new Iowa Code came to permit the manufacture of liquor in towns that both permitted its sale and a majority of whose voters and whose city council or board of supervisors consented to its manufacture.

Hayes’s lengthy substitute for Trewin’s amendment sought to resurrect and make even more meaningless for the purposes of cigarette suppression Senator Carpenter’s amendments that the Senate had already rejected. Hayes would merely have made it unlawful to sell cigarettes without a license. The press reported that it had been “desired by the cigarette trust....” If ATC did not itself draft this proposal, it must have been delighted that as a condition of receiving this license, the applicant was required to make an oath pseudo-certifying the pseudo-non-harmful nature of the cigarettes: “The applicant...shall make oath in writing that according to his best knowledge and belief the cigarettes intended to be sold pursuant to such license do not contain any injurious drug or other deleterious matter or substance foreign to tobacco, except the pure paper wrapper and the pure gelatinous or other pure and harmless adhesive substance required to enclose the same, and that he will not knowingly sell any cigarettes containing any such injurious drugs or other deleterious matter, or any wrapper containing

---

103 “Save the Possible Prohibition,” ISR, Mar. 2, 1897 (4:1-2) (morn. ed.) (edit.).
104 Journal of the Senate, Extra Session, Twenty-Sixth General Assembly of the State of Iowa 722-23 (1897) (Apr. 2).
105 Journal of the Senate, Extra Session, Twenty-Sixth General Assembly of the State of Iowa 865-68 (1897) (Apr. 14). Of the 13 members of the Suppression of Intemperance Committee the two Democrats and six Republicans voted to legalize manufacture, while five Republicans including Perrin voted against it. For the committee’s membership, see Journal of the Senate of the Twenty-Sixth General Assembly of the State of Iowa 31 (1896).
106 Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa 841-45 (1897) (Apr. 21) (55 to 41).
108 “Iowa Legislature,” Shelby County Republican (Harlan), May 6, 1897 ([4]:4).
any harmful concoction of any kind whatsoever; and he shall also present...the
written affidavit of one of the manufacturers of such cigarettes...to the effect that
such cigarettes...do not contain any such drugs or deleterious matter or any other
harmful matter or concoction of any kind whatsoever.” Hayes’s substitute then
imposed a “duty” on city councils and boards of supervisors to grant a license to
sell cigarettes to anyone filing the aforementioned meaningless oaths and
affidavits, provided that the applicant paid the license fee ranging from a
minimum of $10 in unincorporated areas to a maximum of $75 in towns of more
than 15,000 inhabitants. The penalty for selling cigarettes with the forbidden
ingredients was a fine of $50 to $100 or imprisonment for a maximum of 30 days.
Hayes then tacked on the same provisions relating to minors that Carpenter had
proposed.\textsuperscript{109}

When the House took up Hayes’s substitute on May 1, Hayes contended that
while he “personally deplored” the federal court decisions with which the Senate
amendment conflicted, “it was his duty to respect them.” He nevertheless insisted
that his substitute was “acceptable in a prohibitive way....” He “wanted the evil
eradicated as far as possible,” but he did not want to pass a bill that the U.S.
Supreme Court would declare unconstitutional.\textsuperscript{110} Presumably finding his
remarks lacking credibility, the House “killed” Hayes’s substitute\textsuperscript{111}: on the roll
call vote, only 17 representatives voted for Hayes’s substitute, 13 of them
Democrats, only five of whom, together with 49 Republicans, voted against it.\textsuperscript{112}
Similarly, the vote on whether to concur in Trewin’s Senate amendment imposing
the mulct tax found 56 Republicans in favor and only four opposed, while
Democrats split six for and 10 against.\textsuperscript{113}

\textsuperscript{109} \textit{Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa} 944-45 (1897) (May 1). See also “Aus dem Staate,” \textit{Der Dubuque National-Demokrat}, Mar. 4, 1897 (4:3).

\textsuperscript{110} “Quiet Day in the Legislature,” \textit{DML}, May 2, 1897 (3:4-5 at 5).

\textsuperscript{111} “May Be Last Day of Session,” \textit{ISR}, May 2, 1897 (20:1-3 at 2).

\textsuperscript{112} \textit{Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa} 953 (1897) (May 1). Three of the four Republicans (Chapman, McNulty, and Whelan) voting for Hayes’s substitute represented Missouri River or Minnesota border counties.

\textsuperscript{113} \textit{Journal of the House of Representatives of the Twenty-Sixth General Assembly, Extra Session, of the State of Iowa} 954 (1897) (May 1).
The Newly Codified Anti-Cigarette Provisions

As enacted, the 1897 Code of Iowa contained three cigarette provisions, only one of which was new. Located in a chapter embodying “offenses against public policy” such as lotteries, disposing of liquors to Indians, allowing minors in billiard rooms or saloons, opium smoking, and selling firearms to minors, Section 5005 (“Sale of tobacco to minors”), codified the 1894 no-sales-to-minors law with one significant change: it removed the express mention of cigarettes from the list of tobacco products prohibited from being sold or given to minors, leaving “any cigar or tobacco in any form whatever....” The general ban on sales of cigarettes from 1896, now occupying section 5006 (“Sale of cigarettes”), underwent no changes except a very few trivial ones appropriate to a code rather than a session law. Finally, the new mulct tax in section 5007 (“Tax on sale”) provided:

There shall be assessed a tax of three hundred dollars per annum against every person, partnership or corporation, and upon the real property, and the owner thereof, within or whereon any cigarettes, cigarette paper or cigarette wrapper, or any paper made or prepared for use in making cigarettes or for the purpose of being filled with tobacco for smoking, are sold or given away, or kept with intent to be sold, bartered or given away, under any pretext whatever. Such tax shall be in addition to all other taxes and penalties, shall be assessed, collected and distributed in the same manner as the mulct liquor tax, and shall be a perpetual lien upon all property both personal and real used in connection with the business; and the payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same. But the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state.

Assessment, collection, and distribution of the cigarette mulct tax in the same manner as the mulct liquor tax meant that quarterly the assessor of every municipality was required to return to the county auditor a list of those engaged in the sale of cigarettes. If the assessor failed to perform this duty, three citizens of the county could provide the information to the auditor. Sellers were required to pay in quarterly installments; the tax due constituted a lien on

---

118 1897 Code of Iowa Ann. § 2433, at 857.
119 1897 Code of Iowa Ann. § 2435, at 857.
the real property in which the business was carried on, and failure to pay within a month of the due date triggered a 20-percent penalty, increased by one percent per month thereafter. Of the tax paid into the county treasury the county retained half and paid the other half to the municipality in which the cigarette seller operated the business. The state district court, upon an application by any citizen of the county, was required to suspend or removed from office any county attorney who wilfully refused or neglected to perform his duty to insure that the mulct tax was enforced.

The adoption in Iowa of the mulct tax from the context of alcohol control and its adaptation to the prohibition of cigarette sales could not be seamless because it was embedded in two diametrically opposed purposes. With respect to liquor, the payment of the tax was designed, in combination with the expressed consent to its sale by the majority of voters in a locality (and a city council resolution to the same effect) and compliance with numerous conditions by the taxpaying seller, to relieve the latter of any liability under the law prohibiting such sales. In other words, whatever the self-contradictions inhering in an arrangement enabling those who would otherwise be criminal wrongdoers to buy their way out of liability, the law was clearly a variant of the local option exception to statewide prohibition. As applied to cigarette sales, however, payment of the mulct tax neither permitted localities to authorize them nor exempted sellers from liability under the statewide prohibition. In other words, the mulct tax was designed as an additional tool to coerce compliance and facilitate identification of potential violators of the sales ban. To be sure, on the level of politico-moral principle, the legislature would have acted more consistently and preempted accusations of hypocrisy had it simply increased the fine for violation of the sales ban by $300.

---

120 1897 Code of Iowa Ann. § 2436, at 857.
121 1897 Code of Iowa Ann. § 2445, at 859.
122 1897 Code of Iowa Ann. § 2446, at 860.
123 1897 Code of Iowa Ann. § 2448 at 860-62. As Attorney General W. H. Byers explained the difference between the liquor and cigarette mulct taxes in 1909 after he had issued an opinion that the payment of the latter did not protect sellers from the penalties imposed for violating the 1896 Phelps law: “It is the vote of the people and the fulfillsments [sic] of the other requirements made in the code that makes [sic] the saloon legal and bars prosecution.... The tax does not legalize the liquor traffic.” “The Cigarette Law,” Dubuque Times-Journal, July 3, 1909 (5:1-2).
124 The same consideration applied to the Given-Funk liquor mulct bill before it was amended to make payment of the mulct a bar to prosecution. See above ch. 9. The addition of the mulct tax did, to be sure, incorporate an important coercive enforcement
The 1897 Mulct Tax Amendment

Six years later, in adjudicating the Tobacco Trust’s (interstate commerce-based) challenge to the law, the Iowa Supreme Court found nothing self-contradictory about the cigarette mulct tax, whose “intended” role “as an aid in suppressing and punishing violations...seems too clear for controversy.” As a penalty or “fine imposed for an offense,” it was “not even a form of license by indirection, for it contains no ‘bar clause,’ but, on the contrary, expressly provides that it may be exacted in addition to the penalties named in section 5006.” Consequently, both sections sought the same “identical” end—“the suppression and prevention of the traffic in cigarettes.” 125

Public Commentary on and Reaction to the Cigarette Mulct Tax

The cigarette fiends of the city have but a few hours now in which to break themselves of puffing the proverbial “coffin nails,” for Friday is October 1, and on that date the new law will go into effect which will, in all probability, tend to put a stop to dealers handling the vile things. 126

The “Phelps-Trewin law” 127 was, in the view of the Cedar Rapids Evening Gazette, “A Stringent Law.” 128 In a front-page article the Democratic Davenport Daily Leader detected no contradiction in the legislature’s having adopted the Phelps anti-cigarette bill “absolutely prohibiting their sale, with an additional $300 mulct tax....” That the law may nevertheless have contained much less than met the eye emerged from the paper’s observation that “[t]he legislature has petitioned congress for a law placing cigarettes under police regulations, which would make the Phelps law operative.” 129 In contrast, the legislative report of the non-partisan WCTU of Iowa at its annual convention in October 1898 tersely, misleadingly, but without explanation, summarized the outcome: “The cigarette law was amended to conform to the inter-state commerce law and thereby somewhat weakened.” 130 While not focusing precisely on the issue of the advantage vis-a-vis a mere increase in the fine by imposing a lien on the owner of the property on which liquor or cigarettes were being sold.

125 Cook v. County of Marshall, 119 Iowa 384, 400 (1903).
126 “Personal,” CREG, Sept. 30, 1897 (3:3-4 at 4).
127 “Iowa Legislature,” Shelby County Republican (Harlan), May 6, 1897 ([4]:4).
128 “A Stringent Law,” CREG, May 1, 1897 (2:4).
129 “Cigarette Mulct Stands,” DDL, May 2, 1897 (1:7).
130 Twenty-Fifth Annual Meeting of the Woman’s Christian Temperance Union of Iowa 61 (1898). Since the 27th General Assembly in 1898 enacted no law relating to cigarettes,
mulct tax’s principledness, the *Chicago Tribune*, which, at least at this time, editorially favored outright prohibition of cigarette sales, pointed out other ways in which the application of the mulct tax to cigarettes might prove to be less effective than in the liquor field:

The commendable object of this last Iowa mulct is to suppress cigaret selling entirely. The tax is intended to be prohibitory; it goes with an absolute interdiction of the traffic. The mulct on the saloons, on the contrary, is permissive and intended to supplant the prohibitory law wherever employed.... The original saloon mulct...was simply a disciplinary or regulative tax and always adjusted below the point of prohibition. [A]bove all else the mulct policy of giving Assessors extraordinary power to levy on a particular kind of traffic was justified because of the peculiarly open, notorious, unmistakable nature of that traffic—dramselling—under a permissive system. In the absence of delegalizing penalties a public drinking place naturally stands out in its true character.... Under such circumstances it is no trick to spot every saloon for taxation.131

In contrast, according to the *Tribune*, not only was cigarette selling not conspicuous, it was “not even a business by itself, but merely an incident or side feature in the legitimate sale of tobacco.... Such a traffic can easily take on a secret character.” Consequently, the paper concluded, “[s]traight prohibition, when generally supported by public opinion, is better....”132 The mulct tax approach was not confined to Iowa. Tennessee, which had basically adopted Iowa’s anti-cigarette bill in 1897, enacted a somewhat different version of the cigarette mulct tax in 1899.133

More than a month before the Iowa mulct tax went into effect on October 1, this reference to such an amendment in Florence Miller’s report is mystifying. (In 1904-1905 Miller was president of the nonpartisan Iowa group.) Equally mystifying is that a multi-page resume of the WCTU’s legislative work offered considerable detail about the amendments to the liquor mulct tax at the 1897 extra session, but nothing about enactment of the cigarette mulct tax. *Id.* at 69. No less mystifying is that Miller’s 1897 legislative report to the October convention never mentioned the cigarette mulct tax, but did discuss the liquor mulct tax. *Twenty-Fourth Annual Meeting of the Woman’s Christian Temperance Union of Iowa* 50-52 (1897). Finally, in her column on legislation in the May 1897 issue of the non-partisan group’s newsletter, Miller did not even mention the cigarette mulct tax. Florence Miller, “Legislative,” *W.C.T.U. Bulletin* 2(5):4 (May 1897). Although it is difficult to view the cigarette mulct tax as having conformed the anti-cigarette law to the congressional commerce clause, it is equally difficult to identify what else Miller might have meant.

131“Iowa’s Mulct on Cigaret Sellers,” *CT*, May 24, 1897 (6) (edit.).
132“Iowa’s Mulct on Cigaret Sellers,” *CT*, May 24, 1897 (6) (edit.).
133See below ch. 16.
1897, the $300 tax had impelled merchants in Le Mars, a Missouri River county
town of about 5,000, not to sell cigarettes. At the same time it was reported in
Muscatine on the Mississippi that cigarettes were becoming scarcer and fewer
were being sold every day. As the local paper reported under the headline, “The
Death-Dealing Cigarette Must Go,” a “prominent tobacco dealer” was “glad of
it.” While he had not keep them in stock for two months, some other dealers that
did were not selling many either: “‘The coffin nail is doomed.’” The reason, he
explained, was twofold:

“All this comes about through the new revenue law by which Congress has added 50
cents a thousand as the internal revenue tax, which brings the cost to the retailer up to
$4.20 and leaves the profit on each box only four-fifths of one cent. This is the prime
cause of the advance....”

“It is known...that quite a number of dealers stopped selling the death-dealing article
when the Phelps law passed and have never begun selling them again, while others, a short
time after the scare, and several decisions of the Federal Court, which virtually declared
the law unconstitutional, again began the sale, and have continued ever since.”

The profit on cigarettes has never been large enough to make their sale a paying
transaction, but many dealers, although it has been against their principles, have been
compelled to sell them.

The price per box has not advanced in this city, although in many places it has
doubled. It is expected, however, that when the Phelps law takes effect the price will go
skyward, and may cause a total stoppage of all sales. Twenty-five cents a box may yet be
the price for ten little coffin nails.

In the very last days of September, M. G. Davenport, the superintendent of
the Hygiene, Heredity and Narcotics Department of the nationally affiliated
WCTU of the State of Iowa, reported to its annual convention that: “Since the
decision of Circuit Judge Sanborn that cigarettes may be sold in the State in
original packages the law in Iowa has been robbed of its force. Manufacturers
make the original packages so small they sell for a nickle and ship them into Iowa
in open baskets.” This unduly pessimistic assessment of the decision, which
ignored Judge Giberson’s decision and would have to undergo revision in a few

---

135 “The Death-Dealing Cigarette Must Go,” Muscatine Journal, Aug. 24, 1897 (5:3)
136 (copy furnished by Merle Davis).
137 Eighth Annual Meeting of the Woman’s Christian Temperance Union of the State
of Iowa, held at Creston, Iowa, September 27th, 28, and 29th, 1897, at 109 (1897).
months after the Iowa Supreme Court ruled on ATC’s appeal of that ruling, did not deter one of the group’s local unions from reporting to Davenport: “‘We put up anti-cigarette law in all places where tobacco is sold: it is a restraint to many.’”

On the eve of the law’s effective date, the Des Moines press reported that it was not probable that any local dealer would pay the tax: “The fact is that cigarettes are sold now at a profit of less than half a cent a package, and are carried more for accommodation than anything else. Dealers do not feel like paying a heavy tax in order to accommodate their trade, and realize that they cannot earn the license.” To be sure, some dealers were already taking heart that ATC would save them from having to pay the tax by backing a test case contesting it on the same interstate commerce grounds that underlay the challenge to the Phelps law. A Trust representative had already written the dealers that he did not consider the law good and expressing the belief that it could be beaten. In Cedar Rapids the Evening Gazette was certain that the $300 mulct tax would make cigarettes “an unknown quantity” because the profit was too small to enable any dealer to pay it. Moreover, the law was not liable to become a dead letter because, if a dealer sold cigarettes despite not having paid the tax, “the lawyers will have a good case.” Within days of the law’s effective date, the authorities in Des Moines began receiving complaints of dealers’ bootlegging “the little lung destroyers” without paying the license fee. The press reported that investigations, arrests, and the first prosecutions were imminent. Nevertheless, despite the bootlegging, the deterrent effect of the new law apparently curtailed supply to such an extent that “many of the fiends have not yet become acquainted with the bootleggers and are resorting to all manner of means to satisfy their cravings.” Many were reduced to using tissue paper, but “probably the most novel method” was the adoption by restaurant waiters of tissue napkins. Once some dealers began to pay the license fee, they prepared to file complaints against the continuing bootlegging, which at least the Des Moines Leader predicted would prompt arrests and a test case.

Despite enactment of this “most excellent law,” whose $300 annual penalty

---

138 Eighth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Creston, Iowa, September 27th, 28, and 29th, 1897, at 108 (1897).
139 “Will Make a Cigarette Test Case,” DML, Sept. 29, 1897 (2:4) (copy supplied by Merle Davis).
140 “Personal,” CREG, Sept. 30, 1897 (3:3-4 at 4).
142 “The City in Brief,” DML, Oct. 15, 1897 (5:2) (copy supplied by Merle Davis).
for dealers had been found to be “prohibitive,” by the end of 1897 the Cedar Rapids Evening Gazette reported that

a surprisingly large number of boys in the city are still able to secure the cigarette paper and in out of the way places indulge their appetites of the vile, nerve and brain racking “coffin stick.” It is not believed that there is a single tobacco store in the city where either cigarettes or the paper can be purchased, but in some mysterious manner the victims of the habit have no difficulty in securing what they term “the makin’s.”

Pass along almost any of the public schools at the noon hour or at 4 o’clock and one will see from one to a score of boys, ranging in age from 10 to 16, rolling cigarettes...and dodging into alleys and behind building [sic] where they can be lighted and smoked without public observation. It is not at all infrequent to see a boy marching down the street with his comrades, puffing away at a cigarette as though his life depended on it.

It would seem as though the school boards of this country will yet be compelled to take this matter in hand and absolutely refuse admission into the schools of boys who persist in this filthy and disgusting habit. It would be the easiest thing in the world to detect the boys who are addicted to the use of cigarettes, both from the stench about their clothing, the discoloration of their fingers and their general lack of mental activity. ... Any thoughtful parent would rather see his son go down the avenue with a big black pipe in his mouth than to see him wasting his vitality on poor tobacco and vile paper.143

The Iowa press does not appear to have adduced concrete figures on the prohibitiveness of the $300 cigarette mulct tax, but discussion of a contemporaneous $100 license fee ordinance in Chicago shed important light on the question. Retail dealers there claimed that the fee would “in most cases...more than extinguish” the profits that the Trust allowed them. With the average five-cent package of 10 to 12 cigarettes allowing the small dealer a profit margin of 1.2 cents: “In order to overcome the tax of $100 a year and prevent an actual loss in the sale of cigarets over 8,300 packages would have to be sold annually.” Consequently, the average retail shopkeeper or tobacco merchant would probably refuse to stock them.144

When the Iowa State Board of Health published its biennial report at the beginning of 1898,145 it included an article on “Cigarettes,” which faulted laws that several states had enacted prohibiting cigarette sales to minors as “unsatisfactory” because they were “constantly evaded” by adults who bought

143“A Burning Shame,” CREG, Dec. 16, 1897 (5:2) (copy furnished by Merle Davis).
144“Cigaret Measure a Law,” CT, Mar. 3, 1897 (7). See above ch. 6.
145Although the title page bears the date 1897, a newspaper article on the report appeared in late February suggesting that it recently been published. “Do They Injure?,” CREG, Feb. 23, 1898 (8:3).
The 1897 Mulct Tax Amendment

cigarettes and furnished them to minors and lacked definite means of enforcement. The board then praised as the “latest and most efficient means of controlling the traffic” the 1897 mulct “system of taxation…. 146 Bizarrely, the board appears to have been unaware both that the 1896 Iowa law prohibited sales to adults too and that the mulct tax was not designed as a means of “controlling the traffic” but of reinforcing the total ban. Nevertheless, for the Evening Gazette the law was unquestionably “a good one,” while the report should have been required reading for “[I]local cigarette fiends, who are waiting for someone to prove that the habit is injurious but who at the same time could not be convinced by a dozen reputable physicians,” though even the newspaper did not expect that “these dumb individuals” would learn from it. 147

A Failed Attempt at Repeal

At the regular session of the legislature in 1898, a one-term Democratic member of the House, James A. Penick, introduced a bill, House File No. 317, to repeal the codified Phelps-Trewin anti-cigarette and mulct tax laws and to “enact a substitute therefor for the purpose of restricting the sale of cigarettes.” 148 Penick, who — unusually for a Democratic leader — represented the Burlington and Rock Island railroads, 149 had, before practicing law, worked in the business of his father, 150 “the merchant prince of southern Iowa,” who owned the largest mercantile business in that part of the state. 152 H.F. No. 317 was a watered-down version of the Code Revision Committee’s sham prohibitory substitute that the Senate had rejected by a vote of 27 to 16 in 1897. 153 Penick’s bill, introduced “by

---

147 “Do They Injure?,” CREG, Feb. 23, 1898 (8:3), referred to the report as analyzing “Iowa’s system of taxation or licensing,” although the newspaper stated that the Iowa law “precludes” the sale of cigarette paper within the state.
148 Journal of the House of the Twenty-Seventh General Assembly of the State of Iowa 671 (1898) (Mar. 10). According to “It Will Be Defeated,” DML, Mar. 11, 1898 (1:5-6, 6:4-6 at 6), the bill did not repeal the $300 mulct tax.
149 A Memorial and Biographical Record of Iowa 1:335-36 (1896).
150 History of Lucas County, Iowa 703 (1978).
151 “Rites Sunday Afternoon at Funeral Home,” Chariton Herald, Mar. 29, 1934 (SHSI, IC, Clippings File, Biography).
152 History of Lucas County, Iowa 702 (1978).
153 See above this ch.
request,” included two sections verbatim from the 1897 committee substitute prohibiting the sale of adulterated cigarettes and that of cigarette packages with pictures or buttons. H.F. No. 317 also contained a watered-down version of Hayes’s substitute for Trewin’s amendment that the House had rejected by a vote of 54 to 17 in 1897. Penick would have required cigarette retailers and wholesalers to pay an annual license fee of $10 and $25, respectively, which would have been divided equally between the state and county. The penalty for violating any of the bill’s provisions was a fine ranging between $50 and $100 or imprisonment up to 30 days. Finally, Penick provided for the express repeal of the codified general cigarette ban and the mulct tax.

In an article published in Penick’s hometown newspaper, the syndicated Iowa legislative columnist Frank Bicknell, alleging that the Phelps-Trewin law was “inoperative,” asserted that the bill was “intended to be a reasonable license law, from which considerable revenue will be derived.” The press, in devoting but brief attention to the bill, uncritically characterized it as “[a]bsolutely prohibiting the sale of cigarettes to boys under 18, prohibiting adulteration and prohibiting the use of obscene pictures in advertising cigarettes.”

The House Public Health Committee, still chaired by Dr. Bowen, who had opposed real anti-cigarette legislation in 1896, recommended that the bill pass. At that point Bicknell contended that the bill might pass the House “as the
members believe it would produce considerable revenue and would be enforced,” whereas the mulct tax “is not enforced anywhere in the state.” When the full House took up the bill at the end of the session, Republican Joseph Edwards, a lawyer from Iowa City, “earnestly” urged passage, while Republican lawyer Charles Johnston and school teacher William Hauger opposed it on the grounds that the statute in force affecting cigarette sales was “much more effective.” Debate ended when the motion by Johnston and Republican grain dealer Merton De Wolf to kill the bill (“by striking out the enacting clause”) prevailed by an “overwhelming” viva voce vote.

The Iowa Supreme Court Is Not Misled by “the thinnest [sic] moonshine”: *McGregor v. Cone* (II)

The public is hoping that the [supreme] court will forward the hearing in this case to meet the urgent conditions which exist. The law...is openly and flagrantly violated every day in all towns of considerable size in this state.

The Supreme Court of Iowa has decided that the anti-cigarette law is a valid one. This is evidently a bid of the Hawkeye state for increased immigration—of folks who want to get rid of the habit and of the many thousands more who want to get rid of the smoker.

In January 1897, the press in Davenport reported that that city’s friends of the anti-cigarette law were “getting anxious” to hear the state supreme court’s decision in the original package cases. Their anxiety stemmed from the (alleged) fact that whereas tobacco dealers had initially discontinued cigarette sales after the law had gone into effect, selling resumed after the lower court rulings so that there was no longer a town in Iowa “where cigarettes cannot be openly purchased.” Although “many prominent attorneys” believed that the Iowa Supreme Court would sustain the statute, in the meantime the cigarette was
The 1897 Mule Tax Amendment

“getting in its deadly work with renewed vigor, the small boy being the chief victim,” as a stroll along any of Davenport’s business streets sufficed “to convince anyone...”\(^{169}\)

Despite having prevailed before Judge Giberson, Attorney General Remley realized, as both he and the Tobacco Trust had understood back in the first days of July 1896,\(^ {170}\) that the Iowa Supreme Court would not uphold the constitutionality of the Phelps law unless he persuaded the court to recede from *Iowa v. Coonan*, an 1891 decision in which it had ruled that bottles of beer and whiskey shipped into Iowa, “for convenience of shipment,” in boxes and barrels were, without any doubt, still original packages after they had been removed and sold individually.\(^ {171}\)

The appellant’s brief that W. W. Fuller filed before the Iowa Supreme Court on behalf of his straw man client McGregor—ironically, in seeking to impugn the legitimacy of a tobacco merchant’s action to restrain ATC from doing business in New York State, the trust’s renowned lawyer, Joseph Choate, charged in 1895 that Whelan & Co. were “merely figure-heads,” while the National Tobacco Company was “the real mover,” whose lawyer “sat behind and pulled the wires” as Whelan’s lawyer argued the case\(^ {172}\)—appealing from Judge Giberson’s decision fit firmly within the narrowest, policy-ignoring tradition of disembodied and reifying the “original package” doctrine. That doctrine, sympathetically manipulated by judges in a series of judicial invalidations of state anti-cigarette and prohibitory license laws that the Tobacco Trust had secured in Washington State (1893), West Virginia (1895-97), Tennessee (1897),\(^ {173}\) and in the federal branch of *McGregor*, doubtless instilled Fuller with great confidence that the Iowa Supreme Court, overruling Judge Giberson’s unprecedented adverse ruling, would also join the bandwagon.

In addition to focusing on the Iowa Supreme Court’s precedents that gave great deference to that doctrine, Fuller sought to make the most of a letter that ATC had secured from the U.S. commissioner of internal revenue in April 1893 (to use in its challenge to the Washington State anti-cigarette law),\(^ {175}\) which misleadingly certified that a package of cigarettes bearing an internal revenue stamp was “a proper and original package, as contemplated by existing [federal]

---


\(^{170}\)See above ch. 11.

\(^{171}\)Iowa v. Coonan, 82 Iowa 400, 401 (1891).

\(^{172}\)“Fighting the Trust,” *N&O*, Sept. 21, 1895 (1:6).

\(^{173}\)See above ch. 11.

\(^{174}\)See below this ch.

\(^{175}\)See above ch. 11.
The 1897 Mule Tax Amendment

law and regulations,” and that therefore repacking them “in additional covering of wood, paper, etc., is optional with the manufacturer and does not concern this bureau.” Fuller cited State of Washington v. Coovert, which in 1893 had struck down Washington State’s anti-cigarette law as violative of Congress’s interstate commerce powers, as “identical” with the facts of the state branch of McGregor in that in Washington, too, 10-cigarette packages had been shipped together in a wooden case. (In fact, in Washington State ATC had displayed “ingenuity” in devising “eight separate and distinct sales of cigarettes, each in quantity and mode of sale slightly differing from the other sales” because it was, in the words of the Washington attorney general, “desirous of securing the advice of this honorable [U.S. Supreme] court as to how it may violate the laws of the State of Washington with impunity, and still enjoy the protection of the constitution and laws of the United States under the federal power to regulate commerce between the states....”) Fuller was also able to cite a case that he himself had litigated on behalf of ATC in West Virginia in which the company had orchestrated shipment of the packages enclosed in a wooden box. He stressed that in June 1896 the Circuit Court of West Virginia, in a decision (that was not reported) holding unconstitutional an 1895 West Virginia law imposing a $500 license on retail sellers of cigarettes as applied to an unlicensed seller who had sold “original packages” had quoted the same Internal Revenue Bureau letter to bolster its conclusion that as “statutory packages” prescribed by federal law they were necessarily original packages for purposes of interstate commerce. Remley in his reply brief characterized the judge’s logic as a “non sequitur” and even “nonsense” and an “absurdity” which “betrays ignorance of the methods of commerce....” Instead, according to the attorney general, “[t]he usual manner in which merchandise is packed for transportation which experience has shown to be the safest, cheapest and most convenient for handling, determines what is an original package in the sense in which the term was used in Brown v.

176 Brief for Appellant at 17 (letter from John W. Mason to ATC, Apr. 6, 1893), McGregor v. Cone, 104 Iowa 465 (1898).
178 Brief for Appellant at 18-19, McGregor v. Cone, 104 Iowa 465 (1898).
179 Brief for Appellant at 1, 6-7 (1893), State of Washington v. Coover, 164 U.S. 702 (1896).
181 Brief for Appellant at 20 (State v. Goetze), McGregor v. Cone, 104 Iowa 465 (1898).
Maryland. To ignore this distinction and permit a retail dealer...to carry on his retail trade in a state in defiance of the laws of the state by indulging the fiction that a retail package shipped in that form and manner in violation of the usages and customs of the importers, is an original package...is not only illogical and without reason, but is a long step in the direction of overthrowing the police powers of the states....“182

Although Remley conceded in his brief that Coonan was “adverse” to his position,183 he chided the Iowa Supreme Court for the same illogic that he detected in the “decisions of an unknown nisi prius court of West Virginia”184—namely, the error of “failing to make the distinction between articles of commerce put up in boxes for the convenience of the retail dealer, and the original packages in a commercial sense.”185 He therefore urged the court to reconsider the question in order to “bring itself in harmony with all the other courts of the country which have spoken on the question.”186

Toward the end of his reply brief Attorney General Remley finally broke loose from the sterile discussion of the original package doctrine in order to introduce factual claims—none of which, to be sure, he documented—concerning the health and moral consequences of cigarette smoking. He executed this turn in an effort to take advantage of language in Plumley v. Massachusetts, a recent U.S. Supreme Court case that upheld, against an attack based on the original package interpretation of the congressional interstate commerce power, a Massachusetts statute prohibiting the sale of oleomargarine in imitation of yellow butter:

[T]he real object of coloring oleomargarine so as to make it look like genuine butter is that it may appear to be what it is not, and thus induce unwary purchasers, who do not closely scrutinize the label upon the package in which it is contained, to buy it as and for butter produced from unadulterated milk, or cream from such milk. The suggestion that oleomargarine is artificially colored so as to render it more palatable and attractive can only mean that customers are deluded, by such coloration, into believing that they are getting genuine butter. ... The statute seeks to suppress false pretenses and to promote fair dealing in the sale of an article of food. It compels the sale of oleomargarine for what it really is, by preventing its sale for what it is not. Can it be that the constitution of the United States secures to any one the privilege of manufacturing and selling an article of food in such manner as to induce the mass of people to believe that they are buying...
The 1897 Mulct Tax Amendment

something which, in fact, is wholly different from that which is offered for sale? Does the freedom of commerce among the states demand a recognition of the right to practice a deception upon the public in the sale of any articles, even those that may have become the subject of trade in different parts of the country? ... 

The language we have quoted from Leisy v. Hardin must be restrained in its application to the case actually presented for determination, and does not justify the broad contention that a state is powerless to prevent the sale of articles manufactured in or brought from another state, and subjects of traffic and commerce, if their sale may cheat the people into purchasing something they do not intend to buy, and which is wholly different from what its condition and appearance import.187

Procrusteanly, Remley sought to squeeze cigarettes into this interpretive mold. He began by observing that the U.S. Supreme Court had not inquired as to whether any buyers of oleomargarine had actually been deceived, defrauded, or injured, but had upheld the law as a valid exercise of the police power despite margarine’s being a subject of interstate commerce.188 Thus launched, the Iowa attorney general segued into the applicability of the approach to the Phelps law: “So tobacco is an article of commerce, and cigarettes are claimed to be made of tobacco. But the form in which cigarettes and cigarette tobacco are prepared makes it easy to mix noxious and deleterious substances with the tobacco, whereby the public are likely to be, and I am persuaded are, deceived and defrauded. ... It is believed that the use of cigarettes often made of deleterious and even noxious ingredients with the vilest kind of tobacco possibly worked over with solutions of opium, is a standing menace to public health, [and] public morals and is detrimental to good order and prosperity, which the state is duty bound to conserve.”189 This rather dubious empirical claim, for which Remley could have cited Dr. Emmert’s aforementioned paper in the Iowa State Board of Health Report190 or myriad other sources, may have constituted the far-fetched jurisprudential link to Plumley that, at the same time, was wholly superfluous from the perspective of the health sciences. Perhaps Remley’s solace derived from his argument that the Iowa Supreme Court did not have to find that anyone actually was deceived or tricked. Instead, he urged the court to take judicial notice of another, subtly subsidiary, claim of personal incapacity, that deviated starkly from the vast majority of contemporary accounts of cigarette smokers’ age and gender composition:

188Appellee’s Argument at 16, McGregor v. Cone, 104 Iowa 465 (1898).
189Appellee’s Argument at 16-17, McGregor v. Cone, 104 Iowa 465 (1898).
190See above ch. 3.
It is a matter within the common observation of all, that cigarettes are prepared especially for boys and youth and women, and are used almost exclusively by them. They are put up in an attractive form and sold at a price within the reach of a boy with a few pennies, and are often accompanied with [sic] lascivious pictures to inspire lust, while the pernicious cigarette habit is sapping his physical and mental vitality, so that many promising boys before reaching the age of twenty become physical, mental and moral wrecks. Men seldom use cigarettes, unless they become cigarette fiends in boyhood. If the sales of cigarettes were limited to persons of mature years there would not be demand sufficient to justify tobacco dealers keeping them in stock.\footnote{Appellee’s Argument at 16-17, McGregor v. Cone, 104 Iowa 465 (1898).}

Remley failed to explain how the Tobacco Trust was deceiving boys, youth, and women or how it was deceiving them more than men; if the latter were no better at uncovering the opium and other non-tobacco ingredients than the former, it is unclear how the reference to them could bridge the gap to Plumley’s applicability. On the other hand, the attorney general did presciently point to a psycho-behavioral fact of overwhelming significance to the tobacco control movement that did not, however, receive adequate consideration until late in the twentieth century—namely, that children and adolescents start smoking for agespecific reasons that are no longer relevant to adults later on in their maturational development.\footnote{Philip Hilts, Smoke Screen: The Truth Behind the Tobacco Industry Cover-Up 63-101 (1996).} As Thomas Roddick, a nationally prominent Canadian physician and medical professor, who was also a Conservative member of the House of Commons, observed during floor debate on a resolution to enact a national prohibition on the import, manufacture, and sale of cigarettes in 1903: “[W]e know that if a boy does not smoke up to seventeen or eighteen he will probably not smoke at all.”\footnote{Official Report of the Debates of the House of Commons of the Dominion of Canada: Third Session—Ninth Parliament 58: 832 (Apr. 1, 1903) (1903).} These younger people also soon outgrow those reasons, but...
by then they have become long-term nicotine addicts. Even if it had been as true in the 1890s (and it was not, especially among women) as it became and remained later in the twentieth century that relatively few people began smoking after their early twenties, the recruitment via addiction that may have caused ATC to focus on younger customers could not have constituted the deception required by Plumley—unless Remley had been able to perceive the much more profound deception that Claude Teague, R. J. Reynolds’ assistant research and development chief, articulated three-quarters of a century later in an internal document discovered in litigation:

Paradoxically, the things which keep a confirmed smoker habituated and “satisfied”, i.e., nicotine and secondary physical and manipulative gratifications, are unknown and/or largely unexplained to the non-smoker. He does not start smoking to obtain undefined physiological gratifications or reliefs, and certainly he does not start to smoke to satisfy a non-existent craving for nicotine. Rather, he appears to start to smoke for purely psychological reasons—to emulate a valued image, to conform, to experiment, to defy, to be daring... Only after experiencing smoking for some period of time do the physiological “satisfactions” and habituation become apparent and needed. Indeed, the first smoking experiences are often unpleasant until a tolerance for nicotine has been developed. [I]f we are to attract the non-smoker or pre-smoker, there is nothing in this type of product that he would currently understand or desire. We have deliberately played down the role of nicotine, hence the non-smoker has little or no knowledge of what satisfactions it may offer him, and no desire to try it. Instead, we somehow must convince him with wholly irrational reasons that he should try smoking, in the hope that he will for himself then discover the real “satisfactions” obtainable.194

Among those “wholly irrational reasons” that the Tobacco Trust had devised in the late nineteenth century were the “lascivious pictures to inspire lust”—forerunners of wholly irrational twentieth-century cigarette advertising suggesting health, pristine environments, vigorous exercise, and sexual attraction.195 In mentioning them and the “wrecks” that boys became, Remley came rather close to formulating the bait-and-switch strategy that tricked the first generation of cigarette smokers into lifelong addiction and that might have

qualified as deception. Instead, he appeared to be advocating on behalf of a no-sales-to-minors law, although he was in fact before the Iowa Supreme Court representing the state in defense of the Phelps law, which imposed an absolute ban on cigarette sales.

If Remley had been able to develop the bait-and-switch argument, he could have explained that consumers had not bargained for a nicotine addiction; he would then have met the *Plumley* requirement that the product’s “sale may cheat the people into purchasing something they do not intend to buy...” But he would then have faced the more difficult obstacle of showing that it was also “wholly different from what its condition and appearance import.” Undeterred, Remley valiantly strove to demonstrate that this *Plumley* standard “applies with equal force to the case at bar”:

> Tobacco is not an article of food nor clothing. It is a luxury, the indulgence of which is due to a perverted taste. The desire for it comes from cultivation and habit indulged in and does not arise naturally in the normal man. While the production of tobacco in many forms prepared for chewing and for smoking has become an industry, and I will concede has obtained a place among articles of interstate commerce, it is eminently proper to forbid the sale of it, either in the original packages or otherwise, to the class of persons who from immaturity or lack of experience are unable to judge of the evil consequences arising from its use. The statute in question, however, does not forbid the sale of all tobacco. It forbids the sale only of tobacco prepared in the form of cigarettes. The form is such that adulteration of the tobacco with injurious mixtures cannot be detected.

However, Remley offered no evidence that adulteration was easier to detect in chewing or pipe tobacco or cigars; nor is it intuitively clear that it would be. Nor did (or could) he explain why the sale of non-cigarette tobacco to, and its consumption by, adults should have been lawful. Instead, he urged the court to take judicial notice of “the common understanding of mankind which includes the manner in which cigarettes are prepared and of the class of persons around whom the legislature intended to throw its protection in the enactment of this statute. It is a matter of common knowledge that men of mature years do not smoke cigarettes.” Even apart from the fact that Remley had already conceded that adult men who had become addicts in their youth smoked, his suggestion that

---

200 Illustratively, the youngest member of the Canadian House of Commons in 1904, Liberal Armand Lavergne, who opposed the resolution to ban cigarettes because it was “an
the legislature’s intent was to protect pre-adults only oddly lacked any explanation as to why then the Phelps law prohibited selling cigarettes to adults. Apparently unwilling (or unable to see the need) to present a utilitarian or deontological justification for depriving adults of cigarettes at a time when science had not yet identified them as injurious to adults’ health, Remley failed to be as candid as a Liberal Canadian legislator in 1903, who supported the aforementioned House of Commons resolution to ban cigarette manufacture, sales, or importation by frankly admitting that “while we are endeavouring to reach the young we can only reach the young by reaching the old. We have no quarrel with those of mature years who smoke cigarettes..., but when we are trying to reach the young we must also have legislation in connection with the old.”

The attorney general tried to break out of his doctrinal adulteration prison by arguing that Plumley revealed that the U.S. Supreme Court was not willing to push Leisy v. Hardin “to its full logical consequences”; rather, the “ebb flow” had already succeeded the “high tide” of the “ultra doctrine” of congressional commerce power. Consequently, he contended that that court would also have sustained the Phelps law as a public health measure under the state police power even in the absence of deception as to adulteration. Remley therefore asked the Iowa Supreme Court to decide the case “on broad general principles” of federalism. From this perspective he was confident that the court would not invalidate a “law prohibiting a traffic, the tendency of which is evil, and the evil consequences are sure to be seen in a degenerated race, mental disorders, indulgence of the passions, bad society[,] depraved mind and other consequences following uncontrolled passions often arising out of the use of cigarettes.” For good measure, he added that even if the state of Iowa were not interested in “the individual man,” it would take an interest in the safety of its “citizens who have to live in the same community with the individual man” because the aforementioned degeneration spawned “[p]auperism, insanity and crime....”

Fuller and ATC reserved their curt response to this cascade of charges to the penultimate page of their reply brief. It set the tone for the mendacious denials in which cigarette companies specialized for the next century: the attorney...
The general’s claim that “cigarettes are ruinous of health and morals” was “mere buncombe...repeatedly shown to be utterly groundless by the most experienced and eminent chemists and alienists of this country and Europe....” Fuller also attributed to Remley a second declaration that “public sentiment is against” cigarettes. The textual warrant for this attribution is lacking, but the Trust did not even bother denying the underlying truth of the declaration; instead, it launched into a pseudo-libertarian diatribe that would also remain the industry’s hallmark for more than a century: “[W]hat have courts to do with such considerations? How unhappy and deplorable would be the condition of our country if the courts should become the mere registrars of popular prejudice, how unstable our institutions and governments, and how insecure our boasted liberty, if the fleeting moods of the populace should be mirrored in the decrees of our courts!”

The Iowa Supreme Court heard oral argument in the case on October 25, 1897, in Des Moines. ATC was represented by Fuller and its local Iowa counsel, John M. Redmond, a leading Democratic politician of Cedar Rapids, who after having served as Linn County Attorney for two terms in the early 1890s and having unsuccessfully sought a seat in the state legislature, was elected mayor in March 1898. Interestingly, at the Cedar Rapids Democratic city convention in February 1897, just a half-year after Judge Giberson had issued his decision in McGregor, Redmond, who conducted a lucrative practice as a sole practitioner, seconded his nomination for re-election, declaring that Giberson had been “‘a surprise in the matter of his fairness to both his friends and his enemies.’” Prophetically, if against (his and ATC’s) interest, he added that Giberson’s “‘record, so far as the decisions of the supreme court upon the cases appealed from the superior court are concerned, is almost unequalled by any judge on the bench in Iowa.’” After Redmond had finished his opening argument for the appellant, Remley, apparently without explanation, “decided that he did not care to argue, and waived his right to be heard.” Under the court’s rules, the attorney general’s waiver precluded Fuller, who, to support his constitutional argument, had wished to present to the court the recent Tennessee federal decision (in

---

203 Brief for Appellant in Reply at 27, McGregor v. Cone, 104 Iowa 465 (1898).
204 The Bench and Bar of Iowa 107-108 (1901).
205 “Democratic Victory!!” CREG, Mar. 8, 1898 (5:1-4); see also id. (1:2-4). Redmond served two terms as mayor until 1902. According to an obituary, he served one term each as county attorney and Cedar Rapids city attorney. Toward the end of his life he was a “staunch New Dealer....” “John M. Redmond, Former Mayor of Cedar Rapids, Dies,” Cedar Rapids Gazette, Feb. 23, 1940 (1:2) (newspaper clipping supplied by SHSI IC).
206 The Biographical Record of Linn County Iowa 462-63 (1901).
207 “City Ticket,” CREG, Feb. 18, 1897 (5:2).
Sawrie) as upholding the Trust’s position in McGregor, from engaging in further argument. However, the Supreme Court “would not have” it when Remley even offered to allow Fuller to argue: it declined to “listen to any unnecessary addresses just as a courtesy to Mr. Fuller.”

On January 24, 1898, the Iowa Supreme Court handed down its unanimous decision in what had become “the famous test case” from Cedar Rapids. Like many rulings in this area of the law, the Iowa Supreme Court’s decision was an uninspired and uninspiring interpretation of the original package doctrine, which failed even to rise to the level of commercial realism that undergirded Judge Giberson’s decision. The opinion left absolutely no trace of Attorney General Remley’s high-flying policy declarations, though it did adopt virtually all of his legal arguments, while studiously ignoring even Fuller’s citation to State of Washington v. Coovert, which presented the same facts because the Tobacco Trust’s legal choreography department had carefully stage-managed both productions. Against the background of the same set of agreed facts that underlay the trial court decision, Chief Judge Horace Deemer, formerly “engaged in the furniture and undertaking business,” asserted that in identifying potential conflicts between state police powers and federal interstate commerce powers, whether the article in question was “deleterious to the inhabitants of the state” was not “material, so long as it is recognized by the commercial world, by the laws of congress, and by the decisions of the court as a commodity in which a right of traffic exists.” Because it had to be conceded that cigarettes were such a commercial commodity, Deemer concluded that insofar as the anti-cigarette law regulated commerce, it was unconstitutional and void. However, he also recognized that at some point a commodity must cease to be in interstate commerce, lose its character as an import, and (together with its owner) become subject to state police regulations. This moment came “when the original package in which it is imported is broken, and the several parcels are so mingled with other property, or so exposed for sale, as to destroy the identity of the package as imported.”

Having proceeded this far, the Iowa Supreme Court had nowhere to go but to confine its analysis to selection of the proper definition of an “original package” and decide how to apply it to the cigarettes in this case (if in fact the prior decision as to the appropriate outcome did not dictate the definition). The court

---

209“Are Not Original Packages,” ISR, Jan. 25, 1898 (7:3).
210Willis Hall, The Iowa Legislature of 1896, at 18 (1895).
211McGregor v. Cone, 104 Iowa 465, 469-70 (1898).
212McGregor v. Cone, 104 Iowa 465, 471 (1898).
The 1897 Mulct Tax Amendment

found to be “correct” the “commonly accepted” definition that “‘it is a bundle put for transportation or commercial handling, and usually consists of a number of things bound together, convenient for handling and conveyance.’” The court also found it “quite apparent” that “the words ‘original package’ have reference to the unit which the carrier receives, transports, and delivers as an article of commerce. The importer decides for himself the size of the package which he desires to import, and when he delivers it to the carrier for transportation he gives it the initial step, and from that time until sold in that form or broken, and transformed, it is the subject of interstate commerce. But when sold or broken, or when it changes form, it ceases to be an article of interstate commerce, and no longer enjoys this protection. The original package, then, is that package which is delivered by the importer to the carrier at the initial point of shipment, in the exact condition in which it was shipped. If sold, it must be in the form as shipped or received; for, if the package be broken after such delivery, it, by that act alone, becomes a part of the common mass of property within the state, and is subject to the laws of that state enacted in virtue of its police power.” Since, in the ATC-McGregor transaction, the “‘original package,’ the unit of commerce, was broken, the contents exposed to sale, and one of the small packages was sold,” the article sold “had lost its distinctive character as an import,” and the sale violated the new law. The Iowa Supreme Court therefore affirmed Judge Giberson’s order.

In the immediate wake of the Iowa Supreme Court’s decision in McGregor—which the newspaper published in extenso—upholding Judge Giberson’s ruling, the Cedar Rapids Evening Gazette reported that:

The last hope of the cigaret fiend is gone. For several months he has been compelled to resort to all kinds of schemes to get even the paper with which to make the cigaretts his system craved, depending largely upon friends who travel out of the state and bring in the “makin’s.” ... It is now thought that the tobacco trust will let the law alone and there will be no further objection to its strict enforcement. The sentiment of a great majority of the people seems to be in favor of the law, for it has been openly violated in but few places.”

213 McGregor v. Cone, 104 Iowa 465, 471 (1898). Although the quoted sentence within a quotation purported to be taken verbatim from State v. Board of Assessors, 15 So. 10, 11 (La. 1894), the court ran two sentences together, inverted their order, and added “usually.”

214 McGregor v. Cone, 104 Iowa 465, 472 (1898).


The 1897 Mulet Tax Amendment

But Judge Giberson himself, having dealt with Fuller in court, had apparently developed a deeper insight into the monopoly’s mindset (though not into the ultimate judicial outcome) when he told the newspaper:

“It is entirely probable...that the trust will appeal this case to the supreme court of the United States. Several decisions have been rendered in other states exactly in conflict with the one just handed down by the supreme judges of Iowa, and the trust is determined to win this important fight, if possible.”

In fact, ATC did not appeal the Iowa Supreme Court’s decision, probably for the same reason that the State of Iowa and Linn County had not appealed Sanborn’s decision in the federal case: the losing party presumably feared that the U.S. Supreme Court would rule against it. There, however, the similarities between the parties ended: Attorney General Remley was supremely unconcerned that the Tobacco Trust had vindicated the right of its dealers to import individual five-cent packages of cigarettes because he was convinced that such shipments were commercially impracticable; conversely, Fuller must have been keenly aware that, from a practical business standpoint, the Iowa cigarette ban was legally unassailable, and that if strictly enforced, ATC would have to write off Iowa (and any other state that enacted a Phelps law) as a cigarette market.

All the more mystifying is the letter that Remley wrote on March 8, 1900, to Anna C. Cripps, the superintendent of the Anti-Narcotics Department of the nationally affiliated WCTU of the State of Iowa, in reply to her previous day’s inquiry to the attorney general about the validity of the anti-cigarette law:

I will say that I know of no bill introduced in the present legislature to change or qualify the law against the sale of cigarettes. The only difficulty in the way to enforcement is that the American Tobacco Co., and other non-resident companies, pretend to ship in the cigarettes in little five-cent packages, and claim the protection of the interstate commerce laws. Of course, this is the thinest [sic] moonshine, and no court or jury ought to be misled by any such subterfuge. I would be very glad to have a test case made and come to the Supreme Court in order to have it settled.

Since Remley had already had and won his test case two years earlier in the

---

218“Will Be Assessed,” CREG, Aug. 11, 1898 (5:1).
219Letter from Attorney General Milton Remley to A. C. Cripps (Albion, Iowa), Mar. 8, 1900, in Eleventh Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Toledo, Iowa, on October 16th, 17th and 18th, 1900, at 83-84 (1900).
The 1897 Mulct Tax Amendment

Supreme Court of Iowa on this very issue, and no other Iowa court had in the meantime been duped by the Trust’s “thinnest [sic] moonshine,” the enforcement difficulty to which he alluded remains an unresolved puzzle.

The Consequences of the U.S. Supreme Court’s Decision in Austin v. Tennessee (1900): Premature Predictions of the “End of the Cigarette”

Tobacco...has never before had the official approval of so august an authority as the Supreme Court of the United States. ...

Justice Brown is inclined to accept the theory that cigarettes are a particularly harmful form of tobacco.... Thus the seductive and vicious little paper rolls cannot claim their share of the court’s approval of tobacco in general. The decision as a whole agrees with masculine public opinion on the tobacco subject. A Supreme Court of women might take a different view of the matter.

In order to understand the jurisprudential background of the Tobacco Trust’s litigation attacks on the constitutionality of the Iowa anti-cigarette legislation it is necessary to analyze the U.S. Supreme Court’s opinion in a case manufactured by ATC challenging the Tennessee statute of 1897. That law made it a misdemeanor, punishable by a fine of not less than $50, to sell or—as the Iowa statute had not done—to bring into the state for the purpose of selling or giving away any cigarettes, without, to be sure, banning either importation for personal consumption or possession or use of cigarettes.

Despite having immediately given notice of intent to appeal Judge Lurton’s decision in Sawrie to the U.S. Supreme Court, the state attorney general, for reasons unknown, apparently did not seek review. Nevertheless, the anti-cigarette law continued to be enforced in Tennessee, and a prosecution growing out of one

---

220“End of the Cigarette,” CREG, Nov. 23, 1900 (3:3).
221“Supreme Court on Tobacco,” CT, Nov. 21, 1900 (12:2-3) (edit.).
222See above ch. 5.
224“Charge to the Grand Jury,” NB, Oct. 5, 1897 (2:1). See also above ch. 5. In late December 1897 or early January 1898 Representative Rogers mentioned to ATC attorney Junius Parker that the attorney general had appealed from Judge Lurton’s decision. “Makes All Public,” KDJ, Feb. 13, 1898 (13:4-7 at 6). And according to Rogers the attorney general had told him as late as Feb. 5, 1898, that “he saw no reason why the case could not be heard” by the U.S. Supreme Court during that term. “Coffin Tack Story,” KDJ, Feb. 7, 1898 (2:6).
enforcement action did prompt the Tobacco Trust and its convicted straw-man dealer to carry the litigation up to the Supreme Court of Tennessee and of the United States with Attorney General Pickle representing the state. 225

This case arose on November 1, 1897, in the small southeastern Tennessee town of Madisonville, when merchant William B. Austin226 sold cigarettes in clear contravention of the statute. According to the evidence presented at his trial in Monroe County circuit court on January 17, 1898, Austin had bought from ATC (which still had no factory, office, or warehouse in Tennessee) in North Carolina a number of packages of Durham cigarettes, which were shipped to Austin by the Southern Express Company

without case, covering, or enclosure of any kind around or about any of said packages, but were by said American Tobacco Company piled upon the floor of its warehouse in Durham, N.C., and said Southern Express Company notified to come and get them.... and said express company, by its agent, took them...and placed them in an open basket, already and heretofore in the possession of said Southern Express Company; that these packages were brought to the place of business of defendant by an agent of said express company in the same open basket...and by said agent lifted from said basket onto the counter in the place of defendant, and so delivered and receipted for by the defendant; that said basket was not left with defendant at all....; that defendant immediately upon his receipt of said packages put them on sale, without breaking, and sold one of them on said Nov. 1st, 1897, to W. G. Brown, an adult resident of...Monroe county....227

Judge James Parks refused the cigarette merchant’s request that he instruct the jury that under these facts Austin should be acquitted because the statute conflicted with the U.S. Constitution.228 On the facts of this scenario,

225The brief account of this case in Cassandra Tate, “In the 1800s, Antismoking Was a Burning Issue,” Smithsonian 20(4):107-17 at 115 (July 1989), is riddled with factual errors, in particular the claims that the case went from the Supreme Court of Tennessee to the U.S. Circuit Court and that the U.S. Supreme ruled that states had the right to prohibit the use of cigarettes.

226No one named Austin was returned for Monroe County at the 1900 census of population.


228Transcript of Record at 4, Austin v. State of Tennessee, 179 US 343 (1900). Parks refused the instruction because “the proofs show that that sale was not an interstate transaction, but a transaction between the citizens of the United States....” Id. Presumably “United States” was a typographical error for “the same state” or “Tennessee.” Austin’s brief before the U.S. Supreme Court confirmed that the latter was the judge’s meaning. Brief for Plaintiff in Error at 5, in Transcript of Record.
presumably carefully choreographed by the Tobacco Trust’s lawyer, Williamson Fuller, the jury found Austin guilty, and the court fined him $50 plus costs, the defendant to remain in custody until he paid. The court having overruled his motion for a new trial, Austin appealed to the Tennessee Supreme Court.\footnote{Transcript of Record at 2, Austin v. State of Tennessee, 179 US 343 (1900).}

In late 1898, the Tennessee Supreme Court handed down its unanimous decision affirming Austin’s conviction and upholding the act’s constitutionality.\footnote{Some uncertainty surrounds the date on which the opinion was published. Although the decision published in Tennessee Reports is dated December 21, The New York Times published a brief article datelined November 21, stating that Judge Caldwell had given it to the press the previous day. “Tennessee’s Anti-Cigarette Law,” NYT, Nov. 22, 1898 (2). The opinion was authored by Waller C. Caldwell; for a memorial, see 151 Tenn. xxxi-xxxiii (1925).} It avoided all debate with the ruling by Judge Lurton—who had been its chief justice until 1893—ignoring \textit{Sawrie} until the last sentence of its opinion, in which it expressed “great respect” for his opinion only to declare its belief that its own “conclusion” was “entirely sound.”\footnote{Austin v State, 101 Tenn. 563, 580 (1898).} The court’s opinion was straightforwardly divided into “two vital inquiries”: first, whether cigarettes were “legitimate articles of commerce”; and second, whether Austin’s sale “was of an original package in the true commercial sense.”\footnote{Austin v State, 101 Tenn. 563, 565-66 (1898).}

The court wasted no time in answering the first question by denying cigarettes’ commercial legitimacy on the grounds that they are

> wholly noxious and deleterious to health. Their use is always harmful; never beneficial. They possess no virtue, but are inherently bad, and bad only. They find no true commendation for merit or usefulness in any sphere. On the contrary, they are widely condemned as pernicious altogether. Beyond question, their every tendency is toward the impairment of physical health and mental vigor.\footnote{Austin v State, 101 Tenn. 563, 566 (1898).}

Redolent of the anti-cigarette rhetoric of the WCTU and Lucy Page Gaston, this unconditional assault, which may still remain the most virulent judicial attack ever on cigarettes, might almost pass as a prescient precursor of a surgeon general’s report—except that it lacked a scientific base and eschewed substantive debate with the opposition as stringently as it had with Lurton:

> There is no proof in the record as to the character of cigarettes, yet their character is so well and so generally known to be that stated above, that the Courts are authorized to take

\begin{flushright}
\textit{The 1897 Mulet Tax Amendment}
\end{flushright}
The 1897 Mule Tax Amendment

judicial cognizance of the fact. No particular proof is required in regard to those facts which, by human observation and experience, have become well and generally known to be true. 234

The only quasi-empirical digression the court permitted itself was a reference to the contemporary volunteer army during the Spanish-American War: “large numbers of men, otherwise capable, had rendered themselves unfit for service by the use of cigarettes, and...among the applicants who were addicted to the use of cigarettes, more were rejected by examining physicians on account of disabilities thus caused than for any other, and, perhaps every other reason.” Without the slightest nod to even the most ephemeral of sources, the court engaged in the most generous of legislative history writing by asserting that it was “also part of the unwritten history of the legislation in question that it was based upon and brought to passage by the firm conviction in the minds of legislators and of the public that cigarettes are wholly noxious and deleterious. The enactment was made upon that idea, and alone for the protection of the people of the State from an unmitigated evil.” Directly from this identification of “the nature of cigarettes” the court concluded that “they cannot be legitimate articles of commerce” and were therefore not comprehended by Congress’s constitutional commerce powers, but, rather, reserved to the states’ police powers for regulation. 235

To be sure, the states were not free to override congressional determinations of commercial legitimacy, but were, in the absence of such congressional action, entitled to act. 236 And to the argument that the federal cigarette tax and its accompanying stamp regulations constituted precisely such preemptive action the Tennessee Supreme Court replied that, because that legislation was enacted solely for revenue purposes, it did not rise to the level of recognition of cigarettes as legitimate commercial articles. 237 Finally, in response to the Tobacco Trust’s argument that in Leisy v. Hardin the U.S. Supreme Court had expressly recognized intoxicating liquors as legitimate articles of commerce, the Tennessee court—again probably in sync with early twenty-first century medical science—declared that alcoholic beverages “stand upon a higher plane in respect of inherent merit than cigarettes, for they are confessedly beneficial in some instances and for some purposes, while cigarettes have no redeeming qualities.” 238

234 Austin v State, 101 Tenn. 563, 566 (1898).
235 Austin v State, 101 Tenn. 563, 567 (1898).
236 Austin v State, 101 Tenn. 563, 568 (1898).
237 Austin v State, 101 Tenn. 563, 573 (1898).
238 Austin v State, 101 Tenn. 563, 571-72 (1898). The court pointed out that the Iowa intoxicating liquors law (like that of some other states) “distinctly acknowledged that the...
The court made even shorter shrift of the original package issue. Although the package may have been original for federal tax purposes, it was nevertheless “not an original commercial package, because not sold and transported apart from other like articles, but in the same general receptacle with them.” The key feature identifying an original package was that it was an “aggregation of goods, put up, in whatever form, covering, or receptacle, for transportation and as a unit transported from one State or nation to another.” The problem with the ATC-Austin package, the judges opined, was that “it is entirely manifest to our minds that the basket, with its contents, made one original package in the true commercial sense, each box or package of cigarettes being a constituent part thereof, and that the original commercial package was broken, and each box or package of cigarettes assumed a separate identity before the law, when the basket was relieved of its contents. ... A box, crate, barrel, or basket, filled with goods for shipment, and actually transported from a citizen of one State to a citizen of another State, is no less a receptacle of the goods in a legal sense, and such receptacle is no less an original commercial package because open and not covered. The presence or absence of a covering to a receptacle...is of no consequence in determining what is...an original package.

Moreover, the court saw through what the Tobacco Trust’s legal staff presumably regarded as a masterstroke of constitutional packing, shipping, and receiving: “It is perfectly obvious...that this plan of shipment was resorted to as a mere device for the purpose of evading the State law against the sale of cigarettes. Prior to the passage of this law, as is well known, no such scheme was adopted in the transportation of such articles, and the carrier was not called upon to play so unusual a part in such a matter.” Having thus demolished the Potemkin village that ATC had so painstakingly built for judicial consumption, the judges concluded that even if cigarettes were legitimate articles of commerce, Austin’s conviction would still be sustainable because what he sold was not “an original commercial package, but only a part thereof after it had been broken and its contents thereby made subject to the laws of the State, like other local property of the same class.”

In reporting that Judge Caldwell had given the opinion to the press on November 20, 1898, *The New York Times* added that the sale of cigarettes had been stopped by the police in Knoxville, the seat of the Tennessee Supreme

---

restricted articles possessed some virtue,” permitting sales for certain purposes. *Id.*

239 Austin v State, 101 Tenn. 563, 574-75 (1898).
240 Austin v State, 101 Tenn. 563, 577 (1898).
241 Austin v State, 101 Tenn. 563, 578 (1898).
242 Austin v State, 101 Tenn. 563, 579-80 (1898).
The 1897 Mulct Tax Amendment

As soon as the Tennessee Supreme Court issued its decision in *Austin v. Tennessee*, the *Iowa State Register* correctly perceived that it was “a knock-out blow to the Federal decision allowing the importation of the small packages as original packages.”

In seeking U.S. Supreme Court review of the Tennessee Supreme Court’s decision in *Austin*, the Trust’s lawyers, Fuller and Parker, identified two alleged errors that the Tennessee Supreme Court had committed: (1) a failure to recognize that the anti-cigarette law was in conflict with the commerce clause of the U.S. constitution; and (2) “holding...that cigarettes...are not legitimate articles of commerce, and are therefore not under the protection of section 8 or section 10 of article 1 of the Constitution, and that the regulation of commerce in said articles is therefore not within the power of Congress...but is under the power of the various States....”

In light of the fact that the judges involved in the litigation all recognized the staged character of the transaction between ATC and Austin, it is unclear why Fuller and Parker thought that their preposterous claim in their main brief before the U.S. Supreme Court that Austin—whom they were representing—“was in no way connected with the American Tobacco Company, as agent or otherwise” would enhance their client’s or their employer’s credibility. The Trust’s lawyers sought to undermine the Tennessee Supreme Court’s holding that cigarettes were not legitimate commercial articles by asserting that no matter how noxious or harmful they were, such evidence—of which that court had cited none—would be irrelevant to a determination of commercial legitimacy because, unlike high explosives or malodorous guano, “they do not harm in their transit nor in their being stored, but their harm can come only, as harm comes from liquor, by an injudicious or intemperate use....” Indeed, ATC’s lawyers not only went so far as to offer their own undocumented assertion that “cigarettes constitute the least harmful form of tobacco,” but even delighted in quoting an unnamed book from 1845 that had alleged that the “cigarette...can do you no harm.” Presumably

---

243“Tennessee’s Anti-Cigarette Law,” NYT, Nov. 22, 1898 (2).
244“Anti-Cigarette Law,” ISR, Nov. 23, 1898 (4:6).
246Brief for Plaintiff in Error at 2, in Austin v. State of Tennessee, 179 US 343 (1900).
247Brief for Plaintiff in Error at 21, Austin v. State of Tennessee, 179 US 343 (1900).
248Brief for Plaintiff in Error at 9, Austin v. State of Tennessee, 179 US 343 (1900).

In fact, the quotation was from Joseph Baker, *Smoking & Smokers, An Antiquarian, Historical, Comical, Verifiable, and Narcotical Disquisition* 42 (1845). Baker was a
Fuller and Parker were not aware that the logic of their argument would, a century later, when a unanimous science certified the per se dangers of any cigarette smoking to smokers and non-smokers, have justified the legal claim that cigarettes (or rather their manufacturers and sellers) “have no commercial rights superior to the police power of the State or municipality.”

The brief filed by the State of Tennessee did little more than negatively interrogate the Trust’s claims as to cigarettes’ commercial legitimacy without offering any supporting empirical evidence. If the latter claimed that cigarettes neither exploded nor were malodorous, the State merely asked: “Is not the cigarette a far more serious menace to the lives, health and safety of our people than any ‘high explosive’ or ‘malodorous guano?’ [sic].” Whereas Attorney General Pickle posited that “[b]eneficial uses of ardent spirits, opium, arsenic, strychnine, and even of ‘high explosives,’ ‘malodorous guanos,’ and ‘putrid meats,’ may be suggested,” he asked rhetorically: “Who can suggest any beneficial use of cigarettes? Who can suggest any but a harmful use of them?”

More than a century later no physician or scientist can, but Pickle deemed it no more necessary to document that claim than this one, whose empirical demonstrability might challenge twenty-first-century medical experts: “[W]hy should a State be denied the right to exclude from its borders cigarettes, or other product or commodity whose use by its people tends to produce paupers, lunatics, convicts, and persons likely to become a public charge?”

A five-justice majority of the U.S. Supreme Court upheld the constitutionality of the Tennessee statute on the political-economically narrow and trivial grounds of an interpretation of the original package doctrine, though the Court did offer several more far-reaching remarks about the relationship between state police powers and congressional commerce power.

The Court was “not prepared to fully indorse” the Tennessee Supreme Court’s denial to cigarettes of the status of legitimate articles of commerce, but it also did not fully reject that position. To be sure, Justice Henry Brown, writing for himself and three others, did stress that where law or custom recognized a product as from time immemorial fit for sale, and its manufacture was subject to federal regulation and taxation, its legitimacy as a commercial article was clear. Nevertheless, the Court conceded, that article might still “to a certain extent be within the police power of the States.”

Tobacco fell within this class:

London cigar merchant and pipe dealer.

249 Brief for Plaintiff in Error at 8, Austin v. State of Tennessee, 179 US 343 (1900).
250 Brief and Argument for Defendant in Error at 8, 9, Austin v. State of Tennessee, 179 US 343 (1900).
251 Austin v. Tennessee, 179 US 343, 345 (1900).
The 1897 Mulct Tax Amendment

From the first settlement of the colony of Virginia to the present day tobacco has been one of the most profitable and important products of agriculture and commerce, and while its effects may be injurious to some, its extensive use over practically the entire globe is a remarkable tribute to its popularity and value. We are clearly of opinion that it cannot be classed with diseased cattle or meats, decayed fruit or other articles, the use of which is a menace to the health of the entire community. 252

Presumably the Supreme Court would have opined differently had science and medicine already been unanimously disseminating the conclusion that they reached a century later that cigarette smoking “injures almost all bodily organs” and is “the leading cause of preventable mortality in the United States, resulting in nearly 16 million deaths since the first Surgeon General’s report on smoking and health in 1964.” 253 But in 1900 the Court declared that it could not, as the Tennessee Supreme Court had done, “take judicial notice of the fact that it [cigarette smoking] is more noxious in this form than in any other,” especially since Congress, in imposing license requirements on the manufacture and sale of cigarettes and a revenue tax on their sale, had “recognized tobacco in its various forms as a legitimate article of commerce...” 254 Nevertheless, the Court clearly stated that cigarettes did not belong to the class of “innocuous” articles, on the prohibition of the sale of which it had never ruled and would not have to rule in this case. 255

Reviewing its decisions on state alcohol prohibition laws, the Court observed that the commerce clause did not forbid state legislatures to suppress the liquor traffic if they had deliberately concluded that public safety and morals required

252 Austin v. Tennessee, 179 US 343, 345 (1900).
253 U.S. Dept of Health and Human Services, The Health Consequences of Smoking: A Report of the Surgeon General i, 861 (2004). The dissenters in Austin may have been impliedly signaling that medical science’s unanimity might have put the Tennessee Supreme Court’s judgment in a different light: “No one can question the sincerity of the legislature...in...enacting what it deemed for the health of its citizens, or the conviction of its...Supreme Court of the validity of such legislation by reason of the great evil which it was intended to design. And yet there is no consensus of opinion as to the fact of such evil.” To support this last assertion the dissenters actually cited a source (Medico-Legal Journal, March and September, 1898). Austin v. Tennessee, 179 US 343, 368 (1900).
254 Austin v. Tennessee, 179 US 343, 345 (1900).
255 Austin v. Tennessee, 179 US 343, 347 (1900). The attempt by the Chicago Tribune to transmogrify the decision into unprecedented praise for tobacco was preposterous. “High Praise for Tobacco,” CT, Nov. 20, 1900 (5); “Supreme Court on Tobacco,” CT, Nov. 21, 1900 (12) (edit.).
Using these state alcohol prohibition laws as a constitutional template, the Court then vindicated the same “bona fide exercise of its police power...dictated by a genuine regard for the preservation of the public health or safety” with respect to state legislation on cigarettes:

Cigarettes do not seem until recently to have attracted the attention of the public as more injurious than other forms of tobacco; nor are we now prepared to take judicial notice of any special injury resulting from their use or to indorse the opinion of the supreme court of Tennessee that “they are inherently bad and bad only.” At the same time we should be shutting our eyes to what is constantly passing before them were we to affect an ignorance of the fact that a belief in their deleterious effects, particularly upon young people, has become very general, and that communications are constantly finding their way into the public press denouncing their use as fraught with great danger to the youth of both sexes. Without undertaking to affirm or deny their evil effects, we think it within the province of the legislature to say how far they may be sold, or to prohibit their sale entirely, after they have been taken from the original packages or have left the hands of the importer, provided no discrimination be used against such as are imported from other states, and there be no reason to doubt that the act in question is designed for the protection of the public health.

Having thus upheld Tennessee’s freedom from being “bound to furnish a market” for cigarettes, the Court turned to the central constraint prohibiting the state from “wholly interdict[ing] commerce in cigarettes”—the original package doctrine. As “the vital question in the case” the majority, implausibly enough, designated that as to “whether a paper package of three inches in length and one and a half inches in width, containing ten cigarettes, is an original package protected by the Constitution of the United States against any interference by the State while in the hands of the importer....” Even more narrowly, Justice Brown characterized “[t]he real question” as whether the governing criterion was “the size of the package in which the importation is actually made” or “the size of the package in which bona fide transactions are carried on between the manufacturer and the wholesale dealer residing in different States.” In opting for the latter, Brown emphasized that the presumption that the actual package of importation was “strong evidence” of being an original package presupposed

---

256 Austin v. Tennessee, 179 US 343, 348 (1900).
257 Austin v. Tennessee, 179 US 343, 349 (1900).
258 Austin v. Tennessee, 179 US 343, 348-49 (1900).
259 Austin v. Tennessee, 179 US 343, 350 (1900).
260 Austin v. Tennessee, 179 US 343, 350 (1900).
“honest dealers”\textsuperscript{261} and did not apply where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several states, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant’s contention would be far reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer’s case to a single paper box of ten, or even a single cigarette, if imported separately and loosely....\textsuperscript{262}

Underscoring that there “could hardly be stronger evidence of fraud than” the very facts of the case, Brown bluntly called the defendant’s staged transaction a “discreditable subterfuge,” thus leaving the basket as the only possible candidate—“[i]f there be any original package at all in this case....”\textsuperscript{263}

In the course of concluding its analysis of the applicability of the original package doctrine, the Court returned to the larger issue of cigarettes’ legitimacy as objects of commerce. Presuming that it would not be unconstitutional for a state legislature to prohibit the manufacture of cigarettes, Brown rejected the implication of defendant’s argument “that citizens of Tennessee may, under the commerce clause of the Constitution of the United States, bring into that state from other states cigarettes in unlimited quantities, and sell them despite the will of Tennessee as expressed in its legislation” as well as the consequence “that the commerce clause of the Constitution, by its own force, without any legislation by Congress, overrides the action of the state in a matter confessedly involving, in the judgment of its legislature, the health of its people.” The Court rejected this position because it would have justified the unacceptable outcome “that the

\textsuperscript{261}Austin v. Tennessee, 179 US 343, 359 (1900). Brown identified the origins of the original package doctrine in the traditional structure of importation of foreign goods by wholesalers who broke packages and distributed the contents to numerous retailers: “But taking the words “original package” in their literal sense, a number of so-called original package manufactories have been started through the country, whose business it is to manufacture goods for the express purpose of sending their products into other states in minute packages, that may at once go into the hands of the retail dealers and consumers, and thus bid defiance to the laws of the state against their importation and sale.” \textit{Id.}

\textsuperscript{262}Austin v. Tennessee, 179 US 343, 360 (1900).

\textsuperscript{263}Austin v. Tennessee, 179 US 343, 361 (1900).
respective power of the state to protect the health of its people, by reasonable regulations, has application only in respect of articles manufactured within its own limits, and that an open door exists for the introduction into the state, against its will, of all kinds of property which may be fairly regarded as injurious in their use to health. If Congress have power to declare what property may and what may not be brought into one state from another state, then the action of a state by which certain articles, not unreasonably deemed injurious to health, were excluded from its markets, should stand until Congress legislated upon the subject.\textsuperscript{264}

The final step leading to the majority’s affirmation of the Tennessee Supreme Court’s conclusion was its rejection of defendant’s sole argument in support of the claim that the 10-cigarette packages constituted original packages—namely, that federal law required manufacturers to put up all cigarettes in packages of 10, 20, 50, or 100 cigarettes. Since Congress, however, imposed this requirement solely for purposes of better enforcement of the internal revenue law, it did not restrict states’ power over the manufacture and sale of cigarettes.\textsuperscript{265}

Just how narrow the ruling in \textit{Austin} was found expression in the brief concurrence by Justice White, who furnished the deciding fifth vote.\textsuperscript{266} Determined to preserve the original package doctrine, he declared that he was “constrained to conclude” that the Court had correctly answered in the negative the “decisive” question as to whether “each particular parcel of cigarettes [was] an original package within the constitutional import of those words” as defined by the Court’s precedents. White’s vote was swayed by the “trifling value” of each package, the lack of an address on each, and the fact that all the packages had been thrown into an open basket, thus precluding the post-arrival segregation essential to each one’s becoming an original package.\textsuperscript{267} Notably, these facts lacked any of the references to corporate fraud that undergirded Justice Brown’s opinion.

The Court’s tortured analysis of the original package doctrine did not impress contemporaneous legal commentary. Rather, as a Kentucky lawyer observed, the Court should have straightforwardly ruled that as soon as the cigarettes imported into Tennessee arrived there, they should have been “treated just like [sic] other

\scriptsize
\textsuperscript{264}Austin v. Tennessee, 179 US 343, 362 (1900).
\textsuperscript{265}Austin v. Tennessee, 179 US 343, 363 (1900).
\textsuperscript{266}In their petition for rehearing, Fuller and Parker complained of their “misfortune” that White (whose concurrence rested “largely on what are supposed to be the special facts of the case”) had been the only justice who had not attended oral argument. Petition for Rehearing by Plaintiff in Error at 2, Austin v. Tennessee, 179 U.S. 343.
\textsuperscript{267}Austin v. Tennessee, 179 US 343, 364 (1900).
goods already there are treated.” In other words, Austin was entitled to the equal protection of the laws of Tennessee—which prohibited the sale of cigarettes—and the mere fact that the cigarettes had earlier been in interstate commerce did not confer any extraterritorial immunity on them. As The Outlook (in part) perspicaciously observed:

In no sense does the Court return to the position it held prior to the original-package decision of 1889, that a State may impose whatever restrictions it sees fit upon traffic in any article so long as these restrictions apply equally to producers within its borders and those outside. Tennessee can prohibit the sale of cigarettes made in Tennessee, but it cannot prohibit any person within the State from ordering for his own consumption cigarettes made in other States. Nevertheless, relatively few persons—and especially relatively few children—care to go to the trouble to import cigarettes from a distance.

The immediate reaction by ATC’s representative in Tennessee, Edward S. Parker, Esq., was considerably more public relations bravado than legal analysis. Two days after the decision was handed down, Parker told the Nashville Banner in an interview that it “will not prevent the importation of ‘coffin tacks’ into the state.” The Supreme Court’s unambiguous ruling to the contrary notwithstanding, he intoned: “The Tennessee law is plainly a violation of the interstate commerce laws, and it cannot stand. The decision...means that cigarettes cannot be shipped into Tennessee and sold in small pasteboard box packages containing ten cigarettes each. But the sale of cigarettes must be protected, and some other means of shipping them into the state will be adopted.” In fact, the decision did not permit the shipment of cigarettes into Tennessee for any purpose other than consumption by the recipient. The state was, in other words, constitutionally empowered to interdict all shipments for resale (or giving away). The immediate result of the decision was, according to a press report, that “[t]he sale of cigarettes

---

268 Shackleford Miller, “The Latest Phase of the Original Package Doctrine,” American Law Review 35:364-82 at 380-81 (May-June 1901). The author was attacking the Court’s legal reasoning, not the effect of the decision, which was the same as the real-world outcome of the proposed approach would have been. The author failed to note that since cigarettes were not manufactured in Tennessee, all cigarettes sold there had previously been in interstate commerce and therefore no question of equal protection of the laws was posed.

269 Anti-Cigarette Law Sustained,” Outlook, Dec. 8, 1900, at 863. The Outlook left the erroneous impression that Tennessee lacked the power to ban the sale of cigarettes produced in other states.

270 “Coffin Tacks,” NB, Nov. 21, 1900 (3:3). In a vast understatement, the paper stated that ATC “controls the cigarette trade in East Tennessee.”
The 1897 Mulct Tax Amendment

has been already stopped."\(^{271}\)

The U.S. Supreme Court’s decision upholding the Tennessee (and by implication the Iowa) anti-cigarette law, which was in effect a resolution of a dispute between the Tobacco Trust and State police powers,\(^{272}\) may have been grounded in narrow factual, technical, and trivial definitional considerations of the “original package” doctrine, which had nothing to do with any larger policy questions of cigarette regulation, but the consequences of this “severe blow” to “[t]he cigarette trust”\(^{273}\) were immediate and widespread. By the following night:

The cigarette fiends of Des Moines suddenly found themselves cut off from purchasing cigarettes.... All tobacco dealers of the city were visited by a representative from the American Tobacco Company during the afternoon who notified them that the company would not stand back of them if they continued to sell them. ... This step leaves some of the dealers in bad shape. A number of them have hundreds of dollars worth on hands [sic]. They cannot sell them without paying the mulct tax of $300 per year, and they declare that the profit is not sufficient to warrant this. As soon as the sale was stopped Tuesday evening the effects were noticed. People went from one dealer to another trying to buy them. The same law covers the sale of cigarette papers and so the dealers had to refuse to sell them. In several cases men actually begged certain tobacconists to sell them one packages [sic]. They were refused, however, in every case.\(^{274}\)

ATC had believed that it could risk litigation so long as the constitutionality of the mulct tax law was in doubt, but after Austin the possibility of “endless expense in this mode of protecting the retailer” could no longer be overlooked.\(^{275}\) Because the Tobacco Trust understood that Austin v. Tennessee entailed the probability that Iowa’s $300 annual mulct tax—which had been “violated by every person who cared to sell cigarettes”—would be judicially sustained, it

\(^{271}\)“Anti-Cigarette Law,” ISR, Nov. 23, 1898 (4:6).

\(^{272}\)One newspaper noted that the decision in Austin v. Tennessee had furnished the “further adjudication” of the McGregor case. “Cigarets Must Go,” CREG, Nov. 22, 1900 (5:4).

\(^{273}\)“Court Hits Cigarettes,” Muscatine Journal, Nov. 20, 1900 (1:5). Despite this blow, the Chicago Tribune headlined its report, “High Praise for Tobacco,” CT, Nov. 20, 1900 (5:4).

\(^{274}\)“No More Cigarettes,” ISR, Nov. 21, 1900 (5:3). The national magazine Outlook inaccurately understated the personal character of ATC’s intervention: “As soon as the decision...was handed down, the American Tobacco Company wired its agents in Iowa withdrawing its guarantee to protect them against prosecution for violating the Iowa statute.” “Anti-Cigarette Law Sustained,” Outlook, Dec. 8, 1900, at 863.

\(^{275}\)“Cigarettes Will Go,” SCJ, Nov. 22, 1900 (10:4).
The 1897 Mulct Tax Amendment

followed up the withdrawal with a letter “announcing that sales would be discontinued and recalling all cigarettes and cigarette papers in the hands of Iowa dealers.”

In Dubuque, a “stir was created” when the American Tobacco Company ordered all tobacco dealers “to at once ship out of the state their entire stock of cigarettes.” The drug and tobacco stores in Des Moines handling ATC’s cigarettes (almost exclusively “Sweet Caporal”) had all received orders to stop selling them immediately. Already on November 23 the Des Moines City Assessor Frank French informed all cigarette dealers that they had to pay the quarterly assessment mulct tax at once in accord with the U.S. Supreme Court decision. Under the headline, “Coffin Nails Ordered Out,” the Des Moines Daily News added, without attribution, that it was “believed” that the dealers could “be held liable for the mulct tax dating from the time the original package law was sustained by the federal court at Cedar Rapids three years ago. Since that time Iowa has collected no tax from cigarette dealers who adhered to the original package, assessments being made against only those who did not do so.”

According to the account in the Des Moines Leader, French had levied the $75 quarterly assessments against 300 tobacco dealers, grocers, and others who had been selling cigarettes during the quarter that began on October 1. If the assessor received legal advice supporting a decision to levy the assessments for the entire three years since the mulct tax had gone into effect, the press at first reported that liability would rest with ATC, which had guaranteed its dealers that it would assume responsibility for any penalties. Alone for the last quarter of 1900 in Des Moines the assessments would then cost the Trust $22,000, “to say nothing of those that will certainly be levied throughout the state.” The prospect of having to pay such sums prompted the prediction that ATC would “undoubtedly” fight the assessments.

---

277 “Coffin Nails Ordered Out,” DMDN, Nov. 23, 1900 (last ed.) (1:7). To be sure, directly underneath this article the paper published another calling the despatch from Dubuque “exaggerated”: “The dealers have been advised to cease selling cigarettes until the decision as to the effect upon Iowa is known.”
278 “Cigarettes Doomed,” MDN-T, Nov. 24, 1900 (1:6).
279 “Coffin Nails Ordered Out,” DMDN, Nov. 23, 1900 (last ed.) (1:7).
280 “Cigarette Mulct Tax Assessed,” DML, Nov. 24, 1900 (5:4). Four days later the paper modified the data: French now estimated that 250 places in Des Moines were amenable to the tax; having failed to pay the tax on time, they were also subject to a $15 penalty. The aggregate amount owed was therefore 250 x $90 or $22,500. “Status of
At the same time, it was “claimed the dealers will have recourse against the American Tobacco company for all taxes or fines that may be assessed and collected against them” on the grounds that ATC had “guaranteed to protect them against damage under this law if they went ahead in defiance of it and sold the American Tobacco company’s cigarettes. ... If the back taxes can be collected the American Tobacco company will be made a defendant in a score of suits.”

The Leader, however, offered a rather different perspective. After dealers had concluded that ATC was “hedging,” they consulted lawyers, who opined that the contracts into which “practically every tobacconist in Iowa” had entered with ATC guaranteeing that the Trust would assume responsibility for all penalties imposed for selling its cigarettes were unenforcible as against public policy on the grounds that their purpose was to induce the dealers to commit unlawful acts. The dealers’ attorneys advised them that performance of the contracts was “purely a question of the honor of the American Tobacco company,” which could not be compelled to comply with the contracts “unless it sees fit to do so.” The Trust’s “honor” was visibly on display in the explanation by its local lawyer, Frank Dunshee, who, despite being “not disposed to talk a great deal” and “evidently strictly on his guard,” nevertheless told the newspaper that ATC would “deal fairly with all who have been fair with it....” Oddly, although this fairness purportedly meant that it would comply with the contract “to the letter,” and Dunshee admitted that the contract did “not provide against the sale of other than American goods” and merely “implied[d] that dealers guaranteed protection

---

Cigarette Tax,” DML, Nov. 28, 1900 (7:1-3 at 3). Though containing important information, both articles erroneously and confusingly contended that the assessments resulted from the U.S. Supreme Court’s decision in the Austin case from Tennessee, “where there is a mulct cigarette tax similar in all the essential details to the Iowa laws.”

“Cigarette Mulct Tax Assessed,” DML, Nov. 24, 1900 (5:4). See also “Grief for Cigarette Dealers,” MDN-T, Dec. 2, 1900 (1:4-5) (copy furnished by Merle Davis). The 1897 Tennessee statute was indeed similar to the 1896 Iowa statute, especially in lacking a mulct tax; consequently, the U.S. Supreme Court decision of 1900 had nothing to do with a mulct tax, which Tennessee did not enact until 1899 and the U.S. Supreme Court never reviewed; on the $10 license tax, which was very differently structured than the Iowa mulct tax, see below ch. 16. Second, the articles’ assertion that “[a]ccording to the [Austin] decision all sales made since the first injunctions were granted over two years ago are technical violations and subject dealers...to the tax” and that Austin “reversed” that injunctive ruling that the tax could not be levied against dealers selling cigarette in original packages made no sense since the nisi prius injunctions issued in 1898 had absolutely nothing to do with the Austin decision. “Cigarette Mulct Tax Assessed,” DML, Nov. 24, 1900 (5:4); “Status of Cigarette Tax,” DML, Nov. 28, 1900 (7:1-3 at 1).

“Will Hold the Trust,” MDN-T, Nov. 27, 1900 (8:2).
under it should handle the American’s product only,” he insisted that “most of the dealers have failed to comply with the conditions of the contract... Most of them have given away cigarette papers that came in other than original packages, many have bought of wholesale houses and not a few have sold cigarettes of other makes than ours that came into the state in cartons.” In spite of the dealers’ emphatic denial of the existence of such conditions and their display of the contracts to the newspaper to “substantiate their claim,” Dunshee allowed as being “positive” that in the cases of such non-compliant dealers “the company will refuse to carry out the conditions of the contract.”

Within a few days of ATC’s move, the press was reporting that:

> It is almost as difficult to buy a cigarette in the State of Iowa as it was in the strictest days of prohibition to get a drink of whisky. This situation is due to the alarm sounded by the American Tobacco Company through its local representative, Charles H. Rollins, and by him hastily transmitted to agents in other cities and towns.

> Tobacconists all over the State are packing up their stocks and [sic] will be shipped back to the American [Tobacco] Company.

As a national magazine commented: “There may be newspaper exaggeration in this statement, but the importance of the decision cannot be questioned. The cigarette-dealers in Iowa are now liable for back taxes, if the law is strictly construed.”

> Retail dealers in the Mississippi River town of Muscatine “immediately” took in their cigarette signs. In Des Moines, although a few dealers resumed selling cigarettes and announced that they would pay the mulct tax for the last quarter of the year, they had to double the price: “Since it is certain that only a few dealers can afford the tax they will not meet with the competition that has heretofore existed. A few other small dealers are still selling cigarettes ‘on the sly,’ but they will soon be suppressed.”

The same process played itself out in Sioux City, where on November 22 the
press reported that cigarettes were likely to be forced out of stores because dealers preferred quitting the trade in “contraband smokes” to running the risk of prosecution without ATC’s guarantee or to paying the $300 tax. A “prominent tobacconist” there was not certain that he and his competitors would be prosecuted if they continued to sell, “...but with these reformers stirring up matters there is serious risk that we may be called to account. ... If the American Tobacco company can’t afford to take the risk, we can’t. We can’t afford to pay the $300 tax, either. I suppose my place of business sells about as many cigarettes as any other in the city, but the $300 would eat up the profits and leave a deficit. It is prohibitory.”

As in Washington State, Tennessee, and elsewhere, newspapers in Iowa were replete with reports of cigarette retail dealers who “Will Shed No Tears” over the fact that “Cigarettes Must Go.” In Cedar Rapids, for example, “only a few” dealers sold “coffin sticks,” but one of them told the Evening Gazette that “he did not care how soon the law compels all dealers to stop the trade, as it is a nuisance and a constant source of annoyance.” Without explanation he stated his opposition “to the cigarette on general principles.”

On November 20, the day after the Austin decision was released, ATC’s share price closed down by more than $2; the Wall Street Journal failed to mention the Supreme Court case, but The New York Times reported that: “Tobacco Trust shares were weak on selling by traders on the belief that the position of the company would be prejudiced by the decision of the Supreme Court that cigarettes cannot be imported into that State, as they are not original packages. It was contended also that the law might be held to apply to other States.” However, when ATC’s stock shares reached their highest price of the year the next day, the Times had a new ad hoc market explanation at the ready: “Tobacco stocks advanced on buying credited to insiders who claim, in respect to the American Company, that the adverse decision of the courts in re the importation of cigarettes into Tennessee will have no effect on the company’s

---

287“Cigarettes Will Go,” SCJ, Nov. 22, 1900 (10:4). For out-of-state reporting on Sioux City, see “Bar Cigarettes in Iowa,” FWN, Nov. 23, 1900 (1:3).
288E.g., MO, Mar. 4, 1893 (4:4) (untitled).
289See below ch. 5.
290“Cigarettes Must Go,” CREG, Nov. 22, 1900 (5:4).
291WSJ, Nov. 21, 1900 (6:2).
292“Market Tests,” NYT, Nov. 20, 1900 (13).
293WSJ, Nov. 26, 1900 (2:3). Significantly, in November-December 1900 the extraordinarily detailed Commercial and Financial Chronicle devoted no attention to the decision and its possible impact on ATC.
The Tobacco Trust's Iowa Lawyer, Frank Dunshee: A Bundle of Pro Malo/Pro Bono Self-Contradictions

A great historical irony attaches to the fact that at the same time that Frank Strong Dunshee (1862-1938) was representing ATC in its rearguard struggle to invalidate the cigarette mulct tax, he was also the first president of the 10,000-
member Iowa Anti-Saloon League,\textsuperscript{298} whose founding secretary, Florence Miller, was the superintendent of legislation of the non-partisan Iowa WCTU.\textsuperscript{299} Perhaps the compartmentalization of his life-spheres was aided by the League’s constitutional pledge “to maintain an attitude of neutrality upon questions of public policy not directly concerned with the traffic in strong drink.”\textsuperscript{300} Later Dunshee even litigated private actions against saloon keepers to enforce the liquor mulct tax,\textsuperscript{301} whose procedure the legislature adopted in toto for the cigarette mulct tax. Equally ironic is that, while assisting ATC to promote tobacco smoking in Iowa, “Dunshee was active in several reform movements” in Des Moines and “organized the first to combat smoke” there, serving on the (non-tobacco) smoke abatement commission until the mid-1920s.\textsuperscript{302}

A third amusing irony in Dunshee’s life was that while representing Duke’s Tobacco Trust, he successfully sued Rockefeller’s Oil Trust in his own name. From 1897 to 1899 Dunshee was a stockholder and director of Crystal Oil Company,\textsuperscript{303} a Des Moines oil retailer, which, after having switched from Standard Oil to another oil wholesaler-supplier in the late 1890s, was forced out of business by the latter, which had entered the retail business, lowered its prices, targeted Crystal’s customers, and then left the business.\textsuperscript{304} On December 5, 1899, Crystal sold and assigned to Dunshee all of the former’s claims against the Standard Oil Company.\textsuperscript{305} As he explained to the jury on November 10, 1908:

\begin{flushleft}
\textsuperscript{298}“To Vote on Prohibition,” \textit{Clinton Mirror}, Dec. 11, 1897 (7:3); “Anti-Saloon League,” \textit{Dubuque Daily Herald}, Dec. 29, 1897 (1:7) (annual presidential address “extolling non-partisan prohibition”). Dunshee was elected president by the organizing convention in Des Moines on Dec. 29, 1896, which he assured of “his deep interest in the movement and that he would do all in his power to promote the best interests of the league.” “Anti-Saloon League Organized” and “The Anti-Saloon Convention,” \textit{Dial of Progress} 2(1):[4:2-5] (Jan. 7, 1897). Later, after his one-year presidential term, he became secretary of the organization. \textit{Oxford Mirror}, Oct. 27, 1903 (4:6) (untitled). The statement in \textit{Who’s Who in Des Moines: 1929}, at 84 (n.d.), that he was president from 1891 to 1893 is erroneous since the League was not founded until the end of 1896.


\textsuperscript{300}“Constitution of the Iowa Anti-Saloon League,” \textit{Dial of Progress} 2(1):[4:3] (Jan. 7, 1897).

\textsuperscript{301}“Eleven Saloon Keepers Fined,” \textit{CREG}, Feb. 2, 1902 (3:3).


\textsuperscript{303}Plaintiff’s Evidence at 65, \textit{Dunshee v. Standard Oil Co.}, 126 NW 342 (Iowa 1910) (F. S. Dunshee’s trial testimony).

\textsuperscript{304}\textit{Dunshee v. Standard Oil Co.}, 126 NW 342 (Iowa 1910).

\textsuperscript{305}Exhibit A-1 of Amendment to Amended and Substituted Petition at 19-20, \textit{Dunshee v. Standard Oil Co.}, 126 NW 342 (Iowa 1910).
“I have paid nothing for it as yet. I undertook to conduct an investigation and advise myself to my satisfaction as to whether or not the Crystal Oil Co. had an action for damages against the Standard Oil Co., for its piratical attacks you have heard about, and if I found we had a cause of action, that I was to institute a suit against the Standard Oil Co....in my own name, pay the expenses out of my own pocket and at the conclusion of the litigation, if I recovered anything, pay to the stockholders or creditors of the Crystal Oil Co. a sum of money equal to half of my net recovery.”

In the petition that Dunshee filed pro se on April 26, 1900, in Polk County District Court, he stated in the second sentence—as he with almost equal truth could have said of his long-time client, ATC—that the “Standard Oil Co., is a wealthy corporation, and is in fact, the most wealthy, influential and potent corporation being in existence in this country or elsewhere, and possesses and exercises vast power and influence in the City of Des Moines, State of Iowa, and claims to be able to destroy all competition, whenever and wherever it sees fit so to do.”

The Iowa Supreme Court’s decision in the case brought him national attention by virtue of its adherence to the principle that “[t]he laws of competition in business are harsh enough at best; but if the rule here suggested were to be carried to its logical and seemingly unavoidable extreme, there is no practical limit to the wrongs which may be justified upon the theory that ‘it is business.’ Fortunately, we think, there has for many years been a distinct and growing tendency of the courts to look beneath the letter of the law and give some effect to its beneficent spirit, thereby preventing the perversion of the rules intended for the protection of human rights into engines of oppression and wrong.”

A graduate of Princeton University, an elder, deacon, and trustee of the Presbyterian church, and a professor of medical jurisprudence at the Drake University College of Medicine in Des Moines from 1891 to 1908,
Dunshee was apparently proud of his labors on behalf of the Tobacco Trust: as early as 1903 he specified for his entry in the nationwide Martindale American Law Directory: “References: J. Parker, Asst. Council [sic], American Tobacco Co., New York.”\textsuperscript{314} His pride endured: as late as 1935 his entry still read: “Have also occasionally represented American Tobacco Co. of New York City,...”\textsuperscript{315}

Nor did Dunshee’s manifold efforts to dismantle the cigarette prohibitory laws that the Iowa WCTU had taken such great pains to enact prevent it from cooperating with him to combat its other, greater enemy. Thus at the end of 1896—the very year in which the Phelps bill was enacted—Mrs. Florence Miller, the Superintendent of the Legislation Department of the non-partisan Iowa WCTU,\textsuperscript{316} was elected secretary of the Iowa Anti-Saloon League when Dunshee was elected president.\textsuperscript{317} And in 1906, when the Anti-Saloon League, Prohibition Party, the WCTU of Iowa, the WCTU of the State of Iowa, and the Iowa Inter-Collegiate Association created a 15-person standing co-operative temperance committee, Dunshee was elected to the legislative committee tasked with working for temperance laws in the Iowa legislature. The other members included Marion H. Dunham, socialist and long-term president of the partisan WCTU of the State of Iowa, and John B. Hammond, one of Iowa’s fiercest foes of cigarettes and liquor.\textsuperscript{318} The next year, the Waterloo local branch of the Iowa WCTU hired

\textsuperscript{314}Martindale American Law Directory: 35th Number 232 (1903). The last time he included this reference in this form was Martindale American Law Directory 228 (1913).

\textsuperscript{315}Martindale-Hubbell Law Directory 1:401 (Biographical Section) (1935). In 1918 and 1919 Dunshee’s law firm was still representing a cigarette dealer in litigation before the Iowa Supreme Court attacking the cigarette mulct tax on the basis of the original package doctrine. See below ch. 14.


Dunshee to attack the liquor mulct law after the saloon owners had resisted the WCTU’s efforts to close the saloons on the grounds that they were operating under that law. Dunshee’s law firm, according to the Iowa WCTU’s account, “carefully prepared eight reasons showing that the mulct law is unconstitutional. They say the whole saloon business is destructive to public morals[,] public health and public safety; it tends to idleness and the promotion of evil manners, and is therefore inherently immoral and unlawful and contrary to the foundation of every civilized government and cannot be licensed under the constitution of Iowa or the United States.”319 All these claims, in the WCTU’s worldview, also applied to the sale of cigarettes.

Most astonishing of all was Dunshee’s cooperation with Hammond on making enforcement of Iowa’s cigarette sales prohibition law stricter. This activity unfolded under the aegis of the Laymen’s Civic Union, which was organized on February 13, 1910, by representatives of every church in Des Moines with the slogan of “good municipal morals.” Dunshee was elected president and Zenas Thornburg, an educational administrator and anti-smoking stalwart, second vice president.320 At a meeting a few months later the group discussed the 1909 anti-cigarette sales law, which was designed to strengthen enforcement. However, members expressed the belief that “the state law becomes ineffective in a city because enforcement of the law is left to the county sheriff or county attorney and not to the city police.” Consequently, the press reported, “the laymen will probably ask that the law be made more rigid in Des Moines” by means of an ordinance assigning enforcement to the city police. None other than Dunshee and Hammond, who was chairman of the prohibitory legislative committee, were appointed to confer with the head of the police department, Zell G. Roe, to determine the requirements of such an ordinance.321

---


321 “Would Bar Cigarettes,” Register and Leader (Des Moines), June 6, 1910 (1:2). As superintendent of public safety Roe was head of the police, fire, and health departments. It is unknown whether Dunshee and Hammond approached Roe, but from the fact that two years later, when Roe was seeking re-election to the council, the Laymen’s Civic Union castigated Roe’s record as a justice of the peace through March 1910, inter alia, because he had failed to suppress the sale of cigarettes although the city assessor had
The 1897 Mulct Tax Amendment

Dunshee’s blatantly self-contradictory role-switching finally came to a public denouement in 1913, when the headquarters committee of the Iowa Anti-Saloon League, of whose board of directors he had been a charter member and of which he had once been the attorney, requested his resignation because the liquor interests, which were “‘diametrically opposed’” to the League’s, had retained him. Forced at last to decide which side he was on, Dunshee promptly resigned, explaining that he did not “‘feel that I can afford to reject honorable employment from the liquor interests in order to hold an official connection with the anti-saloon league.’”

The Tobacco Trust Attacks the Mulct Tax in Court

The American Tobacco Company is placing its cigarette goods freely in the hands of dealers in many parts of this state, proposing to guarantee them against loss by litigation, fines, or attorneys [sic] fees, if prosecuted under the Iowa law. In Des Moines steps are being taken to bring a test case to determine whether this cigarette act is in contravention with the federal constitution.... It is to be hoped that the Company will fail, and the sufferable nuisances be banished from our midst.

Altogether there seems to be hazard for dealers in putting much faith in the guaranty of the manufacturers.

The Tobacco Trust lost little time in judicially attacking the constitutionality of the mulct tax, which went into effect October 1, 1897. Two days earlier the Des Moines press had reported that the new tax would only exacerbate dealers’ traditional complaints of profitlessness, prompting a cessation of selling and thus the possible irrelevance of the tax: “It is not probable that any of the local dealers
The 1897 Mulct Tax Amendment

will pay the tax. The fact is that cigarettes are sold now at a profit of less than half a cent a package, and are carried more for accommodation than anything else. Dealers do not feel like paying a heavy tax in order to accommodate their trade, and realize that they cannot earn the license.\(^\text{325}\) But this quasi-automatic economic motivation on the dealers’ part might also be powerfully reinforced by the legal intervention by the Tobacco Trust:

There is also a chance, however, that the tax will not have to be paid. The American Tobacco company...will probably back a suit to defeat the present tax. Its representative has written to dealers here to the effect he does not consider the law good, and believe [sic] it can be beaten. He is evidently paving the way to bring about a test case. Local dealers do not know which one will be backed, but the impression is the case will be made in Des Moines. It is probable all of them will stand together in the test case. The claim will be made that the new law is not in any way different from the other [Phelps law] in that the penalty is so heavy that it amounts to a prohibitive clause and has the same effect on the business. The statutes provide and the decisions for years have upheld them, that a tax that amounts to a prohibition is illegal and unconstitutional.\(^\text{326}\)

Ironically, the Des Moines wholesale tobacconist Frederick Youngerman, who in 1896 had refused the Tobacco Trust’s importuning to become its straw man litigant to challenge the Phelps law,\(^\text{327}\) was reported to have received a letter from the secretary of ATC “directing him that attorneys hold the clause to be non-effective and not enforceable, and tobacco dealers will refuse to pay the tax.”\(^\text{328}\) However, in early October 1897 counter-rumors—attributed to lawyers—were also beginning to circulate to the effect that the Trust’s suit would not see the light of day because of the fundamental difference between the Phelps prohibitory law (which had been “declared invalid a year ago”) and a license law, which would be upheld on the same grounds as the liquor mulct tax.\(^\text{329}\)

This prediction suffered a setback in early August 1898 when the press announced that ATC had begun its battle against the cigarette mulct tax: a company agent was in Des Moines and would remain there “to assist in fighting

\(^{325}\)“Will Make a Cigarette Test Case,” DML, Sept. 29, 1897 (2:4).

\(^{326}\)“Will Make a Cigarette Test Case,” DML, Sept. 29, 1897 (2:4).

\(^{327}\)See above ch. 11.

\(^{328}\)“Will Not Obey the Law,” BDT, Sept. 29, 1897 (1:2). Though datelined Des Moines, such an article mentioning Youngerman does not appear to have appeared in the Des Moines papers.

\(^{329}\)“Bootleggers Selling Cigarettes,” DML, Oct. 10, 1897 (6:6-7) (copy supplied by Merle Davis).
The 1897 Mulct Tax Amendment

the cases through for local dealers in the event arrests are made."330 A few days later, ATC’s general agent, C. E. Fisk, let it be known through the press that “the Iowa cigarette law is to be violated not only in Des Moines, but throughout the entire state.” The Trust had taken orders from more than a thousand dealers all over Iowa, and in order “to get these orders the company has given each dealer a contract agreeing to defend him in a case of arrest for selling the cigarettes without paying the $300 license.” The company’s legal stratagem underlying this suborned mass civil disobedience relied on its victory in the federal branch of its attack on the Phelps law: it “decided that each small box can be sent direct to the dealers as an original package, and protection under the interstate law will be afforded.”331 Shipping each package of ten cigarettes separately was precisely the method that two years earlier Attorney General Remley had pooh-poohed as so commercially impracticable and unprofitable that the volume of cigarettes that could be imported that way would be negligible.332 Whatever shipping method ATC was using, the Cedar Rapids Evening Gazette’s dyspeptic reporter in Des Moines had noted back in May 1898 that the cigarette law was not being observed in that city, “the seat of government, and anyone, young or old, rich or poor, can secure all the vile ‘coffin nails’ that they have money to pay for. This is in keeping with the high moral standard of the capital city, which permits a couchee-couchee show on the principal business street and tolerates a ‘Whitechapel’ that is a disgrace to the state.”333 A few months later the Gazette’s editor extended the scope of the sarcastic attack: “The attorney general of the state seems to be unaware of the fact that there is an anti-cigarette law on the statute books. It is believed he could find such an act if he should make an examination of the authorities.”334

Polk County Attorney James A. Howe, who during the summer had discovered that many drug stores in Des Moines were selling cigarettes,335 struck back a few days later by notifying the city assessors “to levy the $300 mulct tax on all property occupied by the forty local tobacco dealers who have undertaken the sale of cigarettes under the guarantee of the American Tobacco company

331“Violating the Law,” CREG, Aug. 5, 1898 (7:4). Around this time the Gazette reported that no demand had yet been made on Cedar Rapids dealers for payment of the cigarette mulct tax, “although a few have been ready to pay the tax provided other dealers were compelled to pay or close up.” “The Cigaret Law,” CREG, Sept. 19, 1898 (5:3).
332See above ch. 10.
333“Should Take Warning,” CREG, May 12, 1898 (3:5).
334CREG, Aug. 10, 1898 (4:2) (untitled edit.).
against loss by the cigarette mulct tax.” He warned the assessors that if they failed to levy the tax, citizens would request the auditor to levy the tax and actions would be brought to “remove the derelict assessors from office.” Against the background of the Trust’s having delivered 20,000 cigarettes to Des Moines within a week, Howe announced that he would also order informations filed against dealers in justice of the peace courts; if he secured convictions and dealers continued to sell, he would seek indictments for second offenses. Howe escalated his threats—prompting the press to pronounce him “on the warpath”—after an ATC representative had arrived in Des Moines to announce that the Trust would support a concerted effort by local dealers to violate and then, by litigation, to invalidate the law. Howe immediately declared that he would prosecute anyone organizing such a conspiracy to the full extent of the conspiracy statute: “Nothing could be more openly and violently a prostitution of the rights of an Iowa institution than to have a corporation come here and under a contract to buy their goods actually proceed to nullify and declare void a law passed by the legislature and properly attested by the governor. It is rank treason. It is trying to undermine the voice of the people.”

In response, Des Moines city assessor Frank French called Howe to find out what to do about assessing the tax against the property where the cigarettes were sold. After Howe had read the law to him, he told Howe that he would soon complete the list identifying the blocks and property where cigarettes were sold and submit it to the country treasurer with instructions to assess the $300 tax against each piece of property. Howe replied that this decision would “cause a great deal of trouble...with those having property on which are located cigarette stores. When the tax is entered upon the books of the county treasurer it is going to take considerable trouble to get it off, and it is barely possible...that some of the dealers will probably desist from any further sales, owing to the demand of their landlord.” It was understood by county officials that other assessors would follow French’s decision.

Howe, apparently engaged in a cat and mouse game with the Tobacco Trust, was using the legal leverage against the landlords to effectuate the mulct tax’s purpose of reinforcing the Phelps-law prohibition on sales rather than to facilitate licensing. Whereas the would-be buyer of Sweet Caporal several weeks earlier had paid 10 cents a package and then only five cents, suddenly there were places

---

337 “Howe on the Warpath,” DMDN, Aug. 9, 1898 (4:2).
338 “Can Soldiers Vote,” Adams County Union-Republican, Aug. 11, 1898 (1:3-5 at 4).
they could no longer be bought at any price. The reason for these radical fluctuations in availability was ATC’s agreement with dealers to stand good for any losses that might result from their consenting to evade the law and sell the firm’s cigarettes at a uniform price of five cents a box. However, after some dealers had dumped “cubic yards” of cigarettes into their store windows, they ran into a snag in the form of French’s plan and removed the boxes, several absolutely refusing to handle them. Despite the fact that payment of the cigarette mulct tax afforded dealers no protection at all from liability for violating the Phelps law, the Des Moines Leader mystifyingly reported that those who had “paid the license that is calculated to protect them” until October continued selling. Among those who had withdrawn from the business and disposed of their stock entirely “until such time as the trade shall be safe” was Frederick Youngerman, who had earlier indignantly declared his solidarity with the majority of the population who rejected cigarettes. He had been expecting a consignment, but in the meantime had resolved to put them all under the counter because he “could not afford to put an incumbrance on his property by defiance of the law.” At the same time dealers were trying to determine the effect of the mulct law and to secure the Trust’s guarantee to hold them harmless. The company’s original letter, which had led to a price reduction and a spreading of sales, had stated “in substance, ‘in case you are arraigned or indicted we will provide counsel for you, and should you entail any loss through suit will give indemnity.’” The question now was whether this language covered the mulct levy: “If the American Tobacco company says it covers this condition the sale may be resumed, otherwise it is likely to be permanently suspended by the unlicensed dealers.” The Leader pointed to the general opinion that the Trust would “rescue the dealers from this new dilemma” because it seemed that “they are not averse to making a test case of the matter.”

After Howe had advised the Des Moines assessors that one could not read the cigarette and liquor laws “without being thoroughly impressed with the fact that it was the intent and purpose of the law that they should be strictly enforced,” the press was convinced that Des Moines was “enjoying an anti-cigarette crusade....” Soon thereafter ATC made its first legal response to Howe’s

---

340“French [???]red Them,” DML, Aug. 13, 1898 (6:5). Unfortunately a tear in the only extant microfilm copy of this issue of the newspaper made it impossible to decipher the second word of the headline as well as several other words in the text. As early as August 1897, dealers in Cedar Rapids had raised the price to eight cents at the request of the Trust. “Personal,” CREG, Aug. 30, 1897 (3:2-3 at 3).


moves on September 6. As the Register’s subhead put it: “American Tobacco Company Redeems Its Pledge to Dealers to Defend Them” by instituting, in the name of Charles C. Tam, who allegedly “keeps a cigar store” in Des Moines, and his landlord, Billy Moore, injunction proceedings in equity court to restrain the county from levying and collecting the mulct tax. The petition recited that: all the cigarettes (“so many packages of Sweet Caporal Cigarettes”) that Tam had sold since July 1, 1898, had been ordered by him from ATC, which had no place of business in Iowa; U.S. Express Company, a common carrier, had delivered these 10-cigarette paste-board boxes to him; ATC had delivered the boxes to the express company in St. Louis “without box, bale, bag, wrapping, or any covering or enclosure or anything in any way attaching said packages...together, with directions to deliver them” to Tam; the express company delivered the boxes in the same form; and Tam put the packages on sale “in the exact form in which they were received...being the original packages received by him from the common carrier....”

This by now rather unoriginal original package doctrine argument was offered by the Trust’s ubiquitously sojourning assistant general counsel, Junius Parker. Like his then superior, general counsel Williamson Fuller, Parker (1867-1944) grew up in North Carolina, but outdid Fuller in eventually rising to chairman of the board of ATC (1925-29), before returning to private practice in Manhattan. Though he did not appear in the 1900 (or 1920) population census, in 1910 Parker was returned as a 42-year-old lawyer living in Morristown, New Jersey, with his wife, two young sons, and six white female servants.

The Register reported that Polk County District Judge Charles A. Bishop issued a temporary injunction and set a hearing for September 9 to determine whether to make it permanent. This account, however, was apparently incorrect: not only does the docket sheet not indicate that any injunction was

\[343\] Petition in Equity ¶2 at 2-3, Tam v. Polk County, Iowa (Polk County Dist. Ct, No. 8584, Sept. 6, 1898).

\[344\] According to the obituary in The New York Times, Parker went to New York in 1899 as ATC’s assistant general counsel; if true, then, like Fuller, he must have been working for ATC before he left North Carolina. “J. Parker, 76, Dies,” NYT, June 12, 1944 (19).

\[345\] Remarkably, the census enumerator included the specific information that he worked for “Am. Tob. Co.” in the column that called for the “general nature of industry, business, or establishment” in which Parker worked. 1910 Census of Population (HeritageQuest).

The 1897 Mulct Tax Amendment

granted on September 6,\textsuperscript{347} but Judge Bishop himself that same day wrote at the bottom of the petition that “it is ordered that the application for temporary injunction be and the same is set down for hearing before me at the court house in Des Moines on the 9th day of Sept 1898 at 2 oclock p.m. two days notice to be given defts.”\textsuperscript{348} Moreover, the notice that Parker then gave defendants stated that “plaintiffs [sic] application for a temporary injunction will be heard before his honor Judge Bishop...on the 9th day of September 1898,”\textsuperscript{349} thus also strongly implying that no injunction had been granted yet.

If there ever was a litigational straw man, Tam was it. According to the Cedar Rapids Evening Gazette, he had opened the cigar and cigarette store on Monday and applied for the injunction on Tuesday.\textsuperscript{350} The Des Moines City Directory did not record him as having any occupational connection to any kind of tobacco store: in 1897 Tam was listed as working for the American Express Company, while in 1898 and 1899 he was entered as advertising agent or advertiser for the American Tobacco Company.\textsuperscript{351} Tam as fictitious plaintiff was merely an extreme example of ATC’s puppeteering approach to private

\textsuperscript{347}Tam v. Polk County, Iowa, Polk County Dist. Ct., Appearance, Judgment, Fee and Execution Docket, No. 21, Equity No. 8584.

\textsuperscript{348}Petition in Equity at 8, Tam v. Polk County, Iowa (Polk County Dist. Ct, No. 8584, Sept. 6, 1898) (copy furnished by Polk County Courthouse Civil Div.). Since no hearing appears to have taken place on Sept. 6, 1898, the newspaper’s error may have resulted from the reporter’s having misread or misunderstood Judge Bishop’s difficult-to-read scrawl.

\textsuperscript{349}This untitled and undated notice, which is included in the Tam v. Polk County, Iowa file (and was, according to the docket sheet, served on Sept. 7), was handwritten on a pre-printed district court form, which was not entirely appropriate for the purpose, causing Parker to strike out some of the language.

\textsuperscript{350}These days do not accord with the account in the Register; the paper also incorrectly gave Parker’s first name as James. “The Cigaret Law,” CREG, Sept. 19, 1898 (5:3).

\textsuperscript{351}R. L. Polk & Co. ‘s Des Moines City Directory: 1897, at 553 (vol. 6); R. L. Polk & Co. ‘s Des Moines City Directory: 1898, at 623 (vol. 7); R. L. Polk & Co. ‘s Des Moines City Directory: 1899, at 696 (vol. 8). Tam did not appear in the 1900 Directory. In its answer, Defendant Polk County admitted that Tam was engaged in the business of selling cigarettes and had been selling them since July 1, 1898. Answer of Defendants, Tam v. Polk County, Iowa (Polk County Dist Ct., Sept. 6, 1898). This admission was based only on the allegations in the complaint, which merely asserted that plaintiffs were liable for the tax that it was defendants’ “declared purpose” to collect; Parker did not claim that Tam and Moore were on an assessment list, let alone that the mulct tax had already been levied or collected. Petition in Equity 8584, Tam v. Polk County, Iowa (Polk County Dist. Ct, Sept. 6, 1898).
constitutional litigation, which two years earlier Parker had sought to justify with respect to the successful attack on the federal income tax: “Courts try cases on the record and there is not a case which holds that they must go behind the record and determine the motives of each of the controverting parties.”

At the hearing on September 9, after the county’s attorney, state senator Thomas Cheshire—who had played a leading but ambiguous role in the legislative debates over amending the anti-cigarette law in 1897—had made a general denial of Parker’s claims, Bishop ruled that it was incumbent on the company to prove that it had evidence that it had shipped the cigarettes in original packages from St. Louis to Des Moines, and adjourned the case until some time in October. Despite the fragmentary nature of the proceeding, the Register concluded that both Bishop and Cheshire had “intimated...that if the package is an original one...there is no reason why the writ should [not] be issued. The indications are that the tobacco company has won, and all it now has to do, apparently” was to produce someone from St. Louis at the October hearing to swear to the original package claim. The Register’s headline and subheads told the whole story: “No Cigarette Tax Is Legal: American Tobacco Company Wins a Big Victory. Court Practically Decides That the Cigarette Mulct Tax of $300 Is Illegal. Case Not Totally Tried, But Such Is the Apparent Conclusion.”

Why, eight months after the Iowa Supreme Court’s decision in McGregor v. Cone denying original-package status to ATC’s cigarette shipments, the judge, county attorney-senator, and press all reflexively presumed that the Tobacco Trust would encounter no resistance to its carefully staged, but commercially unrealistic and implausible tale of original packages, is mystifying.

The narrative extreme to which Parker and the ATC were willing to go to gussy up this interstate commerce yarn was comically visible in the response that a newspaper man elicited from Parker on the evening of September 18. Apparently impressed by “the ingenious methods by which the trust expects to get

---


353 See above this ch.

354 “No Cigarette Tax Is Legal,” *ISR*, Sept. 10, 1898 (6:2). In order to furnish the evidence that Judge Bishop required, ATC deposed Thomas Donellan on October 7. *Tam v. Polk County, Iowa*, Polk County Dist. Ct., Appearance, Judgment, Fee and Execution Docket, No. 21, Equity No. 8584. The deposition transcript is not in the case file, but the stereotypically choreographed affidavit of the selfsame Donellan—an ATC packing and shipping employee in St. Louis—in another ATC-staged mulct tax suit (Cook v. Marshall County) a few months later is discussed below.

355 See also “Law Unconstitutional,” *CREG*, Sept. 10, 1898 (7:1).
out from under the law,” the reporter prompted Parker to display a degree of graphic bluster exceeding even that which he and his colleague Fuller had dared to serve up in their various briefs by asking him whether he would be able to offer the proof requested by the court. The scene that Parker choreographed contemplated a delivery company even more “superserviceable” than the one the Iowa Supreme Court would ridicule five years later:

“The tobacco trust sells all cigarettes coming into Iowa in original packages, the same as one buys from the retailer. For instance, in the case of Tamms [sic], the express company was notified that a certain number of packages of cigarettes were at the company’s warehouse in St. Louis. When the expressman arrived there he found a large number of small packages of cigarettes piled up like so much cord wood. On the top of the pile was a slip giving the address of the party to whom the cigarettes were consigned. So far as the Tobacco trust is concerned it makes little difference as to the manner in which the express company handles them in transport. As a rule they employ large baskets and carry them to their destination. I understand that in the case of Tamms [sic] the express company used large paper bags and that when taken to Tamms’ [sic] place of business they were removed from the bags, showing that the express company delivered the goods in the exact condition they received them.

Returns from five assessorial districts in Des Moines in the second half of September included 34 cigarette sellers with a total tax liability of $10,200 (compared to $39,000 in liability among 65 saloons and drugstores selling liquor). Cigarette selling had, according to the Register, undergone a marked change: “At the time when the law went into force there was a general stoppage of business among the cigarette sellers, and for some time the paper covered weed was sold on the sly. Then many of the dealers doubled the price and prepared to pay the tax.” Many others, however, were determined not to pay it, since ATC had “instructed them to ignore the law” while the Trust prepared to test its constitutionality. In fact, the tax was “prohibitive to many of the smaller dealers. They will have to stop the sale if the law is enforced.” Already at this point it was clear that as soon as the Polk County Board of Supervisors dealt with the dispute, “the fight with the dealers will begin.”

Toward the end of September the press was reporting that the mulct tax might “prove to be uncollectible.” Four dealers in Des Moines had already paid it, but

---

357See below the analysis of Cook v. Marshall County.
358“The Cigaret Law,” CREG, Sept. 19, 1898 (5:3). It seems implausible that Parker would literally have referred to ATC as the “tobacco trust.”
359“Cigarette Mulct,” ISR, Sept. 21, 1898 (6:3).
The 1897 Mulct Tax Amendment

one had refused to do so on the grounds that he had sold the cigarettes he had imported from St. Louis in their original packages. Although Judge Bishop had not yet decided the case, he had intimated that if the dealer could clearly prove sale in original packages, the tax would not apply. In that case, the Dubuque Herald’s correspondent in Des Moines added, “no other dealer would pay the tax, of course,” and those who had paid might be able to recover refunds. Why, in the light of the Iowa Supreme Court’s decision in McGregor v. Cone upholding the Phelps law and of the commercial impracticability of shipments in individual 10-cigarette packages, such pessimism prevailed was unclear, but the paper asserted that county attorney Howe, who had “made every effort to enforce the law and collect the tax,” had nevertheless admitted that it appeared “very doubtful.” At an all-day session on the last day of September, the Polk County Board of Supervisors heard applications from druggists and storekeepers for remission of the assessments for alleged sale of liquor and cigarettes without having paid the mulct tax. Because Assessor Calkins was unable to provide the requisite evidence of the sales, the Board remitted the tax for all the applicants (including the three alleged cigarette sellers).

A few weeks later the press reported that Judge Bishop, basing his decision on the original package doctrine, had given ATC a temporary injunction enjoining tax collectors from collecting taxes on property where its cigarettes were sold without payment of the tax. Securing this injunction was just “one step” in the Trust’s “state-wide fight against the law.” As a result, dealers were selling cigarettes “under the contract for protection.” Whether this report was accurate is unclear since the docket sheet in Tam v. Polk County contains no entry for the issuance of any injunction. That the county may nevertheless have voluntarily agreed not to levy the tax against Tam and Moore is suggested by the court’s dismissing the case on November 26 and ordering defendants to pay the costs.

360F(rank]. W. Bicknell, “Politics Now in Order,” Dubuque Herald, Sept. 21, 1898 (2:2-3 at 3).
363Tam v. Polk County, Iowa, Polk Dist. Ct., Appearance, Judgment, Fee and Execution Docket, No. 21, Equity No. 8584.
364Tam v. Polk County, Iowa, Equity No. 8584, Polk County Dist. Ct., Journal, Nov. 26, 1898, at 179 (Stevenson, J.) (copy furnished by Polk County Courthouse, Civil Div.). Oddly, the Register, which published a daily column devoted to Polk County District Court proceedings including a listing of the day’s docket sheet, did not mention the Tam case the
On November 18, the Polk County Board of Supervisors took up several dealers’ petitions for refunds of the cigarette mulct tax assessed against them. Amusingly, eight months earlier the supervisors had unanimously passed a resolution banning smoking during their meetings: “It is presumed that the supply of Havanas brought from Cuba by Chairman Teachout has been exhausted, whereas it is beneath the dignity of the officials of this board to smoke while in session and it is not necessary for the health of the members and tends to the disrespect of others, it is hereby resolved that smoking should not be permitted in the supervisors’ chamber during its session.”

Dunshee, the Tobacco Trust’s Des Moines lawyer, represented R. Lavine, while the assistant county attorney (And Senator) Cheshire represented the county. After numerous witnesses had testified on Lavine’s behalf and the county assessor on the county’s, the board voted 4 to 1 not to grant the petition. Next, A. Cohen, also represented by Dunshee, had even less success, the board unanimously not granting his petition. Finally, the board also unanimously did not grant the petition of A. C. Bondurant, as landowner with a tenant (J. F. Cline) and as business owner. The board resumed consideration of further petitions on November 19: a succession of six petitioners, some represented by Dunshee, appeared, only to see the board unanimously (or against one Yes) not grant them, though by the time the last one testified the board voted to postpone further consideration until November 21.

After the board of supervisors had denied these petitions for refunds, ATC let it be known that it would appeal the decision in state district court. When the board reconvened, first it denied the petitions of four more dealers for a refund of the cigarette mulct tax assessed against them, and then immediately did an about-face, unanimously adopting a resolution granting the petitions of these four and nine others. The resolution remitting the mulct tax to the 13 dealers
The 1897 Mulct Tax Amendment

declared:

Whereas, numerous petitions have been presented to this Board asking for a refund of cigarette mulct tax assessed against various parties, and whereas a number of such petitions have been granted by this Board for the reason that the petitioners claimed that they had only sold cigarettes received from without the state, and sold in the Original packages in which they were received, and it having been held by the District Court that the State law prohibiting the sale of cigarettes could not operate as against a decision in the Federal Court, permitting such sale in Original packages, and whereas, numerous other petitions for a refund of cigarette mulct tax have been refused on the evidence showing that packages of tobacco have been sold and cigarette paper given away with such packages of tobacco,

Therefore be it resolved by the Board of Supervisors of Polk County Iowa, that in as much as this conflict between the State and Federal laws exist with reference to the sale of cigarettes in Original packages of tobacco, and packages of tobacco with cigarette paper given away, that an injustice is done between the classes of dealers, and in as much as numerous dealers in tobacco with which the cigarette papers come were ignorant of the law, and therefore violated it unknowingly, that the action of this Board on the following petitions be reconsidered and the petitions granted upon payment of the costs.

The *Daily Iowa Capital* underestimated the significance of this move in commenting that it would end further litigation and “doubtless prevent a further violation of the state law by those who have so narrowly escaped the penalty which the board might have required.” The newspaper passed over in silence that—unless, contrary to Attorney General Remley’s prediction, ATC had been shipping thousands and thousands of 10-cigarette packages loose to Des Moines dealers—a county board of supervisors had apparently decided on its own to ignore the Iowa Supreme Court’s decision in *McGregor* issued just 10 months earlier: if the packages had in fact not been shipped loose, then the federal court’s decision in *McGregor* would not apply to them; that the Polk County Board of Supervisors had investigated the circumstances of the Trust’s shipments to each and every petitioner and determined that they fell under the federal branch of the

---

370 *Proceedings Board of Supervisors [Polk County],* Nov. 21, 1898, Journal 7 at 391-92. A somewhat different version of the resolution was printed in “County Board Remits the Tax,” *DIC,* Nov. 22, 1898 (7:3).

371 “County Board Remits the Tax,” *DIC,* Nov. 22, 1898 (7:3).
The 1897 Mulct Tax Amendment

case seems wildly implausible. Furthermore, the board appears to have been
confused since McGregor did not involve “original packages of tobacco with
cigarette paper given away.” Consequently, based on willful disregard of the
Iowa Supreme Court’s decision and an inexplicable excusal of dealers’ self-
servingly alleged ignorance of the clear subjection of cigarette paper to the mulct
tax, the board created a fictitious “injustice.” In contrast, the Perry Advertiser
reported that the board’s action “virtually put[ ] an end to the cigarette mulct tax
in Des Moines.” 372 That the Polk County Board of Supervisors’ action had not
made the mulct tax a dead letter in Des Moines was proved not only by the data
on collection, 373 but also by the fact that, for example, in 1901 the board
continued to remit the tax in non-test cases. 374 Nevertheless, the chairman of the
board did state at that time that the supervisors had decided not to deal with the
mulct tax until the U.S. Supreme Court handed down a decision; until then the
board would hold cases and petitions in abeyance. 375

Enforcement was headed toward a similar climax in Cedar Rapids, where, in
August the Gazette assured its readers, the cigarette industry “will undoubtedly
receive the hardest blow this week that it has ever been dealt” when the assessor,
instructed by County Attorney Grimm, began to enter the $300 mulct tax against
every property where cigarettes were sold. Although the newspaper correctly
stated that the 1897 code made the sale of cigarettes illegal, penalized it, and
provided a mulct tax, the Gazette did not explain why cigarettes were still being
sold. Instead, it suggested that landlords’ back-up liability under the mulct law
would probably impel the owners of the property on which cigarettes were sold
to require tenants to post a bond indemnifying the landlords against any and all
taxes or assessments. In turn, the tenants, who were “practically the agents” of

372“Cigarette Tax a Failure,” Perry Advertiser, Nov. 18, 1898 (2:4). It is a mystery
how the newspaper, in an article dated November 17, could have known what the board
did not do until November 21.

373See below this ch.

374“Supervisors Fill Offices,” ISR, Jan. 9, 1901 (6:5). In the case of a drug store the
board remitted the tax because the owner claimed that he had not known that cigarette
papers had been disposed of: a clerk had given cigarette papers away free that had been
received with tobacco consignments. In another case the property owner persuaded the
board that no cigarettes had been sold by the occupant. Lucy Page Gaston’s national
magazine reported that that week cigarette dealers and property owners against whom
Assessor French had levied a cigarette mulct tax had presented a petition to the county
board of supervisors requesting that the tax be remitted; ATC was “pushing the case” to
test the mulct tax law and “if possible [for] a definition of what an original package is.”

and indemnified by the American Tobacco Company against prosecution under the mulct law, did not, like their counterparts in Des Moines, yet know whether the Trust would also pay the tax. The Gazette unwittingly revealed a deep insight into the state of enforcement in Cedar Rapids and Iowa when it praised Grimm as “one of the unalterable enemies of the cigarette, like every other well thinking man with a son of his own....” Although Grimm authorized the newspaper to report that if anyone brought a complaint against any cigarette dealer, he would “prosecute to the bitter end,” his enmity toward cigarettes was purely reactive:

“I am not a police officer...and do not feel that it is my duty to go around looking up testimony in these cases or endeavoring to find out who is selling cigarettes, but I know that they are being sold in this city contrary to law and I will gladly prosecute any complaint which is formally brought before me. There is probably no question but that convictions would follow, as I regard the law as perfectly plain. There is nothing which can save the property occupied by cigarette dealers from taxation, and I think that Assessor McKinlay will give the matter immediate attention.”

This last sentence made it perfectly plain as well that Grimm’s prosecutorial activity was not only reactive, but applied only to nonpayment of the mulct tax and not to the underlying violation of the prohibition on sales under the Phelps law, which the Iowa Supreme Court had unambiguously and unanimously upheld half a year earlier.

**Cook v. County of Marshall and Hodge v. Muscatine County:**
The Tobacco Trust Also Loses Its Judicial Challenges to the Mulct Tax

The case [Hodge] is one of great importance to tobacco users in all parts of the state, for upon the decision of the supreme court depends in a large measure the future of the cigarette business in Iowa.

The Tobacco Trust prepared the basis of its litigation against the mulct tax in 1898 in Marshalltown with the help of straw men Charles P. Cook, a 27-

---

378 “Testing the Cigarette Law,” *DWL*, Nov. 27, 1903 (9:1).
379 According to “Cigarette Law Is Held to Be Valid,” *DMRL*, Jan. 17, 1905 (10:3), the mulct tax law “was attacked by F. S. Dunshee of Des Moines, attorney for the American Tobacco company, on behalf of dealers at Marshalltown and half a dozen other places.”
year-old tobacco, cigar, and cigarette dealer  (who in 1915 would be involved in a dispute in Marshalltown over the legal consequences of his having paid the mulct tax), and his landlord Edward Plunkett, a 52-year-old Irish immigrant, whom the 1900 population census returned as a “capitalist” with 10 children living in his house.

“The American Tobacco company,” as the press correctly noted, “was the real plaintiff in the case....” On December 10, 1898, the Marshalltown city assessor returned their names to the Marshall county auditor as persons carrying on a cigarette business and maintaining a place where cigarettes were sold in violation of the law because they had failed to pay the quarterly mulct tax to which they were liable and which was also a lien on the premises. On January 23, 1899, Cook and Plunkett filed a petition with the county auditor denying liability for the tax on the grounds that since September 30, 1898, Cook had not sold any cigarettes except those that he had bought from ATC, which had shipped them to him in “original packages” from St. Louis, Missouri. Alleging that they were advised and believed that the tax as to such sales was void as an interference with interstate commerce, they requested that the tax be remitted.

On January 31 Cook and Plunkett filed an affidavit, in the tradition of carefully choreographed Trust statements, by Thomas Donnellan, an ATC packing and shipping employee in St. Louis, who swore that he had shipped to Cook paste board boxes of Sweet Caporal cigarettes “absolutely loose, or at least neither the American Tobacco Company, nor myself or [sic] any one of its other employee...furnished any box, bale, bag, wrapping or other covering

380 As a 10-year-old at the time of the 1880 census of population Cook was returned as living with his parents in Waterloo, his father being a butter packer. He appears in the index to the 1900 census of population, but the apparent entry for him on the very last line of the census schedule page is illegible. Series T 623 Roll 448 Page 227. Cook was also returned at the 1910 and 1920 census of population as a tobacco or cigar merchant. In 1899 the city directory listed him as operating a restaurant; beginning in 1906 he was listed as operating a cigar store to which from 1908 onward were added billiards, bowling alley, and barber shop. Marshalltown City Directory, 1899-1900, at 48; Marshalltown City Directory, 1906, at 53; Marshalltown City Directory, 1908, at 55. The press stated that at the time he filed the petition, Cook was a restaurant keeper. “Cigaret Law Declared Valid,” ET-R, Feb. 2, 1903 (3:2).

381 “Now Easy for Boys to Obtain Cigaretts,” Marshalltown Times-Republican, July 17, 1915 (7:2); below ch. 14.

382 Plunkett’s age was omitted in 1900, but in 1910 he was returned as being 62, when his occupation was listed as “own income.”

383 “Must Dig Up Now on Cigaret Tax,” CREG, Jan. 17, 1905 (7:3).

384 Appellant’s Abstract of Record at 1-2, Cook v. County of Marshall, Iowa, 196 US 261 (1905).
for these packages nor [sic] in any way attached them together. These packages were not separately addressed nor were any of them addressed but at the time they were delivered to the driver of the U.S. Express Co....” Donnel[l]an swore that from the duplicate receipts the driver had given “I suppose the express Co. had notice of the number to be delivered and the name of the consignee and his address.”

After the county board of supervisors had heard the petition on April 3, 1899 and refused to grant it, the Trust’s puppets perfected an appeal to district court, and then on February 26, 1901 Dunshee traveled to Marshalltown on behalf of ATC to file an amended petition, which argued that section 5007 was invalid and assessments, levies, and taxes were void and unenforceable because the section had nothing to do with title 24 of the Code under which it was enacted, which dealt with crimes and punishments. The gussied-up account in the Des Moines Daily News of this routine filing as a “direct body blow” at the mulct tax law did correctly note that if the argument were sustained, “thousands of dollars will be saved to the dealers of the state who have not paid into the county treasure’s [sic] the taxes accumulating for the last two years.” Much more remarkable, however, was the newspaper’s critical comment that even if ATC prevailed on this “pure technicality in the wording of the statute,” the company,

in advancing this point, do [sic] not hope to be able to sell cigarettes in Iowa for the reason if the [tax] statute is unconstitutional it is not to be understood that the prohibitory features [of the Phelps law, Code sect. 5006] are invalid. They remain in force and effect just as they were originally and any attempt on the part of the American Tobacco company or any other to sell cigarettes in Iowa would result in a punishment for a violation of the prohibitory features....

---

385 Appellant’s Abstract of Record at 3, Cook v. County of Marshall, Iowa, 196 US 261 (1905).
386 Appellant’s Abstract of Record at 5-6, Cook v. County of Marshall, Iowa, 196 US 261 (1905).
387 The more than two-year delay apparently resulted from a “stipulation” that the parties had made that the case would be continued in district court until the U.S. Supreme Court decided Austin v. Tennessee. After the that decision was issued in November 1900, the Marshall County Attorney filed a demurrer in district court based on that ruling. “Cigaret Law Declared Valid,” ET-R, Feb. 2, 1903 (3:2).
388 “Blow at Cigarette Tax,” DMDN, Feb. 26, 1901 (8:5).
389 Appellant’s Abstract of Record at 6, Cook v. County of Marshall, Iowa, 196 US 261 (1905).
390 “Blow at Cigarette Tax,” DMDN, Feb. 26, 1901 (8:5-6).
391 “Blow at Cigarette Tax,” DMDN, Feb. 26, 1901 (8:5-6). Since the article’s
What was remarkable about this point—that the 1896 and 1897 enactments were independent of each other and that selling cigarettes remained prohibited regardless of whether sellers paid the tax or whether the tax was invalidated—was that, despite its obviousness, law enforcement officials over and over again lost sight of it during the next two decades, no matter how often it was rediscovered.\(^{392}\) However, the *Daily News* then went on to undercut this point by stressing that the great interest in the case stemmed from the fact ATC’s victory “means the end of a war that ha[d] been waged in...Iowa and other states for two years”: after county treasurers had begun enforcing the mulct tax, dealers began selling cigarettes in original packages, but had to stop after the U.S. Supreme Court (in *Austin v Tennessee*), “contrary to expectations,” had ruled that “the original package must go.” In fact, if the Trust had intended to comply with the underlying sales prohibition, litigating the mulct tax would have been senseless inasmuch as even an intact tax could not have represented a threat to businesses that sold no cigarettes.\(^{393}\) That compliance was not uppermost in the plans of ATC or some dealers was underscored by the newspaper’s reminder that:

> Here in Des Moines the dealers secured a compromise with the board of supervisors and were successful in getting a remittance of the assessments. In other sections of Iowa, however, they were not so successful with the result that the American Tobacco company has decided to bring an action looking to a nullification of the mulct law.\(^{394}\)

After the Trust had filed another amendment to its petition (this time alleging that the statute’s non-applicability to jobbers and wholesalers doing an interstate business denied ATC equal protection of the laws under the U.S. Constitution and violated article I section 6 of the Iowa Constitution, which provides that “all laws of a general nature shall have a uniform operation”), the district court tried the case on April 4 and, in June 1901, dismissed the petition and confirmed the tax assessment.\(^{395}\) Cigarette smokers in Marshalltown were, according to the press, “dismayed” by the decision: “The white death-dealing tubes were placed under a ban here many months ago and have been hard to obtain.” Youths, deprived of temporal perspective was Dunshee’s trip to Marshalltown before he had actually arrived there and filed the amended petition, presumably the newspaper’s information (including the critical comment) stemmed from him.

\(^{392}\) See below chs. 13-14.

\(^{393}\) “Blow at Cigarette Tax,” *DMDN*, Feb. 26, 1901 (8:5-6).

\(^{394}\) “Blow at Cigarette Tax,” *DMDN*, Feb. 26, 1901 (8:5-6).

\(^{395}\) Appellant’s Abstract of Record at 7-9, *Cook v. County of Marshall, Iowa*, 196 US 261 (1905).
manufactured cigarettes, had “turned in their extremity” to rolling their own, but “even this comfort will be denied them, for the selling or even giving away of the white tissue slips is strictly forbidden unless the dealer desires to pay the almost prohibitive mulct tax of $300 a year.” In fact, however, in spite of the newspaper’s erroneous suggestion that payment of the tax immunized dealers, none in Marshalltown intended to obtain a “license” because all believed that the tax would wipe out any possible profit.\(^{396}\) (The year 1901 witnessed a campaign against smoking in nearby Waterloo, Iowa’s seventh largest city, while Nashua was “practically free from cigarette smokers, or if we have them they keep out of sight while smoking the filthy things.”\(^{397}\) In Boone, too, the local press supposed that those “vile destroyers of physical and moral force are not sold in the city....”\(^{398}\)\)

ATC, represented by Dunshee and its associate general counsel, Junius Parker, appealed the decision to the Iowa Supreme Court. In its brief, Marshall County did not bother to conceal its contempt for ATC’s transportational manipulations and jurisprudential arguments. The County argued that “there can be no possible claim that the Austin case does not fully settle the question as to...the nature of the small packages, improperly called original packages.” In both cases, the Trust obviously sent the packages “not at all for the convenience of shipping,” since they “would be quite inconvenient, and the expense of transportation would, necessarily, be great.” The brief derisively culminated in the advice that unless the U.S. Supreme Court reversed Austin v. Tennessee, “the American Tobacco Company must resort to some other and more ingenius [sic] method of disposing of its goods...."\(^{399}\)

On February 2, 1903, the Iowa Supreme Court unanimously affirmed the lower court’s judgment.\(^{400}\) The opinion, written by Republican Justice Silas Weaver, was sharp-tongued throughout, oozing sarcasm and scorn for the Trust’s litigational machinations. In dealing with ATC’s claim that under Leisy v. Hardin and other U.S. Supreme Court decisions Cook was lawfully selling cigarettes in their original packages, Weaver observed that:

\[
\text{T]he question is whether ten cigarettes, put up, handled, shipped, and sold in the manner}
\]

\(^{396}\)“Cigarette Mulct Tax Decision,” MDN-T, June 13, 1901 (1:4) (copy furnished by Merle Davis).

\(^{397}\)Nashua Reporter, Nov. 28, 1901 (5:1) (untitled).

\(^{398}\)“They Get Them,” Boone County Republican, Mar. 7, 1901 (1:1) (copy furnished by Merle Davis).

\(^{399}\)Argument of Appellee at 2-3, Cook v. Marshall County, 119 Iowa 385 (1903).

\(^{400}\)Cook v. Marshall County, 119 Iowa 385 (1903).
The 1897 Mulet Tax Amendment

indicated by the petition, is such an “original package” as is meant by the authorities which the appellant relies upon. As an original proposition, addressed by common sense, aided by a conscience of average enlightenment, and uncomplicated by precedent, there would seem to be no room for doubt that this question should be answered in the negative. It must be admitted, however, that authorities are not wanting affording the appellants some ground to believe that any scheme or device, no matter how transparent the fraud, is sufficient to baffle the power of a sovereign state so long as it bears the magic legend “original package.”

Persuaded that Chief Justice John Marshall would not acknowledge “the legitimacy of the descent of the modern doctrine,” the court proceeded to take full advantage of the U.S. Supreme Court’s recent decision in Austin v. Tennessee, which had rejected the Trust’s interstate commerce-based attack on Tennessee’s anti-cigarette sales act:

There, as here, the nonresident manufacturer and the resident agent or dealer, aided by a superserviceable common carrier, undertook to convert the interstate commerce privilege afforded by the federal constitution into a shield behind which to violate the law of the state with impunity. The plan adopted may be explained as follows: To conform to the internal revenue law of the United States, the manufacturer put the cigarettes into small pasteboard boxes of ten each. These boxes are about three inches in length, and one and one-half inches in width, a convenient size for the vest pocket of the schoolboy or man addicted to the use of tobacco in that form. In filling an order for these goods from a state where the traffic was unlawful, the seller instead of packing the requisite dozens or hundreds or thousands of boxes in a larger box or package, as would be done in legitimate commercial transactions generally, placed the small boxes in a loose pile upon the floor of his warehouse, and notified the carrier, who came, gathered up the consignment in a basket, and put it in course of transportation to the consignee. By this device it was claimed that each box of ten cigarettes was to be considered an original package, which the importer might lawfully receive, hold, and sell without let or hindrance by the state authorities. The adoption of this doctrine would, of course, prove absolutely destructive of the right of the state to place any ban whatever upon the sale of this class of goods. The cause of good government and good morals is to be congratulated, however, upon the fact that a majority of the court refused to allow the last vestige of the police power of the state for the protection of its people to be thus obliterated.

401Cook v. Marshall County, 119 Iowa 384, 387 (1903).
403Cook v. Marshall County, 119 Iowa 384, 389-90 (1903). In a post-mortem comment on the case after the U.S. Supreme Court had upheld the Iowa Supreme Court’s ruling, ATC’s Iowa lawyer, Dunshee, falsely asserted that “it was apparent to the [Iowa Supreme] court that the manufacturer had equipped a cigarette factory with the special processes requisite to do this business in original package way....” “Cigarette Law Is Held
The 1897 Mulct Tax Amendment

Weaver noted that the sole distinction that the Trust’s lawyers could find between Austin and Cook was that in the latter no mention was made of the basket that the express company had used in the former to remove the loose pile of cigarette packages from the ATC warehouse floor. Weaver was not amused by the choreography:

The care and precision with which we are told what the tobacco company did not do in making the shipment is no less conspicuous than the omission to tell what its agent, the express company, did do in that regard. We think, however, it indicates no such material variance in the facts of the two cases as to affect the application of the rule. Conceding that the tobacco company scrupulously refrained from doing more than counting and pointing out the loose packages to the express company with directions to carry the same to the buyer in Marshalltown, yet we know, as a matter of common observation and immemorial usage, that this is not the manner “in which bona fide transactions are carried on between the manufacturer and wholesale dealer residing in different states,” and is, therefore, not entitled to claim the exemptions attaching to interstate commerce. Still further we may rightfully assume that the express company, in receiving and shipping these little boxes, did it in a rational manner, not by handling or carrying the boxes as ants carry sand, one grain at a time, but by gathering them, if not in baskets, in receptacles of some suitable and convenient kind; and in such case, under the doctrine of McGregor v. Cone, supra, the receptacle so used would be the original package, if, indeed, there be anything in the transaction entitled to that appellation. The extreme and unreasonable extension of the principle affirmed in Brown v. Maryland has been the fruitful source of much annoyance and embarrassment in many of the states of the Union. And it is a striking, but just, commentary upon the perversion of the principle embodied in that decision, to note that practically the only beneficiaries of the modern doctrine of the sanctity of original packages in interstate commerce are the whisky seller, the cigarette manufacturer, and the dealer in bogus butter,—a trinity which finds it profitable to force its wares upon states whose people, speaking through their constituted authorities, seek to exclude them as injurious to public health and morals.  

The Court did not bother to attempt to disguise its contempt for the Trust’s “chief contention” at oral argument in October 1902—namely, the aforementioned claim that the mulct tax was unrelated to the Code article on crimes and punishments under which it was enacted. After mocking the Trust for urging this point “with much earnestness,” the Court re-centered the discussion by underscoring that the constitutional provision invoked by appellants “was

---

404 Cook v. Marshall County, 119 Iowa 384, 393-94 (1903).
The 1897 Mulct Tax Amendment

designed to prevent surprise in legislation by having matters of one nature embraced in a bill whose title expressed another.” In the course of explaining why “the so-called ‘mulct tax’” was indeed “germane to the general purpose of the act” in which it was situated, the Iowa Supreme Court set forth the necessary subordination of the mulct tax to Phelps law’s sales prohibition, which would be repeatedly suppressed by the cigarette industry and many law enforcement officials as well as by the press over the following 18 years:

It certainly was competent for the legislature under this head to designate those acts which, in its wisdom, should be forbidden as against public policy, and to include therein the traffic in cigarettes. In codifying these statutes the legislature found already upon the statute book the prohibition now carried into section 5006 (see Laws 26th General Assembly, chapter 96), and in carrying it into the Code amended it by adding thereto section 5007, providing for the mulct. That it was intended as an aid in suppressing and punishing violations of the provisions of the preceding section seems too clear for controversy. While called a “tax,” it is a “mulct” tax, and a mulct is “a fine imposed for an offense, a penalty.” See “Mulct,” Anderson, Law Dictionary, Ebersole, Law Dictionary, Century Dictionary. It is not even a form of license by indirection, for it contains no “bar clause,” but, on the contrary, expressly provides that it may be exacted in addition to the penalties named in section 5006. The end sought by both these sections is identical,—the suppression and prevention of the traffic in cigarettes. To use the language of the authorities to which we have referred, there is here a “unity of object,” and the mulct is manifestly an auxiliary to the end sought to be accomplished. It is not wholly, unlike those familiar enactments which provide for the punishment of a crime or misdemeanor, and unite them with provision for assessing further penalty or damages in a civil proceeding. Other instances of like legislation will readily suggest themselves in which a “tax” or “mulct” or “penalty” is provided as an additional weapon in the hands of the state for enforcing obedience to its commands.

The Marshalltown Evening Times-Republican was not waxing hyperbolic when it reported the same day that the court had “branded” the cigarette dealer’s attempt to escape liability under the original package doctrine a “fraud.” The ruling’s fiscal result was that, with eight or nine dealers “interested,” the county stood to gain about $5,000 in mulct taxes—if the U.S. Supreme Court upheld the Iowa Supreme Court. The newspaper was as expressly certain that the Trust would appeal as it was implicitly that the outcome would be payment of the tax

408 Cook v. Marshall County, 119 Iowa 384, 400 (1903).
409 Cook v. Marshall County, 119 Iowa 384, 400-401 (1903).
rather than enforcement of and compliance with the prohibition on sales.\footnote{“Cigaret Law Declared Valid,” \textit{ET-R}, Feb. 2, 1903 (3:2). See also “The Court’s Opinion,” \textit{ET-R}, Feb. 2, 1903 (7:2).} Not all commentators were so pessimistic. For example, the \textit{Davenport Daily Republican} advised “both male and female” “Davenport rollers of the naughty little tube” that the Court had held that “according to all common sense, the cigaret people will not sell original packages in Iowa.”\footnote{“Cigaret Mulct Upheld,” \textit{DDR}, Feb. 4, 1903 (7:2).}

In spite of the Iowa courts’ unequivocal rejection of its position, ATC sought review of the decision from the U.S. Supreme Court, on whose decision in \textit{Austin v. Tennessee}, issued barely two years earlier, the Iowa Supreme Court easily rested its opinion. Fuller and Parker’s protestation in their brief to the contrary notwithstanding that their contentions “do not involve an application for a rehearing of the \textit{Austin} case,”\footnote{Brief for Plaintiffs in Error at 5, \textit{Cook v. Marshall County}, 196 US 261 (1905).} the U.S. Supreme Court in 1905 characterized their main argument as “frankly addressed to a reconsideration of the principle involved in the \textit{Austin} case, and a reinsistence upon the position taken there.” Without explaining why it chose to accommodate the Tobacco Trust’s request for a second bite at the apple, the Court laconically observed: “We have carefully reconsidered the principle of that case, and...we have seen no reason to reverse or change the views expressed there.”\footnote{Cook v. \textit{Marshall County}, 196 US 261, 269-70 (1905).} Whether or not the Court’s purpose in taking the case was to put a definitive end to ATC’s interstate commerce-based legal machinations to subvert state police powers, its absolute refusal to deviate from its settled position apparently prompted the Trust to refocus on other stratagems for combating anti-cigarette legislation.

In their brief, Fuller and Parker had conceded that the difference between \textit{Cook} and \textit{Austin} was “small,” but insisted that “the distinctions and peculiarities” that produced the decision in the latter case “were themselves small.” What this small difference allegedly boiled down to was that in \textit{Cook} “it does not appear what means were adopted by the express company for its convenience in transportation—so far as appears, and therefore presumably, these packages were carried as any other express packages are carried, to wit, on the floor or in permanently attached receptacles of the express car....”\footnote{Brief for Plaintiffs in Error at 5, \textit{Cook v. Marshall County}, 196 US 261 (1905).} Why this further trivialization of the already nonsensical pseudo-constitutional original package doctrine should have prompted the Supreme Court to revisit the legality of the Trust’s shenanigans is unclear. It is also implausible that Fuller and Parker could have imagined that of all jurists Oliver Wendell Holmes, the only justice to have
replaced one who had voted against the Trust in *Austin v. Tennessee*, would have given the slightest credence to their threadbare claims.\footnote{In fact, the remaining justices voted just as they had in *Austin*, while Day, who replaced the dissenter Shiras, joined the majority, which was thus increased from 5 to 6.}

To furnish empirical support for their preposterous claim that “the unimpaired perpetuation and enforcement of [their conception of the original package] doctrine is essential to the maintenance of a National Commerce” and that “when occasions arise...for a change of conditions so as to give to the States a control in a limited way of this national subject, such change can be better made by Congressional action” than by the Supreme Court’s changing its mind about its own doctrine, Fuller and Parker asserted that, with regard to cigarettes, “it is very evident that there is no great popular demand for the regulation of their sale by the States....”\footnote{Brief for Plaintiffs in Error at 16-17, *Cook v. Marshall County*, 196 US 261 (1905).} In fact, in addition to the general anti-cigarette statutes that Washington, West Virginia, North Dakota, Iowa, Tennessee, and Florida had enacted from 1893 to 1899, alone between 1889 and 1903, at least one chamber of the legislature in at least 20 states (Alabama, Arkansas, California, Colorado, Delaware, Georgia, Illinois, Kentucky, Maine, Massachusetts, Minnesota, Mississippi, Nebraska, New Hampshire, Oklahoma, Pennsylvania, Texas, Washington, and Wisconsin had at least 39 times passed a bill embodying a general prohibition on selling or smoking cigarettes.\footnote{Presumably to mobilize support from other producers, ATC added that: “The Legislature that concludes that the sale of cigarettes should be prohibited need go but a little further to conclude that the sale of tobacco should be prohibited, and but a little further still to say that the sale of coffee is injurious to the citizens and should not be allowed.” *Id* at 18.} After boasting of the four federal decisions that had vindicated the Trust’s interstate commerce position by striking down the Washington, West Virginia, Iowa, and Tennessee laws from 1893 to 1897, ATC’s lawyers argued that “Legislatures might very well have thought that it would be impossible to prohibit the sale of cigarettes by dealers who imported them and then sold them in the original packages in which imported.” Even after the Supreme Court’s decision in *Austin*, which held that when cigarette packages “were shipped in a basket at least, they were no longer original packages and therefore entitled to no immunity...no State has seen fit to pass a statute forbidding the sale of cigarettes....”\footnote{Brief for Plaintiffs in Error at 17, *Cook v. Marshall County*, 196 US 261 (1905).} Apart from overlooking the law that the Oklahoma Territory enacted in 1901,\footnote{See above Table 1.} Fuller and Parker counted their chickens prematurely: within

---

\footnote{See below ch. 16.}
a few weeks of the Supreme Court’s decision in Cook, in the greatest outpouring of general anti-cigarette legislation yet, Indiana, Nebraska, and Wisconsin enacted general anti-cigarette statutes, while Oklahoma enacted a stronger version of its aforementioned law. As even the tobacco trade press was constrained to admit, the U.S. Supreme Court had made rather short shrift of the Trust’s argument, which the Court characterized as “the same as that which was pressed upon our attention” in Austin. There the Court had viewed the method of shipment as “merely a convenient subterfuge for evading the sale of cigarettes within the State,” and the fact that the only difference between the cases lay in the Court’s being “left to infer” that loose cigarette packages “were shoveled into and out of a car, and delivered to plaintiffs in that condition” rather than in a basket could scarcely generate a different appraisal. The Court continued to reject the Trust’s claim that the governing circumstance should be the “actual” package in which cigarettes were shipped, whereas the motives that prompted that type of shipment or the “fact that ordinary importations of cigarettes were made in boxes containing a large number of these so-called original packages” were irrelevant. 

While it is doubtless true that a perfectly lawful act may not be impugned by the fact that the person doing the act was impelled thereto by a bad motive, yet where the lawfulness or unlawfulness of the act is made an issue the intent of the actor may have a material bearing in characterizing the transaction. [W]here the lawfulness of the method used for transporting goods from one State to another is questioned, it may be shown that the intent of the party concerned was not to select the usual and ordinary method of transportation, but an unusual and more expensive one, for the express purpose of evading or defying the police laws of the State. If the natural result of such method be to render inoperative laws intended for the protection of the people, it is pertinent to inquire whether the act was not done for that purpose, and to hold that the interstate commerce clause of the Constitution is invoked as a cover for fraudulent dealing, and is no defense to a

---

420See vol. 2.
421Oklahoma made it a misdemeanor “to sell, or to bring into the Territory for the purpose of selling, giving away or otherwise disposing of, any cigarettes, cigarette paper or substitute for the same...” 1901 Okla. Laws ch. 13, art. 4, § 1 at 111.
422“Iowa’s Anti-Cigarette Law Upheld by the U.S. Supreme Court in a Rather Sharp Opinion,” USTJ, vol. 54, Jan. 21, 1905 (8). The local Marshalltown paper also captured the spirit of the opinion in an above-the-fold front page article: “The Iowa Cigaret Law Is Upheld,” ET-R, Jan. 16, 1905 (1:1).
prosecution under the state law.

... While this court has been alert to protect the rights of nonresident citizens and has felt it its duty, not always with the approbation or the state courts, to declare the invalidity of laws throwing obstacles in the way of free intercommunication between the States, it will not lend its sanction to those who deliberately plan to debauch the public conscience and set at naught the laws of a State. The power of Congress to regulate commerce is undoubtedly a beneficent one. The police laws of the State are equally so, and it is our duty to harmonize them. Undoubtedly a law may sometimes be successfully and legally avoided if not evaded, but it behooves one who stakes his case upon the letter of the Constitution not to be wholly oblivious of its spirit. In this case we cannot hold that plaintiffs are entitled to its immunities without striking a serious blow at the rights of the States to administer their own internal affairs.425

The Marshalltown Times-Republican immediately understood that the Court’s decision was “one of the most important...affecting the cigaret business in Iowa that has ever been handed down....” Moreover, in the wake of the decision, “other counties where similar actions might have been brought, will make attempts to secure mulct taxes from dealers.”426 (According to the records of the treasurer of Linn County, in which Cedar Rapids, the state’s fifth largest city was located, “only one concern...has sold any cigarettes since the new Iowa law was adopted [in 1897]” and that firm was “not worrying about” the U.S. Supreme Court decision because it had been paying the mulct tax. The suggestion by the press that the other dealers who had been selling “‘coffin sticks’” would “probably save themselves needless annoyance by...settling on the basis of $300 a year” indicated that county officials were unlawfully treating the mulct tax as a license to violate the Phelps law’s ban on selling cigarettes rather than as a penalty.)427 And although all of the affected merchants in Marshalltown had “discontinued the cigaret business long ago,...the taxes dating from the time they began, until they quit the business”—and totaling some $8,000 to $9,000—were now “made collectible.”428 In fact, about a month later the American Tobacco Company entered into a partial settlement agreement with Marshall County and paid $7,321.50 on behalf of the dealers (including Cook) whom it had contracted to hold harmless. In dispute were the last 40 days of the last quarter of 1901 when the protectees had stopped selling cigarettes on the advice of the Trust, which, despite its public bravado, “was not willing to take any more chances” in view of

427“Must Dig Up Now on Cigaret Tax,” CREG, Jan. 17, 1905 (7:3).
the “adverse legislation” and decisions in the pending cases that it foresaw. Ultimately the Marshall County supervisors remitted that part of the tax, but required ATC to pay the $566.72 for the rest of the quarter, bringing the grand total to $7,888.22.429

Nor was this denunciation of the Tobacco Trust’s underhandedness the U.S. Supreme Court’s last word on the subject. On the same day (January 16, 1905) it handed down another decision destroying ATC’s last nationally prominent legal ploy attacking the validity of Iowa’s mulct tax, this time on grounds other than interstate commerce.

Mrs. J. Tabor, who owned a house suited to the tobacconist business in the business center of the Mississippi River town of Muscatine, rented it to R. E. Hodge for operating such a business.410 On November 15, 1900, Tabor and Hodge filed a petition in equity in state district court alleging that the only cigarettes Hodge sold were sold in original packages shipped from out of state by ATC in exactly the same manner as alleged in Cook, and that consequently the mulct tax as the county sought to enforce it against Hodge and Tabor was void as an unconstitutional attempt to regulate interstate commerce, entitled plaintiffs to bypass filing an application with the county board of supervisors for a remission of the tax and to seek injunctive relief from the court against assessment and collection of the mulct tax.431

Interestingly, almost eight months earlier, the city assessor, while making his

429“Partial Settlement Is Effected,” ET-R, Feb. 23, 1905 (7:3); “Cigaret Mulct Tax Remitted by Board,” ET-R, Mar. 9, 1905 (7:2) (quote). See also “Pay Big Tax for Cigarettes,” Waterloo Daily Reporter, Feb. 24, 1905 (3:1); “News From All Over the State,” WC, Mar. 10, 1905 (8:4). Nevertheless, in June the county treasurer reported that he had collected (only) $6,246.42 in cigarette tax for the period between Jan. 1 and June 1, 1905. “County Affairs,” Reflector (Marshalltown), June 24, 1905 (1:5) (Proceedings of the Board of Supervisors, June 6). The Marshall County Board of Supervisors rejected the claim of County Attorney F. E. Northup, who had represented the county, for $500 in fees in collection of the cigarette tax “on the grounds of his drawing regular salary covering county cases.” Id. (Proceedings of the Board of Supervisors, June 6). An additional $650 was assessed individually against three dealers whom ATC had not agreed to protect. The first and third articles stated that the year in question was 1900. The county treasurer’s semi-annual report for the second half of 1905 included no entry for a cigarette tax. “County Affairs,” Reflector (Marshalltown), Jan. 28, 1906 (1:6, 7:4-7 at 5).

430Transcript of Record at 1, Hodge v. Muscatine County, 121 Iowa 482 (1905). An additional $650 was assessed individually against three dealers whom ATC had not agreed to protect. The first and third articles stated that the year in question was 1900. The county treasurer’s semi-annual report for the second half of 1905 included no entry for a cigarette tax. “County Affairs,” Reflector (Marshalltown), Jan. 28, 1906 (1:6, 7:4-7 at 5).

431Transcript of Record at 1-4, Hodge v. Muscatine County, 121 Iowa 482 (1905).
rounds on March 31, had informed tobacco dealers, grocers, and news-stand owners that the $300 annual mulct tax would be assessed against all cigarette sellers. The local press reported that the notice had come “as a surprising revelation to a majority of those selling the tissue paper poison, as they were not aware that the law provided for such a mulct.” Although dealers were apparently even more ignorant of the fact that the law also absolutely prohibited the sale of cigarettes regardless of whether they paid the tax, the financial deterrent sufficed: “All the dealers in town have decided to no longer handle the coffin nails in future and believe that the absence of cigarettes will create a larger demand for cigars, in the sale of which there is a larger margin of profit.” In contrast to the situation in Davenport, where the assessor decided to ignore the law, the alleged “unconstitutionality ha[d] not permeated the grey matter of the officials of Muscatine county.”

Four days later, a Dr. Wallace Struble of Chicago spent the whole day in the Muscatine city schools instructing pupils in the evils of cigarettes. That evening he gave a lecture, also attended by children, during which he expressed his understanding that “the officers of this city were now after the violators of the anti-cigarette law.” In order to reinforce his message that “[c]igarettes were invented by the arch enemy,” Struble horrifyingly recounted the (urban-mythical) manufacturing process, which involved 2,000 six- to 14-year-old “gutter snipes” in Chicago, whose parents hired them out to Italians, who required them to hunt out three pounds of partly smoked cigars and cigarettes out of the gutter, punishing those who failed to meet their daily quota. This “practical slavery right under the eye of the eagle” produced 6,000 pounds a day just in one city. Struble continued in the graphic mode: “This old cigar which has been puffed by a man who has not cleaned his teeth in many years, who has catarrh, consumption and cancer, is ground up into material for cigarettes and snuff and sent out to spread disease or death.” The story sufficed to impel 135 of Muscatine’s school children the next day to hold a mass meeting at the YMCA to organize a boys’ and girls’ Anti-Cigarette League Juniors No. 1, who were already “keeping their

---

432 “Abandon the Trade,” MDN-T, Apr. 1, 1900 (1:4) (copy furnished by Merle Davis).
433 “Will Not Assess Cigarettes,” EJ, Apr. 5, 1900 (1:4) (reprinted from Davenport Times) (copy supplied by Merle Davis).
434 “‘Burning Brains,’” MDN-T, Apr. 4, 1900 (1:4-5) (copy furnished by Merle Davis).
435 See also “Against the Cigarette,” EJ, Apr. 4, 1900 (4:5) (copy furnished by Merle Davis). Rev. Struble, who was the national vice chairman of the Federation of Young People’s societies, had given this talk many times in many places. Katharine Kinsey, “Fighting Deadly Cigarette,” Davenport Republican, June 9, 1901 (16:3-5 at 4); “Cigarettes from Cigar Stubs,” NYT, Aug. 27, 1899 (4).
The 1897 Mulct Tax Amendment

eyes open for violators of the law...."435

Dealers may have been stopped in their tracks by the city assessor’s announcement, but within a few days their “general opinion” was that the mulct tax was unconstitutional as applied to cigarettes in the original package.436 Although many dealers in Muscatine had “rejoic[ed]” over Judge Bishop’s decision in favor of their confreres in Des Moines, the Muscatine press suspected that the U.S. Supreme Court decision issued on April 9, 1900, affirming the Illinois Supreme Court’s decision upholding the validity of a Chicago ordinance prohibiting the unlicensed sale of cigarettes,437 would be “more binding” than that of a Polk county judge and “the local dealers would have to shell out with their $300.”438 Undeterred, one of ATC’s agents, claiming that the Chicago case was irrelevant because it involved an ordinance rather than state law, traveled to Muscatine to “get them to handle the article even if the laws of the State do say that a mulct of $300 must be paid by all such dealers.” And succeed he did, at least with several merchants, despite the fact that some Muscatine city officials differed with the Davenport press as to the statute’s constitutionality so that the parties appeared to be heading for a test case. At the same time, the weakness of the local unit of the Anti-Cigarette League was visible in its judgment that it scarcely mattered whether the mulct tax was collected or not because cigarettes would still be sold one way or the other, especially since the group’s focus was not on suppressing the traffic but in getting boys and young men to reject cigarettes. How the organization imagined achieving the latter without the former is difficult to reconstruct when seven dealers handling cigarettes in Muscatine and selling thousands of packages would probably accept the backing of ATC, which had dealers “in almost every town in the State” who also did not pay the mulct tax.439

The Tobacco Trust’s success in making cigarettes available statewide in spite of “a most drastic law” prohibiting their sale paradoxically also ran counter to the wishes of the regular tobacco dealers themselves, who “with real thankfulness” had initially discontinued their sale when the law had first gone into effect. But once ATC had devised its original package litigation strategy, it set in motion competitive forces that dealers, as exemplified in Burlington, were unable to hold at bay: “The fruit stands first took up the sale, supplying a certain class of trade,

435“Form Two Leagues,” MDN-T, Apr. 5, 1900 (1:1) (copy furnished by Merle Davis).
436“The Cigarette Law,” EJ, Apr. 6, 1900 (8:5) (copy furnished by Merle Davis).
437Gundling v Chicago, 177 US 183 (1900), aff’g Gundling v City of Chicago, 176 Ill 340 (1898). See above ch. 6.
438“Against Cigarettes,” EJ, Apr. 12, 1900 (7:3) (copy supplied by Merle Davis).
439“About Cigarettes,” EJ, Apr. 13, 1900 (7:3) (copy supplied by Merle Davis).
and then a cigar dealer was induced to take a stock of the pernicious articles. This made it necessary for the other dealers to take cigarettes in their stock, and the result was that again the unhealthful ‘coffin nails’ are in every store where tobacco is sold,” even though not a dealer in town had a “commendatory word to say for cigarettes, as all realize their harmful properties.” Because the more profitable cigar and pipe tobacco business immediately declined, aggregate trade profits fell, prompting “some talk among dealers of signing an agreement not to sell cigarettes,” but a combination of the “original package’ decision” and ATC’s offer to protect dealers arrested for selling is commodities.440

However, despite the Struble-inspired zealotry, and despite the fact that by the end of July it had become “generally known” that cigarette sellers were subject to an annual $300 tax, the owners of the buildings in which “these coffin nails” were sold were “astonished” to receive notices from the country treasurer that they were co-liable for the quarterly mulct tax due in a few days. Although the press predicted that the owners would be “compelled to ante up graciously or otherwise,”441 later in the year the dealers were back in business. The reason for the recidivism in Muscatine appears to have been the lack of a basis for collective action. During the spring of 1900, the assessor, A. C. Begey—who was also a charter member of the Cigar Makers’ Union in a city in which virtually all the cigar factory owners supported enforcement of the anti-cigarette law—found in speaking to every cigarette dealer in Muscatine that all but one agreed to stop selling:

“[I]f it were not for that one, there would not be a cigarette sold in the city to-day. When he would not quit two more dealers began again, so now there are three dealers in Muscatine handling cigarettes contrary to law. Cigarettes were previously sold in seven places. ... That which brought the policy to a head last fall when I visited the different places of sale was that many tobacco dealers did not care to violate the law and did not want others to. ... The majority wanted all to quit or none. ... The one who would not quit said he was in it for the money and that the cigarette factories were backing him. They are also backing the other two. The concern which is backing these cigar dealers is the American Tobacco Trust, which is the largest in the world. The mulct law will be enforced or the supreme court will have to declare it unconstitutional. ... Either all shall have the privilege to sell or all shall quit.”442

That at least some segment of the residents of Muscatine must have nourished

---

441 “They Are Hard Hit,” MDN-T, July 29, 1900 (1:1-2) (copy furnished by Merle Davis).
442 “Want It Enforced,” MDN-T, Aug. 3, 1900 (1:4-5) (copy furnished by Merle Davis).
an acute animus against cigarette smoking was reflected in this advertisement which appeared in October 1900 in the local paper:

No Cigarette Smoke
Annoys you at the elegant
Hotel Grand Barber Shop

On November 19, 1900, the same day that the U.S. Supreme Court issued its decision upholding, on interstate commerce grounds, the constitutionality of the Tennessee anti-cigarette law, the district court judge in Muscatine granted the temporary injunction restraining Muscatine County from collecting the mulct tax. Some local dealers had stopped selling cigarettes when they heard that the county would collect the tax, “but others relying on the promise of the tobacco firms continued and as it is [al]most time for the mulct tax to be paid an attorney has been in the city, representing the American Tobacco Company....” The Trust had “backed local dealers in disregarding the anti-cigarette law, claiming that it interferes with the interstate commerce law [sic].”

The county denied that Hodge had sold cigarettes in original packages; rather, the packages “were a mere subterfuge to enable...Hodge...to retail, in violation of the police laws of Iowa, a commodity decided by the legislature and shown by experience be detrimental to health and good morals.” State district judge William F. Brannan ultimately sustained the defendant’s demurrer and entered judgment against ATC’s puppets, whose ATC lawyer, Dunshee, appealed the
decision to the Iowa Supreme Court. ATC’s brief was notable for openly admitting the undeniable fact that the mulct tax was not a license because it not only did not permit the payors to engage in the taxed occupation, but expressly declared that payment did not bar prosecution. In addition, the Trust was forced to concede that: “No one familiar with the history of the act can doubt that its sole purpose was to place additional burdens on the cigarette business, and make it still more difficult to engage in it.” That Parker must have realized the frivolous nature of the whole action was revealed by the absurd argument that he concocted to support the bizarre claim that the procedure set out in section 5007 was “arbitrary,” constitutionally “unknown,” and “revolutionary.” Asserting that “necessity justifies many innovations, many practices which verge on tyranny,” he then, risibly, appealed to “the common people,” who “hate cordially any technical and dangerous practice” and “tolerate our taxation methods only because they realize that they are justified by overruling necessity, the impossibility of maintaining government without prompt collection of its revenues....” Having allegedly aligned the Tobacco Trust with the People, Parker then tried to show that “overruling necessity” did not apply to cigarette mulct tax revenues because they made up “a very inconsiderable part” of the general tax funds, adding, preposterously, that they “grow out of an extraordinary condition of facts and cannot be relied upon as a steady source of income. They are rather an extraordinary and to some extent an unexpected addition to the ordinary revenue.” In light of the extraordinary growth in cigarette sales—which had been temporarily halted by laws like Iowa’s—the explosive growth to come, and the Trust’s own decisive contribution to dealers’ violations of the sales ban and refusals to pay the mulct tax, ATC’s bathetic plea on behalf of “the citizen” that “the rights his fathers fought for be not ruthlessly trampled upon by an inconsiderate legislature” was so outrageous that the Iowa Supreme Court, once again, made little effort to disguise its impatience with the plaintiffs’ contentions.

By the time the case was argued, the Trust had ceased to press the interstate

449 Transcript of Record at 8, Hodge v. Muscatine County, 121 Iowa 482 (1905). According to “May Appeal to Supreme Court, MDN-T, Dec. 24, 1901 (1:1) (copy furnished by Merle Davis), the demurrer that Brannan sustained set aside a temporary injunction restraining levying the tax.

450 Appellants’ Argument at 28, Hodge v. Muscatine County, 121 Iowa 482, 486 (1903).

451 Appellants’ Argument at 17, Hodge v. Muscatine County, 121 Iowa 482, 486 (1903).

452 Appellants’ Argument at 28-29, Hodge v. Muscatine County, 121 Iowa 482, 486 (1903).
commerce claim raised in its petition, presumably, as the court supposed, because its intervening decision in *Cook v. Marshall County* had held it to be without merit. So threadbare had the Tobacco Trust’s arguments worn that Junius Parker could not prevail in this sideshow even against an opponent that did not bother to make an appearance.

Plaintiffs’ objections to the mulct tax were all focused on the central claim that they amounted to a taking of property without due process of law. The chief objection to section 5007 of the Code was that it failed to provide for notice to the dealer or the property owner. Subsidiarily, they maintained that: the measures for enforcing and collecting the tax were not adapted to the criminal nature of the penalty; seeking to enforce a criminal penalty by means of the state’s taxing machinery was “revolutionary, and contrary to the established principles of justice”; and the principles embodied in section 5007 were “arbitrary, unusual, and unknown to ‘the law of the land’....” The basis of the Trust’s attack was the cigarette mulct tax’s peculiarity that paying it—unlike the liquor mulct tax—did not bar prosecution for violating the underlying sales prohibition. Although Iowa Supreme Court precedent had already established that liquor and cigarette sellers needed no notice of assessment or levy of the tax because the tax was specific and operated in the same manner on all sellers, the amount was fixed, and there was no need for any further inquiry or determination, ATC argued that it was raising a new question in that the property owner who was not engaged directly in the unlawful selling was entitled to notice before the tax was levied.

The court addressed and disposed of this claim by examining the nature of the mulct tax:

It is clearly not a license, for it does not grant permission to do an act which, without such permission, would be invalid. ... It is manifestly a tax upon the traffic which the legislature saw fit to impose, not for the purpose of giving countenance to the business, but as a deterrent against engaging therein. It confers no right, but imposes an impediment to the transaction of the business. It is clearly a tax on that business, levied to meet the burdens imposed upon the general public by what is thought to be the result upon the human race, and particularly upon children, of the use of cigarettes. Indemnity and

---

453 Hodge v. Muscatine County, 121 Iowa 482, 486 (1903).
454 Hodge v. Muscatine County, 121 Iowa 482, 486 (1903). Plaintiffs’ arguments were set out in Writ of Error to the Supreme Court of Iowa, Transcript of Record at 19-23, Hodge v. Muscatine County, 121 Iowa 482 (1903).
455 Hodge v. Muscatine County, 121 Iowa 482, 487 (1903).
456 Hodge v. Muscatine County, 121 Iowa 482, 488 (1903).
The 1897 Mulct Tax Amendment

protection to the public against evils resulting from the nature and character of the business is the central thought. It also partakes of the nature of a police regulation, but it is not to be wholly so regarded. Indeed, we think it may be fairly said to be a tax upon the business. That a tax is imposed for the double purpose of regulation and revenue is no reason for declaring it invalid. ... Being a tax, it was competent for the legislature to prescribe the proceedings and processes for its collection. From the beginning the people of this country have collected taxes through administrative officers, and there has been no suggestion that ordinary judicial processes were necessary to meet the constitutional guaranty of "due process of law."\textsuperscript{457}

Because summary process was necessary to insure prompt payment of the tax, the court found that the statute was not arbitrary.\textsuperscript{458}

The Republican Des Moines Capital opined that it would have been unreasonable for the court to rule otherwise because, after all, cigarettes bore "a similar relationship to the moral and physical well being of the community" as alcohol and should there "be treated accordingly." Consequently, it predicted that the decision "will give very general satisfaction."\textsuperscript{459}

Fuller and Parker’s arguments met with no greater success before the U.S. Supreme Court. Accepting, for the purposes of the case, the Iowa Supreme Court’s conceptualization of the mulct tax, the U.S. Supreme Court admitted that it was not easy to distinguish a tax from a penalty, but insisted that it could not "go far afield in treating it as a tax" since the statute called the assessment a tax, provided proceedings appropriate for collecting a tax rather than a penalty, and did not contemplate criminal prosecution. The Court found it "entirely clear" that no notice of the assessment or levy was required as to the person actually selling cigarettes; and if sidewalk and sewer taxes could be made liens on the affected property, it saw no reason why the legislature lacked the power to do the same with the mulct tax, especially since the owner was chargeable with knowing what business was being conducted on her property and that the latter might become encumbered by a tax on that business. The Court did concede that the landowner was entitled to notice before she could become personally liable, but observed that the statute itself protected her by entitling her to apply to the county board of supervisors for a remission of the tax and to appeal an adverse decision to district court.\textsuperscript{460}

\textsuperscript{457}Hodge v. Muscatine County, 121 Iowa 482, 488-89 (1903).
\textsuperscript{458}Hodge v. Muscatine County, 121 Iowa 482, 492 (1903).
\textsuperscript{459}“Cigarette Mulct Law Valid,” \textit{W.C.T.U. Bulletin} 9(2):[1] (Feb. 1904) (reprinted from \textit{Des Moines Capital}).
\textsuperscript{460}Hodge v. Muscatine County, 196 US 276, 279-81 (1905). The Court faulted the landowner, who alleged that she had not known of the sale of cigarettes on her premises,
The 1897 Mulct Tax Amendment

Thus by mid-January 1905, the Trust’s constitutional obstacles having, after 12 years of almost continual state and federal litigation, been swept aside, the states were now free to enact general anti-cigarette laws without running afoul of interstate commerce restrictions. Almost immediately the legislatures of Indiana, Wisconsin, and Nebraska, overcoming what now became ATC’s favored legal strategy—bribery—exercised that freedom.461

The Cigarette Mulct Tax in Operation: 1898-1921

The cigarette people, which means that American Tobacco Company, is trying, through its agents, to get the boards of supervisors in the several counties to remit the tax on the little coffin nails they are distributing among the Iowa school boys. Some months ago they attempted to shut up the mouths of the country press of Iowa as used against this [sic] little devils, the intimation being that fat advertisements would be withdrawn otherwise. The contract was framed with a view to such a countermand. But the Iowa press thought more of the children than the ads, and lost the latter. Now their seductions are transferred to the County Boards.462

The Iowa anti-cigarette law is constitutional—so says the United States supreme court. The American Tobacco Company tried to have this law “knocked out” but the supreme court of the nation says not. If dealers throughout the state would live up to the provisions of the law it wouldn’t be a great while before cigarettes would go out of style entirely in this state.463

Enforcement of the mulct tax during the pendency of the Cook v. Marshall County and Hodge v. Muscatine County litigation appears, according to press accounts, to have waned (though the tax data from Scott and Polk counties do not bear out that trend).464 The Evening Gazette reported in March 1902 that the fact that during the few months cigarettes had been sold in Cedar Rapids and other towns of Linn County “openly...in bold violation of the law” had prompted “some of the best known religious workers” in that city to undertake “another systematic effort” to put an end to the sale of cigarettes countywide by gathering sufficient evidence to secure indictments. Bizarrely, the dealers allegedly would “shed no

461See vol. 2.
462Boone Standard, Apr. 15, 1899 (3:2) (untitled) (copy furnished by Merle Davis).
463Oxford Mirror, Jan. 26, 1905 (2:4) (untitled edit.).
464See below.
tears” because a majority of them “despise the filthy ‘coffin nail.’” The motivating factor behind this project, according to one of its participants, was the noticeable increase in cigarette consumption in Cedar Rapids in the previous few months, while the law was not being observed at all. Moralistic-aesthetic dimensions predominated among this anti-cigarette movement’s aggressively articulated concerns about visual and olfactory exposure to first-hand smokers and second-hand smoke, respectively:

“Little boys, big boys and young men, by the score, are to be seen in public places every day with the vile and offensive cigarette between their teeth. Just look at the gang that assembles in front of Greene’s opera house after any evening performance. The air is so filled with the smoke that decent people are compelled to hold their breath. Why the police allow this practice to continue is more than I can understand. The cigarette-sucking fiends not only blow their smoke in the faces of people, but stand to ogle the ladies. We mean business now, and we don’t care who is hit. If the authorities cannot see that the law is enforced we will take the necessary steps and call the attention of the courts to the dereliction of the officers.”

Since no Iowa law prohibited cigarette use let alone smoking in public, even by minors, but only the sale of cigarettes, it is not clear what legal basis the police would have had to break up outdoor public group smoking. If the cigarettes had been lawfully acquired outside of Iowa and imported individually by the smokers themselves, then clearly no legal basis would have been available for action—other than a highly refined notion of nuisance law, which presumably far transcended the jurisprudential sensibilities of the day.

The following year, the WCTU in Council Bluffs planned a crusade against the selling of cigarettes in Iowa’s fifth biggest city that was to begin by trying to induce each seller to stop by means of moral suasion. If that avenue failed, the organization proposed to “invoke the strong arm” of the Phelps law. Spurred, perhaps, by this initiative, Georgia McClellan, the president of the non-partisan Iowa WCTU, asserted that “[t]he public generally is getting interested against the sale of cigarettes.” Seven years after enactment of the law, she reminded the membership in her monthly letter that: “It will be no trouble to settle this question as the Code of Iowa prohibits the sale of cigarettes...and provides a penalty....”

By mid-1903 the Cedar Rapids Evening Gazette classified the laws

465“After the Cigarette,” CREG, Mar. 21, 1902 (6:1).
466“After the Cigarette,” CREG, Mar. 21, 1902 (6:1).
prohibiting the sales of tobacco to minors and “[r]egulating the sale of cigarettes and imposing a special tax” alongside those banning prostitution, fighting dogs, obscene literature, and the sale of firearms to minors among Iowa’s many dead-letter laws, the violation of which could be observed almost daily in almost any community. 469 The statute banning the sale of cigarettes was apparently so dead that the paper transmogrified it into a mere sales regulatory scheme. Yet just a few months later, after the Iowa Supreme Court had upheld the mulct tax law in the Hodge v. Muscatine County, the Iowa State Press opined that it was “altogether probable that some steps may be taken soon in the direction of enforcing its collection.” 470

A considerably more impressive mobilization of public opinion was the reaction in Waterloo at the beginning of January 1905, a few days before the U.S. Supreme Court handed down its Iowa mulct law decisions, to what turned out to be a false press report—stemming from a local city official471—that for the first time a tobacco dealer there had “decided to take out a license for the sale of cigarettes.” The Waterloo Courier may not have understood that the mulct tax was not a license entitling the payor to sell cigarettes, but it probably stuck closer to reality in stating that only in a few cities were such licenses issued, Des Moines itself being able to boast of only four or five. And even if it took an absence of “licenses” for an absence of sales in other cities, presumably the newspaper knew what it was talking about, at least in Waterloo, when it asserted that it was “next to impossible to get cigarettes or even cigarette papers in most of the cities unless they should be given away.” 472 Unsurprisingly, the news immediately “aroused bitter opposition” by the WCTU, which, together with ministers and others, sought to mobilize public opinion against “legalizing...the sale of these little ‘coffin nails’ in Waterloo”—though if any organization, the WCTU should have known that paying the mulct tax could not legalize selling. On the first Sunday following the news revelation all the city’s ministers intended to “preach against the cigarette evil....” 473 On the first Saturday, a resolution was adopted by those in attendance at the YMCA which, declaring that cigarette smoking was a “race suicide more potent that any other evil except drunkenness” and that the WCTU, “representing the conservers of society and the home,” emphatically protested against licensing, called on “all organizations and individuals who stand for religion, purity, morality, civic prosperity, intelligence, or [sic] health of mind to

470“Enforcing Collection,” ISP, Nov. 16, 1903 (3:2).
473“Arouses the Public,” WC, Jan. 5, 1905 (7:4).
The 1897 Mulct Tax Amendment

unite with us in arousing public sentiment to prevent the threatened evil.”

After hearing its minister discuss the matter, the congregation of the Congregational church in Waterloo, as unaware as the WCTU that the mulct tax in no way licensed the sale of cigarettes or exempted the payor from liability under the Phelps law, adopted a resolution protesting against any firm’s securing a cigarette sales license on the grounds that cigarette use, “especially by boys,” tended to “undermine the health, becloud the intellect, and degrade the morals...” Whether the antis succeeded because or despite the fact that in this instance the WCTU’s rhetoric was especially formulaic and ossified, a few days later a cigar maker published a notice/advertisement on the front page of the Waterloo Daily Courier denying rumors that he was the one who had been thinking of “taking out a license” to sell cigarettes: he was, in fact, “too busy” making cigars “to think of handling cigarettes,” and as a kind of shtick continued to advertise that “I am not going to handle cigarettes....”

The day after the U.S. Supreme Court had issued its decisions upholding the mulct tax in Cook and Hodge, the Des Moines Register and Leader commented that although no estimate was available on the total mulct tax on cigarette dealers affected by the decisions, “[e]very town in the state of any size has one or more dealers in cigarettes,” with half a dozen in Des Moines paying it. The next day even a Nebraska newspaper reprinted a report from Des Moines, under the headline, “Invincible Cigarette Still Doing Business,” that they had not affected sales in Iowa because the “cigarette companies” had been paying the tax since the state courts had held them invalid:

Thousands of dollars are paid into the county treasuries on this account, though the amount of the tax is such that only a few dealers in each city have been willing to undertake the payment of the $300 for the privilege of reaping a year’s profits off the sale of “coffin nails.” Des Moines has but four dealers who pay the tax and are licensed to sell the cigarettes. Smaller towns have but one or two licensed dealers. Those who roll their own “pills” have constantly increased in number therefore since the tax went into effect.

The tobacco trust has made some kind of an arrangement whereby it helped bear the tax of favored dealers but even then it has suffered a heavy loss in business. The tax has

---

476 “Protest Adopted,” WC, Jan. 9, 1905 (4:2).
477 “‘Coffin Nails, Nit,’” WDC, Jan. 12, 1905 (1:2). George W. DeWald, Jr. was already returned at the age of 17 at the population census of 1900 as a cigar maker.
479 “Cigarette Law Is Held to Be Valid,” DMRL, Jan. 17, 1905 (10:3).
always been paid under protest and the trust’s attorney, F. S. Dunshee of this city, felt confident that the supreme court would...declare the Iowa law unconstitutional. ... The effect of the decision will not be apparent, therefore. Cigarettes will continue to be sold in this state under exactly the same conditions as before.480

In spite of the article’s fundamental error of characterizing the tax as a “privilege” tax licensing payors to sell and profit from cigarettes, it may have called attention to the important fact that the tax was apparently also serving its deterrent purpose by significantly reducing sales (“heavy loss in business”).

It is difficult to reconstruct how strictly the cigarette mulct tax was enforced between 1897 and 1921, when the legislature transformed its function within the new cigarette license law that repealed prohibition.481 The lack of data is ambiguous because it is unclear whether it resulted from a failure by counties to collect the tax, or merely to report and publish the data, or (most importantly) the absence of sales resulting from a lack of demand, voluntary dealer compliance,482 or local government suppression. Since the tax might have constituted a welcome supplement to local government revenues in smaller towns or counties, it seems plausible to assume that such entities would have been willing to collect the cigarette mulct tax had sales in fact been taking place.

A deeper ambiguity also inhered in the counterintuitive structure of the law, which required those who were violating the law by selling cigarettes to come forward and identify and call attention to themselves to the county assessor, thus insuring the imposition of a tax in addition to the risk of the penal fine—for the privilege of self-incrimination. The fact that any sellers at all—other than those prompted by ATC to challenge the validity of the tax—did pay the tax would be puzzling in its own right but for the bizarre ‘misinterpretation’ by many local officials (as well as sellers and newspapers) that the mulct tax was a license fee rather than a penalty. To be sure, exactly the same structure characterizes a late-twentieth-century statutory innovation in many states, including Iowa: requiring dealers in illegal drugs to pay a tax for a stamp to be affixed on the illegal drug, payment of which “does not provide in any manner a defense...to or immunity for

480“Invincible Cigarette Still Doing Business,” LEN, Jan. 18, 1905 (6:2). The identical article was published as “Coffin Nails Still on Top,” WC, Jan. 18, 1905 (4:3-4).
481See below ch. 15.
482On October 3, 1897, two days after the mulct tax had gone into effect, in an effort to “see what effect the young and stringent law would have on cigarette smokers,” a “representative” of the Cedar Rapids Evening Gazette “lingered about” a place that had formerly sold cigarettes for an hour, observing numerous smokers unsuccessfully trying to buy cigarettes or wrappers: “All [dealers] seemed to be content to wait until a test case under the new law had been brought.” “Cigarettes Out,” CREG, Oct. 4, 1897 (8:1).
The 1897 Mulct Tax Amendment

a dealer from criminal prosecution pursuant to Iowa law.”

Virtually no drug dealers buy the tax stamp, but, the state of Iowa, using the law as a way of taxing the underground economy, collects significant sums from arrested drug dealers who had not paid it. This statute clearly does not signal state acquiescence in illegal drug sales.

In contrast, at least at times in the larger cities, payment of the cigarette mulct tax prompted local officials erroneously to regard the sellers as relieved of liability under the 1896 prohibition law, as if the tax were a streamlined mandatory statewide version of the liquor mulct tax dispensing with the need of a local option vote or city council action. (This outcome lacks the subtlety that legal philosopher Lon Fuller was seeking to capture when he characterized a statute as “a process of becoming. By being reinterpreted it becomes by imperceptible degrees something that it was not originally.”)

This misconception was nicely captured by the Des Moines Leader’s confused and incorrect report in November 1897 that the “old Phelps prohibitory law is still in force, and dealers are selling now under a mulct rider.”

Similarly, of a dispute in Davenport in 1903 over whether one Reinhardt Vogel was selling cigarette papers without paying the tax the press reported: “There is a heavy license demanded by the state for the selling of cigarettes and cigarette papers and there has [sic] been two cigar stores in the city that have been paying the tax. Frequent complaints have been made that several saloons were selling cigarettes or tobacco and cigarette papers who have not been paying the tax.”

But some dealers did pay the license fee and did so publicly with the manifest intent to sell cigarettes and not, in accord with the statute’s remarkable deterrent structure, to reinforce their own compliance with the prohibition on sales. Thus,

---

484 Miranda Leitsinger, “Iowa Touts Illegal Drug Stamp Tax,” AP (June 2, 2003), on http://cannabisnews.com/news16/thread16503.shtml (visited Nov. 2, 2006). Interestingly, if a drug dealer actually went to the Iowa Department of Revenue and bought a stamp to put on illegal drugs, the department would not notify the authorities. Id. The law provides that “the director or an employee of the department shall not reveal any information obtained from a dealer; nor shall information obtained from a dealer be used against the dealer in any criminal proceeding, unless the information is independently obtained, except in connection with a proceeding involving taxes due under this chapter from the dealer against whom the tax was assessed.” Iowa Code § 453B.10 (2006).
485 Lon Fuller, The Law in Quest of Itself 10 (1999 [1940]).
486 “Competition in Coffin Nails,” DML, Nov. 3, 1897 (8:3).
487 “Has Trouble in Davenport,” ISP, Apr. 3, 1903 (4:5-6) (reprinted from Davenport Leader).
as early as October 10, 1897, just ten days after the mulct tax law had gone into effect, the Des Moines press reported that Marco Chiesa, “the well-known saloon man, will pay the $300 tax and commence the sale of cigarettes...in a few days. He intends to charge 10 cents a package, which will yield him a profit of 100 per cent; and if he can secure any fair portion of the trade formerly enjoyed by dealers it ought to make him rich.” Another dealer was “also figuring on taking out a license and selling at 10 cents.” Three weeks into October five Des Moines dealers had paid the $300 for a license to sell cigarettes. Selling a package for 10 cents, they “expected to become wealthy” and “to monopolize the trade at the old figures, when now a druggist of the city proposes to also get a license and sell at half price.” The other dealers claimed that this intervention would “ruin their expected profits” because, with a package costing them 4½ cents, “after paying an annual license of $300 there is positively no money in the business for them.” And four years later a prominent Davenport paper misinformed the citizenry that “Emil Schmidt has taken out a license to sell cigarettes and has paid to County Treasurer McManus the $300 mulct tax.”

Although the legislature enacted a law in 1902 requiring county auditors to compile an annual financial report that included amounts received as mulct tax, the early county financial reports appear largely to have omitted data on the liquor mulct tax, while virtually none included cigarette mulct tax figures. Nevertheless, even the scattered data that were published show that the tax was
The minutes of the “Proceedings of the Board of Supervisors” of Johnson County from September 1897 through January 1902 include considerable information on the collection (and remission) of the liquor mulct tax, but no reference to the cigarette mulct tax. The original handwritten books are located at the Johnson County Administration Building, Iowa City. Nevertheless, in 1903 the board of supervisors paid $36.20 to J. C. Stouffer for “assessing saloons, cigarette mulct, etc.” “List of Claims,” Daily Iowa State Press (Iowa City), Jan. 26, 1904 (3:4).

Financial Report of Polk County, for 1897, by the Auditor and Treasurer to the Board of Supervisors 107 (1898). This account does not appear to be reconcilable with the aforementioned newspaper reports that by the end of October five dealers had already paid the $300 license fee. Those early reports were presumably based on the erroneous assumption that dealers were required to pay the $300 annual tax regardless of how long they had been selling cigarettes; in fact, the tax liability accrued quarterly, and the total collection of $386.52 (the $193.26 being Des Moines’ 50 percent share of the total tax collected) approximated very closely five times the $75 due for the fourth quarter—the first and only quarter that the tax was in effect in 1897.

The minutes of the “Proceedings of the Board of Supervisors” of Johnson County from September 1897 through January 1902 include considerable information on the collection (and remission) of the liquor mulct tax, but no reference to the cigarette mulct tax. The original handwritten books are located at the Johnson County Administration Building, Iowa City. Nevertheless, in 1903 the board of supervisors paid $36.20 to J. C. Stouffer for “assessing saloons, cigarette mulct, etc.” “List of Claims,” Daily Iowa State Press (Iowa City), Jan. 26, 1904 (3:4).

Financial Report of Polk County, for 1897, by the Auditor and Treasurer to the Board of Supervisors 107 (1898). This account does not appear to be reconcilable with the aforementioned newspaper reports that by the end of October five dealers had already paid the $300 license fee. Those early reports were presumably based on the erroneous assumption that dealers were required to pay the $300 annual tax regardless of how long they had been selling cigarettes; in fact, the tax liability accrued quarterly, and the total collection of $386.52 (the $193.26 being Des Moines’ 50 percent share of the total tax collected) approximated very closely five times the $75 due for the fourth quarter—the first and only quarter that the tax was in effect in 1897.

Financial Report of Polk County, for 1902, at 48 (1903).

Biennial Report of the Auditor of State to the Governor of Iowa: July 1, 1899, at 194-95 (1899).
cigarettes and cigarette paper. Nevertheless, the press touted the report as containing “the first authentic figures showing the extent to which the laws are in operation.” The data are presented in Table 4:

<table>
<thead>
<tr>
<th>County</th>
<th>City</th>
<th>Number of Stores</th>
<th>Tax ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Clinton</td>
<td>Clinton</td>
<td>2</td>
<td>975</td>
</tr>
<tr>
<td>Johnson</td>
<td>Iowa City</td>
<td>2</td>
<td>450</td>
</tr>
<tr>
<td>Linn</td>
<td>Cedar Rapids</td>
<td>1</td>
<td>300</td>
</tr>
<tr>
<td>Polk</td>
<td>Des Moines</td>
<td>13</td>
<td>4,275</td>
</tr>
<tr>
<td>Scott</td>
<td>Davenport</td>
<td>4</td>
<td>1,275</td>
</tr>
<tr>
<td>Wapello</td>
<td>Ottumwa</td>
<td>1</td>
<td>300</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td>**</td>
<td>**23</td>
<td><strong>7,575</strong></td>
</tr>
</tbody>
</table>

Thus, all of the 23 stores that paid the tax were located in several of the state’s largest cities, Des Moines alone accounting for more than half of them. In comparison, the 43 counties in which the liquor mulct law was in effect (that is, in which some localities had opted out of the statewide prohibition) reported 1,770 saloons operating in 242 cities and towns and 51 townships from which $1,097,052.52 in mulct tax was collected. While it is eminently plausible that liquor sales and the number of businesses selling liquor far exceeded cigarette sales and businesses selling cigarettes, the disproportions reflected by these data (77 times as many saloons as cigarette-selling stores and 145 times as much tax revenue, which must be halved to account for the liquor mulct tax’s being twice as high) seem implausible. The unanswered (and, unfortunately, perhaps unanswerable) question is the extent to which the gap is attributable to substandard reporting by the county treasurers, incompetent assessment by local assessors, incompetent collection by county auditors, inadequate enforcement by

---

500 *The Iowa Official Register for the Years 1907-1908*, at 573 (22nd No., 1907).
502 *The Iowa Official Register for the Years 1907-1908*, at 573 (22nd No., 1907).
503 *The Iowa Official Register for the Years 1907-1908*, at 573 (22nd No., 1907).
The 1897 Mulct Tax Amendment

county attorneys, noncompliance by cigarette sellers, or—the most interesting possibility—the absence of cigarette sales in many localities and a significant decrease in sales and the number of tobacco stores selling cigarettes in others as a result of the double disincentive of the statutory fine for violating the absolute prohibition on sales and the mulct tax for selling.\textsuperscript{504} For reasons unknown, when the secretary of state solicited mulct tax information from the counties twice more, on neither occasion did he request data on the cigarette mulct tax, and no such data were published.\textsuperscript{505} Even later, when the state auditor devoted a section of his annual report to county accounting, data on the cigarette mulct tax were sporadic and fragmentary at best. Thus in the biennial report covering fiscal years 1916 and 1917, the same table of receipts that listed “cigarette license” for the latter year, omitted even the rubric for the former. And even the table for 1917 was blank for 96 counties, including entries only of $300 for Des Moines (Burlington), $37.50 for Iowa, and $1,129.80 for Scott (Davenport).\textsuperscript{506} Similarly, in the next biennial report the receipts table for 1918 included the rubric “cigarette license,” but the line was blank for all counties, while the table for 1919 lacked even the rubric.\textsuperscript{507}

Fortunately, Scott county did continuously publish figures on its annual collection of the cigarette mulct tax from 1901 until the anti-cigarette law was repealed in 1921, while Polk county published its from 1897 to 1915 (no liquor or cigarette taxes being listed in the reports for 1916 through 1921). These data are presented in Table 5.

\textsuperscript{504}Perhaps the 1906 data lend a modicum of credibility to a press claim in 1909 that under the pre-1909 law only 36 “licenses” were issued statewide annually, 20 of them in Des Moines. “Cigarets to Go Say the Dealers,” \textit{Davenport Democrat and Leader}, July 2, 1909 (10:4).

\textsuperscript{505}\textit{The Iowa Official Register for the Years 1909-1910}, at 717-22 (23rd No., 1909); \textit{The Iowa Official Register for the Years 1911-1912}, at 747-52 (24th No., 1911).


Table 5
Cigarette Mulct Tax Collected in Scott and Polk Counties, 1897-1921

<table>
<thead>
<tr>
<th>Year</th>
<th>Scott</th>
<th>Polk</th>
<th>Year</th>
<th>Scott</th>
<th>Polk</th>
</tr>
</thead>
<tbody>
<tr>
<td>1897</td>
<td>$386.52*</td>
<td></td>
<td>1910</td>
<td>$300.00</td>
<td>$2,700.00</td>
</tr>
<tr>
<td>1898</td>
<td>$3,077.36</td>
<td></td>
<td>1911</td>
<td>$375.00</td>
<td>$4,500.00*</td>
</tr>
<tr>
<td>1899</td>
<td>$375.00*</td>
<td></td>
<td>1912</td>
<td>$975.00</td>
<td>$4,065.90*</td>
</tr>
<tr>
<td>1900</td>
<td>$435.90*</td>
<td></td>
<td>1913</td>
<td>$975.00</td>
<td>$6,000.00*</td>
</tr>
<tr>
<td>1901</td>
<td>$450.00</td>
<td>$6,000.00</td>
<td>1914</td>
<td>$900.00</td>
<td>$7,350.00*</td>
</tr>
<tr>
<td>1902</td>
<td>$600.00</td>
<td>$1,260.00</td>
<td>1915</td>
<td>$900.00</td>
<td>$9,000.00*</td>
</tr>
<tr>
<td>1903</td>
<td>$750.00</td>
<td>$1,650.00</td>
<td>1916</td>
<td></td>
<td>$600.00</td>
</tr>
<tr>
<td>1904</td>
<td>$1,050.00</td>
<td>N.A.</td>
<td>1917</td>
<td></td>
<td>$1,125.00</td>
</tr>
<tr>
<td>1905</td>
<td>$1,650.00</td>
<td>$2,850.00</td>
<td>1918</td>
<td></td>
<td>$1,200.00</td>
</tr>
<tr>
<td>1906</td>
<td>$1,275.00</td>
<td>$4,275.00</td>
<td>1919</td>
<td></td>
<td>$1,275.00</td>
</tr>
<tr>
<td>1907</td>
<td>$1,200.00</td>
<td>$4,800.00*</td>
<td>1920</td>
<td></td>
<td>$1,200.00</td>
</tr>
<tr>
<td>1908</td>
<td>$900.00</td>
<td>$6,675.00</td>
<td>1921</td>
<td></td>
<td>$600.00</td>
</tr>
<tr>
<td>1909</td>
<td>$750.00</td>
<td>$3,675.00</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Total $19,050.00 $69,075.68

The 1897 Mulct Tax Amendment

Year 1919, at fold-out between 36-37 (n.d.); Financial Report of Scott County, Iowa for the Year 1920, at 35 (n.d.); Financial Report of Scott County, Iowa for the Year 1921, at 40 and fold-out following (n.d.); Financial Report of Polk County, for 1897, at 107, 118 (1898); Financial Report of Polk County, for 1898, at 98, 106 (1899); Financial Report of Polk County, for 1899, at 103, 105 (1900); Financial Report of Polk County, for 1900, at 59, 61 (1901); Financial Report of Polk County, for 1901, at 60, 62, 64 (1902); Financial Report of Polk County, for 1902, at 48, 51 (1903); Financial Report of Polk County, for 1903, at 49, 54 (n.d.); Financial Report of Polk County, for 1905, at 48 (n.d.); Financial Report of Polk County, for 1906, at 57 (n.d.); Financial Report of Polk County, for 1907, at 72, 101 (n.d.); Financial Report of Polk County, for 1908, at 95 (n.d.); Financial Report of Polk County, for 1909, at 61, 65, 81 (n.d.); Financial Report of Polk County, for 1910, at 64, 69, 86, 91 (n.d.); Financial Report of Polk County, for 1911, at 71 (n.d.); Financial Report of Polk County, for 1912, at 79 (n.d.); “Semi-Annual Report of the County Treasurer of Polk County, Iowa Ending June 30, 1913,” Altoona Herald, Sept. 18, 1913 (6:3); “Polk County Board Proceedings: Report of Collections, Disbursements and Fund Balances for Period Ending December 31, 1913,” Altoona Herald, Feb. 12, 1914 (2:3); Financial Report of Polk County, for 1914, at 60 (n.d.); Financial Report of Polk County, for 1915, at 65 (n.d.). The tax for Scott County for 1901 has been calculated from the figures furnished by the county treasurer for the period through June 1 and the county auditor’s semi-annual report for the period June 1, 1901 to Jan. 1, 1902. Significant tabular excerpts from the financial reports were also published in the local press. See, e.g., “Board of Supervisors,” Davenport Republican, Jan. 27, 1903 (5:1-6). Financial Report of Polk County, for 1906, at 57 (n.d.), stated that the cigarette tax was $3,750.00, whereas the aforementioned special survey conducted by the secretary of state reported a figure of $4,275.00, which has been adopted here without any basis for clarifying the discrepancy. Of the $1,520.52 in Des Moines cigarette tax collected in 1898 $825.00 was refunded. Financial Report of Polk County, for 1898, by the Auditor and Treasurer to the Board of Supervisors 98 (1899). Of the $3,000 in county cigarette mulct tax collected in 1901, $2,343.75 was refunded.

The quality of the Polk County data was marred by the local authorities’ failure to present them uniformly during these 19 years: sometimes the figures were for the whole county, sometimes they pertained only to Des Moines, and sometimes the annual Financial Report failed to identify whether it was reporting the larger or smaller datum. Since the mulct tax law required the county to turn over one-half of the revenue to the municipality in which the business taxed was conducted, in those years in which the Financial Report expressly specified that only the Des Moines figure was being published, it has been doubled (and asterisked) in the table below. In years in which the Financial Report failed to specify which figure it was presenting, on the basis of other background information an attempt has been made to determine which one was published and, if it was the city’s share of the tax, it was doubled in the table. (To a lesser extent the same confusion affected the Scott County/Davenport data. That Polk

508 Code of Iowa Annotated § 2445, at 859 (1897).
509 Where interest payments (which were relatively minor) were reported separately they have been ignored in order to show the correspondence between the fixed amount of the mulct tax and the number of sellers paying it.

1048
The 1897 Mulct Tax Amendment

and Scott counties split the mulct tax only with Des Moines and Davenport, respectively, presumptively meant that dealers only in these two cities paid the cigarette mulct tax; presumably cigarettes were not sold anywhere else in these two counties.) The lack of data in Scott county for the years before 1901 may be linked to the fact that as late as April 1900, the Davenport assessor announced that he would not “pay any attention” to the cigarette trade tax law because the Supreme Court had declared it unconstitutional “so long as the cigarettes are sold in the original packages as they are.” The Scott County Board of Supervisors appears not to have ordered the $75.00 quarterly cigarette mulct tax levied before it acted on August 5, 1901, beginning with July 1, 1901 (with retroactive force to April 1, 1901, in cases where the business had begun before July 1). Whether a causal relationship was at work here is unclear, but on July 25, 1901, a cigarette was said to have caused “one of the most disastrous conflagrations that ever visited Davenport,” injuring more people and bringing about greater property loss than any previous fire in the city’s history. The low repute in which many held cigarettes and their users found expression in a stinging editorial in the Davenport Daily Republican observing that:

It is strange that a district a third of a mile square in which were factories and outputs representing an aggregate investment of fully three-quarters of a million dollars, the cozy homes of laborers and others who had invested there the savings of a lifetime, should be wiped out through the medium of a cigar—-the most obnoxious and contemptible thing on earth. The cigarette was no doubt rolled and lighted by some idler, who is a degenerate slave of that disgusting habit. In time the cigarette lands its victim, but too often not before its slave does serious damage to others.313

The cigarette mulct sums were minuscule compared with those collected

510The county auditor’s and treasurer’s reports for 1898, 1899, and 1900 include no entries for cigarette mulct tax. “Board of Supervisors,” DDR, Jan. 21, 1899 (5); “Board of Supervisors,” Davenport Sunday Republican, Jan. 21, 1900 (7); “Board of Supervisors,” DDR, Jan. 26, 1899 (5).

511“Will Not Assess Cigarettes,” EJ, Apr. 5, 1900 (1:4) (reprinted from Davenport Times) (copy supplied by Merle Davis).

512“Board of Supervisors,” DDR, Aug. 8, 1901 (5:1) (meeting of Aug. 5, 1901). When the county board of supervisors on April 2, 1901 ordered the liquor mulct tax to be levied for the April-June quarter it did not mention the cigarette mulct tax. “Board of Supervisors,” Davenport Daily Democrat, Apr. 10, 1901 (6:1) (Apr. 2)

513“The Deadly Cigaret,” DDR, July 27, 1901 (4:1-2). The same attitude was visibly on display in a want ad for a printer which specified that “no boozer nor cigarette fiend need apply.” Des Moines Capital, Feb. 3, 1905 (6:6).
under the liquor mulct tax: for example, the more than $136,000 liquor tax collected in Scott County alone in 1902 amounted to almost eight times as much as the total cigarette mulct tax over the entire 21-year period there. With the cigarette mulct tax set at $300, the number of cigarette dealers paying it in Scott County in any year ranged from one to 5.5—implausibly low numbers since the county seat, Davenport, was the state’s third largest city with a population of more than 43,000 in 1910 and one of the six or seven cities in which cigarettes were at times openly sold.515

The more fragmentary set of cigarette mulct tax data for Polk County and Des Moines,516 the state’s largest city and twice as populous as Davenport, reveals a total tax collection more than 3.6 times as great for about 86 percent as many years.517 The peak tax collected ($9,000 in 1915) represented licenses for 30

---

515 “Coffin Nails to Die a Very Sudden Death,” Evening Tribune (Des Moines), June 26, 1909 (1:5-6). See also below ch. 14.
516 The total tax of $6,000 paid in 1901 (presumably by 20 dealers) is wholly inconsistent with a report in the Chicago Tribune that: “Up to last November [1900] every tobacco dealer and confectioner and many grocers handled cigarettes in Des Moines. Today only three dealers are selling them. The majority were driven out of the business by the refusal of the American Tobacco company to stand behind them any longer, this announcement being immediately upon the handing down of the decision of the United States Supreme Court” in Austin v. Tennessee. The newspaper also stated that Des Moines, Sioux City, Davenport, and three or four other cities were the only ones where cigarettes were still sold. “States Declare War on Cigaret,” CT, Feb. 10, 1901 (10).
517 Data are lacking for Polk County for 1904 because the Financial Report of Polk County for 1904, at 47 (1905) combined the liquor and cigarette mulct taxes ($56,900.70), making it impossible to segregate out the latter. Although the SHSI libraries in Des Moines and Iowa City, which have thousands of county financial reports, both lacked the report for 1913, which in Des Moines was designated “unobtainable” in its files, the Des Moines Public Library’s long run also lacked 1913, and the Polk County administration lacked all early reports, the data were taken from semi-annual reports published in the press. From 1916 through 1921, Polk County not only reported no liquor or cigarette tax collected, but omitted mention of the existence of these taxes that had been included in the board of supervisors resolution on county taxes in 1915 and earlier years. Financial Report of Polk County for 1916, at 14 (n.d.). In the course of instituting absolute liquor prohibition, the legislature abolished the liquor mulct tax in 1915. No cigarette tax may have been collected in 1916 because dealers stopped paying it after Miles Odle’s raid of Nov. 4, 1915 created the risk of criminal prosecution under the Phelps law. See below ch. 14. The lack of tax collections for 1917 to 1921 is more puzzling: although payments were judicially enjoined during the pendency of C. C. Taft Company’s litigation challenging the
The 1897 Mulct Tax Amendment

stores. The $69,000 in mulct tax paid by sellers in Des Moines equaled almost exactly $1,000 per quarter for the 69 quarters during which Polk County collected it (ignoring the year 1904 in which officials did not distinguish between the liquor and cigarette tax), which represented an average of a little more than 13 dealers during this 18-year period. If instead the focus is the 10-year period (1906-15) following the upholding of the tax by the state and federal Supreme Courts, the average annual tax paid was $5,304, which represented payments by almost 18 sellers. Noting in 1911 that 21 places in Des Moines were paying the $300 annual cigarette tax, a Waterloo newspaper editorialized that their ability to afford to pay it showed that they were selling large quantities. That so many dealers in Des Moines continued to pay the tax even after the 1909 enactments began providing for strict enforcement of the sales ban suggests that the Trimmers Club and Cosson laws did not completely fulfill their promise in the state capital.

---

518 Waterloo Evening Reporter, Sept. 24, 1911 (4:1) (untitled edit.). The further judgment that the “inhibition of the little pills is not very effective anywhere in Iowa” was distorted not only in the sense that it overlooked the fact that in many localities cigarettes were not sold at all, but also because it failed to understand that the mulct tax was not a high license fee.

519 See below chs. 13-14.
The Iowa WCTU Achieves Two of Its Goals in 1909: 
Prohibition of Public Smoking by Minors Under 21 and 
Effective Enforcement of the General Sales Ban/Mulct Tax

“If all boys could be made to know that with every breath of cigarette smoke they inhale imbecility and exhale man-hood.... The yellow finger stain is an emblem of deeper degradation and enslavement than the ball and the chain.” No boy living would commence the use of cigarettes if he knew what a useless, soulless, worthless, thing they would make him.¹

The WCTU, the driving force behind anti-cigarette legislation in Iowa, was deeply dissatisfied with the 1896-97 “prohibitory cigarette law,” which, as it noted at its annual convention in October 1909, had been “ignored in almost every particular because no provision was made for its enforcement, and no officer delegated with the authority to impose the $300.00 tax against the property.”² Earlier that year it finally secured passage of legislation—including a ban on smoking by under-21-year-olds in public—that it believed would provide for the kind of enforcement that would fulfill the promise of the original interventionist regime designed to shut down the industry in Iowa.

A generally Progressive legislative orientation did not emerge in Iowa until the latter half of the first decade of the twentieth century. Conventionally linked to the political rise of Albert Baird Cummins, who, after being elected in 1902 to the first of an unprecedented three terms as governor, became the state’s leading Republican insurgent,³ Progressivism was initially unable to make its breakthrough in the General Assembly because the conservative Republican Standpatters, through whom large railroads controlled government in Iowa, still constituted a majority there.⁴ Not until the elections of 1906 ousted the

¹Woman’s Christian Temperance Union of Iowa, Forty-Second Annual Convention 139 (1915).
²Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention 117 (1909).
⁴On the lawyers Joseph W. Blythe and Nathaniel Hubbard, who directed the Republican Party in Iowa on behalf of the Chicago, Burlington & Quincy Railway and Chicago and North Western Railway, respectively, see Leland Sage, William Boyd Allison: A Study in Practical Politics 260, 276, 327 (1956); Thomas Bray, The Rebirth of Freedom 15-31 (1957); Thomas Ross, Jonathan Prentiss Dolliver: A Study in Political Integrity and Independence 67, 139 (1958); William Bowers, “The Fruits of Iowa Progressivism, 1900-
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

Standpatters and produced a Progressive majority in both chambers for the 1907 session was the Republican Party “split into two hostile branches”5 and Cummins in a position to push his reform measures through the legislature. Indeed, at this juncture “it was no longer sufficient or even meaningful merely to say ‘Republican’; now one must always use the significant adjective, standpat or progressive,”6 though the latter retained their predominance in the state legislature after Cummins became a U.S. Senator in late 1908.7 The Progressive reform program in Iowa, not unlike the earlier Populist movement, focused in the economic sphere on curbing monopolistic trusts, regulating railroads, grain elevators, animal slaughter plants, life insurance companies, child labor, limiting working hours in certain industries, and imposing inheritance taxes, and in terms of democratic political process on the direct primary, direct election of senators, the initiative and referendum, and anti-lobbying legislation.8 During the 1907 session Cummins secured enactment of what he and others considered a key measure to subvert railroads’ ability in effect to bribe government officials by giving them free passes to travel on the railroad.9 Then in 1909 the Progressive

5Leland Sage, A History of Iowa 237 (1987 [1974]).
71907 Iowa Laws ch. 112, at 115-17; Thomas Bray, The Rebirth of Freedom 63, 65, 101 (quote), 112-14 (1957). For the anti-free passes bill passed the previous session, see 1906 Iowa Laws ch. 90, at 59. To be sure, Cummins himself had hardly been above
majority in the post-Cummins General Assembly insured passage of more, but by no means all, of the insurgents’ demands, including anti-trust, child labor, railroad, and corporate legislation.\textsuperscript{10}

\textbf{The Iowa WCTU’s Socialist President: Marion Howard Dunham}

\begin{quote}
[N]o man ever smoked a cigarette without being hurt by it, and no man ever will. ... Cigarettes...are unmanly, obnoxious, nerve and mind-destroying. It is unbelievable that any human being in his right mind should deliberately encourage their hold on his nervous system and his success in life.\textsuperscript{11}
\end{quote}

Gaining access to the Iowa WCTU’s general political orientation by the latter half of the first decade of the twentieth century is facilitated by studying its long-time president’s annual addresses at the organization’s conventions. At the 1904 convention, the organization’s partisan political position at this time can be partially gleaned from Marion Howard Dunham’s characterizations of the Populist party as not going “far enough for the radical element to rally around” and of the Prohibition party as “disappointing us in its statement of the rights of suffrage which is so carefully worded as to mean nothing for the women of the nation to whom it owes so much....” Much more enlightening was her neutral description of the Socialist party as setting out “the fundamental principles of justice on which the whole social fabric should be based,” asking “the attention and favor of the people on the ground that it represents the oppressed of all races and nations,” and making “immense demands which will do away with much of the injustice and consequent suffering which now prevails.” Of most direct relevance to the WCTU was that the Socialists, as the only party claiming to “stand for all humanity instead of a country, a class or a race,” declared as one of its basic principles “the full and complete equality of women with men....”\textsuperscript{12}

In 1906, at the last annual convention of the group that had remained affiliated with the National WCTU (before the non-partisan state group merged

\\textsuperscript{10}1909 Iowa Laws chs. 225, 145, 129, and 129.

\textsuperscript{11}“Here Is a Disagreeable Death,” \textit{W.C.T.U. Bulletin} 7(6):[1] (June 1902).

\textsuperscript{12}\textit{Fifteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa held at Marshalltown, Iowa, October 11, 12, 13, and 14, 1904}, at 32-33 (1904).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

with it).\footnote{See above ch. 9.}

13 Marion Howard Dunham spoke of: “Greed, oppression, injustice, brutality everywhere. Graft seeming to be the rule of the business world and its motto, ‘Do the other fellow before he can do you,’ and failures, defalcations and embezzlements.... Injustice in the laws, favoring one class by discrimination against another, and in the courts by their assumption of autocratic power, unjust decisions.... Brutality in the lynchings in the south and the mobs of the north, the convict camps and the sweat shops, the peonage system and the factories in all sections....” Returning to the WCTU’s origins, Dunham called the liquor traffic “the embodiment of greed....”\footnote{Seventeenth Annual Convention of the Woman’s Christian Temperance Union of the State of Iowa 22-23 (1906).}

The departing president’s speech in September 1908, just a few weeks before the Taft-Bryan-Debs presidential election, undermines any lingering skepticism as to whether the WCTU merited categorization as fully participating in the Progressive movement. Dunham, who had been president of the nationally affiliated WCTU of the State of Iowa during its entire existence (1890-1906), was then elected president of the reunited state organization in 1906,\footnote{Says Women Need Suffrage,” CT, Mar. 19, 1909 (8:7)} and developed a high national organizational profile, having been prominent as a candidate for national president.\footnote{Local Brevities,” Mason City Globe-Gazette, June 2, 1909 (2:2). On the occasion of delivering a lecture in Portland, Oregon in 1899, she had been called “one of the first women of the land.” “City News in Brief,” MO, Oct. 23, 1899 (5:1).}

The “Dear Comrades”\footnote{Iowa Woman’s Christian Temperance Union: Thirty-fifth Year Convention Held at Cedar Rapids, Iowa, September 22, 23, 24, 25, 1908, at 15.} who heard her review the economic basis of the national political parties might have been forgiven for speculating as to whether the spirit of Friedrich Engels had perhaps served as an inspiration. (This orientation was hardly an aberration peculiar to the Iowa organization. Toward the end of her life, national president Frances Willard delivered a presidential address, part of which was taken directly from Karl Marx’s explanation of surplus value in Das Kapital.\footnote{See above ch. 9.})

Since the 50’s our industrial system has been completely revolutionized by the invention of machinery in so many industries by which one man can do the work of fifty or one hundred men and the forty-nine or ninety-nine are thrown out of employment and must seek new fields of labor as they can, while the concentration of wealth and its consequent power in the hands of the few goes steadily on.
...The Socialist party, and Socialism in some form will be the system of the future, for as slavery, which was once the industrial system of the world, gave way to the feudal system, and the feudal system was in turn supplanted by the wage system, so the wage system is already beginning to give way to co-operation in different forms, and will at last disappear. The Socialist party has for its basic principle the absolute equality of opportunity for every human being, and that necessarily includes the complete equality of women with men, industrially, financially and politically, and is the only party which makes this a foundation principle. Its attitude in dealing with the liquor traffic is logical if we class that as an institution, which it is not, it is only a parasite upon the real industries of the world, and many of the leaders are beginning to study the question from this point of view.¹⁹

Nor had Dunham finished with her anti-capitalist tour d’horizon. Arguing that the millions of votes cast for the Republican and Democratic parties meant that “no stockholder in a Southern factory [or] a Northern sweatshop will fear that his profits from the toil of little children will be lessened, for these parties stand for the continuance of things as they are,” she insisted that just as a million votes for the Prohibition candidate would signal the rise of a sentiment that would be “recognized as the handwriting on the wall for the liquor traffic,” a million votes “for the Socialist candidate means the swift passing of the time when strong men beg for work and little children fill their places in the industries of the land.” Moreover, Dunham declared, if Iowa had the Initiative and Referendum, “the people can instruct, not petition, their representatives to pass the laws they desire,” starting with equal suffrage.²⁰

The reason for the socialist orientation of Dunham’s speech was simple: she was the corresponding secretary (the third highest-ranking officer) of the Woman’s National Socialist Union,²¹ having joined the Socialist Party of America shortly after its founding in 1901 and become a leading organizer, coordinating

¹⁹Iowa Woman’s Christian Temperance Union: Thirty-fifth Year Convention Held at Cedar Rapids, Iowa, September 22, 23, 24, 25, 1908, at 19-20. In light of Dunham’s socialist orientation it is remarkable that at the same convention the retiring president gave a “touching and beautiful” response to the convention’s present to her of a “silver purse filled with gold....” W.C.T.U. Champion 2(12):[2:3] (Oct. 1908); “Election Day at Convention,” CREG, Sept. 25, 1908 (8:1).

²⁰Iowa Woman’s Christian Temperance Union: Thirty-Fifth Year Convention Held at Cedar Rapids, Iowa, September 22, 23, 24, 25, 1908, at 20.

midwestern Socialist women’s clubs.22 A well-known party member, she openly injected her socialist politics into her WCTU work, as an appreciation of Dunham, written by one of her socialist comrades before she yielded her presidency, revealed:

At the last meeting of the Woman’s Socialist league Comrade Mary Dunham told the story of her work for Socialism: told how for many years she had been carrying the message of Socialism into the meetings of the W.C.T.U. Like all suffragists, she was born a rebel, and all her life had been a consistent one. Although born and brought up in a church she withdrew because they refused to ordain women for the pulpit.

Then, although an ardent prohibitionist, thoroughly believing in the principles of the party, she refused to support it when it turned down woman’s suffrage.

She remarked with a little twinkle of the eye that she had hardly been fair, for she had never talked temperance at a Socialist meeting, [but] she had always talked Socialism at a temperance meeting.

For eighteen years she has been president of the W.C.T.U. of Iowa, and at all meetings of the organization she distributed quantities of Socialist literature and papers.23

Although Dunham doubtless failed to persuade the bulk of Iowa WCTU members to become socialists, the fact that they re-elected a prominent socialist president for 18 consecutive years strongly suggests that this vanguard of the anti-cigarette movement hardly consisted of narrow-minded, single-issue, petty-bourgeois Christian moralists.24 Indeed, the only reason that they did not continue re-electing her is that in 1908 she and her husband moved to Chicago,25 where, at the

---

22Mari Jo Buhle, Women and American Socialism, 1870-1920, at 112 (1981). Her socialist organizing techniques were unusual. In 1902 she wrote to every local of the Woman’s National Socialist Union asking them to plan a series of parlor meetings hosted at members’ homes: “You can have light refreshments, wafers and one kind of drink if thought best, for they add to the friendly feelings and loosen tongues.” Marion Dunham [untitled letter], Los Angeles Socialist, No. 52, at 2:4 (Oct. 25, 1902).

23Annah Finsterbach, “Socialist Women Meet,” CDS, July 23, 1908 (4:3-4 at 3).

24A decade after Dunham’s death, in the wake of the repeal of Prohibition, the Iowa WCTU president, Ida B. Wise Smith, in an apparently uncommon reference to her, summoned up the membership’s memory of her: “From the heights of Heaven today, if Marion H. Dunham knows of things on earth, she feels for us who have labored long and valiantly for the welfare of mankind.” Ida B. Wise Smith, “State President’s Annual Address 1933,” Woman’s Christian Temperance Union of Iowa, Sixtieth Annual Convention 13 (1933).

25In August 1908, when she and her husband were already living in Chicago, she informed the members that since she did not expect to move back to Iowa, “it will be better...to elect some one [sic] else for president.” Marion H. Dunham, “President’s
age of 66, “Mrs. Mary Dunham,” together with other “women members of the Socialist party, regularly mounted a soap box in Union Park and on various street corners to speak on behalf of socialism and woman’s suffrage.26

The State Prohibits Minors from Smoking in Public

It is the infernal cheapness of the cigarette, and its adaptability for concealment, that tempt this school-boy’s callow intelligence.27

Not until 1909 did Iowa introduce the control measure that many states such as neighboring Minnesota had implemented years earlier—a prohibition on public smoking by minors.28 As early as 1900, the House, by a vote of 62 to 13,29 passed a bill—virtually identical to the 1897 Minnesota statute30—providing that: “Any person under...16...years of age who shall smoke or use cigarettes, cigars or other tobacco in any form on any public highway, street, alley, park or other land used for public purposes, or in any public place of business, shall be arrested by an officer of the law who may be cognizant of such offense; and further, it shall be the duty of all such officers, upon complaint of one citizen, to arrest such offenders and take them before the proper court.” The bill then directed courts to impose a punishment in a sum not above $10 or imprisonment of more than five days in county jail. Courts were also given the power to suspend sentences against minors who gave information that might lead to the arrest of those who

---

28. A memorandum apparently prepared by or under the aegis of Covington & Burling’s star tobacco lawyer, David Remes, for Philip Morris in connection with the latter’s opposition to raising the legal age for buying tobacco above 18 incorrectly claimed that: “The first age restrictions governing the use of tobacco (as opposed to the sale of tobacco products) were enacted in Arizona in 1917; in Idaho in 1918; and in Illinois in 1921.” C+B (David Remes to Cristian Sainz [Philip Morris Management Corp.], “Historical Developments Regarding Minimum Age Laws Governing the Sale or Use of Tobacco Products” (Jan. 28, 1998), Bates No. 2072554889/92.
30. 1897 Minn. Laws ch. 116, at 201. The Minnesota law set the minimum age at 18, as did the Iowa bill as filed.
violated the code in selling or giving the minor the tobacco and also testified in court against them. Anyone who harbored or granted those under sixteen “the privilege of gathering upon or frequenting any property or land held by him, who there indulge in the use of cigarettes, cigars, or tobacco in any form” were subject to the penalties provided in the anti-cigarette laws (Code sections 5005-5006). Finally, the entire bill was subject to the proviso that none of it “shall be so construed as to interfere with the rights of parents or lawful guardians in the rearing and management of their minor heirs or wards within the bounds of their own private premises.”

31 House File No. 200, as introduced by Republican R. G. Clark, had set the age of consent at 18, but the substitute reported out by the Public Health Committee lowered it to 16, for adoption of which Clark himself moved. Accounting for only 19 of the 100 House members, Democrats cast 7 of the 13 Nays and but 5 of the 62 Yea. The capital’s leading newspapers briefly mentioned the passage without any commentary or hint of controversy, but the next day the Senate referred the bill to its Public Health Committee, where it died. A paper on cigarette smoking read at a meeting of Iowa school superintendents and principals in Des Moines on December 30, 1901, prompted “considerable discussion” and passage of a resolution requesting the group’s legislative committee to work for enactment of a statute similar to the aforementioned Minnesota law. The bill, which was to be (but never was) introduced at the 1902 session of the legislature, was criticized by the Davenport Daily Republican as being “a little too drastic to be popular and effective.”

31 Journal of the House of the Twenty-eighth General Assembly of the State of Iowa 646-47 (1900) (Mar. 8).
32 Journal of the House of the Twenty-eighth General Assembly of the State of Iowa 283-84 (1900) (Feb. 8). Clark introduced the bill by request. Clark was a businessman, who joined the minority faction of the Republican party in the legislature to fight corporate influences especially with regard to railroad taxes. A Biographical Record of Hamilton County Iowa 378-80 (1902).
33 Journal of the House of the Twenty-eighth General Assembly of the State of Iowa 646-47, 981 (1900) (Mar. 8, 27).
34 Journal of the House of the Twenty-eighth General Assembly of the State of Iowa 982 (1900) (Mar. 27).
35 Enact Valued Policy,” ISR, Mar. 28, 1900 (5:3-5 at 5); “Valued Policy Approved,” DML, Mar. 28, 1900 (3:3-5 at 5).
36 Journal of the Senate of the Twenty-eighth General Assembly of the State of Iowa 835 (1900) (Mar. 28).
37 Here and There in the State,” DDR, Dec. 31, 1901 (5:1-4 at 2).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

because it did not focus exclusively on cigarettes, “the greater evil,” but instead encompassed “other features of the tobacco problem...”

Before the legislature returned to the question of youth public smoking, in 1904 it unanimously passed a bill that prohibited distributing, posting, painting, or maintaining any advertisement for the sale of tobacco or intoxicating liquor within 400 feet of any premises occupied by a public school or used for school purposes. In her annual president’s address to the nationally affiliated WCTU of the State of Iowa, Dunham merely characterized the measure as “of interest to us, even though we did not work for” it. But the group did take satisfaction from its work of “educating and saving the youth” from the deterrent effect on smoking of employers’ proliferating unwillingness to hire smokers. “When an employer advertises for help,” the superintendent of the Anti-Narcotics

38“After Cigarettes,” DDR, Jan. 31, 1902 (4:2) (edit.).

391904 Iowa Laws ch. 137, at 125. The statute contained an exemption for “advertisements in newspapers of regular publication, distributed to subscribers or purchasers thereof. Id. H. F. No. 352, contained no such exemption, which was added by the Senate, and concurred in by the House. Journal of the House of the Thirtieth General Assembly of the State of Iowa 608-609, 1293 (1904) (Mar. 14, Apr. 8); Journal of the Senate of the Thirtieth General Assembly of the State of Iowa 1087-88 (1904) (Apr. 8). In 1917, the legislature enacted a ban on advertising that included newspapers. See below ch. 14. The no-advertising-near schools law was not repealed until 1980. 1980 Iowa Laws ch. 1030 at 218. Repeal was, according to its sponsor, inspired by the possibility that “every school principal and librarian and many school teachers could be jailed for 30 days or fined $100 because” the law made “it a crime to place magazines with tobacco advertising in a school library.” “The Legislature,” DMR, Mar. 11, 1980 (3B:5). Why the law could not have been amended to exempt school officials while retaining the ban on nearby store or billboard advertising was not explained. The same General Assembly took no action on a bill that would have banned all tobacco and alcohol advertising—including in newspapers—in Iowa. H.F. No. 515 (Feb. 22, 1979, by Cusack). Sixteen years later Sen. Johnie Hammond included in her anti-smoking bill (S. 2174) a ban on tobacco advertising on any advertising device within 1000 feet of any school or playground when it was being used primarily by people under 18 for educational or recreational purposes, but it died. At the time Philip Morris’s profit-driven interest in legal history was piqued, as the following internal document revealed: “In 1980, the Iowa Legislature repealed a ban on tobacco ads 400 ft. from schools that had been in place since 1904. Our databases don’t have records that far back, but the state house should. Could you ask your lobbyists to check with the state to see if they can uncover why the original was repealed? It might be useful in the near future.” Note, P. J. O’Neil to Jack Lenzi (Jan. 16, 1996), Bates No. 2044010029.

40Fifteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa held at Marshalltown, Iowa, October 11, 12, 13, and 14, 1904, at 34 (1904).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

Department, Mrs. Elsie M. Lawrence, reported to the annual convention in 1905, “you always see the phrase, ‘No cigarette smoker wanted.’ The fact is that there is always something the matter with cigarette smokers and they are ‘not wanted.’”

The Iowa WCTU achieved one of its greatest triumphs in 1907, when Newell Miller, the superintendent of the Des Moines post office, gave notice that smoking will no longer be tolerated there. Not an employe of the 150 men whom Uncle Sam hires to attend to the Des Moines mails will be allowed henceforth to smoke cigarettes [sic] of any kind.

“I was forced to take drastic steps to show my displeasure of cigarette smoking and it went hard with one of the employes who rolled a pill and smoked it in here. He went out of the building by the back door,” said Mr. Miller. “Since then I have let it be known that such practices shall not exist here so long as I have charge of the building. Why, I don’t know whether cigarettes hurt a man or not, the smell of them is enough to drive any decent citizen frantic. Suppose half the men in here should get to smoking cigarettes; it would put us out of business.”

Although the superintendent had not yet applied the ban to the lobby and customers, it was not certain that if they “should smoke so many cigarettes as to become a nuisance,” he “would not order them ejected from the building.” And the WCTU positively exulted in the fact that he was the widower of “our sainted Florence Miller,” who had been superintendent of the non-partisan Iowa WCTU’s legislation department. And although she had declared in 1896 that there was “no weapon the liquor traffic so dreads as the prayers of Christian women,” even more effective than their devout petitions for divine intervention was apparently marriage to someone with power to exclude cigarette smokers

---

41Sixteenth Annual Meeting of the Woman’s Christian Temperance Union of the State of Iowa, held at Des Moines, Iowa, October 9, 10, 11 and 12, 1905, at 66 (1905).
44Miller died in 1906. “In Memoriam Florence Miller” (1906) (small brochure printed by the Iowa WCTU a copy of which was retained in one of the organization’s history binders donated to the University of Iowa Women’s Archives and examined on Feb. 1, 2007, before the materials were cataloged). Miller had also been president of the non-partisan Iowa WCTU in 1904-1905. Helen Tyler, Where Prayers and Purpose Meet: The WCTU Story, 1874-1949, at 272 (1949).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

That the federal postal superintendent’s action was not the idiosyncratic decision of a local official motivated by his personal marital background could be surmised by juxtaposing it to an even more sweeping, consequential, and revealing intervention undertaken by the Commissioner of Immigration at the Port of New York in 1905. That year Robert Watchorn prohibited the sale of cigarettes on Ellis Island at the request of authorities in anti-cigarette states because immigrants were traveling directly from Ellis Island to those states with large quantities of cigarettes for friends and relatives. In the hands of the United States Tobacco Journal, the subtext of this fascinating indirect and tangential interference with interstate commerce by a high-ranking federal official was a dampening of the proliferation of cigarette smoking among ethnic groups that the Tobacco Trust, just as its sales were emerging from a decline, would have welcomed as bringing to the United States an especially high prevalence rate: “As to many of the immigrants, particularly Italians and Russians, cigarettes are nearly as necessary as bread. The situation that confronts them on the threshold of the promised land of freedom must seem rather peculiar and disillusionizing.”

In 1908 the City of Des Moines added another smoking prohibition that would surely have pleased Miller (even if the action was based on fire prevention) when the city council passed an ordinance making it “unlawful for any person to smoke tobacco in any form in any opera house, moving picture show room, or in any adjoining room or rooms opening into such opera house or moving picture show rooms, or on the stages of such houses or rooms,” and imposed a fine ranging between five and 20 dollars and, in default of payment, commitment to the city jail for two to five days.

Anti-smoking forces finally succeeded in mobilizing the legislature on the issue of public smoking in 1909. On January 27, Senator Aaron Van Scoy Proudfoot, by request (of the Iowa WCTU), introduced Senate File No. 92. Proudfoot, a Republican lawyer, had attended Simpson College in

---

47 Ordinance No. 1547, in Revised Ordinances of the City of Des Moines: 1916, §§ 1105, 1107 at 519, 520 (1916) (passed Aug. 22, 1908). The council provided an exemption for smoking “indulged in as part of the act of play, and in full view of the audience attending such act or play, or in any room especially provided as a smoking room.” Id. § 1106. Later the council provided yet another exemption—“when the management of any theater may desire to permit smoking, provided permission is granted to the management by resolution of the city council.” Municipal Code of Des Moines: 1942, ch. 62-7. When the Iowa legislature passed a statewide ban in 2008, it did not provide for an exemption for actors on stage as Minnesota had in 2007. See below ch. 35.
Indianola—both college and city, the former being maintained under the auspices of, and the latter heavily influenced by, the Methodist Episcopal Church, were centers of alcohol prohibition—where he remained and became secretary of the school board and city solicitor. An officer in the county and state Republican organization, Proudfoot was himself a “zealous” member and officer of that church as well. The bill was less comprehensive, harsh, and punitive than the Clark bill of 1900:

Every person under the age of sixteen years who shall smoke or use cigarettes, cigars or tobacco on the premises of another, or on any public road, street, alley or park or other lands used for public purposes or in any public place of business or amusement, except when in company of a parent or guardian, shall be punished by a fine of not more than ten dollars, or the [sic] imprisonment for not exceeding thirty days.

Any person who shall permit any person under the age of sixteen years who shall not be in the company of a parent or guardian, to use cigarettes, cigars or tobacco in any form in or upon the premises occupied by him or under his control or supervision, shall be punished for the first offense by a fine of not more than ten dollars, and for any subsequent offense by a fine of not more than twenty-five dollars, or by imprisonment for not exceeding thirty days.

Two days later an identical bill (H.F. No. 133) was introduced in the House by Jesse Elliott, a Republican physician. It was referred to the Suppression of
Intemperance Committee, which Elliott chaired and which reported it back with the recommendation that it be indefinitely postponed (presumably because S.F. No. 92 was the chief vehicle). 51

At the end of March the Senate Judiciary Committee recommended passage of the following substitute for Proudfoot’s bill:

SECTION 1. It shall be unlawful for any person under the age of twenty-one years to smoke or use a cigarette or cigarettes on the premises of another, or on any public road, street, alley or park or other lands used for public purposes or in any public place of business or amusement, except when in company of a parent or guardian.

SEC. 2. Any person found guilty of violating the provisions of Section 1 hereof shall be punished by a fine of not to exceed ten dollars ($10.00), or imprisonment in the county jail not to exceed three days, for each offense; provided, that if said minor person shall give information which may lead to the arrest of the person or persons violating any of the provisions of Section five thousand six (5006) of the Code, and shall give evidence as a witness in the proceedings which may be instituted against said party or parties, the court shall have the power to suspend sentence against said minor person.... 52

This substitute, which was identical with the ultimate enactment, varied significantly from Proudfoot’s bill. First, it raised the minimum age for public smoking from 16 to 21, but at the same time eliminated all other kinds of tobacco than cigarettes from the prohibition. Second, it deleted the provision penalizing anyone who permitted a minor to smoke on his premises. Instead, it gave a minor an incentive to testify against anyone who gave him a cigarette in violation of section 5006 Code, which, however, did not prohibit or penalize permitting a minors to smoke cigarettes on one’s premises.

Both chambers adopted the bill by huge majorities. On April 5, the Senate, which 34 Republicans controlled against 16 Democrats, passed the amended version of S.F. No. 92 by a vote of 30 to 1; 24 Republicans and six Democrats voted for the bill, and one Democrat against. 53 Three days later, the House, under the control of 80 Republicans opposed by a 28-member Democratic minority, passed the bill by a vote of 84 to 3; 59 Republicans and 15 Democrats voted for

51Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa 486 (1909) (Feb. 20).
52Journal of the Senate of the Thirty-Third General Assembly of the State of Iowa 1236 (1909) (Mar. 30).
53Journal of the Senate of the Thirty-Third General Assembly of the State of Iowa iv-v, 1430 (1909) (Apr. 5).
and two Republicans and one Democrat against it.\textsuperscript{54}

As enacted in 1909, the statute,\textsuperscript{55} which was both more comprehensive (it covered all persons under 21) and less comprehensive than the House bill of 1900 (it was limited to cigarettes and permitted children to smoke in public in their parents’ presence), was in part identical to one enacted in 1907 in neighboring Illinois.\textsuperscript{56} Not until 1959 did the Iowa legislature lower the public smoking age to 18.\textsuperscript{57}

The new ban, to judge by the paucity of commentary in the Iowa press, appeared not to have stirred controversy.\textsuperscript{58} Apart from brief perfunctory mention of passage of the bill in the legislature,\textsuperscript{59} newspapers devoted no attention to the legislative process. As early as July 1909 the first attempt to “invoke” the new ban on public smoking by minors took place in a rather unexpected location—a justice of the peace courtroom in Des Moines. The “official ire” of Special Officer W. H. Davis, who was “particularly averse to cigarette smoking,” was aroused when he caught sight of a “youthful reporter inhaling one of the destructive ‘pills’ beneath the very noses of a constable, justice of the peace, and the county attorney who happened to be present to try a case.... Marching the beardless consumer of the forbidden ‘whiffs’ up to the bar of justice he demanded a warrant for his arrest.” In what may have been an inauspicious initiation of enforcement, the intervention of the attorney and constable “saved the young man

\begin{itemize}
\item \textsuperscript{54}Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa iv-vi, 1707 (1909) (Apr. 8).
\item \textsuperscript{55}1909 Iowa Laws ch. 224, at 203.
\item \textsuperscript{56}1907 Ill. Laws, S.B. No. 32, § 2, at 265 (“on any public road, street, alley or park or other lands used for public purposes, or in any public place of business or amusement”). Unlike the Iowa law, the Illinois statute expressly made it a misdemeanor for anyone to permit a minor “to frequent the premises owned by him for the purpose of indulging in the use of cigarettes” subject to a maximum fine of $50 to $100 or imprisonment of 30 days. Id. § 3.
\item \textsuperscript{57}1959 Laws of Iowa H.F. 266, ch. 119.
\item \textsuperscript{58}Four years later, when Pennsylvania enacted a similar ban on cigarette smoking by minors, the U.S. Tobacco Journal protested that morality could not be legislated: smoking and chewing tobacco were highly satisfactory creature comforts whether to engage in which was to be determined by a man or youth “in the ratio of enjoyment relative to his own capacity, showing no more ill effect than if he had satisfied [a] permanent appetite for lettuce of boiled eggs.” “The Quaker Anti-Cigarette Law,” USTJ, vol. 79, May 17, 1913 (12).
\item \textsuperscript{59}E.g., “House Favors Counsel Bill,” BH-E, Apr. 6, 1909 (1:1-2) (included in list of bills passed by Senate); “House to Pass on Liquor Bill,” BH-E, Apr. 9, 1909 (1:3) (mentioning House passage of Senate bill).
\end{itemize}
The Iowa WCTU, looking back during its annual convention in October 1909, was delighted with Senator Proudfoot’s anti-cigarette law: none of the “reform measures” of the 33rd General Assembly gave “more encouragement to the mother of boys,” prohibiting as it did cigarette smoking by minors and “making it a misdemeanor for property owners to permit minors to smoke cigarettes thereon.” except that, contrary to the WCTU’s wish, the committee substitute that was enacted had dropped this latter provision. The organization’s hope sprung eternal: the WCTU urged all local unions to “keep a copy...posted in conspicuous places. No law will enforce itself, but now that we have a law that will protect the growing boys against this pernicious habit, the fathers of our State ought to see that it is enforced.” However, the WCTU called into question its own capacity to enforce a statute effectively when its own legislative department was unaware that, contrary to the group’s ardent wishes, the committee substitute that was enacted had, as noted earlier, dropped Proudfoot’s provision prohibiting private property owners from permitting minors to smoke cigarettes. (To be sure, the WCTU was hardly alone in its confusion: a number of Iowa newspapers also misinformed their readers about the matter.) The law was enforced by the police and judiciary, which declared imposition of the fine and incarceration a “warning to those who persist” in smoking cigarettes in public. What the apprehension rate was and whether the law had any impact on smoking prevalence among minors are unknown.

61 Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention, Davenport, Iowa, October 12-15, 1909, at 16 (n.d.).
63 The organization repeated this misstatement later during the proceedings. Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention, Davenport, Iowa, October 12-15, 1909, at 118 (n.d.).
64 E.g., Hull Index, Apr. 9, 1909 (4:3) (untitled); “Small Boys, Be Careful,” Emmetsburg Democrat, May 5, 1909 (2:5); “W.C.T.U. Notes,” Iowa Postal Card (Fayetteville), May 13, 1909 (8:3). In contrast, “Hope for Change,” Globe (Cedar Falls), Apr. 29, 1909 (7:1), correctly noted that the provisions had been stricken out.
65 “Cigarette Smoking by Minors Must Cease,” CREG, June 6, 1910(8:4).
66 On a Des Moines school principal who frisked boys every morning for cigarettes and papers in order to enforce the law and protect them from “mental deterioration,” see “Boys Searched by School Ma’am; Finds ‘Makins,’” DMDN, Sept. 17, 1908 (2:3). As late as 1916, a high school boy who pleaded guilty to smoking cigarettes was fined $10 plus $3.25 in costs was told by the judge that he would suspend the fine if the boy would reveal his
The Trimmer Clubs and John B. Hammond Succeed in Securing
Enactment of a Law Enforcing the Cigarette Sales Ban/Mulct Tax

The devil has three traps to catch the youth. The first trap is the cigarette habit—that
is the starter. The second trap is the saloon where beer is absorbed. The third trap is the
gambling den and houses of immorality. ...

Some boys think they are smart and can enter these traps and still not get caught, but
the boy who smokes cigarettes nine times out of ten will get to using beer to soak up the
dryness in his throat, and he in time graduates from the third trap.67

The cigarette trust is already out with a big bluff that it will evade the law in some way,
and continue to sell its noxious and poisious [sic] wares, as usual. But J. B. Hammond,
state manager of the Trimmer Club...and the man who led the crusade against the
cigarette..., says he is ready to meet the trust on its own proposition, and ascertain whether
the people of Iowa are the boss or whether the trust is running the government. ... It will
be a merry war in which the “trust” is likely to get the black eye. It will be mighty risky
for any person to undertake to sell cigarettes in Iowa from this time forward.68

The Iowa WCTU was even more enthusiastic about the other cigarette-related
statute enacted two weeks earlier during the same legislative session. In order to
correct the “deficiency” in the enforcement of the 1896-97 Phelps-Trewin
prohibitionist scheme, the WCTU’s chief lobbyist, John Brown Hammond, had
“framed” the bill,69 which was duly enacted. Hammond (1855-1940)—a second
cousin70 of “John Brown of Harper’s Ferry,” who “carried a strain of that
perfectionist character”71—was a detective72 and former miner from Centerville,
Iowa, whose prominent anti-saloon activities there had brought him to Des
Moines in 1908. Although he eventually “spent a lifetime prosecuting

68 “It Is Only a Bluff,” IU, July 9, 1909 (4:2).
69 “Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention 117
(1909).
70 Hammond, Liquor Foe, Led Raids on Bars in Iowa,” DMR, July 21, 1940 (1:1-4, 4:5).
72 At the 1900 Census of Population, which mistakenly recorded him as being 35 rather
than 45 years old, he was returned as a detective living in Wayne County, which was very
close to Centerville. Series T 623 Roll 464 Page 138 (HeritageQuest).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

...bootleggers, whisky druggists and saloons,” especially while in charge of prohibition enforcement in Iowa (1918-1921) and as Des Moines police chief (1922-1923), Hammond “vigorously fought all forms of vice,” including prize fighting, marathon dancing, and apartment houses. Credited with having drafted 95 percent of the state’s liquor and moral behavior laws, he nevertheless received no credit in his front-page, four-column-headlined obituary in the Des Moines Register for his role in cigarette prohibition. He succinctly expressed his fundamentalist position in an opinion piece in the Register in 1917: “‘Personal use’ of intoxicating liquor is the only objection I have to the whole liquor business. I do not care who makes it or where it is made, I do not care who sells it or where it is sold.” Thanks in no small part to Hammond himself, 1909 turned out to be a banner year for public morality legislation in Iowa—abating houses of prostitution and prohibiting immoral plays being merely two of a slew of such laws.

Hammond’s bill, according to the WCTU, “delegated authority to any peace officer or citizen to start an action to search suspected premises for cigarettes or cigarette papers, and the presence in any public place, of either, constitutes prima facie evidence that they are kept with intent to sell or give away unlawfully.” When a magistrate made an entry of guilty he was required to certify a copy to the county treasurer, who was then required to impose the $300 mulct tax against the property.

The bill was introduced by Fred Hunter—whose father and mother had been a physician and women’s rights advocate, respectively—a Republican manufacturer representing Polk county (of which the state capital Des Moines is...
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

the seat), three weeks after Proudfoot had filed his.\footnote{Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa v, 452 (1909) (Feb. 19).} Though drafted by Hammond, who was closely associated with the WCTU, it was known as the Trimmer Club bill\footnote{“New Laws Become Effective Today,” R&L, July 4, 1909 (1:7). On the Trimmer Clubs’ “pride in their first effort to get legislation to protect young men,” see “Trimmer Clubs Win on the New Cigarette Bill,” DMN, Mar. 23, 1909 (5:7).} because Hammond had become state manager/superintendent of that new organization in December 1908, when he resigned as state chairman of the state central committee of the Prohibition Party, a post that he had held for a year,\footnote{“To Be Head of Trimmer Club,” WR, Dec. 14, 1908 (2:2). On the title superintendent, see “Temperance Forces Are Very Active,” Carroll Times, Aug. 26, 1909 (3:3-4).} and he himself stated that the bill had been “drawn by the management of the Trimmer clubs....”\footnote{“Stop Cigarette Sales Altogether,” R&L, June 18, 1909 (5:2).} The Trimmer Club Movement was initiated in 1908 by 68-year-old Samuel Saucerman, a sometime Sunday school teacher\footnote{Samuel Saucerman Passed Suddenly,” Oelwein Daily Register, Mar. 27, 1911 (4:4).} who had been casting about for “some scheme by which he could do the most good to humanity with a portion of his wealth,”\footnote{Sam’l Saucerman Gives His Wealth to Unique Boys’ Club,” DMDN, May 11, 1908 (1:1). The name derived from a boy’s having to “‘begin to trim off his bad habits’” to become a member. Id. at 2:2.} which he in large part acquired by buying up land cheap during the early years of Des Moines and then developing and selling it.\footnote{L. Andrews, Pioneers of Polk County, Iowa, and Reminiscences of Early Days 208-11 (1908), on http://www.archive.org/stream/pioneersofpolkco02andr/pioneersofpolkco02andr_djvu.txt (visited Aug. 26, 2009).} In particular, “[I]nd which he had purchased for speculation twenty years before became a paying investment. A sum of $25,000 was set aside to promote the Trimmer club movement.”\footnote{“Sam Saucerman Dies Suddenly,” R&L, Mar. 27, 1911 (1:1).} Since the “‘scheme of endowing libraries and that sort of thing never appealed to me very much,’” he decided to organize a club composed of 100 boys aged nine to 12 “recruited largely from boys of the street.” A prerequisite for joining was taking the “‘Trimmer Pledge,’” which, after declaring that “I want to be a manly man,” obligated boys to forswear intoxicating drinks, profanity, and “the useless and wasteful tobacco habit.” Finally, Trimmer boys pledged to “want to save money and earn more.” To encourage these little accumulators, Saucerman placed in trust for them one dollar plus one cent a day so that at the end of three years they would have
“accumulated” about $10—at a cost to Saucerman of only $1,200.90 Reading “[g]ood books” does not appear to have been part of Saucerman’s program for boys, but selling them “to earn money in their spare time” was.91 If, as the “wealthy real estate dealer” expected, the boys kept saving, by the time they reached their majority, they would each have $1,000-$1,200, “and instead of being a beggar or a tramp or a dead drunkard, they will be good, clean, sober men and help to do things in the world.”92 Saucerman gave the United States only a few generations to change in order to avoid the fate of a polarized nation consisting of “tramps and slaves to the devil with a few multimillionaires sprinkled in.”93 By February 1909, almost a thousand boys aged 8 to 15 had joined in Des Moines,94 and, with the addition of clubs in towns such as Oelwein, more than 2,000 were expected by year’s end.95

House File No. 278 was referred to the 24-member Judiciary Committee (composed of 18 Republicans and six Democrats),96 a majority of which quickly reported it back with the recommendation that it be indefinitely postponed, while a four-member minority (consisting of three Republicans and one Democrat) recommended passage.97 On March 13, the full House took up the bill and by a vote of 69 to 20 adopted the minority views as a substitute for the majority report. Then by a vote of 68 to 26 it passed the bill with a minor amendment. That Democrats continued to contest the legitimacy of state regulation of individual adult consumption and businesses that profited from it was visibly on display in the party-line vote: only four Democrats joined 64 Republicans in supporting the

---

90. “Sam’l Saucerman Gives His Wealth to Unique Boys’ Club,” DMDN, May 11, 1908 (1:1, 2:2).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

bill, while only six Republicans joined 20 Democratic opponents.\textsuperscript{98}

The Senate Judiciary Committee recommended a series of non-substantive or minor amendments,\textsuperscript{99} having adopted which the Senate then voted 39 to 0 for H.F. No. 278.\textsuperscript{100} The House followed suit, concurring in the Senate amendments by a vote of 67 to 0.\textsuperscript{101}

As enacted, the bill provided:

If any reputable citizen of the county make oath before a magistrate, that he has probable cause to suspect, and does suspect, that any house, place or building, naming the house, building or place...and the occupant, is unlawfully used as a place in which to receive, keep, store, sell or give away cigarettes, cigarette papers or cigarette wrappers, or any paper made or prepared for the purpose of making cigarettes, or for the purpose of being filled with tobacco for smoking; or that the occupant is in any way concerned, engaged or employed in owning or keeping any such cigarettes or cigarette papers or wrappers, with intent to violate the law, or authorize the same to be done, such magistrate shall issue his warrant particularly describing the place to be searched and the person or persons to be apprehended or things to be seized directed to any peace officer in the county, for the purpose of searching such house, building or place and for the seizure of such cigarettes, cigarette papers or cigarette wrappers, or any paper made for the purpose of making cigarettes, and for the apprehension of the occupant or keeper thereof; and the said cigarettes or cigarette papers and the keeper shall be brought before such magistrate to be dealt with as provided by law. All such cigarettes or cigarette papers, so seized and unlawfully kept, shall be destroyed.... The discovery of cigarettes or cigarette papers in any public place shall be prima facie evidence of the keeper’s intent to unlawfully sell or give the same as prohibited in section...5006...of the code.\textsuperscript{102}

The magistrate was then required to collect the tax assessment of $300 against the property where the cigarettes were unlawfully sold or kept, as provided for in

\textsuperscript{98}Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa iv-vi, 835-37 (1909) (Mar. 13). The amendment required the search/seizure warrant to “particularly describ[e] the place to be searched and the person or persons to be apprehended or the things to be seized....” \textit{Id.} at 836.

\textsuperscript{99}Journal of the Senate of the Thirty-Third General Assembly of the State of Iowa 904 (1909) (Mar. 22).

\textsuperscript{100}Journal of the Senate of the Thirty-Third General Assembly of the State of Iowa 1032, 1042-43 (1909) (Mar. 22).


\textsuperscript{102}1909 Iowa Laws ch. 223, § 1, at 202, 203 (codified at § 5007-a, Supplement to the Code of Iowa 1913, at 1820 (1914)).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

section 5007 of the Code. On June 18, three months after the legislature had passed his bill, Trimmer general manager Hammond put the world in general and cigarette and cigarette paper sellers, property owners of the premises used for such selling, and smoking minors in particular on notice that, as his chosen vehicle, the Register and Leader, phrased it, he and his organization intended to “stop absolutely the sale of all cigarettes in Iowa.” In announcing that “a movement will be put on foot to enforce the cigarette laws to the letter” Hammond explained that he did not wish to take anyone “by surprise,” although ignorance of laws that for years had been “unenforced on account of a misinterpretation” would be no excuse. Since the 1897 mulct tax law expressly and unambiguously stated that “payment of such tax shall not be a bar to prosecution under any law prohibiting the manufacturing of cigarettes or cigarette paper, or selling, bartering or giving away the same” and the Supreme Court had upheld it, it was unclear why the Register called Hammond’s view of the mulct tax “new,” but then Hammond himself, after quoting the Code and the Court’s gloss of it, also did not explain on what basis “many dealers and officers of the law” had interpreted the law as meaning that payment of the tax gave dealers the right to sell. Rather, he cited these sources so that dealers who incorrectly believed that they were “acting lawfully may prepare themselves to go out of business.” Under no illusion as to the anti-cigarette movement’s capacity to agitate, prosecute, or litigate all over Iowa,

103 1909 Iowa Laws ch. 223, § 2, at 203 (codified at § 5007-b, Supplement to the Code of Iowa 1913, at 1820-21 (1914)).
104 “Stop Cigarette Sales Altogether,” R&L, June 18, 1909 (5:2).
106 See above ch. 12.
107 “Stop Cigarette Sales Altogether,” R&L, June 18, 1909 (5:2). The state’s leading paper continued in the same Eureka! vein when it declared that the anti-cigarette sales law “is to be made operative for the first time since it was passed ten [sic; should be 12] years ago through the belated discovery” that the $300 annual tax did not protect dealers against criminal prosecution. “Officials Will Bar Cigarettes,” R&L, June 29, 1909 (10:3). One sarcastic press account, which stated that probably upwards of 90 percent of Iowans supposed that paying the cigarette mulct tax exempted sellers from prosecution as was the case with the liquor mulct tax, claimed that Hammond himself had agreed until he “got to reading the code...and discovered the last sentences in section 5007. Then a great light dawned on him and he got an idea larger than any that ever grew on a boy.” “O! You ‘Pills’ Look Out for ‘Si’ Trimmer,” EG, June 23, 1909 (1:5, 2:1). If true, Hammond’s misunderstanding would have been even more puzzling than legal officials’. “‘Ware, You Pill Smokers! Hammond’s After Cigarettes,” DMDN, June 18, 1909 (10:6-7), falsely stated that Hammond “wants to give them [dealers] a chance to prepare a defense.”

1072
Hammond concluded his press communication with this appeal:

“The National Trimmer and Home Builders association has entered a new field and proposes to clear the ground of all obstructions for raising a crop of young men and women stronger, cleaner and more useful than has ever been raised before and they have interested themselves in laws whose enforcement will prevent public leeches from filling their coffers out of the manhood and womanhood of our country. Realizing their limited opportunities to procure the observance of these laws they call upon the enforcement officials of this state and all good citizens in every section of the state to rise up in their might and with the powers that the law gives them wipe this dangerous and disgraceful business out of our state and save our boys and girls from this degrading brain and body destroying evil.”

A week after going public with his plan and ten days before H.F. 278 was to go into effect, Hammond, its drafter, informed the attorney general’s office that in a number of Iowa cities “merchants are openly advertising and making sales of cigarettes and cigarette papers....” He then posed several questions to which he presumably already knew the answers, but they were answers that it was important to have the attorney general’s office publicly confirm. One was whether the mulct cigarette law protected the dealer in any manner; another was whether anyone was permitted to sell cigarette papers or keep them for sale or gift. On June 26, the Republican Des Moines Evening Tribune reported under the attention-grabbing front-page headline, “Coffin Nails to Die a Very Sudden Death,” that Attorney General Howard Byers—who, as the Republican Speaker of the House in 1896 had voted against the Phelps law on the grounds that it was unconstitutional—had “sounded the death knell of the cigarette in Iowa” in a letter to Hammond fully upholding and endorsing the latter’s view that it was illegal to sell cigarettes in the state regardless of whether the $300 mulct tax was paid. Fifteen cigarette dealers in Des Moines, “feeling secure in the payment of the quarterly tax of $75 each,” had laughed at Hammond’s claim that once the new law went into effect on July 4, he would begin prosecutions, but Byers’ letter not only supported Hammond, but meant that any county attorney who neglected to enforce the anti-cigarette law was as liable to removal from office as for failing to enforce any other law.
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

Byers, a Progressive, also had George Cosson, a special counsel of the attorney general (who would himself be attorney general from 1911 to 1917), research U.S. Supreme Court decisions, which “established without any question the right of a state to collect a tax and at the same time prosecute the man who pays it.” Cosson, who as a Republican member of the Senate in 1909 voted for H.F. 278, had been the chief sponsor of two bills passage of which meant that every county attorney in Iowa “would be obliged to aid [Hammond] in his efforts to thoroughly enforce the [anti-cigarette] law.” Specifically, the Cosson law both made it the duty of county attorneys to enforce all state laws and mandated the removal from office by district court of any county attorney (or sheriff, mayor, police officer, marshal, or constable) for wilful or habitual neglect or refusal to perform the duties of his office. On June 28, Cosson replied that paying the


“Coffin Nails to Die a Very Sudden Death,” Evening Tribune (Des Moines), June 26, 1909 (1:5-6). Cosson’s research involved looking up state and U.S. supreme court decisions on the morning of June 26. Id.


“It Is Only a Bluff,” IU, July 9, 1909 (4:2). Nevertheless, during his later tenure as attorney general Cosson was accused of being a selective law enforcer in the sense that he “would never been [sic] guilty of such an impolitic act” as “to take up the cause of law enforcement in Des Moines” because “[h]is time and efforts have been confined to law enforcement in Davenport, or Ottumwa, or Mason City—in fact, anywhere excepting in the shadow of the capitol dome.” Not only graft and stock watering, but “the open disregard of the Iowa cigarette and liquor laws in Des Moines, have entirely escaped his notice.” “Bi-Partisan Hypocrisy!” IH 61(39):1, 2, 4-5, 24-25 at 24 (Sept. 28, 1916).

1909 Iowa Laws ch. 17, § 2(1), at 19 (S.F. 6). Another Cosson bill applied to sheriffs. 1909 Iowa Laws ch. 34, at 31 (S.F. 7).

1909 Iowa Laws ch. 78, § 1, at 72 (S.F. 8). The Cosson law also empowered any five electors of the county to file the complaint (§ 2 at 73). The removal law, though not aimed specifically at enforcement of the anti-cigarette law—liquor and prostitution were more central issues—incontestably was covered by it. In opening his campaign for attorney general in 1910, Cosson explained the purposes of his bill in systemic terms that far transcended the anti-cigarette law: “The fundamental proposition back of the present law is the fact that no local community in the state has a right to openly and flagrantly violate the state law; in other words, if the state has the authority to pass a law, it has the authority to see that it is enforced, and in doing this it does not destroy local self government because as was well said by [Missouri] Governor [Joseph] Folk: “When any
mulct cigarette tax did not in any manner authorize the sale of cigarettes or cigarette papers. He added that the legislature had not enacted the mulct tax in order to relieve any payer of any of the criminal penalties imposed for violating the ban on sales; instead, “one of its objects was to add an additional impediment to the business of selling...cigarettes....” Cosson also negatived the other question: “Stronger language could not be used than that found in section 5006 prohibiting the sale or disposition of cigarettes and cigarette papers and wrappers either by way of gift or exchange....”

The Byers-Cosson letter, in conjunction with the new law authorizing search warrants, would, in the Register and Leader’s understatement, “be of more importance than was accorded it when the law was passed last winter.” In particular, “the fifty Iowa tobacco shops where cigarettes are sold must either dispose of their stocks or face a criminal prosecution.” Intriguingly, in what appeared to be an exhaustive rather than an illustrative list, suggesting that illegal cigarette sales were exclusively a big-city phenomenon, the press observed that cigarettes were “sold in Des Moines, Sioux City, Iowa City, Clinton, Cedar...
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

Rapids and Davenport.” The next day a newspaper in Council Bluffs, where dealers were disposed to sue over the mulct tax payments, one-upped its competitors by adding that city to the list. Apart from Iowa City, these six cities accounted for six of the state’s eight largest cities. In Waterloo, the seventh largest, “[o]nly one business man...has at all considered paying the mulct tax necessary for handling cigarette papers, but when he learned that the payment of such tax would be no protection to him, he concluded not to take out a license.” As the new law’s effective date approached, in Dubuque, Iowa’s fourth largest city, the cigarette dealers—of whom there only three—“experienced no such record sales” as the million sold on one day in Des Moines, because, they claimed, the Mississippi River city was “one of the poorest for cigarette sales in the country,” there never having been sold there one-third as many as in same-sized eastern cities, and most of those that were sold having been bought by “transients.”

In Des Moines, whose 15 dealers almost equaled the number in the rest of the state combined, the sale of cigarettes, which were freely advertised, was “said to be enormous.” Initially the Des Moines merchants regarded Byers’ opinion “with comparative equanimity....” One of them reassuringly asserted: “‘We fellows who have been paying our tax under protest have nothing to worry about.... The money we have paid in will be refunded at compound interest and the interest will amount to as much as our profits for the next five years.’” Then

123 “To Enforce Cigaret Law,” SCJ, June 29, 1909 (3:3).
124 “Will Demand Return of Cigaret Taxes,” Sunday Nonpareil (Council Bluffs), June 27, 1909 (1:2). Two days later the Register reported that “[c]igarettes have been sold openly in Des Moines and six other Iowa cities for years.” “Officials Will Bar Cigarettes,” R&L, June 29, 1909 (10:3).
126 “Dubuquers Must Quit Cigarettes,” Telegraph-Herald (Dubuque), July 3, 1909 (8:4). According to another account, four cigarette dealers in Dubuque had carried extensive stocks; sales on July 3 equaled those on a Sunday in August two years earlier when for the first time in 50 years a Sunday closing law became effective in Dubuque. “No Cigarettes Here,” Dubuque Times-Journal, July 3, 1909 (5:3-4). The same paper referred to the “land office business” that the cigarette sellers had done on July 3. “Last of Cigarettes,” Sunday Times-Journal (Dubuque), July 4, 1909 (1:4).
reverting to a traditional lament, the seller looked forward to a more profitable post-cigarette world that he and his competitors had been unable to create on their own: “There is no money in them anyway. The trust keeps boosting prices and after the tax is paid the dealer has nothing left.” Infected by the cigarette merchants’ optimism, the Register and Leader spun out the further tale that Polk County and Des Moines might lose under the attorney general’s ruling since they “may be required to float another bond issue if the $300 per year cigarette tax is held to be unconstitutional [sic] and no bar to prosecution for the sale of ‘coffin nails.’”128 Two days later the News gave further shape to the dealers’ plan by reporting that after having heard that payment of the tax would not even confer on them the right to sell cigarettes, “the cigarette men have banded together, and will make an attempt to collect from the state the money they have paid in the last five years.”129

The new law’s impact was immediate.130 For example, as early as May, the Iowa City assessor placed notices in the local press warning grocers and other tobacco dealers that they would be “prosecuted to the fullest extent of the cigarette mulct law” for “giving cigarette papers with tobacco or having it on the premises to be taken by anybody.”131 Then a week before the law’s effective date, the Brown and Fink cigar stores in Iowa City announced that they would no longer sell cigarettes after July 4. Since only two tobacconists had sold them,132 after that date it would be “impossible to secure them in Iowa City. Both dealers have said that they were content to let some one [sic] else go into the courts and fight the attorney general’s ruling.”133 As one self-reflective dealer conceded: “We knew the license problem had to be decided, when we first took out licenses, and we took a risk. I don’t think we’ll fight.”134 Because of the location of state’s leading university in Iowa City, the retailers’ statement was “of

129“Cigarette Men After Back Pay,” DMDN, June 29, 1909 (3:8).
130In Burlington, the county attorney’s public announcement about the law reportedly would make dealers “hesitate” about having a cigarette “within forty miles” of their stores. “Law Is Severe,” Evening Gazette (Burlington), June 30, 1909 (6:3). In Des Moines, a cigar dealer’s filing voluntary bankruptcy in mid-July was attributed to the new law. “First Victim of New Law,” DMN, July 28, 1909 (2:8).
131“Notice,” ICC, May 10, 1909 (5:7) and May 12, 1909 (4:2).
133“Cigarettes Ousted,” Hawk Eye (Burlington), June 29, 1909 (3:4).
134“Cigarette Tax Fight in Court,” Iowa City Daily Press, July 1, 1909 (8:5).
more than ordinary importance locally...." Enforcement of the ban would “mean something of a loss to the dealers..., particularly during the school year, as the cigarette has many users among the students,” but, one of the two merchants voiced the aforementioned lament, “‘in the end we will sell more cigars. It costs considerable to handle cigarettes. The profit was not very great and license of $300 per year cuts in on the receipts.”

In Dubuque dealers, having “indicated an unwillingness to take any chance with the law by paying the mulct tax assessment,” stopped selling at midnight on July 3 and packed up what was left over to “ship them back to the manufacturers and trade them for cigars.” The flux in which commercial-legal strategizing was caught up as the law’s starting date loomed was exemplified by Davenport, where on July 1 the Democrot and Leader reported that many local lawyers had opined that the law would not withstand supreme court scrutiny because it authorized issuance of search warrants based on statements of probable cause for suspicion rather than a sworn statement of actual fact. But then the very next day, after the dealers had held a meeting, the same paper predicted that “[c]igaret sales will be a thing of the past after tomorrow night.” Sellers, based in part on the basis of legal opinion they had received, concluded that: “The penalty for violations of the act are [sic] so strenuous and the legal machinery which has been placed in operations forcing prosecutions is so strong that the dealers have concluded that the same way of law obedience is the only way of business prosperity in this respect.” In case the “level playing field” rhetoric that a century later had become gospel among their epigones meant anything to Davenport dealers in 1909, they surely drew solace from intelligence they received from Des Moines and other cities that no one would contest the law and that throughout Iowa all cigarettes would be cease to be sold on July 4. The Council Bluffs dealers—including one who had been stocking $1,500 worth and another almost as much—who had been selling cigarettes for several years, stopped all retail sales the night before the new laws went into effect: “Neither firm wants to see a minion of the law take these goods out and make a bonfire of them. This would be bad enough, but to be cinched for $300 besides would be

The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

the final straw.” To be sure, these dealers, harkening back to the Tobacco Trust’s constitutional commerce dream that never came true, insisted that they had a right to sell cigarettes in “original packages,” but the Council Bluffs Nonpareil promptly deflated that illusion: “Whether or not dealers can sell cigarettes in original packages is not material in actual practice. Few persons buy cigarettes by the gross or by the 1,000 or 10,000.”141 In Clinton, where only few stores had been selling them anyway, the press reported under the headline, “Cigarettes Doomed,” that one owner had announced that he would stop because he knew that the law would be enforced.142

Des Moines, Iowa’s cigarette capital, presented a more complex situation. A few days before new laws’ effective date, city and county officials, including the chief of police, the superintendent of public safety, the county attorney, and the sheriff, assured Hammond that they were “ready and willing to enforce” the prohibition: if dealers exceeded the few days’ grace for disposal of their stocks on which the officials agreed, they would face a fine ranging between $25 and $50.143 On July 3, the last day on which retailers could sell cigarettes with de facto impunity under the laws that had prohibited their sale since 1896/1897, they purportedly sold one million (one dealer alone selling more than 60,000), twice as many as were sold daily in New York.144 (The Des Moines labor union weekly put the figure at several million.)145 Sellers stopped selling at midnight “rather than pay the quarterly mulct tax today and run a risk of having to quit July 4 with no chance to recover the tax money.”146

As soon as the laws went into effect, however, the press began reporting (and thereby spreading) “[r]umors” that the United Cigar Stores Company would “fight the Iowa anticigarette law....” They gained credibility from the fact that as early as July 5 the manager of the local Des Moines store stated that corporate headquarters had instructed him to consult a lawyer about “the belated enforcement of the twelve year old law.” In confirming that he would speak to a lawyer the next day he refused to reveal whether he had also “been instructed to start a test case if advised by lawyers that there is a chance to knock out the

141 “Iowa Cigaret Laws,” Sunday Nonpareil (Council Bluffs), July 4, 1909 (4:4). On the original package doctrine, see above chs. 4-5.
142 “Cigarettes Doomed,” Clinton Daily Advertiser, June 29, 1909 (3:5).
143 “Officials Will Bar Cigarettes,” R&L, June 29, 1909 (10:3).
145 “It Is Only a Bluff,” IU, July 9, 1909 (4:2).
146 “Cigaret Bargain Days,” Bedford Times Republican, July 8, 1909 (8:3).
However, under the headline, “Paper Pipe Trust May Buck Law,” the Des Moines Daily News interpreted the consultation as being planned “with a view of attacking the new anti-cigarette law.” Independent dealers interpreted the move as a “sure indication” that the firm expected to try to legalize sales.

Crucial to understanding this maneuvering is the fact that the American Tobacco Company owned two-thirds of the stock of United Cigar Stores, which, in other words, an integral part of the Tobacco Trust, which, despite the series of defeats that the State of Iowa had inflicted on it in litigation before the Iowa and U.S. Supreme Court, was, at least for public consumption, contemplating further frivolous action to stave off the dismantling of an entire state cigarette market. Interestingly, ATC was undertaking this effort despite the fact that United Cigar Stores had opened its first store in Des Moines only two months earlier, though no one doubted that it would “invade Iowa in earnest,” and local cigar manufacturers and dealers opposed the advent of the “trust,” which would send “all the profits out of the city” and whose anticipated price cutting would inure to the “discomfiture of the smaller cigar stores.”

Nevertheless, the Trust’s legal machinations regarding cigarettes were hardly anathema to these lesser merchants, who were themselves not above profitmaking civil disobedience: “Orders for cigarettes to be shipped into Des Moines from Chicago and other points are already reaching the dealers, who say the anti-cigarette law will have but little effect in decreasing the number of ‘pills’ smoked.” Mail order houses had sent circulars all over Iowa offering to ship cigarettes in any volume by mail or express C.O.D., one firm promising false packaging labeling large rolls of cigarette papers “‘toilet paper.’” From the resumption of sales “in as large quantities as ever” (“ordered by the box from Chicago by dealers”) but unaccompanied by mulct tax payments the News concluded that Polk County and Des Moines would each lose $3,600 a year.

---

147 “Will Consult Attorney,” ICC, July 7, 1909 (3:5).
152 See above chs. 11-12.
in revenue that they shared equally. The saga of cigarettes’ comeback reached its high point in the Daily News on Saturday July 31 with the front page announcement that “[s]oftly, quietly, without the blare of trumpets or the sound of cymbals, the little cylindrical pill, pet aversion of purists...will go on sale again in Des Moines Monday.” The occasion for their reappearance was the opinion of a half dozen of Iowa’s best lawyers that sale in original packages was a safe haven from the “Byers-Hammond ruling,” since which dealers had been in their attorneys’ “hands.” To be sure, the unidentified elite of the state bar were not satisfied with merely regurgitating the judicially discredited original-package doctrine: this time round it was paired with a new scam. In the newspaper’s folksy account:

“Can you sell me some cigarette papers?” the slave of the habit asks his dealer.
“No, but I’ll order them from Chicago for you. In a package of 500,” the wily retailer replies. He orders them—from Chicago—and gets them in the incredibly short space of 20 minutes.

The Daily News then unveiled “the gist of the lawyers’ opinion”: “if the retail dealer does business in this way he becomes a jobber, and escapes the law.” How the retailer could possibly become an exempt jobber with in-state customers

---

157“County and City Lose on Pills,” DMN, July 29, 1909 (1:6). If sellers had paid $3,600 for the second half of 1909 as they had for the first, the figures projected by the newspaper would have been correct; in fact, however, only $75 in cigarette mulct tax was collected for the second half. Financial Report of Polk County for 1909, at 61, 65, 81, 85 (n.d.).


159The newspaper claimed that the “new ruling” would help rather than impair cigarette sales in that smokers would be “compelled” to buy “by the 500 in original cartons.” The supply would “disappear all the faster because” because smokers always had a large one on hand until they ran out. “Death Pills Are Again on Sale; Laws Are Evaded,” DMDN, July 31, 1909 (1:8). Naively, a provincial newspaper commented on the original package doctrine as applied to cigarettes: “To say that they may be not be sold singly, but permit their sale in certain sized packages, is simply absurd from a common sense view of the case. No self-respecting man will take advantage of a technicality in law to sell that which he knows is intended to be prohibited.” Adams County Union-Republican, Aug. 18, 1909 (4:1) (untitled edit.).

160“Death Pills Are Again on Sale; Laws Are Evaded,” DMDN, July 31, 1909 (1:8).

161“Death Pills Are Again on Sale; Laws Are Evaded,” DMDN, July 31, 1909 (1:8).
when the mulct tax law unambiguously declared that “the provisions of this section shall not apply to the sales by jobbers and wholesalers in doing an interstate business with customers outside the state”\textsuperscript{162} the newspaper did not need to explain in terms of statutory construction: rather, it furnished a concise yet fully satisfactory account of the Trust’s and the lawyers’ legal tactic by noting that cigarette sellers “will at least make a test case out of the jobbers’ dodge.”\textsuperscript{163}

This crescendo of Trust legal shenanigans was muted by a brief report on August 10 on an inside page of the \textit{Register and Leader} (which had not been competing with the \textit{Daily News} for coverage of the United Cigar Stores initiative) that in fact no attempt would be “made by the majority of Des Moines tobacconists to sell cigarettes in wholesale packages, as has been claimed in a rumor that has been circulating for the past week that the distribution of the ‘pills’ in original packages would be attempted.” That “none of the dealers seem[ed] disposed” to put into practice the advice of their lawyer, whom the paper revealed to be John B. Sullivan\textsuperscript{164}—who a few months earlier, as chairman of the House Judiciary Committee, had reported and voted for the recommended indefinite postponement of Hammond’s search and seizure bill\textsuperscript{165}—that cigarettes could be sold lawfully was attributed to their belief that any such effort would lead to prosecution on the same grounds that had prompted legal action against liquor sellers who had sought to evade statewide temperance by selling liquor in the original package “being shipped in and immediately disposed of to the purchaser without either storing it or opening the keg or barrel.” Instead, cigar merchants intimated that they would try to repeal the anti-cigarette sale law at the next general assembly.\textsuperscript{166} Carrying this (unattributed) narrative much further, remarkably, the weekly organ of 6,000 Des Moines labor union members,\textsuperscript{167} which deemed the cigarette “the most dangerous enemy of youth” and as having

\textsuperscript{162}1897 Code of Iowa Ann. § 5007, at 1955.
\textsuperscript{163}“Death Pills Are Again on Sale; Laws Are Evaded,” \textit{DMDN}, July 31, 1909 (1:8).
\textsuperscript{165}\textit{Journal of the House of Representatives of the Thirty-Third General Assembly of the State of Iowa} 508 (1909) (Feb. 23).
\textsuperscript{166}“Few Will Defy Statute,” \textit{R&L}, Aug. 10, 1909 (3:2). In the days following the alleged resumption of cigarette sales in Des Moines (and again after publication of the \textit{Register} article) the \textit{News} did not mention the subject. In mid-August a provincial weekly claimed that Des Moines dealers had “placed the coffin nails again on sale,” but it was, as was customary, presumably merely repeating what (in this case) the \textit{News} had claimed almost three weeks earlier. \textit{Adams County Union-Republican}, Aug. 18, 1909 (4:1) (untitled edit.).
\textsuperscript{167}\textit{IU}, July 9, 1909 (3).
“no place in a civilized nation,” editorialized: “It is not likely that the sale of cigarettes will ever again be general in Iowa. There is such a strong sentiment against the ‘dope’ stick—a sentiment that is constantly growing—that the business cannot be safe or remunerative.”

Although the Iowa legislature had banned the sale, not the smoking, of cigarettes, cutting off the supply also depressed the prevalence of smoking them. Two months after the laws went into effect, in Iowa City, one of the seven cities in which cigarettes had been openly sold under the old law, the press guessed that current users represented probably no more than one-tenth of their pre-July 4 numbers. Nevertheless, enough of them were smoking enough cigarettes as to raise the question as to where they were coming from. In the first instance the Iowa City Citizen identified Illinois and other non-prohibitory states as places from which they were being brought into Iowa (legally insofar as they were exclusively for the importer’s own consumption). But then it mentioned that some smokers claimed that it was “still possible to get cigarettes if it is known that you want them.” Although the newspaper was certain that no local cigar dealer was guilty of “transgressing a law which the criminal department of the state has set about to rigidly enforce,” it stressed that it was in law-abiding merchants’ interest to see to it that violators be brought to justice. Within a few days the paper, thanks to an informant, had been able to run these rumors to the ground: “A big tobacco company, one known throughout the country by its great advertisements,” was looking after smokers’ interests by offering them seven books of cigarette papers if they sent two cents in postage in an envelope.

---


169A Dubuque newspaper erroneously asserted that the new cigarette search warrant law was “designed to do away completely with cigarette smoking of all kinds and if rigidly enforced will accomplish its purpose as it is a strict law.” “No Cigarettes Here,” Dubuque Times-Journal, July 3, 1909 (5:3-4). Even if all sales in Iowa were prevented, it remained lawful, at the very least, for adult Iowans to buy cigarettes in non-prohibitory states and bring them back to Iowa for their own personal consumption. Moreover, not only did the anti-smoking law apply only to minors, it was not even unlawful for them to smoke in private houses.

170“Where Do They Get ‘Em?” ICC, Sept. 6, 1909 (2:2).

171“The Farmer and the Moral Hope of the Nation,” Homestead (Des Moines), July 29, 1909 (1:3-4 at 4).

172“Where Do They Get ‘Em?” ICC, Sept. 6, 1909 (2:2).

The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

In late September 1909, three months after special counsel Cosson had issued the aforementioned opinion to Hammond, Attorney General Byers sent a long letter to county attorneys with various suggestions for law enforcement on a wide range of subjects including illegal combinations formed to destroy competition. But Byers also touched on the liquor and cigarette mulct taxes, updating the impact of the new law. Reiterating that paying the latter “in no wise relieves a person who violates any of the provisions of section 5006 of the code from any of the penalties of said section, but is simply an additional penalty against the traffic,” the attorney general added:

“In nearly every part of the state the open sale of cigarettes has been abandoned since the 4th of July, but it is still the custom of a number of persons who sell tobacco to either sell packages of tobacco which contains in each package a certain number of cigarette papers or wrappers, or else to leave a quantity of these wrappers on the counters, where the same may be conveniently appropriated by those who are addicted to the cigarette habit. This is simply another method of attempting to evade the law, and ought not to be permitted.”

The attorney general’s unambiguous declaration that the mulct tax was in no way a license to sell cigarettes that had somehow superseded the general prohibition embodied in the 1896 Phelps law convincingly revealed that four years after the U.S. Supreme Court had definitively put an end to the 12-year (1893-1905) judicial delaying action that the Tobacco Trust’s lawyers, Fuller and Parker, had devised to subvert the statutes in Washington, West Virginia, Iowa, and Tennessee, discourage other states from enacting similar bans, and counteract the nationwide decline in sales, the cigarette-suppression pioneering state of Iowa, reinforced by the adoption of the Hammond enforcement mechanism, was mobilizing and empowering its citizenry to create a cigarette-free Iowa. Little wonder, then, that a week after Attorney General Byers had circulated the aforementioned letter to the county attorneys, the WCTU at its annual convention boldly predicted that the Proudfoot and Hammond laws “will banish the cigarette from Iowa.”

Iowa’s legislative action in 1909 may have gained it national recognition, but

---

174“Gets After Illegal Pools,” Altoona Herald, Sept. 30, 1909 (2:2). The identical text was published in numerous newspapers; e.g., “Attorney General H. W. Byers,” Humeston New Era, Oct. 6, 1909 (2:6). The letter, from which the newspapers printed only extracts, did not appear in the attorney general’s biennially published report and opinions. The particular evasion that Byers mentioned was not confined to Iowa; see below ch. 16 on Tennessee.

175Iowa Woman’s Christian Temperance Union, Thirty-Sixth Annual Convention 118 (1909).
The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

the account provided by the newspaper of historical record was a comedy of errors. “The War on the Cigarette—Eight States, Through Their Legislatures, Have Taken Action to Prevent Its Sale” published by The New York Times in its Sunday magazine erroneously asserted that “the first cigarette hammering that was done in the United States occurred in Wisconsin and Indiana five years ago.”

Why the Times believed that these two laws from 1905 were the first, when Washington State had acted a dozen years earlier (as the amnesiac Times had reported at the time) and North Dakota, Iowa, Tennessee, Florida, and Oklahoma, had also acted before 1905 remains a mystery. Interestingly, the Times denied effective agency to the anti-cigarette militants (who “gave the word for it [the cigarette] to go. But it didn’t go”) and attributed the legislative successes to business under the slogan that “the best reformer is not a reformer. Business does infinitely more.” Discovering that men who smoked “were not efficient” and “could not be trusted,” business “began to discriminate against cigarette smokers.” And unlike the anti’s, “[b]usiness didn’t preach—it practiced. It didn’t say: ‘For the sake of your immortal soul, cut out the smoke.’ It said: ‘If you smoke, skiddoo—no job for you.’ And man, requiring food, raiment, and an occasional plug of tobacco, will listen to the voice of his job, when his soul seems to have difficulty in getting in a word between the puffs. Eventually the voice of the community became law.”

The problem with this edifying narrative is that it lacked any empirical basis.

The Times’s report of the legislative process in Iowa in 1909 was especially skewed:

Last Winter business was heard in the Iowa Legislature. Somebody proposed a law prohibiting the manufacture, sale or use of cigarettes in Iowa. Nobody smiled. Such legislation had passed the joke stage. The wisdom of the few had dribbled down into mediocrity. Therefore a majority was easily counted in both houses. The Governor approved, and on July 1 the law became effective. Iowa had crushed out the cigarette, precisely as she had crushed out the legal sale of liquor—not because she listened to the

---


177 See above ch. 4.

178 Forty years later a scholarly publication repeated this erroneous claim that Indiana and Wisconsin in 1904 and 1905 had been “the first states to pass anti-cigarette legislation.” Eugene Porter, “The Cigarette in the United States,” Southwestern Social Science Quarterly 28(1):64-75 at 72 (June 1947).

The WCTU Achieves Prohibition of Public Smoking by Minors in 1909

pleased of reformers, but because she heeded the commands of business. ¹⁸⁰

Virtually every one of these empirical claims was wrong. In fact: Iowa had
begun prohibiting the manufacture and sale of cigarettes in 1896; the only ban on
use proposed and enacted in 1909 applied to minors, which Iowa was a late-comer
in imposing; and it was the WCTU—and not employers—that had been and
remained the driving force behind anti-cigarette legislation in the state. A few
days later a Times editorial reinforced and compounded these errors, asserting,
for example, that in Iowa’s and other midwestern states’ recently enacted bans on
manufacturing or selling cigarettes “moral reasons and preachments did not
weigh.” The paper then turned a bright light on its newsgathering competence by
claiming that as a result of the customary refusal of employment in the Midwest
to “persons bearing this badge of servitude to nicotine...the habit began to be
universally discarded.”¹⁸¹

¹⁸⁰“The War on the Cigarette—Eight States, Through Their Legislatures, Have Taken
At Times Vigorous Enforcement, Legislative Deadlock, and Litigational Success: 1910-1920

And to think that the cigarette output should have increased in one year by over one thousand eight hundred and fifty-six millions in spite of the increase of the stamp tax from 54¢ to $1.25 and in spite of the boycotting and outlawing of the cigarette by entire States and individual associations. The more the cigarette has been sinned against by legislators and individual fanatics the greater the hold it seems to have taken of the popular favor and the wider has its consumption spread amongst the masses.¹

Contrary to later non-empirical assertions by scholars and others that the Iowa anti-cigarette statute was a dead letter that was never enforced,² numerous campaigns in larger cities (including and especially in Des Moines) demonstrate that the prohibitory cigarette statutes were in fact at times and in places enforced. (Even an American Tobacco Company traveling agent in Iowa estimated in 1913 that about half of tobacco dealers in the United States living in prohibitory jurisdictions obeyed their state law.)³ Such concerted efforts at enforcement were, to be sure, often the result of non-governmental pressure reacting to officials’ failure to perform their statutorily mandated duties. Perhaps equally consequential was the Iowa attorney general’s successfully prosecuted litigation, in support of his aggressive raids on sellers, destroying, at last, the original package doctrine even as a frivolous legal tool for the cigarette industry. And, finally, throughout the second decade of the twentieth century, despite the much ballyhooed World War I-inspired acclaim for cigarettes, opponents of cigarette and smoking regulation failed to mobilize enough votes in the Iowa legislature for repeal in the face of widespread backing for the WCTU’s program. During these same years, however, it became clear that the anti-cigarette movement, its strength having peaked, was losing its capacity for pushing its prohibitionist agenda to new frontiers. The reason for this stagnation and ultimate reversal was not difficult to discern: during the 10 years from about 1906 to 1916—that is, from the point at which cigarette production had definitively surpassed the


²More generally, one author asserted that anti-cigarette laws “were rarely enforced. Occasionally police departments would experience little spasms of virtue (or perhaps develop a thirst for payoff money) and make a few arrests....” Cassandra Tate, Cigarette Wars: The Triumph of “The Little White Slaver” 61 (1999).

³“Tobacco Agent Tells How Law Is Broken,” WR, Jan. 29, 1913 (5:4). To be sure, he claimed that the other half sold more prohibited cigarettes in a day than they otherwise would in a week. “And in all cases a higher price is demanded in sale.”
previous high point attained in 1896 before a massive slump set in, to the time directly before U.S. entry into World War I—cigarette production/consumption quintupled. The only realistic way, as the WCTU had been acutely aware, to put an end to cigarette smoking was to ban sales before what had initially been perceived as a fad was transformed into a lifelong addiction that pervaded more and more diverse age, regional, class, gender, ethnic, occupational, and income groupings. The explosive expansion of cigarette usage during the decade preceding the arrival of the multi-million-strong American Expeditionary Forces in Europe definitively signaled the popular breakthrough that shut the window of prohibitionist opportunity that would not begin to be re-opened (by science) for half a century.

**More Than Merely “somewhat sporadic effort at law enforcement in a few of the larger cities of the state,” Especially in Des Moines: 1910-1916**

A. MacEachron gave a talk on “How to Enforce the Cigarette Law.” He said that it is much easier to make such laws than to enforce them, for those who are to enforce them are often not interested in them, as are those who have had them placed upon the statute books.

Whatever...failure there has been in enforcement of this law, cannot be charged to the judiciary department of the State, for it has stood squarely and unafraid for the enforcement of these laws, and has sustained the law in all of the numerous attacks made upon it.

At a meeting of the Laymen’s Civic Union—a church-spawned organization advocating municipal government morality that had been founded just a few

---

4See above ch. 1.


8Women’s Christian Temperance Union of Iowa, “Important Rulings of Supreme Court of Iowa in Cigarette Cases” (n.d. [ca. 1919]), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
weeks earlier—at the beginning of March 1910 the ubiquitous and multifarious prohibitionist John B. Hammond attacked Des Moines City Councilman and Superintendent of Public Safety John Hamery for failing to enforce the anti-cigarette laws (before moving on to his shortcomings in the matter of “arresting and prosecuting fallen women”): “If proper vigilance had been exercised...there would have been arrests and prosecutions for selling cigarettes. The anti-cigarette law is violated in Des Moines every minute of every hour of every day in the year, and Hamery knows it. I saw a boy perhaps 14 years old smoking a cigarette the other day and Hamery stood within four feet of him.”

To be sure, such misfeasance was scarcely statewide: in Burlington, for example, based on information, furnished by citizens, that the manager of the local establishment of United Cigar Stores—a creature of the Tobacco Trust—was selling cigarettes, the county attorney instructed the sheriff to raid the place. Finding cigarettes, the latter arrested the manager, who was to be tried three days later in the first local prosecution under the 1909 laws.

Hammond was by no means confined to the Laymen’s Civic Union as the sole vehicle for implementing his prohibitionist program. Less than two weeks after he had launched the aforementioned attack he was named by the prohibition state central committee as its representative on a state law enforcement and legislative committee formed by almost all of Iowa’s temperance organizations (including the WCTU) one of whose principles was enforcing the state’s moral laws. The new committee’s object was to secure enforcement of state laws relating to the sale of liquor, cigarettes, and tobacco as well as gambling and “social purity” by the officials “elected for that purpose through the application of the Cosson removal laws.”

By early June the anti-cigarette movement’s relentless pressure, once again, bore fruit: during the last week of May and the first week of June the agents of City Assessor James Parker succeeded in buying cigarettes at 30 different stores in Des Moines. The owners’ names were then handed over to the county auditor,
whose task it then was to collect from them the $75 quarterly mulct tax for the second quarter. (The dealers would not be prosecuted criminally because officials did not find the cigarettes through searches.) Among the violators appearing on the list of names published in the Register and Leader were two United Cigar and two C. C. Taft stores as well as two drug stores. The obverse side of this vigorous tax enforcement action, as a result of which sales fell “alarmingly” the night it became known that publication was impending, was that despite the “grand clearance sale, disposing of nearly three million cigarettes” on July 3, 1909, they had manifestly gone back on sale after almost a month when “sales were conducted on the quiet, dealers refusing to sell to anybody but their personal friends.” Ironically, the reason for merchants’ bold return to open selling was “the common supposition” that they “would not be forced to pay the mulct tax as they were practically in the face of the law.”

How, in the wake of all the publicity over enactment of the 1909 laws and especially over Attorney General Byers and Senator Cosson’s unambiguous opinion that payment of the tax did not immunize sellers against prosecution for selling, any dealer could possibly have concluded that illegal selling would then de facto immunize him against payment of the mulct tax is difficult to reconstruct (especially after 1919, when the revised Code of Iowa broke the mulct tax law into several code sections, one of which was headed “Payment of tax no bar to prosecutions”).

Legal logic finally surfaced several days after Parker’s revelations when Polk County Attorney Thomas Guthrie announced that he would prosecute the more than 30 cigarette sellers as soon as the grand jury completed its current investigation. Anticipating that action, dealers, who had already been put “on their guard” by Parker’s investigation, disposed of their cigarette stocks, which they had kept for illegal sales, making it “impossible to buy a box of the ‘coffin nails’ in Des Moines.” To Guthrie it was a matter of indifference whether they

---

13. Cigarette Sales Drop,” R&L, June 8, 1910 (12:3). Also in violation was the Rex Cigar Store, which had actually advertised their sale in the anti-cigarette Iowa Unionist, Oct. 1909 (2). In fact, whereas only $75 in cigarette mulct tax was collected for the first half of 1910, $2,625 was collected for the second half (which would have represented little more than one-half of 30 payments of $150). Financial Report of Polk County for 1910, at 64, 69, 86, 91 (n.d.).

14. Thirty Taxed $300 for Selling ‘Pills,’” WEC, June 8, 1910 (2:5). The 30 “prominent cigar firms,” according to a provincial paper, “were thunderstruck to learn” of the mulct tax assessment. “Cigar Firms Hit Hard,” Graettinger Times, July 16, 1910 (3:4).

15. See above ch. 13.

were still selling, because his evidence dated back more than a month, “‘when all of the dealers were selling cigarettes.’” After 13 years, enforcers of the 1896, 1897, and 1909 anti-cigarette sales and mulct tax laws seemed, at last, to have caught up with sellers, who “were undecided...as to what course to pursue. The majority were in favor of paying the tax, but feared that by doing so they would admit the operation of illegitimate business.” While dealers struggled to wriggle out of the trap that their own illegal acts had laid for them, Attorney General Byers—at least as filtered through the press—both counterproductively confused the legal situation and undercut their prosecution by rendering an opinion on June 18 that declared that the mulct tax was “in full force, but expressed a doubt whether the payment of the tax would protect the dealer from criminal prosecution.” Why Byers would now backtrack, expressing any doubt whatsoever, whereas a year earlier he and Cosson had set forth the only interpretation to which the law was susceptible, is unclear, but in the meantime the Polk County treasurer had requested from Guthrie an opinion as to whether he was legally permitted to accept the dealers’ tax payments. Towards the end of June the dealers—some of whom had once again resumed selling cigarettes—raised yet another bogus issue by insisting (despite supreme court precedent to the contrary) that it “is just as illegal to try to collect a tax for the sale of cigarettes as it is to collect a tax from the proprietress of a disorderly house.” The only way to go after them was by means of criminal prosecution and the Cosson law. Unsurprisingly, Guthrie did issue an opinion a few days later that the 30 tobacconists had to pay the mulct tax assessed by the county treasurer, but by mid-July none of them had paid the $75 assessment, although the tax had been certified on the county books almost a month earlier. Knowledge that failure to pay by August 1 would trigger a levy against the owners of the premises occupied by the dilatory dealers exerted additional pressure, which was further intensified by a clause in each lease prohibiting the use of the building for any illegal purpose so that the lessees’ failure to pay the tax was “practically an admission of guilt and grounds for terminating the


18. “Dealers Doubtful as to Payment of Cigarette Levy,” DMN, June 19, 1910 (1:6). The possibility that the press had garbled this account is supported by the absence of any such opinion by Byers in the official collection of attorney general opinions.

19. “To Give Opinion on Pills,” R&L, June 27, 1910 (2:6). The trustworthiness of this article is put into question by its self-contradictory claims that: “many” Des Moines cigar dealers were selling cigarettes again; “many” refused to sell cigarettes; and cigarettes could still be bought at a “few” stores.

20. “’Pill’ Peddlers Will Have to Pay Taxes,” DMN, June 30, 1910 (1:6).
lease...”21 The only concession that Guthrie made was his opinion that the county lacked the power to impose a 21 percent penalty on the dealers on top of the mulct tax.22

At this juncture the C. C. Taft Company embarked on what became a decade-long rearguard legal defense campaign to avoid paying the mulct tax. Fifty-four year-old president Charles Chester Taft, who had begun as a wholesale fruit dealer in Des Moines in 1893 and expanded the scope of his business to include the retailing of cigars and tobacco in 1898, owned numerous cigar stores in Des Moines under various names.23 By the time of his death in 1918, his front-page obituaries noted that his chain of retail cigar stores (now numbering 22)24 had grown “until an ambition to have a “cigar store on every downtown corner seemed near of attainment.”25 With more than a score of retail stores and stands selling tobacco in 191726 in addition to his entry into the amusement industry, his business interests were “among the most substantial in Des Moines,”27 enabling him to leave an estate valued at $750,00028 (the equivalent of almost $11 million in 2009).

Of the 32 cigarette sellers against whom City Assessor James Parker levied

---

231910 Census of Population, T 624, Roll 419, Page 109 (HeritageQuest); R. R. Polk Co.’s Des Moines City Directory 992 (v. 18, 1909); Iowa: Its History and Its Foremost Citizens 3: 818-19 (1915) (14 stores). Taft had other economic interests: he was president of the Iowa Amusement Co. and director of the Century Savings Bank. Id. The company paid the “very best compensation” to its wage earners, who in turn held the management in “the highest terms” according to a union weekly, which included Taft in its “honored roll” (of advertisers). “The C. C. Taft Co.,” IU, Oct. 8, 1909 (12:2). Taft’s daughter Jessie, whose 1913 doctoral dissertation at the University of Chicago dealt with the women’s movement, was director of the University of Pennsylvania School of Social Work from 1934 to 1950. Notable American Women: The Modern Period 673-75 (Barbara Sicherman and Carol Green eds. 1980). Ironically, her biography, written by her lifelong companion, described her father as having been in the wholesale fruit business without mentioning his leading role either as a purveyor of cigarettes in the state’s leading market or as a violator of and litigator against state law suppressing their sale. Virginia Robinson, Jessie Taft: Therapist and Social Work Educator, A Professional Biography 23 (1962).
24"C. C. Taft Dies of Pneumonia at His Home,” DMC, Mar. 22, 1918 (1:5).
27"C. C. Taft, Wholesale Commission Man, Dies,” DMN, Mar. 21, 1918 (1:4).
28"Taft Will Is Found Friday,” DMN, Mar. 29, 1918 (1:3).
the mulct tax all but five (including Taft) paid. Taft’s lawyer filed a petition with Polk County Board of Supervisors for a refund, arguing that the tax was “void and not binding” and the underlying statute “not operative.” After hearing from Guthrie that the tax was valid, on August 29 the Board voted the petition down, and Taft’s lawyer intimated that the case would be appealed to the district court.\textsuperscript{29} A week later Taft filed an appeal in district court claiming judgment against Polk County for $375 in mulct tax that it paid in 1908, 1909, and 1910. In arguments that had been repeatedly dismissed by the courts and should have been recognized as frivolous ab ovo, the company contended that the tax assessment was “a direct violation of the free and untrammeled trade between states” and that Taft was a wholesaler and a jobber that sold cigarettes only in original packages.\textsuperscript{30}

Assessor Parker sustained the pressure. By mid-September he had completed his appointed rounds yet again of the city’s cigar and drug stores with a view to levying the mulct tax for the third quarter; this time he discovered that 23 of them (including all the drug stores) had stopped selling cigarettes. He levied the tax against nine cigar stores (including two of the United Cigar chain) pending the hearing of their petitions for refunds with the Polk County Board of Supervisors.\textsuperscript{31}

Yet by early 1911 the Des Moines press reported that 90 percent of the city’s cigar stores were “selling cigarettes in open violation of the law.” Not that this non-compliance had been rampant ever since the legislature had enacted the new laws in 1909; in fact, “[f]or a time” thereafter “it was almost impossible to buy them. Only the men who were “on the inside” could purchase “pills.” As time went on and no prosecutions followed, the dealers became bolder, and now

---

\textsuperscript{29}“Guthrie Declares Tax Will Stand,” \textit{R&L}, Aug. 30, 1910 (1:2). See also “Tax Is Assessed,” \textit{DMN}, Aug. 30, 1910 (2:1). Three drug companies requested that the tax be remitted on the grounds that they were not in the business of selling cigarettes. The hearing of their appeal was continued until Sept. 12 because their lawyer was not in Des Moines and Guthrie requested more time to prepare his resistance. “Guthrie Declares Tax Will Stand,” \textit{R&L}, Aug. 30, 1910 (1:2); “Postpone Hearing,” \textit{DMN}, Sept. 12, 1910 (1:8). On that date the hearing was rescheduled for Sept. 26, but the press appeared not to have reported on that meeting. “Polk County Tax Levy Is Increased,” \textit{R&L}, Sept. 13, 1910 (1:4). The number of businesses mentioned added up to only 31.

\textsuperscript{30}“Cigarette Tax Is Held Not Binding,” \textit{Waterloo Daily Times-Tribune}, Sept. 8, 1910 (8:5). The aforementioned three drug companies also appealed.

\textsuperscript{31}“Coffin Nails Are Rare Article Now,” \textit{DMN}, Sept. 14, 1910 (8:7); “Parker After Dealers,” \textit{R&L}, Sept. 15, 1910 (5:2). According to another account, the procedure involved the assessor’s certifying the dealers’ names to the county attorney, the filing of the names with the county auditor and the county treasurer, who then assessed the tax against the dealers on the county books. “After the Cigar Men,” \textit{WT-T}, Sept. 16, 1910 (12:4).
anyone can buy cigarettes openly. ..." To the WCTU’s request that the anti-cigarette law be enforced Public Security Superintendent and Councilman Zell Roe announced that cigarettes were “not being offered for sale in the city of Des Moines.” This conclusion exonerating dealers was based on the unanimous reports of officers assigned to determine whether retailers were “trafficking in the ‘finger stainers.’” The only assurance that Roe furnished the WCTU was the police department’s willingness to cooperate with state authorities in enforcing the state law, even in the absence of a city ordinance prohibiting the sale of cigarettes—if violations were “pointed out.” Roe’s lame promise prompted the members of “that sedate body in chorus” to chime, “Oh, piffle!” More graphically, Mrs. Joshua Jester (the 48-year-old wife of a 65-year-old real estate business owner), president of the federated WCTU clubs of Des Moines, more than skeptically responded: “Anyone with eyes knows that cigarettes are being sold in the city and the instinct of smell in the blind would tell them as much.”

The WCTU’s suggestion that “Roe should...prosecute every dealer apprehended selling pills” found resonance in interesting quarters. The Iowa Unionist, Des Moines labor unions’ weekly organ—which denounced cigarettes but not other forms of tobacco—made light of Roe’s policemen’s inability to find any sellers: “One cannot step out upon the street without bumping into men and boys puffing away at the ‘coffin nails.’ These illegal ‘sticks’ are sold in Des Moines.” At least the boys could be compelled to divulge their sources, and in any event it was “not the province of the people to play the part of detective to secure the enforcement” of the anti-cigarette law. On the contrary, the 1909 Cosson law made it peace officers’ duty to “secure the evidence and to institute proceedings against offenders.” If Roe failed to perform his duty, the public would consider him “derelict in his duty...."

Within a few months the WCTU succeeded in pushing local authorities in Des Moines to go “on the warpath....” On May 3, City Assessor Parker bought cigarettes from and then certified to the county auditor the names of 14 cigarette dealers (including four C. C. Taft stores) for the $75 fine levied against violators of the anti-cigarette law. The result, according to the Republican Des Moines Evening Tribune, was that “a fine tooth comb would not have revealed a pill in any of the establishments that have been selling them in open violation of the law.” The WCTU’s “crusade against the dream producers” turned out to be

---

“[t]he secret of the sudden disappearance of the pill from off the shelves....” The campaign, however, had, as already noted, not proved easy. After being rebuffed by the public safety commissioner, who claimed that cigarettes were not being sold in Des Moines, the WCTU approached County Attorney Guthrie, who had been considering proceeding against cigarette dealers: “[I]t needed only the touch of the finger of the temperance people to throw the scales against the pill dispensers.” The local legal authorities then visited the city’s cigar stores, warning the owners to cease violating the cigarette law and giving them one day to dispose of their stocks. Guthrie deemed it better to warn the dealers to stop selling and proceed against them in case they committed further violations than to prosecute them because no evidence of sales had been put in his hands and the process of prosecuting under the new injunction law was slow. In the event, the dealers, attentive to the notice, moved the last cigarettes out of their stores by midnight. The WCTU viewed dealers’ having “voluntarily” cleared their shelves of cigarettes as a kind of ploy designed to foil the organization’s plan to stop sales altogether. Mrs. Jester declared: “‘No, we will not give up our fight.... We intend to continue to gather evidence against the dealers and see that the state law is enforced. Action of the dealers in stopping the sale temporarily will not affect our work. We expect to stamp out this unlawful business forever in Des Moines at least.’” Although she declined to divulge the details of the WCTU’s battle plans, she intimated that the group intended eventually to submit its evidence to the grand jury.

Four months later, Des Moines Police Chief George Yeager warned dealers that the sale of cigarettes would no longer be tolerated: “‘I am going to stop the selling of “coffin” nails altogether.’” His resolve stemmed from his having “‘looked into the statutes pretty thoroughly’” and “‘failed to find where tobacco dealers are permitted to sell cigarettes...although they may pay a tax.’” His reading of the law may have been impeccable, but this law enforcement official’s apparent need to reinvent the legal wheel that the legislature and Attorney General Byers had, in the vortex of intense and widespread public debate, fashioned less than two years earlier was nothing short of astonishing and scandalous (though perhaps no less mysterious than why the statutory wheel of 1896-97 itself had had to be reinvented in 1909 or why a policeman rather than a learned-in-the-law prosecutor had re-discovered the obvious). Several

---

36Cigarette Sellers in for a Fine,” *Evening Tribune* (Des Moines), May 3, 1911 (1:7).
38Must Stop Traffic in Cigarettes,” *Evening Tribune* (Des Moines), Sept. 16, 1911 (1:3).
39See above ch. 13.
“ineffectual attempts” had been undertaken during the previous few months to rid the city of cigarettes, but, the *Evening Tribune* reported, the dealers were “not to be frightened. They hide their supply until after the ‘storm,’ and then begin operations anew.”\(^{40}\) That 21 places in Des Moines were reportedly paying the $300 mulct tax underscored not only the laxity in enforcement of the underlying sales prohibition, but also the large volume of cigarettes that they must have been selling in order to be able to afford the payments.\(^{41}\) Such facts prompted the WCTU to announce that it would “conduct a relentless campaign to drive cigarettes out of Des Moines”; to this end it retained a lawyer to insure that dealers be fined.\(^{42}\)

The fine imposed by the underlying 1896 Phelps cigarette sales prohibition law could constitute a significant deterrent: ranged between $25 to $50 for the first offense and $100 to $500 for additional offenses; more compelling, however, was the alternative for second offenders (such as Taft and United Cigars) of up to six months’ imprisonment in county jail.\(^{43}\) In some Iowa cities prosecutions had pursued this more coercive course. Press reporting of hints that the ban on cigarette sales was being openly violated in cities other than Des Moines\(^ {44}\) was confirmed by an enforcement action in another major Iowa city in 1911. In Sioux City, the state’s second largest, in January tobacco stores and news stands (except one whose owner said that he would stop as soon as his stock was gone) stopped selling cigarettes after Councilman R.S. Whitley had warned tobacco dealers that search warrants had been issued and would be executed if sales did not cease immediately. The “cause of the edict,” as was true almost everywhere in Iowa, was “[a]gitation started some time ago by the W.C.T.U.,” which had sent around “spotters” to uncover unlawful sales.\(^ {45}\) Recidivism, however, set in again: several months after three dealers had been fined $25 in January, anti-cigarette activists, led by the Holiness League, began collecting evidence against dealers they had

---

\(^{40}\)*Must Stop Traffic in Cigarettes,* *Evening Tribune* (Des Moines), Sept. 16, 1911 (1:3).

\(^{41}\)*Waterloo Evening Reporter*, Sept. 24, 1911 (4:1) (untitled); “Things They Say,” *Muscatine Journal*, Sept. 25, 1911 (3:2) (reprinted). That 21 sellers were paying the $300 annual tax was not reconcilable with the total cigarette mulct tax of $4,500 collected by Polk County for 1911. See above ch. 12. The $4,500 would, however, have represented payments by 20 sellers for three quarters.

\(^{42}\)*War on Cigarettes,* *Nashua Reporter*, Sept. 28, 1911 (2:4).

\(^{43}\)*Iowa Code § 5006*, at 1955 (1897).

\(^{44}\)*Woman Brings Action Against Two Barbers,* *National Democrat* (Des Moines), Sept. 12, 1912 (8:3).

\(^{45}\)*Cigarette Lid Clamped On,* *SCJ*, Jan. 26, 1911 (5:2).
warned earlier; for three months spotters were sent to the stores, acquiring cigarettes without difficulty.⁴⁶ By the first week of August the press revealed that the WCTU would prosecute sellers, beginning with 12 dealers the following week in justice court. In addition, women campaigners in the Holiness league also asked the city assessor to assess each of these dealers $300.⁴⁷ Their double-edged strategy was calculated to generate additional evidence if the sellers admitted the charges and "took out the license," while the militants could proceed with their cases even if the retailers refused to pay the tax.⁴⁸ A week later, Mrs. Sarah Doebler of the WCTU filed 11 original informations against sellers (including four cigar stores, three pool halls, two hotels, and a candy store).⁴⁹ Several days later a justice of the peace fined nine of them $25 plus costs⁵⁰—an outcome that the panoptically vigilant *United States Tobacco Journal* also duly recorded.⁵¹

In Waterloo, too, sheriff’s officers secured compliance with the sales prohibition in 1911 by arresting a Mexican, Julian Alba, after having searched his basement Mexican chili restaurant where they found 60 books of cigarette papers.⁵² That very afternoon the justice of police fined him the maximum $50

---

⁴⁶“Crusade Against Sale of Cigarets,” WEC, Aug. 5, 1911 (12:4). It was also reported that the “ban on 'coffin nails' was tacked down [so] tight by the Sioux W.C.T.U. that "cigarette smokers have begun to patronize the mail order houses." “Iowa News,” Altoona Herald, Feb. 2, 1911 (3:5).

⁴⁷“After Cigarette Sellers,” SCJ, Aug. 5, 1911 (9:3).


⁴⁹“Cigaret Sales Charged,” SCJ, Aug. 12, 1911 (7:4). Doebler, who was 54 in 1911, was married to Martin Doebler, who was not returned at the 1910 population census, but in 1900 and 1920 listed farmer and carpenter contractor, respectively, as his occupation.

⁵⁰“Nine Cigar Men Are Fined,” SCJ, Aug. 17, 1911 (5:1). Costs for eight of them were $3, but in the test case they amounted to $19.50, because the expenses of G. F. Towner, one of the WCTU’s spotters, who had traveled from another city to secure evidence, were included. Although the dealers’ lawyer, Sam Page, had earlier intimated that the cases would be appealed to the Iowa Supreme Court if the ruling was not satisfactory, once it was handed down he was undecided. *Id.*

⁵¹“Fined for Selling Cigarette Papers,” USTJ, 76, Aug. 26, 1911 (23:2) (stating that dealers had sold cigarette papers).

⁵²“Mexican Sold Cigarette Papers,” WEC, Nov. 20, 1911 (8:5). On the arrest of three Greeks for selling cigarette papers, see “Which Law Did They Violate,” CRDR, Jan. 24, 1911 (7:1-2); on an arrest following a search and seizure of 41 packages of cigarettes by the Marshalltown chief of police, see “Cigarettes Are Seized,” CREG, Nov. 9, 1911 (12:4), and “Cigaret Case Dismissed,” MT-R, Nov. 9, 1911 (8:4) (mayor dismissed case without prejudice because there was no chance of a trial soon to establish ownership, but mayor
“or its equivalent of 15 days in jail,” which latter punishment Alba chose. The conviction obligated the county attorney to assess the $300 mulct tax against the premises where the papers were kept.53 (A year later the Black Hawk County Board of Supervisors voted to cancel and remit three-fourths of the tax against the landlord because Alba had not sold any cigarettes or papers since his conviction.)54 Perhaps displaying a special preference for non-Anglo-Saxons, a year later the sheriff confiscated cigarettes at a Greek pool hall, whose owners pleaded guilty and paid a $25 fine.55

In Cedar Rapids, too, local government enforced the sales ban. In 1914 the city attorney “gave out a gentle hint to the tobacconists...that the cigarette was ‘tabooed’ by the state laws.... It did not take the dealers long to understand...and as a result, each and every one of them made disposition of them of their stock on hand, and now their reply to inquiries for cigarettes is ‘we don’t handle them.’”56

At least one major innovative non-governmental initiative to prohibit smoking unfolded in 1913 in Cedar Falls, a town of 5,000, in which Iowa State Teachers College was located.57 Predicting that it would be precedent-setting for “future crusaders,” the press called it a “unique campaign,” which, if successful, would mean that smokers would “have to indulge in the habit in the utmost seclusion.” Mrs. J. M. Fisk, a prominent WCTU member and church worker, induced more than 150 women from among the city’s “best families” to sign a widely circulated

intimated case might be recommenced); on an arraignment of a restaurant owner for selling cigarettes in the very small town of Dunkerton near Waterloo, see “Hearing Postponed,” WEC, Nov. 1, 1916 (5:5); on the arrest of both owners of a confectionery store near the Iowa State College campus in Ames following seizure of 37 cartons of cigarettes, see “Ames Fights Cigarettes,” WT-T, Jan. 9, 1917 (3:7-8).

53City in Brief,” WEC, Nov. 21, 1911 (11:3). The legal source of authority for the jail time equivalent for a first offense is unclear. For the imposition of a $25 fine for selling in Mason City, see “Bootlegger Arrested,” WT-T, Mar. 2, 1913 (9:7).


“instrument” that came out “pointblank” requesting “the smokers to quit smoking in public, the reason advanced for the demand being that the power of example is the sole thing that causes the boy to take up the cigarette habit.” The circular was headed by quotations from Judge Ben Lindsey and Professor Michael Vincent O’Shea. Lindsey, a nationally famous juvenile court judge in Denver, pithily opined that the cigarette habit was “one of the leading factors in the criminality of a large per cent of the young boys in the reformatory institutions of the nation....”  

From O’Shea, a well-known professor at the University of Wisconsin who specialized in psychology, education, and the child, and would soon add jazz, movies, automobiles, and non-gymnastic dance to the innovations that retarded students’ intellectual development, Fisk quoted the assertion that a boy learned to use tobacco “simply because it is forced upon him through suggestion.” Once he started, “everything in him rebels” because “it makes him feel that he is mature, so that he tends to become indolent” toward school and home. In order to nip such rebellious tendencies in the bud, O’Shea insisted that “[o]ne cannot overstate the necessity of society controlling these suggestions....” Against the background of this “expert testimony” concerning the urgent need to impose counter-social controls to prevent the further proliferation of the myriad forms of disobedience and indiscipline promoted by smoking, Fisk’s women, desiring to “conserve the boyhood of Cedar Falls for the best and highest manhood,” asked that “the men who must smoke, refrain from doing so on the street or in other public places.”

Despite its transparent ruling-class ideological linkages, the campaign was guided by the same social-psychological insight that motivated the late-twentieth and early-twenty-first-century tobacco control movement—to de-emphasize the one-dimensional focus on children and their access to tobacco in favor of the framework of a smoke-free society designed to disrupt the demonstration effects of adult smoking on children. And although Fisk boldly extended the scope of the campaign to include non-cigarette smoking—a much more widespread

58 “Would Have All Smoking on the Street Stopped,” *CFDR*, Nov. 19, 1913 (2:4-5); “Would Have All Smoking on the Street Stopped,” *CFR*, Nov. 20, 1913 (5:4-5). On Fisk’s WCTU membership, see “W.C.T.U. Notes,” *CFR*, Nov. 13, 1913 (8:1). Without mentioning Cedar Falls by name, the National WCTU’s Narcotics Department reported at its 1914 convention that in one Iowa town “the women launched a unique campaign against the smoking habit.” *Report of the Forty-First Annual Convention of the National Woman’s Christian Temperance Union* 214 (1914).

59 “Educator Says Movie and Jazz Retard Student,” *CT*, Apr. 8, 1922 (15).

60 “Would Have All Smoking on the Street Stopped,” *CFR*, Nov. 20, 1913 (5:4-5).

61 See above ch. 2.
phenomenon than cigarette smoking at the time—the fact that she did not dare even suggest that fathers and other adult men not smoke in the ur-matrix of generational demonstration effects, the home,\textsuperscript{62} should not detract from this otherwise astonishingly forward-looking proposal. After all, the proportion of adult males who used tobacco in the early twentieth century far exceeded that of their counterparts a century later on university campuses, none of which have so far requested such voluntary abstention, though a very few have established an outdoor ban.\textsuperscript{63}

Perhaps as the price it extracted for accommodating the sponsors’ request that the instrument be published, the Cedar Falls Record could not refrain from mocking the initiative by wondering whether the town’s smokers would comply “or come back with a counter request that the women appear on the streets with their faces free from artificial beautifiers and clad in other garments then [sic] hobble skirt, the slit skirt, and late kindred creations....”\textsuperscript{64} Two weeks later the paper reported that although the campaign had not yet materially reduced the number of public smokers, it had “started an endless discussion of the smoking habit, and...focused attention on Cedar Falls as the ‘town where it’s risky to smoke on the streets’....” The publicity prompted some cigar and tobacco manufacturers to ask local dealers about the impact, but allegedly most replied that trade had increased. In a quasi-self-fulfilling prophecy, “[s]ome smokers,” who willfully failed to understand the purpose of the WCTU’s request, irrationally offered to “meet the women halfway. They say they’ll quit smoking in public if the fair ones will give up some equally prevalent habit.”\textsuperscript{65} (Nevertheless, during this time the state anti-cigarette law continued to be enforced in Cedar Falls: for example, a restaurant owner was convicted of giving away cigarette papers.)\textsuperscript{66}

\textsuperscript{62}The local daily newspaper inadvertently underscored this point when it included in a series of banal front-page cartoons during the run-up to Christmas one in which two young sons, in order to butter up their father in the hopes of getting better presents, bring him his smoking paraphernalia (“Pa here’s your smoking jacket, pipe and terbaccer”) to the delight of their mother looking on. “Tactful Season Is Here,” \textit{CF[DR]}, Dec. 11, 1913 (1:3-5). On the twenty-first century tobacco control movement’s cutting-edge view of the “ethically complex” question of “parental smoking in private domains,” see Jill Jarvie and Ruth Malone, “Children’s Secondhand Smoke Exposure in Private Homes and Cars: An Ethical Analysis,” \textit{AJPH} 98(12):2140-45 at 2144 (Dec. 2008).

\textsuperscript{63}In 2008 the Iowa legislature became the first to ban smoking on all college and university campuses. See below ch. 35.

\textsuperscript{64}“Would Have All Smoking on the Street Stopped,” \textit{CFR}, Nov. 20, 1913 (5:4-5).


\textsuperscript{66}“Fined for Giving Cigarette Papers,” \textit{CFDR}, Dec. 23, 1913 (4:5) ($25 fine
Statewide the press commented on the campaign. One paper opined that in seeking to "suppress the smoke nuisance...the good women of Cedar Falls have raised a great public question. The years were when it was a breach of good manners for a man to appear in public with a pipe in his mouth and even a cigar was in more or less disfavor. ... The experiment...will be watched with considerable interest and it is hoped that they will win." An editorial in the *Waterloo Courier* shed important light on the extent to which, 17 years after the legislature had first prohibited the sale of cigarettes, Iowans had developed a social prejudice against smoking:

The crusade against smoking on the streets in Cedar Falls is interesting as bringing out radical provincial differences regarding the small habits. The state of Iowa is anti-cigaret to the extent that the sale of the "pill" is forbidden by law. To be seen smoking one on the street is only one degree removed from damnation.

In the east nearly everybody of masculine persuasion smokes. Indeed the practice is in such general good repute that some growing youths fail to see anything attractive in it and leave it alone. ... We fear that some of the Iowa people who are trying to interfere with the personal habits of others would be on the program for a fainting fit if they should happen to run across the familiar sight in the east of a professor smoking with his students within the walls of learning of a great university.

In the event, the local WCTU regarded its own request as "as mild in comparison" with the distribution by the St. Louis Central WCTU of thousands of cards all over that city with various inscriptions including this rhetorical riposte to second-hand smoke exposure: "'Smokers Should Consume Their Own Smoke.'"

By the beginning of 1914, perhaps as a parting shot at the WCTU’s now failed public smoking crusade, the *Cedar Falls Record*’s large front-page cartoon showed a well-dressed man self-satisfiedly walking outside with a halo attached to the back of his hat. Another man, who is smoking a cigar, offers him a cigar (or perhaps a cigarette), which he twice demonstratively refuses with hand
signals. In the final frame, as he slips on the ice, his legs are pointing skyward, and his hat and halo fall off, a bubble over his head filled with expletive-deleted typographical symbols suggests that non-smokers (or perhaps smokers who have agreed not to smoke in public) are sanctimonious hypocrites. A few days later the same paper smugly reported that the local WCTU, “[u]ndismayed by the apparent failure of their appeal to the adult smokers of Cedar Falls to refrain from use of ‘the weed’ on the streets and other public places,” had begun “another movement against the smoking habit—this time with more chance of success.”

Aimed especially at boys, the campaign sought to make available to local physicians a prescription it had obtained from Dr. D. H. Kress in Chicago, who, under the auspices of the Anti-Cigarette League, operated a clinic in which he allegedly successfully induced aversion to tobacco by swabbing smokers’ throats with silver nitrate.

(The apparent failure in Cedar Falls did not put an end to this type of initiative. At the 1919 WCTU annual convention Natalie Gordon, the superintendent of the Anti-Narcotics department, reported that in four places “the best citizens have petitioned to have smoking prohibited in markets and where food is sold....” However, in the absence of a pre-existing state law or city ordinance, little was accomplished.)

In spite of the WCTU’s optimism, the struggle against cigarette sales, even to minors, continued unabated. At the end of September 1915, its anti-narcotics department informed the group at its annual convention in Iowa City that:

Iowa has most splendid laws relative to the sale and use of tobacco, and particularly cigarettes. In very few places, however, is there any enforcement of the law whatever.

... Des Moines Federation W.C.T.U. are engaged in a fight against the illegal sale of cigarette papers and cigarettes to minors. They have four detectives [sic] and two minors to ferret out the guilty parties; they already have evidence against fifty-two dealers; there are twenty places that are not holding a license for sale of cigarettes, all of whom will be punished to the full extent of the law.

---

70“Story Without Words,” CFR, Jan. 3, 1914 (1:3-5).
72“Quit Cigaretts? Here’s Way!” CT, Aug. 3, 1913 (3).
73Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 127 (1919).
74Woman’s Christian Temperance Union of Iowa, Forty-Second Annual Convention 23, 139 (1915).
The summer of 1915 also witnessed a remarkable public discussion of the interconnection between the prohibitory law and the mulct tax law, which resulted (perhaps uniquely) in Marshall County’s refusal to accept the $75 quarterly cigarette mulct tax from local dealers. The textual and policy relationships between sections 5006 and 5007 of the Iowa Code were free of ambiguity from the day the latter was had been enacted in 1897, but 18 years later they were still being contested. That in Marshalltown, the state’s 13th largest city, at least four dealers (including Charles P. Cook, who had been the Tobacco Trust’s straw man plaintiff in its frivolous challenge to the mulct tax lasting from 1898 to 1905) were selling cigarettes in 1915 “in open violation of the state law and that the county stands in the apparent light of licensing a misdemeanor” were developments that according to the Marshalltown Times-Republican had not come to light before the newspaper learned that they were paying the mulct tax for selling cigarettes. Although the newspaper made it clear that the fact that all four had paid the mulct tax for the third quarter did not bar prosecution, such a dealer “figures that he is...getting protection,” and the Times-Republican, revealing its own failure to understand the logic of the interconnected sanctions, could not help agreeing that “it would seem inconsistent, to say the least, for a county to accept a tax for the sale of cigarettes and then turn around and prosecute for those sales.” The county attorney was aware of what the dealers were doing, but emphatically denied that the county board of supervisors had promised them immunity in exchange for paying the tax, which, he correctly pointed out, was a “misnomer” for what was really a “penalty.” Nevertheless, he was constrained to admit that there was a “tacit understanding’...much as Des Moines and all other cities were permitting the sale of cigarettes on the payment of the $300 per year penalty.” The county auditor, who stated that the sellers in tendering the payment had explained that “they wanted to be on the safe side,” insisted that he had no alternative to accepting the money, but denied that the board of supervisors had advised him to accept the tax payment in lieu of prosecuting the dealers. However, journalistic research discovered in the county auditor’s books that a payment by Fred Gates, one of the four, in March of $150

---

75A few months later the attorney general’s office issued instructions to local officials in all wet counties to refuse any liquor mulct tax payments for the first quarter of 1916 that saloon keepers were planning to tender in an effort to test the repeal of that tax, which, unlike the cigarette mulct tax, did authorize serving of alcohol if the locality approved, but repeal of which was designed to shut down the industry. “Cosson Too Busy to Take Up Odle’s Blue Law Crusade,” Des Moines Register and Leader, Dec. 11, 1915 (1:3).

76“Growth of Cities Shown by Census,” R&L, Nov. 5, 1915 (14:1).

77See above ch. 12.
was accompanied by the notation “in settlement of case against him.” Moreover, a stipulation linked to the settlement between the board of supervisors and the seller on file in the same office punctured the county government’s denials: “several causes of action now pending against the defendant, in which he is charged with the misdemeanor in the sale of cigarets, are compromised on the following terms: Said actions for misdemeanor are dismissed...and no claim shall be made for mulct tax for any year preceding Jan. 1, 1915.” In exchange, the defendant agreed to pay the county treasurer $150 as one-half the mulct tax for 1915. Finally, the signatory chairman of the board of supervisors and county attorney furnished themselves with legal cover by including in the stipulation that it “shall not be construed as an agreement that the defendant may continue the sale of cigarets, and no presumption shall arise by payment of this tax that he shall be required to pay [the] full tax of 1915, should there by [sic] no further violation of the law by him in the sale of cigarets.” Interestingly, Marshalltown city solicitor Frank Northup, who doubled as Gates’s lawyer—and in 1904-1905 as county attorney had represented Marshall County before the U.S. Supreme Court in the case against Cook aka the Tobacco Trust—sought to cite precedent to the press in the form of other cities’ extra-legal practices: although the law did not “contemplate immunity from prosecution by payment of the tax” and selling cigarets was illegal regardless of whether dealers paid the mulct tax or not, payment was nevertheless “treated as immunity by many cities, including Des Moines, Cedar Rapids, Dubuque, and other Iowa cities.”

In the wake of the newspaper’s disclosures, the Marshall County board of supervisors “decided that the county would not [sic] longer stand in the light of being a party to the arrangement.” Consequently, as of October 1, 1915, the beginning of the fourth quarter when the mulct tax was again payable, the board of supervisors had instructed the county auditor not to accept the penalty/tax and “whatever protection” cigarette sellers “thought they [had] built up around themselves” by paying was eliminated. Because no other dealers came forward after the first tender of payment was refused that day, the press presumed that that one attempt had been a test to determine whether the “understanding,” as the county attorney had put it, between the county and the dealers that “payments of the mulct tax were accepted in lieu of arresting and fining the dealers regularly”

---

80. “Now Easy for Boys to Obtain Cigarets,” MT-R, July 17, 1915 (7:2-3). Anti-cigarette sentiment in Marshalltown may have been signaled by the first listing in the “Help Wanted” column adjacent to this article: “Three first class painters: no cigaret smokers need apply.” MT-R, July 17, 1915 (7:4).
was still in effect.\footnote{“County Turns Down Cigaret Tax Money,” \textit{MT-R}, Oct. 1, 1915 (8:2). These legal developments in Marshalltown were also reported elsewhere in Iowa. E.g., “Cigarette Tax Refused,” \textit{Altoona Herald}, Oct. 7, 1915 (6:6).}

On November 4, 1915, a little more than a month after the WCTU convention, Des Moines, once again, became the statewide focus of enforcement. That cigarette selling was once again proliferating in the capital was indicated by the doubling of the total annual cigarette mulct tax collected from $4,500 in 1911 to $9,000 in 1915 (its all-time peak).\footnote{See above ch. 12.} On that date, Miles S. Odle, attorney for—but not acting under the auspices of—the Anti-Saloon League,\footnote{The 31-year-old Odle was returned at the 1910 population census as living in Des Moines as an attorney for the Anti-Saloon League. Between 1909 and 1917 Odle litigated about 40 liquor-related cases to the Iowa Supreme Court. He does not appear to have appeared in the 1920 census. Because he regarded then-Attorney General Cosson and Reverend J. L. Hillman, a member of the board of directors of the Anti-Saloon League, as “purely time-servers, favoring law enforcement only where they felt it could not hurt themselves” and discriminating “in favor of Des Moines law violators,” Odle “refused to renew his contract as attorney for the league” and declined to serve after being reelected. “Bi-Partisan Hypocrisy!” \textit{IH} 61(39):1-2, 4-5, 24-25 at 24 (Sept. 28, 1916). “Bi-Partisan Hypocrisy!” \textit{IH} 61(39):1-2, 4-5, 24-25 at 4 (Sept. 28, 1916). “Odle Raids Tobacconists for Cigarets,” \textit{Evening Tribune} (Des Moines), Nov. 4, 1915 (1:1, 13:2-3). “War on Cigarets at Capital City,” \textit{WEC}, Nov. 5, 1915 (2:3-5 at 4). “More Stores May Be Raided,” \textit{R&E}, Nov. 5, 1915 (3:3).} who had been prosecuting violations of the liquor laws for years and was perhaps best known for his “sensational raid of whisky drug stores in September 1915,”\footnote{Odle Raids Tobacconists for Cigarets,” \textit{Evening Tribune} (Des Moines), Nov. 4, 1915 (1:1, 13:2-3).} secured the services of a deputy sheriff and began enforcing the anti-cigarette law by raiding four tobacco dealers (including C.C. Taft) and removing hundreds of packages of cigarettes as evidence.\footnote{“War on Cigarets at Capital City,” \textit{WEC}, Nov. 5, 1915 (2:3-5 at 4). “More Stores May Be Raided,” \textit{R&E}, Nov. 5, 1915 (3:3).} (The first store raided immediately telephoned scores of cigar dealers warning them to “‘ditch the pills.’”)\footnote{“More Stores May Be Raided,” \textit{R&E}, Nov. 5, 1915 (3:3).} Denying reports that he had told his salesmen not to hide their stocks, Taft claimed that “he had said nothing” to them “about not hiding their stocks of cigarettes while the morning raids were occurring.” Implausibly for one who was only halfway through decade-long frivolous litigational maneuvering, Taft insisted that if his stores were raided, “there would be no attempt made to overturn the Odle campaign.”\footnote{“More Stores May Be Raided,” \textit{R&E}, Nov. 5, 1915 (3:3).} The reason that he adduced for this resignation the Iowa attorney general was remiss in not quoting back at him during the height of their litigation beginning in 1917.
“As I understand it there is nothing we can do, Mr Taft said. “The law is perfectly plain, and we appear to be victims of it, just as the druggists were in the soft drink crusade, with nothing to do but take our medicine.”

Not “representing anybody but myself” in what was purportedly “the first enforcement of the cigarette law in years” in Des Moines, Odle had sworn out warrants and then gone to Des Moines police headquarters; after a captain had refused on the grounds of lack of available police to serve the warrants and referred him to Police Chief Crawford, Odle and the chief got into a loud argument that the press was easily able to hear through a closed door; soon Odle left “in a white anger” in pursuit of someone to serve his warrants. Crawford, who had bluntly expressed his disapproval of the Anti-Saloon League’s methods, confided to the press after Odle’s hurried departure that the police department did not propose to be made the tool for pusillanimous prosecution for revenue only. Why then the police did not enforce the prohibitory law he did not explain, but Crawford insisted to the reporters that he had told Odle that the police were “anxious to” help and had helped stop the sale of intoxicating liquor, in part because “You can enforce the law successfully when you have public sentiment behind you.” But the police had their hands full suppressing saloons and liquor, while Odle did not have “the sentiment of the people” behind him in his prosecutions of druggists. Unfazed by this criticism, Odle declared that “there is no question but that the cigarette evil should be wiped out in Des Moines.”

---

89 Odle Raids Tobacconists for Cigarets,” Evening Tribune (Des Moines), Nov. 4, 1915 (1:1, 13:2-3). “Cigarette selling has gone on under the eyes of city and state officials unmolested for four years. In the winter of 1911-12, a feeble effort was made to stop the traffic, but it was a failure.” “Odle Active in Cleaning City,” WT-T, Nov. 6, 1915 (2:3).
90 Odle Raids Tobacconists for Cigarets,” Evening Tribune (Des Moines), Nov. 4, 1915 (1:1, 13:2-3). The newspaper misunderstood the statutory basis of the prosecution, asserting that the prohibitory law and mulct tax law were “not relating in any way” to each other. Although Odle had received fees in connection with his prosecution of some liquor cases, he voluntarily waived $800 in fees in connection with his famous malt liquor raids. “Bi-Partisan Hypocrisy!” IH 61(39):1-2, 4-5, 24-25 at 5, 24 (Sept. 28, 1916). See also “Ten Fined for Sale of ‘Near Beer,’” DMC, Oct. 29, 1915 (1:1). The liquor mulct tax law required courts to allow 10 percent of the fine collected to the attorney prosecuting equity actions against those charged with keeping a nuisance. Code of Iowa Annotated § 2429 at 856 (1897).
91 “More Stores May Be Raided,” R&L, Nov. 5, 1915 (3:3). The day after the raids the Iowa Congress of Mothers and Parent-Teachers Association came out in favor of
Within two weeks, however, the *Evening Tribune* reported in a front-page headline: “Last Puff Is Taken Today at Cigaretts.” On November 19, Polk County Attorney George Wilson\(^2\) sent a deputy sheriff and a police officer to almost every downtown Des Moines store that had been paying the $300 license and selling cigarettes in violation of state law to serve notice that they would be prosecuted if caught selling in the future. Although one lawyer advised several dealer-clients that selling sealed packages as they were received from the factory—as opposed to a single box—was not unlawful, all dealers interviewed by the *Evening Tribune* “said they contemplated cleaning out their stocks of contraband, and of operating on a strictly law-abiding basis from today forward.” Because unbroken packages generally could be returned, it was “expected that the express offices this afternoon and tomorrow will be flooded with packages addressed to the various cigaret factories in the east.” In contrast, broken packages, unless they could be sold to other dealers, would probably have to be destroyed. Police Chief Crawford did agree to “cooperate with authorities to enforce the law if...asked to,” but nevertheless also stressed, in response to a question as to whether police patrols would watch suspected cigarette sellers, that selling cigarettes and operating dice games or candy raffles in stores “were on a different plane” because the latter was prohibited by city ordinances, whereas the former was subject to state law.\(^3\) Chastened by his experiences with the city authorities, Odle announced that: “I am going to send out investigators and ascertain whether or not the sale of coffin nails and papers has been stopped in Des Moines.... If I learn of any law violations, I will begin prosecutions immediately. Either cigarettes will get out of Des Moines or I will.”\(^4\) (A front-page headline eight months later read: “Attorney Odle to Quit Des Moines.”)\(^5\) Whatever the form or substance of these conflicts, the press soon observed that “practically all the business men of the city are opposed to the fight that is being made for the enforcement” of the cigarette sales ban:


\(^3\)“Last Puff Is Taken Today at Cigaretts,” Evening Tribune (Des Moines), Nov. 19, 1915 (1:1, 10:5-6).


\(^5\)“Attorney Odle to Quit Des Moines,” DMN, July 27, 1916 (1:1).
They take the position that the sale of cigarettes in the cigar stores is no worse than the surreptitious sale would be if the stores were compelled to close out. Anyway they feel that the agitation and discussion aroused over the matter is doing injury to the city and that it would be better to leave matters alone. The cigar store influence has become wonderfully influential in business circles in the city since the closing of the saloons.  

Commercial interests were especially concerned about the disputes because there did not “seem to be any doubt that the fight against the cigarettes will result in driving them out of public sale in the city. A large number of the women of the city banded together to assist in making the fight....”

Many of the dealers purportedly held a special “grudge against Odle” for not having raided their stores a day earlier and thus saving them the $75 “quarterly license to the city” that they had paid that day. Until November 4, according to the farmers’ *Iowa Homestead*, tobacco dealers had been paying the mulct tax “as a bribe, in return for which they were permitted to violate the law openly.”

Under the headline, “City Loses $3,500 on Tax for Cigarettes,” the *Des Moines News* attacked Odle in the latter half of December on the grounds that the city was not collecting the cigarette tax for the fourth quarter after Odle’s recently announced crusade. The paper claimed that about 25 dealers had been paying the $300 a year tax, which had been collected for the first three quarters and amounted to $3,500 a year. (In 1916 the *News* intensified this attack on Odle.)

At first the *Waterloo Evening Courier* had reported at the end of November that in connection with the “war” that the WCTU was “waging” against cigarettes in Des Moines “local cigar dealers ha[d] given up the sale of the pills” after they had been “apprised that the county attorney was going to bring action against them unless the anti-cigaret law was obeyed.” But then in mid-December the newspaper presented a wholly different perspective once it became clear that a number of leading cigar stores in downtown Des Moines—doubtless tutored by the arch-choreographer, the Tobacco Trust, whose legally frivolous scenarios had stood up poorly under judicial scrutiny—fabricated yet another “original

---

98“Odle Active in Cleaning City,” *WT-T*, Nov. 6, 1915 (2:3). This claim is inconsistent with the claim below that the tax was paid Jan. 1, Apr. 1, July 1, and Oct. 1.
100“City Loses $3,500 on Tax for Cigarettes,” *DMN*, Dec. 21, 1915 (1:6). For the official figures, see above ch. 12.
102See above chs. 11-12 and below this ch.
package” scam for evading the anti-cigarette sales law:

By failing to keep a stock of cigarettes on hand, the dealers escape the mulct tax. Instead, they take individual orders, and sell the original packages, which are shipped in by parcel post. The consumer pays the postage from the factory to Des Moines.

Attorney [Charles] Maxwell [who together with Dunshee represented C. C. Taft Co. in its unsuccessful litigation from 1917 to 1920] advised the cigar dealers they couldn’t escape the mulct tax if they ordered the cigarettes shipped to themselves and then resold the original packages.

Instead they take your order, forward same to the factory, and have the “pills” shipped in your name to the store. When the packages arrive you pay for the cigarettes and the postage.

No orders are taken for less than five packages of cigarettes.

Although this threadbare hoax would no more pass judicial muster than any of the others that the Trust and its lawyers had staged since the 1890s, some dealers were once again gullied into believing (or, perhaps, persuaded to pretend for public consumption that they believed) that they had cleverly slipped free from the ban: “This is fine,” said one cigar dealer. “Odle did us a favor and we are just beginning to realize it.” The “crusade” had cut down their cigarette sales “to a certain extent” because, initially, when the dealers stopped selling cigarettes, cigar sales rose sharply, but eventually “a man that wants cigarettes wants cigarettes and nothing else.” And once they began selling in “the original packages,” volume increased: “Before Odle got busy, we used to sell about 2,000 packages of cigarettes daily. Now the business is just about one-half.” Before long he expected trade to be “almost back to normal” with “a little difference,” especially since “the boys don’t kick on the postage,” which amounted to only 10 cents on 200 cigarettes.

The Iowa Homestead regarded the unchanged situation in Des Moines in the aftermath of Odle’s intervention as a function of the quasi-immunity that that city’s wrong-doers in general enjoyed. The failure of the Anti-Saloon League, the Register and Leader, “and others who should have helped him, instead of putting every obstacle in his way” led to the renewed sale of cigarettes in “open violation of the law” at virtually every cigar stand. “The only difference,” according to the farm weekly, was “that, as a result of Odle’s raid, the tobacconists stopped paying the $300 mulct tax, since it failed to buy them immunity from prosecution, and they put up the price of cigarettes to pay for those which were lost in the Odle

---

raid.” The News, in contrast, made Odle personally responsible for this outcome. In a long front-page article in August 1916 the paper waxed ironic that “[i]f...the professional reformer who is about to leave the city...could collect from Des Moines cigar dealers in a degree commensurate with the financial good he did them by his anti-cigarette crusade last November, he could build a villa in California, buy a 12-cylinder automobile, and live in luxury all the remainder of his life. He would have a $10,000 a year income.” The occasion for this irony was the fact that Odle’s erstwhile targets were retailing cigarettes as openly as ever as attested by a News reporter’s success in buying cigarettes in seven different downtown stores (including a United Cigar store and four owned by C. C. Taft Company)—several of which displayed them openly—in less than half an hour. To Odle belonged the credit for “transforming what amounted to little more than an ‘accomodation’ [sic] business by the cigar men into a very profitable one” while “cheat[ing] the city of Des Moines out of about $10,000 a year revenue, to no discernible purpose.” This outcome resulted from the destruction of the previous system under which allegedly “every person who dealt in cigarettes paid Des Moines $300 a year penalty tax.” Not only did these blatant violators of the Phelps law’s ban on cigarette sales all pay, they “always paid promptly” at the beginning of each quarter. The “Odle disturbance” merely succeeded in frightening cigar dealers into hurriedly disposing of their retail stocks in order to avoid being fined under the Phelps law. After allegedly legally selling wholesale for several weeks, the dealers, having decided that it was safe to begin again, at noon on a set date around Christmas 1915 in concert resumed retailing illegally and continued doing so without any arrests or prosecutions; indeed, they became “so sure of immunity” that they openly displayed the contraband and, at least in one instance at a United Cigar store, sold cigarettes to a man “while a policeman stood at his elbow.” Correspondingly, on the tax revenue side, “not a dollar” was paid following the Odle raid, although more dealers were selling precisely because nonpayment of the mulct tax made lower-volume business profitable.

106“City Is Losing $10,000 Year in Cigaret Tax,” DMN, Aug. 17, 1916 (1:1). The article mentioned only one Taft store as such, but three others were owned by Taft. The claim that prior to 1916 annual tax collections amounted to about $10,000 (based on payments by 30 businesses in October 1915) was inconsistent with Polk County tax collection data, which peaked at $4,500 in 1915. However, for the first half of 1917 125 dealers owed $150 each or a total of $18,750, which however the Polk County Board of Supervisors remitted. See above ch. 12. Finally, the claim by the News in August that there had been two “pay days” since the last tax payment in October 1915 was inconsistent.
The vanguard of the aforementioned female militants was organized in the WCTU, which, in order to remove Chief Crawford’s aforementioned excuse for police inaction, tried to pressure the Des Moines City Council to pass ordinances making it unlawful for those under 21 to smoke cigarettes on the street or anywhere except at home and to outlaw the sale of cigarettes to anyone. At a public hearing before the council on January 13, 1916, Anna Edworthy of the Iowa WCTU revealed that it had evidence of unlawful cigarette sales by 52 dealers, 20 of whom had not even paid the $300 mulct tax. Unlike Odle—who did not attend the meeting and to whose presence there some attendees objected—the WCTU had not yet proceeded judicially, preferring, instead, to hold the possibility over the dealers’ heads should they ever break the law again. The council, according to press reports, questioned the point of the proposed ordinances, which would merely reinforce state laws, one councilman adding that the size of the police force would be inadequate to enforce the ordinances. The ubiquitous John B. Hammond sought to meet such arguments with the following offer, which the press ridiculed as “the most spectacular stunt of the morning”.

“For twenty-one years I have pleaded with officials to enforce the cigaret laws in Iowa..., and for twenty-one years I have received the same excuse—that the officials were busy with something more important.

If the council will pass these ordinances I will guarantee that the committee we represent will pay the salaries of special officers necessary to enforce them here.”

When one councilman tried to subvert the WCTU’s tactic by asking whether, since the city had no prosecutor whom it could use for such cases, his organization would also pay a special prosecutor’s salary, Hammond promptly agreed to finance that part of enforcement too.

Others introduced by Hammond did not regard the proposed ordinances as...
stringent enough. Frank B. Joseph, the state’s deputy superintendent of public instruction, who assured the council that in schoolmen’s experience “‘cigarettes are the most efficient element in making “retards” who can’t keep up with their studies,’” made a legislative prediction whose realization in Iowa remained unfulfilled until 2008: “‘I do not think it is right to allow pollution of the air I breathe in cafes, hotels, street cars and other public places by vile tobacco smoke. I think it is right, and I believe the time is coming when laws will be passed forbidding anyone to smoke in any public place.’” The Des Moines City Council neither took action on the ordinances that day nor scheduled a definite date for resuming discussion of them.110 The Evening Tribune justified rejection on the by no means nonsensical grounds—discussed above in the context of the WCTU’s Cedar Falls campaign for voluntary refraining from smoking in public—that it was “virtually impossible to prohibit in a minor what is sanctioned in an adult. The woman who endeavors to make it a crime for a boy to smoke is defeated in her efforts by the fact that her husband draws away at his cigar or pipe before the fireplace or as he walks downtown. The boy believes that what doesn’t hurt his father doesn’t hurt him, and it will take something more than unenforced and unenforceable laws to make him see differently.”111

Although the aforementioned WCTU convention account, once again, left the impression that dealers who paid the mulct tax and sold only to adults were complying with the law, the 1896 Phelps law, enshrined in section 5006 of the Code—in the chapter, “Of Offenses Against Public Policy”—still prohibited the sale of cigarettes generally.112 And from the fact that county attorneys were submitting requests to the attorney general for his opinion as to the conditions under which dealers could lawfully sell cigarettes in original packages it seems plausible to conclude that local officials did not regard the anti-cigarette law as a dead letter. (That authorities took the law seriously in small towns was illustrated by the sentencing to six months and 15 days in county jail of G. Van Roekel for selling cigarettes and conducting a nuisance in his restaurant/rooming house and levying the $300 tax against the property owner in the small northwestern town of Hawarden in 1915.)113 This conclusion is strengthened by

---

111 Education Needed,” Evening Tribune (Des Moines), Jan. 15, 1916 (4:2-3) (edit.).
112 Supplement to the Code of Iowa 1913 § 5006, at 1819 (1914).
113 Busy District Court This Week,” Hawarden Independent, Nov. 11, 1915 (1:6); “County on Good Behavior,” Hawarden Independent, Dec. 30, 1915 (1:1); “County Seat News Notes, Hawarden Independent, Feb. 10, 1916 (1:4). Van Roekel was paroled by the governor after having served somewhat more than half of his sentence. Id.
the attorney general’s responses, which, after formulaically intoning that the “state is powerless and cannot prevent a retail dealer from selling cigarettes in their original packages,” went on to stress how implausible it was that the shipments in fact satisfied the judicially glossed bona fide transaction requirement of the doctrine. For example, the county attorney in Marshalltown related that tobacco dealers were sending cigarettes all across the state in small parcel post packages consisting of three to five ordinary small cigarette packages. Although it seemed to him that such sales were legal, he refused to render such an opinion until the attorney general issued such a ruling. The assistant attorney general promptly replied that such shipments were not bona fide transactions, “but merely for the purpose of evading the Iowa law prohibiting the sale of cigarettes.” Moreover, in a case involving the cigarette mulct tax, the attorney general opined to another county attorney that with regard to a shipment of retail (as opposed to importation) packages, because the former “may become commingled with the property of the state upon its arrival at destination, by treating it as other property for sale to customers in a retail business,” it would not be protected by the original package doctrine; rather, because it had been “shipped into Iowa in a form contemplated to evade” the cigarette law, it would be subject to the mulct tax. In 1917, Attorney General Horace Havner stated his understanding that an original package was a “package containing five thousand or more cigarettes enclosed in a box or other carton or container, usually made use of by the shipper in shipping cigarettes to the trade....”


Anti-Smoking Forces Reach the Limits of Their Power to Effect Incremental Amendatory Legislative Change: 1913 and 1915

In spite of the fact that a considerable portion of the mid-western territory is under the ban of the anti-cigarette laws travelers report business on the “nails” to be about as brisk as before any of the States adopted the “anti” slogan... In Iowa, Kansas and Oklahoma some pretense is said to be made in the enforcement of the anti-cigarette law, but never-the less [sic], a vast number of cigarettes are there being sold.118

At its 1909 annual convention the Iowa WCTU declared that it had inaugurated a “plan of campaign...by which, with united forces, we might capture the next Legislature, both House and Senate.”119 In the event, the organization’s influence, at least with regard to positive tobacco control measures, had (with one exception)120 already reached its maximum. Following the hiatus of the 1911 General Assembly, by 1913 proponents and opponents of statewide regulation and prohibition had returned to the legislature to achieve their objectives. That session Senator John B. Sullivan, a Republican lawyer from Des Moines121 who as chairman of the House Judiciary Committee in 1909 had issued the report recommending that the Hammond-Trimmer Club search and seizure bill be indefinitely postponed,122 introduced a bill to amend the anti-cigarette law123 by increasing the minimum and maximum fines for a first conviction from $25 to $125 and from $50 to $200, respectively, and for additional convictions from $100 to $200,124 but the Judiciary Committee having recommended that it be indefinitely postponed,125 the Senate took no further action. However, by large
The legislature did pass a minor revision to the law regulating the conduct of public school pupils that required schools to issue rules and regulations “prohibiting the use of tobacco in any form by any student of such school” and empowering school boards to suspend or expel any student for violating such rule. At the next session in 1915, two bills relating to minors passed the Senate, but the House took no action on them. Republican Senator John H. Taylor, a Methodist pastor turned editor, introduced a bill to amend the 1909 prohibition of public cigarette smoking by minors by extending the ban to all tobacco, which passed by a vote of 36 to 2. The House did not pass the proposed measure, which the "Waterloo Times-Tribune" editorially lambasted as "'reform' gone mad." The bill to amend the 1894 no sales-to-minors law by expanding the universe of minors to whom it was unlawful to sell tobacco to include “any pupil enrolled in the public schools of the state” introduced by Democratic Senator Fred Hagemann, a lawyer who had been a county school superintendent for four years, passed by a unanimous 38 to 0 vote. This virtual inability to enact any further (including mildly incremental) anti-tobacco legislation stands in sharp contrast to the legislature’s willingness at every session from 1911 to 1917 to pass a large volume of increasingly stricter anti-alcohol measures, as a result of which Iowa came “under the rule of absolute prohibition.”

---

126 The votes on H.F. 175 in the House and Senate were 64 to 13 and 28 to 3, respectively. Journal of the House of the Thirty-Fifth General Assembly of the State of Iowa 1478-79 (1913) (Mar. 24); Journal of the Senate of the Thirty-Fifth General Assembly of the State of Iowa 1735 (1913) (Apr. 5).
127 1913 Iowa Laws ch. 241, at 261.
128 Iowa Official Register for the Years 1915-1916, at 714 (1915).
129 S.F. No. 517 (1915) (copy furnished by SHSI DM); Journal of the Senate of the Thirty-Sixth General Assembly of the State of Iowa 839,1153, 1583-84 (1915) (S.F. No. 517, Mar. 18 and 31, Apr. 12 ).
130 "Regulation That Doesn't Reform," WT-T, Mar. 23, 1915 (4:1) (edit.).
131 S.F. No. 543 (1915) (copy furnished by SHSI DM).
132 Iowa Official Register for the Years 1915-1916, at 710 (1915).
133 Journal of the Senate of the Thirty-Sixth General Assembly of the State of Iowa 924-25,1153, 1583-84 (1915) (S.F. No. 543, Mar. 18 and 31, Apr. 12 ).
134 Dan Clark, “Recent Liquor Legislation in Iowa,” IJHP 15(1):42-69 at 69 (Jan. 1917). Interestingly, despite dismantling the liquor mulct tax in 1915 (payment of which, unlike the cigarette mulct tax, did bar liability for what would otherwise have been a violation of the prohibition on selling liquor), which was no longer to be paid, collected or apportioned, the legislature did not repeal the implementing provisions, presumably
Legislative Stalemate: The 1917 Session

The cigaret habit now is stronger than present laws governing it.... We must pass laws that will be as strong as the habit.  

[A] prohibition of the manufacture and sale of cigarettes...has thus far proved ineffective.  

Republicans had enjoyed their typical large majorities during the 1911, 1913, and 1915 sessions, but in 1917 they achieved their greatest House majority since the Civil War, occupying 94 of 108 seats, and magnified their control of the Senate by securing 40 of that chamber’s 50 seats. The Republican state platform of 1915 still declared that: “The wise laws enacted by the Republicans of Iowa, that have resulted in the suppression of intemperance and materially aided in arousing and fostering in the state a love of temperance and good government, meet with our most hearty approval and support, and we pledge ourselves to the enforcement of the same.” As a tiny minority, the Democrats were hardly in a position to bring their quasi-libertarian temperance views to bear on the outcome of legislation. The newly elected governor, William Harding, 

because it would then “have been necessary to incorporate the provisions of the omitted sections in the cigarette law if the methods of assessing, collecting, and distributing the cigarette tax were still to remain on the statute books.” Id. at 64-65 n. 81.


137Republicans occupied 34, 33, and 35 of the Senate’s 50 seats in 1911, 1913, and 1915, respectively; in the 108-seat House they controlled 70, 66, and 76 seats. Michael Dubin, Party Affiliations in the State Legislatures: A Year by Year Summary, 1796-2006, at 65 (2007).


139The Iowa Official Register for the Years 1915-1916, at 377 (26th No., William Allen comp. 1915). In 1911 Republicans boasted that under “Republican laws...temperance sentiment has been promoted, temperance territory extended, and saloon influence minimized. While Republican control is continued no backward step shall in any degree imperil the moral welfare of the state.” The Iowa Official Register for the Years 1911-1912, at 351, 347 (24th Number, William Hayward comp. 1911).

140In 1911 the Democrats in their platform declared themselves “in favor of as large
was also a Republican, but in a “strange switch of traditional situations,” he had opposed prohibition and had, at the election in November 1916, been “openly supported by the liquor interests, who also opposed woman suffrage on the grounds that women would vote for Prohibition,” while the Democratic candidate, publisher and Methodist Edwin Meredith, as a strong supporter of prohibition received considerable normally Republican support such as that of the Des Moines Register.\footnote{141}

The key action during the 1917 session undertaken by those opposed to the general anti-cigarette regime was Senator Arthur L. Rule’s introduction of Senate File No. 159 on January 31.\footnote{142} Rule was a Republican lawyer who had been a member of the law department of the Chicago, Milwaukee and St. Paul and Burlington, Cedar Rapids and Northern railroads.\footnote{143} His bill proposed to repeal the 1896 Phelps law and the 1897 mulct tax. Its principal purpose was to transform the general prohibition on cigarette sales back into a no-sales-to-minors regime, but now subject to a $100 annual license, which the State Dairy and Food Commissioner “may withhold...from any applicant whom he may deem unworthy” and which he “may” also revoke for violating its terms. Selling cigarettes without a license would have been subject to a $100 to $300 fine; any building used for selling cigarettes in violation of any of the measure’s provisions constituted a nuisance subject to abatement in the same way that intoxicating liquor nuisances were enjoined.\footnote{144} Selling to a minor would have triggered a fine

\footnote{141}Leland Sage, A History of Iowa 250 (1987 [1974]). German-Americans, who purportedly abandoned their traditional affiliation with the Democratic Party because of President Wilson’s failure to convince them of the seriousness of his European neutrality policy, voted in sufficient numbers for Harding to “offset the Republican drys who voted for Meredith.” Id. In 1917, when the statewide (male) electorate rejected by a vote of 50.1 percent to 49.9 percent a proposed constitutional amendment prohibiting the sale or manufacture of liquor that the legislature had overwhelmingly approved in 1915 and 1917, party preference played a subordinate role, whereas (German) ethnicity, (Catholic or Methodist) religion, and vote on woman suffrage at the 1916 referendum were the leading explanatory variables. Thomas Ryan, “Supporters and Opponents of Prohibition: Iowa in 1917,” AI, 3d ser. 46(7):510-22 (Winter 1983).

\footnote{142}Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 263 (1917) (S.F. No. 159, Jan. 31).

\footnote{143}State of Iowa 1917-18: Official Register 314 (27th No. n.d.)

\footnote{144}S.F. No. 159 § 2 (1917) (copy furnished by SHSI IC).
of $100 to $300 (up from $5 to $100). If the police or a teacher asked a minor in possession of a cigarette or cigarette paper from whom it had been obtained and the minor refused to identify the person, he was subject to a five-dollar fine, or up to five days’ imprisonment or both (but a minor under 16 years was remitted to juvenile court action). Finally, the public smoking ban would have been amended to increase the age to 21 but to eliminate non-cigarette tobacco from the prohibition.

Newspaper publishers had begun propagandizing on behalf of such a bill two weeks before Rule filed his. On January 16—just three days after the Oklahoma House of Representatives, by an overwhelming 79-21 majority, had passed a bill that prohibited the sale, possession, and smoking of cigarettes—the Associated Iowa Dailies sent out a letter (accompanied by a copy of Pennsylvania’s model adult deregulatory law and an editorial from the Davenport Times supporting a law with which cigar dealers would have a chance of complying “instead of being subject to the possible whims of a blackmailer”) to its members to simulate a statewide referendum among “newspaper men” on the cigarette law. Already three days later, under the headline, “Revised Cigaret Law Is Favored,” the Waterloo Evening Courier—whose general manager had co-signed the letter as the organization’s president—reported that all of the first replies revealed a “widespread conviction that a reasonable cigarette law rigidly enforced in Iowa would be preferable to present conditions.” Iowa’s newspaper readers were, thus, well apprised of the newspaper owners’ view that the press was “emphatically in favor of new legislation” that would ban sales only to minors well before any had been filed. To be sure, publishers did not mention their self-regarding direct economic interest in legalizing sales so that they could profit from the expected huge volume of newspaper advertising.

Of S.F. 159 the WCTU said, later that year at its annual convention,

---

145S.F. No. 159 § 1 (1917).
146S.F. No. 159 § 3 (1917).
147H.B. No. 3, § 1 (Jan. 3, 1917, by McCollister et al.)(copy furnished by Oklahoma Department of Libraries); Journal of the House of Representatives of the Regular Session of the Sixth Legislature of the State of Oklahoma 22, 426-27 (1917) (Jan. 3 and 13); “House Passes Anti-Cigaret Bill 79 to 21,” Oklahoma City Times, Jan. 13, 1917 (1:3). The Senate defanged the bill, in which the amendment the House (including the bill’s chief sponsor) concurred, by striking the universal ban on sale, possession, and smoking, restoring the 1915 law with its applicability only to minors, and adding a county-level $25 annual license fee. 1917 Okla. Sess. Laws of Okla ch. 148 at 238-39. See vol. 2.
149See below this ch. and ch. 15.
“[p]erhaps no other bill...so quickly aroused the mothers of the state and the teaching fraternity....” In response, the organization’s president promptly “sent out 873 form letters to the School Superintendents and also a protest to the members of the Senate.” The WCTU also tried to outflank the anti-prohibitionists, as will be seen shortly, by requesting that the injunction law be applied to cigarette sales.\footnote{Woman’s Christian Temperance Union of Iowa, \textit{Forty-Fourth Annual Convention} 123 (1917).}

On February 10, the Judiciary Committee, to which the bill had been referred, recommended that it be indefinitely postponed.\footnote{\textit{Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917}, at 410 (1917) (Feb. 10).} Rule sought to turn sentiment around by announcing that Governor Harding supported the repeal and licensing bill and that at the governor’s suggestion he would amend the bill to remove the $100 minimum fine “in order to shut off the opening left by such a limitation for blackmail.” Insisting that the bill “had been misunderstood and regarded as a step backward from the present laws,” Rule “defended it as a measure calculated to offer the young men of the state a protection which they do not now receive....” He also alleged that the letter that the WCTU had placed on each senator’s desk that morning requesting that they oppose “any measure intended to weaken the present laws” had been written by someone who had not seen the bill. Republican Attorney General Horace M. Havner was also alleged to be backing Rule’s bill “because of the difficulties of enforcing the existing laws which,” at least according to the \textit{Register}’s garbled or confused report, “are being violated under the original package doctrine of the interstate commerce commission.” As a final lure to support S.F. 159, Rule claimed that the license fees collected pursuant to his bill would bring in $200,000 annually.\footnote{“Claims Harding Is for Cigaret Repeal,” \textit{DMR}, Feb. 11, 1917 (6:1). According to another paper, it was “a known fact” that Harding had suggested removing the $100 fine. “Is Harding a Friend of the Coffin Nail?” \textit{Davenport Democrat and Leader}, Feb. 13, 1917 (2:3).} One editorialist replied that if the bill passed, the boys who used cigarettes would discover that “legislative approval of the bill didn’t include the employer’s approval of a cigarette smoking kid.”\footnote{“B.T.W.,” \textit{Renwick Times}, Feb. 15, 1917 (6:3).} Some of Rule’s assertions may have been persuasive: by an overwhelming majority of 28 to 3\footnote{\textit{Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917}, at 410 (1917) (Feb. 10).} (of whom Aaron Proudfoot, the
WCTU’s chief advocate and husband of a WCTU member, was one) the Senate rejected the committee’s report and ordered the bill placed on the calendar. No Democrat voted Aye, while eight of ten voted Nay together with 20 of 40 Republicans.

Undeterred, when the Senate took up the bill a few days later, Proudfoot, calling Rule’s bill the “most vicious piece of legislation that has been up to the state for many a year,” offered a substitute amendment that essentially applied the public nuisance provision of S.F. 159 to all buildings in which cigarettes were sold to anyone in violation of the general ban. Rule “heartily condemned” Proudfoot’s measure, again defending his own bill as “the work of the attorney general.” Not to be outdone in arguing from authority, Proudfoot “shouted” back: “My own bill was drawn in the attorney general’s office not half an hour ago.... That office is as apt to get its wires crossed as is any other.” But before Proudfoot’s substitute could be voted on, another Republican senator offered an amendment to Proudfoot’s that would have added to the buildings deemed a public nuisance any one in which “cigars, plug tobacco, snuff, fine cut, smoking tobacco, leaf tobacco and all and every product of the weed known and called tobacco” were sold or kept for sale. Since the anti-tobacco movement (including Proudfoot) had not developed to the point at which it was willing to ban all tobacco, the maneuver was manifestly designed as a killer amendment, but it secured only six Ayes (including Rule’s and those of four other Republicans) against 35 Nays (28 Republicans and seven Democrats). Parliamentary counter-tactics having been exhausted, Proudfoot’s substitute amendment prevailed on a close 26 to 21, non-party-line, roll-call vote (21 Republicans and

155Indianola or Guthrie County, Woman’s Christian Temperance Union, Roll of the Members [1919-1924], Mrs. Lou Proudfoot (A.V.) (1920-21), in WCTU of Iowa Papers, Unprocessed, Local Branches, Indianola, Iowa Women’s Archives, University of Iowa.

156Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 410 (1917) (Feb. 10); State of Iowa 1917-18: Official Register 279-80 (27th No. n.d.). Both Proudfoot and Rule were committee members as was one of the other Aye votes; ten committee members voted Nay, and the rest were absent or did not vote. On committee membership, see Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa 126 (1917).


158Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 488-89 (1917) (Feb. 15).


160Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 489 (1917) (Feb. 15).
5 Democrats for and 17 Republicans and 5 Democrats against). Immediately, Republican Senator Charles Helmer moved to amend the pending measure by striking out the enacting clause (i.e., killing both Rule’s bill and Proudfoot’s substitute). Its adoption by a viva voce vote makes it impossible to analyze the constellation of forces behind the move.

The “progressive” Register, still profoundly misinformed about the constitutional vitality, commercial significance, and source of the original package doctrine, sarcastically summarized the outcome as meaning that: “The sale of cigarettes is still unlawful in Iowa and will still be plentiful unless Attorney General Havner goes a long way around to catch the dealer who breaks the original package to accommodate a friend. ... It will now be up to the attorney general to enforce the existing laws in so far as enforcement is possible under the ruling of the interstate commerce commission that cigarettes may be shipped into the state in original packages. (Misinformed and misinforming newspaper reporting may not have been accidental: a poll at this time by the Associated Iowa Dailies of its publisher-members revealed overwhelming support for a change in the law, which allegedly was “so strict that cigarettes are sold only secretly and...dealers are subject to the whims of blackmailers. The state derives no revenue from that sale and none of the tobacco companies making cigarettes advertise in the newspapers of the state.” Additional evidence that publishers’ own narrow economic interests underlay their views was supplied by a quotation from an editorial claiming that many doctors believed that cigarettes were less harmful than other forms of tobacco.)
In fact, the “long way around” is precisely what Havner had in mind. That he would have favored vigorous enforcement of such a prohibitory law was biographically consistent: before being elected attorney general, Havner not only “had achieved large success in prosecuting leading violators of the prohibitory laws,” but as a candidate was “the worst hated of the ‘drys’ in Iowa by the liquor interests...because of his activities as an attorney for anti-saloon organizations.” (That the movement regarded him as having retained his prohibitory bona fides was amply demonstrated more than a decade later by the fact that Ida B. Wise Smith, the president of the WCTU, recommended Havner as U.S. assistant attorney general to President Hoover.) In the event, Havner announced on February 20, 1917 that he would “enforce whatever laws the legislature leaves on the statute books, when it adjourns.” Stressing that he was “not making a bluff at law enforcement,” he insisted that he intended to “make the enforcement real,” and urged the legislature to repeal the laws it did not want enforced because there would be “no winking at the law after the session closes.” Although Havner was speaking expressly about various blue laws—prohibiting, for example, Sunday baseball, theaters, and movies—in connection with legislative repeal proposals, with the possibility of local option for cities with a population under 10,000, his threat applied to the anti-cigarette laws as well.

165 On Havner, who was attorney general from 1917 to 1921, see State of Iowa: 1919-20: Official Register 215-16 (28th No., n.d.).
166 Edgar Harlan, A Narrative History of the People of Iowa 4:159 (1931).
167 “Bi-Partisan Hypocrisy!” IH 61(39):1-2, 4-5, 24-25 at 2 (Sept. 28, 1916). Havner’s political positions were hardly uniformly progressive. Although as a candidate for the Republican nomination for governor in 1920 he advocated the extension to women of “absolute political equality with men, and the removal of any economic discrimination against them in our present statutes,” he aggressively positioned himself to the right of his rival (who became governor) Nate Kendall with regard to labor unions and strikes. He was “opposed to the radical demands of a section of organized labor...which clearly has for its object the sovietization of all property from railroads to the farms” and which endorsed his two opponents, including Kendall, support for whom was tantamount to repudiating the anti-strike plank of the national Republican platform. “Havner Stands on Labor Issue,” DMN, June 23, 1920 (1:4).
168 Lawrence Richey (secretary to the president) to Ida B. Wise Smith (June 27, 1929), in Presidential Papers - Secretary’s File, Folder: Smith, I. 1929-1933, Herbert Hoover Presidential Library, West Branch, IA.
After the anti-prohibition forces had failed to resuscitate Rule’s bill, the focus shifted to the House, where prohibitionists, unintimidated by the specter of the original package doctrine, controlled enough votes to pass Proudfoot’s nuisance substitute. A week after the debacle in the Senate, Republican Charles V. Findlay, who had been a teacher, county school superintendent for 10 years, and then proprietor and president of Tobin College in Ft. Dodge, a business college that he had bought, introduced House File 441, which declared any building used to sell or keep for sale cigarettes or cigarette papers a public nuisance, and provided for the latter’s abatement by injunction in the same way that the Code already prescribed for intoxicating liquor nuisances. Conviction—which was powerfully facilitated by a provision that deemed finding cigarettes or cigarette papers “in any quantity whatever” in the building prima facie evidence that the latter was a public nuisance and its owner or keeper was guilty of maintaining the nuisance—brought with it a fine of between $300 and $1,000. The bill was referred to the Committee on the Suppression of Intemperance, but two weeks later Findlay withdrew the bill from further consideration and filed in its stead House File 500, a more streamlined and stringent version.

Its origins, according to the WCTU of Iowa, were straightforward: “We asked that the Injunction law be applied to the sale of cigarettes. ... House File 500 was introduced, making the injunction law applicable to cigarettes the same as to liquors. It was worded the same as the famous Red Light Injunction Law, which has been upheld by the Supreme Court and copied by 30 states.” While retaining the aforementioned abatement procedure—which now more broadly applied to “[w]hoever shall erect, establish, continue, maintain, use, own, or lease” a building “used for the purpose of” cigarette selling—H.F. 500 provided for summary judicial trial and punishment of anyone who violated an injunction or abatement order by selling, keeping for sale, or giving cigarettes or cigarette

---

171 Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 520-21, 1066-69 (1917) (Feb. 16 and Mar. 21).
172 Edgar Harlan, A Narrative History of the People of Iowa 3:113 (1931).
174 H.F. No. 441, Feb. 23, 1917 (copy furnished by SHSI IC); Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 703 (1917) (Feb. 23).
175 Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 788 (1917) (Mar. 8).
176 Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 123 (1917).
papers or wrappers. Arrest was triggered by the filing with the clerk of the court of a sworn complaint alleging facts that constituted a violation; the judicial proceeding was the same as that for contempt in a liquor injunction suits. For a first offense the fine was 30 days to six months in county jail; one year’s imprisonment was imposed for each additional offense.\(^{177}\) On top of the penalties imposed by the original Phelps law of 1896 and the mulct tax of 1897, the punishment meted out by this new proposal demonstrated that the WCTU and other prohibitionists were not only unwilling to acquiesce in repeal of Iowa’s 20-year-old anti-cigarette statutes, but intended to strengthen enforcement and deterrence. After initial referral to the Police Regulations Committee, the bill, at Findlay’s own request and with unanimous consent, was re-referred to the Suppression of Intemperance Committee,\(^{178}\) which a few days later recommended passage.\(^{179}\)

In the midst of these proceedings, Republican Senator Perry Holdoegel, a businessman who had previously been a school teacher and superintendent,\(^{180}\) and whose voting record on the anti-cigarette bills in 1917 was not consistent, wrote to Attorney General Havner apparently asking whether Findlay’s H.F. 441, if passed, would empower the state to prevent the sale of cigarettes in original packages. Not only did Havner unambiguously negative the question, but added that the proposed law would not even “absolutely prohibit the sale of cigarettes to minors in the state of Iowa,” though “it would be a very effective means in curtailing the sale to minors....” The reason for this practical effectiveness lay in the U.S. Supreme Court’s Iowa cigarette decisions, which required original packages to be those used in bona fide transactions between manufacturers and wholesalers in different states (and not whatever schemes the Tobacco Trust contrived in order to simulate actual interstate transactions). As a result of this holding, Havner wrote: “The average minor purchases his cigarettes either two or three cigarettes at a time, or else a small box, which does not constitute an ‘original package’ within the meaning of the law.”\(^{181}\) Despite the fact that

\(^{177}\)H.F. No. 500, Mar. 8, 1917 (copy furnished by SHSI IC); Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 783 (1917) (Mar. 8).


\(^{180}\) State of Iowa: 1917-18: Official Register 309-10 (27th No., n.d.).

practically speaking no sales to minors would be lawful, it is astonishing that the attorney general appeared to be implying that all the states’ no-sales-to-minors laws (including Iowa’s of 1894) could theoretically be trumped by a four-year-old with enough money to buy a case of cigarettes large enough to qualify as an original package for interstate commerce purposes.  

When the full House took up H.F. 500 on March 28, Findlay himself offered an amendment, providing for a fine of $100 to $500 as an alternative to imprisonment, which was adopted. Then Otto Starzinger, a Republican hotel manager in Des Moines—four years later he became the second person in Des Moines to receive a cigarette sales permit after repeal of the prohibitory law—tried a favorite anti-prohibition tactic by moving that the bill be amended by inserting a knowledge requirement (“knowingly”) into the aforementioned “[w]hoever” clause. Prohibitionists defeated this transparent effort to weaken, if not undo, the measure, especially as to landlords, by erecting a potentially insuperable evidentiary barrier by a solid vote of 29 to 63—except that 23 of the Ayes were cast by Republicans, who accounted for almost 30 percent of the 80 Republicans who voted yea or nay.

Next, Republican Frank Lake, a newspaper reporter from Sioux City on the Missouri River, offered an amendment to limit the coverage of the injunctive procedure to selling and giving cigarettes to minors, but it attracted only 10 votes (only one of which was cast by a Democrat), while 66 Republicans and ten
Democrats voted Nay. 188 This overwhelming rejection of an initiative to repeal Iowa’s prohibitionist approach to cigarette sales literally a few days before U.S. entry into World War I and at a time when nationally cigarette sales exceeded by seven-fold the level attained when Iowa had banned them in 1896 189 underscored the deep-seated character of the oppositional forces. In a final effort to kill the bill entirely, Starzinger filed an amendment bringing the sale of cigars within the scope of enjoinable public nuisances, which, given the vastly greater prevalence of cigar smoking among adult men than among children, was not even on the WCTU’s agenda. 190 (Three years later the Kansas Supreme Court rejected a challenge to the validity of that state’s prohibition of cigarette sales based on the claim that banning the sale of one form of tobacco and permitting that of others was arbitrary and unreasonable. The court recognized the existence for years of a “well-settled opinion that the use of cigarettes, especially by persons of immature years, was harmful.... [T]he state determined that the sale of cigarettes was a greater menace to the health and welfare of the people than would be the sale or use of tobacco in other forms.... It was within the province of the legislature to determine what kinds of tobacco lead to the most hurtful results....“) 191

All of the anti-prohibitionists’ procedural moves having been exhausted—the WCTU referred to “a hard battle by the enemies to get the word ‘knowingly’ in” 192—Findlay’s motion to vote on the bill’s passage prevailed, and the House passed H. F. 500 by a massive majority of 82 (including 10 of 14 Democrats) to 5 (including Starzinger and Lake). 193 The third Republican voting Nay, George Tucker, a linotype operator from the Mississippi River town of Clinton, 194

189 In 1917 more than 36 billion cigarettes were produced compared with slightly under 5 billion in 1896. Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298-99 (1934).
190 Nevertheless, 1919 was the first year in which more leaf tobacco was used in the manufacture of cigarettes than in that of cigars. U.S. Dept. of Agriculture, First Annual Report on Tobacco Statistics (with Basic Data), tab. 13 at 89 (Statistical Bull. No. 58, May 1937).
191 State of Kansas v Nossaman, 193 P. 347, 348, 350 (Kansas 1920).
192 Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 123 (1917).
explained his vote as based on the belief that “it would be unfair to the innocent property owner. I favor a heavy penalty for the selling of cigarettes to minors but this measure would virtually confiscate an innocent man’s property.” Correctly the Des Moines Register reported that if the Senate passed the Findlay bill, the “anticigaret bill promises to develop a full set of teeth...”

On March 31 the Senate Committee on Suppression of Intemperance needed only five minutes to recommend passage of H.F. 500, which had been endorsed not only by the WCTU, but also YMCA, YWCA, Boy Scouts, board of education, federation of women’s clubs, the city union of mothers’ clubs, the ministerial association, and the Des Moines Federation of Churches. The full Senate did not take up the bill until April 10, four days after President Wilson had declared war against Germany. Alert to efforts in the Senate to water down the bill by making the changes that the House had defeated, the superintendents of the WCTU’s Anti-Narcotics and Christian Citizenship departments sent letters to every senator warning of the ploy. As soon as the committee report was adopted, Republican Senator Frank Thompson, a lawyer from the Mississippi River city of Burlington, arguing that the bill was “too drastic,” offered Representative Lake’s defeated amendment limiting injunctions to violations involving minors. Thompson presumably believed that he was gaining votes by declaring that the bill without his amendment “merely offered an inducement to long-nosed old women-meddlers to make trouble.” Irrepressibly he went on to insist that smoking cigarettes, which were not so injurious as cigars, could not be prevented and the law’s only effect would be to “make millions for mail order houses.” Despite Senator Taylor’s objection that the amendment’s adoption

---

197Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1396 (1917) (Mar. 31).
198“Findlay Bill Reported,” DMR, Apr. 1, 1917 (8:7-8) (five minutes). See also “‘Best Law Legislature Could Pass. What Iowa’s Youngest Lobbyist Thinks of Anticigaret Law,” Des Moines Evening Tribune, Apr. 6, 1917 (4:3-5) (10-year-old appointed by his school, which in turn had been asked by Lucy Page Gaston, the president of the Anti-Cigaret League, to lobby legislature).
199Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 123 (1917).
would render the law unenforcible, the Senate passed it on a non-party-line 29 to 14 vote: six Democrats and 23 Republicans voted for the amendment, while three Democrats and 11 Republicans opposed it (including Senator Rule). Another Republican lawyer, Senator James Wilson, then offered Starzinger’s “knowingly” amendment, which was adopted on a non-roll-call vote. Proudfoot moved for a vote on third reading and joined eight Democrats and 32 other Republicans who passed the bill against only one Nay. Presumably Proudfoot and other prohibitionists regarded this “tamed” injunctive bill with most of its “teeth” yanked as a better outcome than the alternative of no bill at all. The motion to reconsider the vote by which the Senate had passed H.F. 500 failed when, on April 12, the chamber voted, again on non-party lines, 25 to 12 to table it. With “[m]uch of the poison...extracted from the fangs” of the bill, many fewer dealers could, in the words of the Davenport Democrat and Leader, “be made the victims of injunctive proceedings....” In the wake of the amendments that “largely annulled” the bill’s force, the Des Moines Capital insisted that the “principal argument” against it had been that the original package doctrine rendered it ineffective. Since the prohibitory and mulct tax laws had, for two decades, survived virtually all constitutional challenges based on that doctrine, and whatever legal force it retained could be translated into radically reduced commercial profitability, so long as the state enforced the laws, that chief argument had been discredited.

With adjournment imminent (April 14), the House took up the amended bill the same day. Findlay himself, carrying on where Proudfoot had left off, moved that the House concur in the Senate changes. Before that vote could be taken, Republican William Giltner—who had earlier voted against Starzinger’s amendment—moved to amend Findlay’s motion by substituting for it concurrence only in the Senate’s insertion of “knowingly.” Findlay, together with Starzinger, Lake, 26 other Republicans, and three Democrats voted for it, but 41 Republicans and nine Democrats opposed it. Findlay’s motion to concur in the Senate’s

201 “Cigarettes and the Long-Nosed Women,” CRDR, Apr. 12, 1917 (2:5).
204 Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1738, 1770 (1917) (Apr. 11-12). Five Democrats and 12 Republicans voted to table against three Democrats and nine Republicans.
205 “Poison Taken from the Anti-Cigaret Bill,” Davenport Democrat and Leader, Apr. 12, 1917 (4:3).
206 “Anti-Cigaret Bill Is Amended; Then Passes Senate,” DMC, Apr. 12, 1917 (10:7).
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

restriction of injunctive procedures to violations involving minors was then defeated by an overwhelming vote of 15 to 63, Findlay himself opposing his own motion.\textsuperscript{207} Once the senate had “extracted most of the teeth,” House backers “decided that no action was better than the brand of action proposed by the senate.”\textsuperscript{208}

The following day, April 13, H.F. 500 having been returned to the Senate, Senator Proudfoot moved that that body recede from its own amendments. As in the House, the two major changes were voted on separately. On the restrictive requirement of “knowingly” violating the anti-cigarette law, the Senate voted 28 to 14 against receding, only two Democrats and 11 Republicans joining Proudfoot in voting Aye. After the Senate had voted 26 to 14 against receding on the restriction of injunctions to violations involving minors as well, on a voice vote the chamber also defeated Proudfoot’s motion to appoint a conference committee to meet with the House conference committee\textsuperscript{209} (which was appointed the next day and consisted of three Republicans who had voted against the Senate amendments and one Democrat who had voted for them).\textsuperscript{210} Thus all initiatives to weaken and strengthen Iowa’s anti-cigarette laws for the 1917 session died.

**The Antis’ One Legislative Success:**

**The Stealth Ban on Cigarette Advertising**

Smoking, while not a necessity, is a recognized and quite universal habit among workmen, and an indulgence reasonably to be anticipated by employers.\textsuperscript{211}

\textsuperscript{207}Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1990-92 (1917) (Apr. 12). Starzinger, Lake, and three Democrats were among those voting Yea, while nine Democrats voted Nay.


\textsuperscript{209}Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1848-50 (1917) (Apr. 13).


\textsuperscript{211}Rish v Iowa Portland Cement Co., 186 Iowa 443, 451 (1919) (not limiting smoking to cigarettes). In contrast, the state workers compensation agency, whose decision denying the cigarette-smoking worker’s claim the Iowa Supreme Court overruled, stated that whereas “lunching, getting a drink of water, seeking relief from excessive cold, and responding to calls of nature” were all “necessary requirements of efficiency on the part of workmen,” insisted that “[n]o such claim can be made for smoking.” Rish v Hawkeye Portland Cement Co., in State of Iowa: 1918: Report of Workmen’s Compensation Service for the Biennial Period Ending June 30, 1918, at 25-27 at 27.
However, the cigarette-prohibitionist forces were able to secure the enactment of one bill that year, albeit one that was a by-product of the anti-alcohol movement. Senate File No. 7, a so-called bone-dry bill passed by large majorities in both houses, made it a misdemeanor to advertise for sale in any means of transportation or public place by means of any sign or billboard, or any poster, newspaper, magazine, or periodical, any intoxicating liquor “or any other article, the sale or keeping for sale of which is prohibited by the laws of this state.” The law also made it a misdemeanor for anyone to publish or circulate any newspaper, magazine, or periodical in which any such prohibited advertisement appeared. (Kansas, which also prohibited the sale of cigarettes, had enacted a similar ban on cigarette advertising a few weeks earlier.) In addition, S.F. 7 deemed an enjoinable and abatable public nuisance any building used for printing or publishing such publications, or such publications containing “any advertisement, notice, reference, editorial or story, giving information of the place where, or the price at which” liquor or such other prohibited article could be bought or obtained, as well as any building in which such publications were exhibited or kept for distribution together with any machinery, type, fixtures, or furniture used to print or publish such publications. Because the 1896 Phelps law prohibited the sale of cigarettes, they were clearly encompassed by the term “any other article” and thus subject to this extraordinarily capacious and stringent intervention, as the WCTU of Iowa underscored at its annual convention later in 1917.

(At exactly the same time Congress was debating—and soon passed—an amendment to the postal appropriations bill to prohibit depositing in the mails any letter, newspaper, or publication of any kind containing any advertisement of intoxicating liquor when such mailing was addressed to anyone in a state in which it was unlawful to advertise liquor. Although the amendment as presented

---

212 Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 448-50, 1386 (1917) (Feb. 13 and Mar. 31) (39 to 9 and 37 to 0); Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa: 1917, at 1429-30 (Mar. 30) (80 to 14).

213 1917 Iowa Laws ch. 136, § 2 at 158, 159. The bill originally made violations a felony punishable by a year in penitentiary, but on the Senate floor the penalty was reduced to 30 days. “Senate Passes ‘Bone Dry’ Bill,” DMR, Feb. 14, 1917 (2:7-8).

214 1917 Kan. Sess. Laws ch. 166, § 2, at 212, 213. See also below ch. 16.

215 1917 Iowa Laws ch. 136, § 2 at 158, 159.

216 Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 122 (1917).

217 CR 54:3324 (Feb. 15, 1917). On passage, which facilitated such state laws like
contained no “any other article” clause, Senator James Martine (N.J. Dem.), who considered the amendment and especially the proposed punishment “prohibition run mad,” offered an amendment to the amendment adding cigarettes to the prohibition. Under no illusion that it would pass, he sought to “test out these humanitarians,” his colleagues, who had not included tobacco because it affected them. Martine declared that “if there is an enormity it is the cigarette habit, which has obtained so fast a hold on the people of this country. Miserable, puny sickly specimens of boys are seen sucking on the ends of these miserable cheroots and spitting their lives away. ... I trust that these splendid specimens of humanity who are advocating prohibition will...vote to save the rising generation from the iniquity of tobacco smoking and from the horrors of the poison of nicotine. [Laughter.]” When Mississippi Senator James Vardaman responded that they could not vote for the amendment, Martine immediately retorted: “Of course, you can not. It is a personal habit that has its fangs so deep in you as to be a part of you.” Owning that Vardaman was “past redemption,” he insisted that his focus was on “the rising generation,” but merely harvested more laughter. Even the leading Progressive Republican, Robert La Follette—who as Governor of Wisconsin had signed the anti-cigarette bill into law in 1905—confirmed Martine’s image of his fellow senators: “I can not vote for this amendment upon principle, and I can not vote against it without casting a vote affecting my own interest, and therefore I decline to vote.” The Senate, as expected, rejected the amendment 38 to 15, but the fact that 15 senators (including both Iowa senators and long-time Progressive Republican George Norris) joined Martine suggested that this intervention may not have fallen within the scope of what Martine himself in his Senate valedictory two weeks later alluded to as commentary that he had been “‘a buffoon and a disgrace to this body.’”

On July 4, 1917, the effective date of the Iowa anti-cigarette advertising law, the Des Moines Register referred to “a phrase which was slipped through without much comment.” Into its plagiarized version of this article, Tobacco inserted the subhead: “A Little Clause that Escaped Comment Until It Became

---

Iowa’s, see “Bone-Dry Bill for 14 States Passes House,” NYT, Feb. 22, 1917 (1);
“Congress Deals Knockout Blow to Saloon Men,” NYT, Mar. 1, 1917 (1).
218 CR 54:3327 (Feb. 15, 1917).
221 “Martine Says Farewell,” NYT, Mar. 1, 1917 (12).
222 “Cigaret Ads Now Barred in Iowa,” DMR, July 4, 1917 (8:3).
Effective.” To be sure, the Register’s coverage of the legislative proceedings had mentioned only liquor, but the bill contained exactly the same language from the day that Republican Senator Chester Whitmore introduced it on January 11 together with his other bone-dry bills. In any event the newspaper acknowledged that: “No publication may now be largely sold in Iowa which contains an advertisement of cigarettes and cigarette advertisements may not be displayed upon billboards or elsewhere. The bulky athlete whiffing a pill and the debonair society man lithographed in the act of lighting some favorite brand of cork tipped divinities are alike are under the ban.” The paper added that the injunctive provision would permit closing any newsstand that sold any publication containing cigarette advertising. Whatever the level of compliance with the prohibition of the sale of cigarettes, newspapers in Iowa complied with the ban on advertising them—at least until about two months before the ban was lifted in 1921. Three weeks after the law had gone into effect, the Register reported that while the owner and manager of two downtown newsstands were clipping out the cigarette advertisements in (presumably out-of-state) magazines, other proprietors were unaware of the new law and had not been the targets of any enforcement actions. Although the United Press reported a rumor at the end of

---

225 S.F. No. 7 (Jan. 11, 1917) (copy furnished by SHSI IC).
226 “Cigaret Ads Now Barred in Iowa,” DMR, July 4, 1917 (8:3).
227 A perusal of numerous issues of numerous bound Iowa newspapers and a search of the numerous Iowa newspapers on the computerized NewspaperArchive database found no cigarette advertisements from 1917 to May 3, 1921. To be sure, cigarette ads appear to have been uncommon in Iowa papers even before 1917. A rare ad for Chesterfield appeared twice in a paper in a very small south-central town. Moravia Union, Feb. 7 and 9, 1911 (7:4-6). The following two cigar store ads included only brief mention of cigarettes: IU, Oct. 8, 1909 (2) (Rex Cigar Co.; labor union weekly was adamantly opposed to sale of cigarettes); DMC, Dec. 18, 1914 (11) (full page ad for C. C. Taft Co.: “All the leading brands of cigarettes in holiday packages”). A billiards hall ad in the labor weekly mentioned cigarettes prominently along with cigars and tobaccos. IU, Dec. 12, 1913 (8:1). Ironically, in 1915 the Iowa press ran a very long piece in which the founder and president of R. J. Reynolds Tobacco Company extolled newspapers for enabling his commodities to become market leaders. “Newspapers The Standard Form of Advertising,” Muscatine Journal, May 15, 1915 (10:1-4). On the appearance of ads before, on, and after July 4, 1921, see below ch. 15.
228 “‘Pill’ Ads Still Appear,” DMR, July 25, 1917 (10:2). According to the United Press, when the July issue of a national magazine carried a full page cigarette ad on the reverse side of which part of a story was printed, dealers “couldn’t obey the law and please
July that dealers were waiting for one of them to be “‘pinched’” in order to make a test case, the Iowa statute was apparently never challenged.

One device for circumventing the advertising ban, at least during the 16 months until the end of the world war, was to merge advertising and notices about mobilizing public support for supplying newly addicted smokers in the trenches or hospitals who “crave[d]” cigarettes. One such item, which was expressly labeled “Adv.,” transparently went over the line: “Millions of the famous LUCKY STRIKE Cigarettes are ‘going over’ all the time. There’s something about the idea of the toasted cigarette that appeals to the men who spend their time in cold, wet trenches. Then, too, the real Kentucky Burley tobacco of the LUCKY Strike cigarette gives them the solid satisfaction of a pipe, with a lot less trouble.” Between the end of the war and repeal of the advertising ban the American Tobacco Company devised another ploy for calling mass attention to Lucky Strike cigarettes: in 1920 it repeatedly published large ads in numerous Iowa newspapers for Lucky Strike pipe tobacco that underscored that it underwent “the same toasting process that made the Lucky Strike Cigarette the greatest success in cigarette manufacturing.”

Attorney General Havner’s Raids and Their Litigational Sequelae: 1917-1920

After that State [Iowa] had let its anti-cigarette law lie dormant for more than a decade, Attorney General Havner, on going into office a few years ago, put the screws on for a week and then relaxed them, announcing that public sentiment was against enforcing the

---

229 “Cut Out the Cigarette Ads,” Oelwein Daily Register, July 30, 1917 (2:3).

230 In contrast, the aforementioned Kansas law was litigated: a federal court, relying on precedent dealing with bans on liquor advertising in states that prohibited the sale of liquor, ruled that while a state could prohibit in-state newspapers from printing cigarette advertisements, it could not, consistently with the interstate commerce clause, exclude out-of-state newspapers carrying such advertising. Post Printing & Publishing Co. v. Brewster, 246 F. 321 (D. Kansas, 1917).

231 “Red Cross Nurses, Army Surgeons, and Regiments of Nerve-Racked Fighting Men Appeal to You to Send ‘Smokes’ to Our Boys in France,” Cedar Rapids Republican, Nov. 30, 1917, sect. 2 (1:4-7).

232 “Our Boys ‘Over There’ Enjoy Toasted Cigarettes,” Maurice Times, May 2, 1918 (7:3).

233 E.g., BH-E, July 7, 1920 (2:2-7).
[E]ven in states where laws were in effect, enforcement was lax.235

That Attorney General Havner’s declared intention to resume enforcement of the prohibitory laws that the legislature had failed to repeal—the bill partially repealing the blue laws died—was no bluff and extended to the anti-cigarette laws became clear shortly after adjournment. On Saturday morning April 28, an obviously leaked article in the Register announced that “Cigaret Lid Is Ready to Drop.”237 Havner had decided to make cigarette selling the first of his threatened enforcement actions. The Iowa WCTU must have rejoiced that its very own John B. Hammond was the special agent in charge of the campaign.238 April 28 was the day on which Hammond’s verified application for search warrants was presented to Polk County District Court Judge Charles Hutchinson, who issued them that same day.239 (Four years later, no longer a judge, Hutchinson was one of the most stalwart public opponents of repeal of the cigarette sales prohibition law.)240 Although Hammond declined to disclose details, he had already collected considerable evidence of violations by a large number of Des Moines
dealers—including cigar stands in most of the capital’s large hotels—against whom already prepared informations would be filed immediately. That the city’s dealers were “not entirely in the dark” as to the impending actions followed from the “open” sale of cigarettes in Des Moines and other cities, which meant that state workers had had “no trouble in gathering evidence in plenty.”  Hammond’s chief agent was his own 23-year-old son, Mott, who, together with one other person, had bought cigarettes in the Des Moines stores before his father carried out the raids.

The next day (Saturday) Hammond met with 30 police officers, eight state agents, and seven members of the sheriff’s staff and gave them the requisite search warrants and instructions for executing them. At 8 p.m. the authorities swooped down on 54 stores and pool halls in Des Moines, confiscating thousands of dollars worth of cigarettes and taking them back to police headquarters, where Hammond and others spent more than two hours counting them, before placing them in a cell for eventual burning. In one store alone Hammond’s raiders confiscated $2,500 worth of cigarettes after having had to kick in the door that had been locked by the resisting owner. At one store, where they were unable to cart off the entire stock in one trip, on their return they arrested the clerk, who had in the interim sold off the remaining cigarettes; also arrested was a pool hall owner who had lied to raiders about having no cigarettes. Hammond’s strictness can be gauged by the fact that he arranged to file charges against a police officer who had allowed clerks to remove cigarettes and hide them in a non-tobacco store. Although search warrants had been issued for 130 locations, lack of manpower prevented the agents from reaching all; consequently, raids were largely limited to downtown areas, including 10 stores owned by the C. C. Taft Company.

Refraining from sabbatarian raids, on Monday the attorney general’s forces

---


turned to Des Moines cigarette wholesalers.244 The same day the Johnson County Attorney Steve Casey in Iowa City announced that he would insure enforcement of the anti-cigarette statute by prosecuting violators:

> “Information has reached me from the Attorney General’s, making very plain the attitude of the State Department with reference to the sale of cigarettes. This information is to the effect that the statute prohibiting the sale of this commodity will be strictly enforced and violation of it prosecuted.

> “This law has been upon a statute book for a number of years but has been disregarded by the people of the entire State, but it seems that the spirit of the times will no longer tolerate its violation, hence it is that all tobacco dealers are now warned of the attitude of the State Department upon this question, and are further warned that all violation of this law will be prosecuted.”245

Just the word of a possible raid in Iowa City prompted dealers there to reduce cigarette prices greatly “in order to escape confiscation of the goods.”246

Announcing that he would prosecute more than 120 people in Des Moines for illegally selling cigarettes and seek to collect a total of $36,000 in mulct tax from them, Havner directed his special agents, headed by Hammond, to see to it that the law was enforced “‘all over the state’” and that Des Moines dealers not resume sales: “‘We are not making Des Moines the victim. We expect to stop their sale in all cities.’” Defying what had already turned into an organized mania, Havner presumably pleased few outside of the WCTU in declaring that the $3,000 worth of cigarettes seized in Des Moines would not be shipped to U.S. soldiers in France.247 (More than a thousand dollars worth of cigarettes could not have been shipped anyway since they were soon destroyed by fire at the police station where they were being stored.)248

The “spectacular” raids in Des Moines represented just the opening blow of Havner’s statewide suppression drive, which, according to the Davenport Democrat, was planned to “descend upon practically every city and town in Iowa.

244“Drive Upon the Cigaret Kept Up,” *Davenport Democrat and Leader*, May 1, 1917 (2:5). Although the press reported the raids on Taft’s retail stores, Taft litigated in its capacity as a wholesaler and jobber based on the raid on April 30. Appellant’s Abstract of Record at 2, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918).


248“Fire in Police Station Destroys Cigarettes of Value Estimated at $1,000,” *Des Moines Register*, Aug. 25, 1917 (3:5).
Within a month it is believed that any cigarettes obtained in the state will either be shipped in parcel post to the consumer or be purchased from bootleggers.\textsuperscript{249} The attorney general’s enforcement raids soon spread across the state as he intimated that the confiscation of slot machines and carloads of whisky in Dubuque on May 5 was just the start of a campaign to suppress the whisky and cigarette traffic.\textsuperscript{250} Havner’s campaign was exerting its intended general deterrence: under the headline, “No Cigarets on Sale Here,” the \textit{Waterloo Times-Tribune} interviewed a tobacco dealer who opined that a raid on stores in Waterloo would not find a single package because, in the wake of the widely publicized Des Moines raids, every store in Waterloo had stopped selling cigarettes. One merchant regretted that, in light of the great demand for cigarettes, the legislature had not legalized their sale: “‘If the law is to be enforced and the sale of cigarettes prohibited, smokers must content themselves with cigars and pipes. Waterloo merchants are not in favor of violating the law and if the attorney general proposes to enforce this law he will not be handicapped by Waterloo firms.’” Intriguingly, the newspaper added that it was “generally understood that cigarettes have been sold freely throughout Iowa for several months, even though it is contrary to state law”\textsuperscript{251}—thus indicating that their unimpeded sale was not of long standing.

In the course of the summer the raids spread to other cities. In August, Oscar O. Rock, a state agent, and the local sheriff raided seven stores in Council Bluffs. Rock’s staff made purchases in each store before officers arrived, while a deputy was planted at each place to insure that no one tipped off other stores. Confiscating many thousands of cigarettes, including 15,000 at one location and “an immense lot” at another, the officials charged the owners with violation of the anti-cigarette law, several of whom immediately appeared before a justice of the peace, pleaded guilty, and paid the $25 fine.\textsuperscript{252} Council Bluffs illustrated the capacity of statewide centralization of enforcement to overcome local incompetence. Just eight months earlier, in December 1916, the police chief, after consultation with the county attorney, had announced his “crusade” against cigarettes, which was based on his plan to take every dealer to court who failed

\textsuperscript{249}“Cigaret Is an Outlaw in Iowa,” \textit{Davenport Democrat and Leader}, Apr. 30, 1917 (2:5-6).

\textsuperscript{250}“Rapids Law Helps Raid in Dubuque,” \textit{Cedar Rapids Republican}, May 6, 1917 (1:1).


to “pay the state license” of $300. In a vast understatement, the local newspaper mentioned that lawyers had always questioned the protection that the “license” provided sellers, since state law prohibited keeping cigarettes for sale: “For this reason there has never been sustained effort to enforce the license law in this county.” Whatever doubts lawyers may have entertained were presumably dispelled by the police chief, who, in perpetuation of the on-again, off-again statewide tradition, turned the two reinforcing laws on their head by deciding to punish all dealers who did not secure a state “license” and to reassure all who did that they “will not be molested by officials....” The problem was the press’s false assertion, which it had been disseminating for almost twenty years, that whereas one state law prohibited the sale of cigarettes, “another law also permits their sale upon payment of a $300 license fee.” The consequence was that allegedly “[c]onfusion as to which law applies has prevented the enforcement of either to any great extent in Council Bluffs and other Iowa cities.” The “confusion” was, however, the press’s: although it is difficult to discern how, in the face of such a long-standing and large volume of unambiguous legislative, judicial and administrative directives that the mulct tax was not a license at odds with the prohibitory act, but an additional penalty for violating the Phelps law, anyone could have continued to hold and act on the opposite view, it nevertheless seemed almost immune to refutation. To some of its adherents it may have been attractive because it offered a market-, or at least a money-based alternative to government fiat: “Most dealers cannot make a profit on the sale of the ‘pills’ if compelled to pay the state license.” Such an approach was, in fact, doomed to fail because the concentration of market-share among the largest stores made it possible for them to spread the tax (if the incidence fell on them at all) over a sufficiently high volume as to reconcile it with profitability.

Litigation, the cigarette industry’s favored tactic to delay the inevitable, was soon the order of the day. Following the seizures in Des Moines, C. C. Taft Company, represented by the law firm of Frank Dunshee, who had been ATC’s local lawyer for two decades, appeared at the hearing on June 11 before Judge Hutchinson to ask that 27 cases made up of cartons containing more than 160,000 cigarettes—including 70,000 Camel cigarettes bought from R. J. Reynolds & Co. in Winston-Salem, North Carolina, and 30,000 Omar cigarettes bought from ATC in New York—be returned to it on the grounds that they were in their original packages as shipped in interstate commerce. The unoriginality of the claim was

255 See above ch. 12.
256 Appellant’s Abstract of Record at 3-6, State of Iowa v. C. C. Taft Co., 183 Iowa
overwhelming in light of the fact that over two decades the Iowa and U.S. Supreme Court had rejected every attempt by the Tobacco Trust to vindicate this doctrinal stratagem. Attorney General Havner, representing the State of Iowa, entered into a stipulation with Taft that the cigarettes as seized were in their original packages shipped into Iowa in the ordinary course of interstate commerce. The parties also stipulated that Taft had kept the cases of cigarettes “with the intention, as its business demanded, to open the same and remove the contents therefrom and to sell the cigarettes to its customers at retail” as well as to place them in Taft’s own retail stores in Des Moines for sale in broken packages—Taft’s business method for at least one year. On August 1, the judge having found that the cigarettes were not subject to any interstate commerce exemption, ordered their condemnation and destruction, but stayed the order pending Taft’s to appeal the Iowa Supreme Court.

In its appeal brief, Taft pleaded for less than strict construction of condemnation statutes because they violated “sound economic principle”—a consideration of especial importance at a time “when the principle of conservation is so forcefully brought home to the human race...” It bemoaned “the large economic wastage” that would result from destroying cigarettes in original packages, which could “legitimately” be shipped out of Iowa and “kept and used within the state....”

In keeping with the state’s tradition in cigarette litigation, Attorney General Havner treated Taft’s legal arguments with unveiled contempt. As far as he was concerned, Taft’s stipulation that it intended to break up the contents of the original packages was the only argument needed to show that it had “lost its right to claim that those packages remained articles of interstate commerce.”

548 (1918). The June 11 hearing was the continuation of one begun on May 8.

257 Appellant’s Abstract of Record at 7, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918). On the grounds that they were in the original unbroken carton packages, Judge Hutchinson—apparently pursuant to an agreement between the state’s and the company’s lawyers—had initially issued an order releasing from confiscation the 250,000 cigarettes that had been seized from Taft, whereas all other seized cigarettes were confiscated. “Some Cigarettes Restored,” DMR, June 12, 1917 (3:3); “Cigaret Tax Case to Supreme Court,” DMR, June 26, 1917 (7:4).

258 Appellant’s Abstract of Record at 8-9, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918).

259 Appellant’s Brief and Argument at 16-17, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918). This latter claim was specious: at best the only person who could lawfully keep and use the cigarettes was Taft’s owner.

260 Appellee’s Brief and Argument at 12, State of Iowa v. C. C. Taft Co., 183 Iowa 548
Taft’s reply brief culminated in a wild charge that Havner had made a “somewhat vicious attack on the plaintiff.” Not only was it “unthinkable” that Taft “should lose all its constitutional rights because some of its officers have had an intent to violate a law,” but “in all earnestness” the plaintiff asserted that Havner’s effort to deny Taft a hearing was “far more reprehensible than” Taft’s intent “to violate a law which has been ignored generally by public officers and private citizens ever since it has been on the statute books.” Dunshee’s firm then accused Havner of having falsified the record and, implicitly, of having taken advantage of Taft’s willingness to acquiesce in the intent stipulation for the sole purpose of enabling him to make as strong a case as possible so as to secure a clear ruling as to “whether we have to submit to a trial of fact as to our intent when we hereafter import cigarettes to resell them strictly within the law.” Exactly how such lawful sales might be possible Taft did not explain, but it did hint that the physical concentration of soldiers at training bases during World War I formed the basis of the stratagem: “The encampment has created a demand for a large amount of cigarettes which can be supplied by legitimate sales in original packages.”

Incautiously, Havner conceded that if Taft had merely been holding the cigarettes for transportation outside Iowa or “for sale only in the form in which they were seized, it might be claimed that they would still be entitled to be regarded as articles of interstate commerce....” Id.

Appellant’s Reply at 8-9, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918). Taft was referring to Camp Dodge, just outside the city of Des Moines, with whose soldiers tobacco stores in Des Moines did a “rushing business....” “A Cigar Dealer Seldom Complains in Des Moines,” Tobacco 67(25):22, 23 (Apr. 3, 1919). At its peak, Camp Dodge, one of 16 national training centers for the war, housed 28,000 soldiers. http://www.globalsecurity.org/military/facility/camp-dodge.htm. Ironically, prohibition in Iowa and the power to keep liquor away from soldiers were largely responsible for Camp Dodge’s having been selected rather than an encampment in Minnesota. “Prohibition Paid Big Dividends to Des Moines—Herring,” DMC, June 13, 1917 (1:2).

In 1909, the converse problem purportedly arose at a large army post near Des Moines (presumably Fort Des Moines), where a sutler or storekeeper sold supplies to soldiers: “The reservation belongs to the national government, not to the state, and is subject to national laws, not state laws. The soldiers may buy as many thousand cigarettes as they can pay for and bring them by street car into the city and give them to friends or act as agent and make the purchases for either friends or strangers.” “The Farmer the Moral Hope of the Nation,” Homestead 54(30):1(3-4 at 4) (July 29, 1909). Whatever extraterritoriality may have shielded soldiers on the army post from the Iowa anti-cigarette sales law would not have extended to their selling cigarettes in the city of Des Moines. In order to prevent sales from soldiers to citizens John B. Hammond announced that he would present the matter to the U.S. district attorney and Iowa attorney general and request (first-
cases of cigarettes that it had received from out of state to whoever sold them in individual packages retail to soldiers, all those retail sales would clearly have been unprotected by the interstate commerce clause and therefore unlawful, and Taft would have known that it was facilitating its customers’ violations of the anti-cigarette law. Taft was manifestly worried that factually correct testimony by its own employees would lead to the unraveling of its profitable ruse

262 On August 24, 1917, A. T. Wallace, the acting county attorney in Des Moines, sought Attorney General Havner’s opinion with regard to tobacco jobbers there who had ordered a large quantity of cigarettes from outside of Iowa in a bona fide original package and intended to sell them in the identical package without the contents “having been mingled with the common property of the state.” Adding that the packages would retain their status as original packages and interstate commerce until they left the jobbers’ hands “in the regular course of trade,” Wallace requested Havner’s sanction or opinion as to his opinion that the transaction was “legitimate.” Assuming that the facts were as Wallace reported them and that a package contained 5,000 or more cigarettes, Havner was “inclined to concur; “While such sales would be contrary to the letter and spirit of section 5006 of the code, which in terms prohibits absolutely the sale of cigarettes within the state, yet under the holding of the supreme court of the United States and this state such statute is ineffective for the purpose of preventing sales made in interstate commerce, and in the original package, and until congress [sic] of the United States shall see fit to enact some law similar to the Webb-Kenyon law withdrawing the protection of interstate commerce from cigarettes, the state is powerless to prevent sales thereof in such original packages,” H. M. Havner to A. T. Wallace, Acting County Attorney, Des Moines (Sept. 14, 1917), in State of Iowa: 1918: Twelfth Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1918, at 425, 426 (n.d.). On the Webb-Kenyon Act, which prohibited importing into a state intoxicating liquor intended to be received, possessed, sold, or used, in the original package or not, in violation of any law of that state (Act of Mar. 1, 1913, 37 U.S. Statutes at Large 699, ch. 90, § 1), see James Timberlake, Prohibition and the Progressive Movement 1900-1920, at 159-64 (1966). Even if Havner’s legal analysis was correct as far as it went, it failed to deal with the issue, raised parenthetically in the text, that regardless of the interstate commerce exemption from the Iowa law that might have applied to the jobbers’ sales, any and all sales of individual small packages to ultimate consumers would have been unlawful, thus making the entire upstream transaction commercially nonsensical, especially since Wallace had stipulated that the jobbers’ transaction was conducted in good faith “with no intention of violating the state or federal law....” H. M. Havner to A. T. Wallace, Acting County Attorney, Des Moines (Sept. 14, 1917), in State of Iowa: 1918: Twelfth Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1918, at 425 (n.d.).
to evade the Phelps law: “If a mere intent to violate the law takes every shipment out from under the protection of the constitutional provision and the safety of our property is to depend in case of every shipment on the chance of testimony from someone that we intend to violate the law we cannot conduct the sale at wholesale in original packages.” In what was probably a reference to Hammond, Taft lamented that its “confidence in the reliability of the testimony of some reformers is not sufficiently strong to make” it believe that it could safely exercise its “constitutional right.”

Two days after Taft’s death in March 1918 his competitors decided to close their cigar stores for one hour to memorialize him. This genuflection before the tenacious litigator on behalf of subverting the state’s anti-cigarette laws failed to impress the Iowa Supreme Court, which in May, focusing on the stipulation that Taft had kept the cases with the intention of opening the cases and selling the cigarettes in broken packages, ruled that the cigarettes had lost their character as articles of interstate commerce, and affirmed the lower court. As a result, Attorney General Havner, who represented the state, faced no legal obstacles to conducting raids as an ongoing enforcement strategy (“Cigaret Stock Can Be Seized”). Indeed, in the wake of the ruling he voiced the view that “the effect of this opinion is that it not only bars the retailing of cigarettes, but makes it impossible for any firm to handle them in any other than wholesale manner, which is impracticable.”

Nor were the raids’ searches and seizures the only dimension of the intense enforcement campaign. In connection with the titanic struggle over Havner’s enforcement of the Sunday closing (Blue) laws—which the “well organized” cigar store owners were “militantly in favor” of defying—responsible for securing compliance devolved upon county attorneys after the attorney general

---

<sup>263</sup>Appellant’s Reply at 9-10, State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918).


<sup>265</sup>State of Iowa v. C. C. Taft Co., 183 Iowa 548 (1918).

<sup>266</sup>“Cigaret Stock Can Be Seized,” *DMN*, May 7, 1918 (1:2).

<sup>267</sup>“State Is Upheld in Cigaret Case,” *DMR*, May 8, 1918 (5:6).

<sup>268</sup>“Blue Law Lid to Be Locked Tight Sunday,” *DMN*, May 9, 1917 (1:7-8).

<sup>269</sup>“Stores Open as usual Sunday, Defy Blue Laws,” *DMN*, May 20, 1917 (1:1). Most of them had threatened to sell, inter alia, cigarettes in original packages, but then kept their stores closed after Havner stated that he would prosecute them for conspiracy. After two Sundays of compliance a number of them did violate the law in Des Moines. *Id.*; “60 Blue Law Arrests Made,” *Iowa City Daily Citizen*, May 14, 1917 (1:4); “Blue Sunday Hits Many of Iowa’s Cities,” *DMN*, May 21, 1917 (1:3); “Deny Violating Blue Law Here,” *DMN*, May 28, 1917 (1:6).
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

had failed to persuade the legislature to modify the legislation. By early May 1917 Polk County Attorney Ward Henry was assessing mulct taxes that would reportedly amount to $36,000 against those establishments that sold cigarettes. This campaign, according to an announcement of the department of justice, was to be extended to Iowa’s other cities.\(^{270}\) On May 15 and 29, 1917, Hammond and two other citizens of Polk County filed with the county auditor, F. J. Alber, a “Statement for Return of Cigarette Mulct Tax” alleging that the mulct tax should be assessed against approximately 150 cigarette dealers and real estate owners (including the Chicago, Rock Island & Pacific Ry Co., the Equitable Life Insurance Company of Iowa, and several banks and hotels), who had been engaged in the business of selling cigarettes between April 1, 1916 and April 1, 1917.\(^{271}\)

The Des Moines tobacco dealers organized under the leadership of the C. C. Taft Company\(^{272}\) which, represented again by the law firm of Frank Dunshee, on June 7 filed an equity petition in Polk County District Court seeking an injunction against the tax assessment on behalf of itself and all the other dealers and owners on the grounds that the mulct tax law was unconstitutional because it allegedly violated article VII section 7 of the Iowa Constitution by failing to state the object to which the tax applied.\(^{273}\) The defendant, represented by Attorney General Havner, demurred, and Judge Hutchinson heard oral arguments two days later.\(^{274}\) While awaiting the court’s decision Havner eyed the fiscal consequences: “‘If the court upholds the constitutionality of the statute...it will mean $54,000 for the state from Des Moines alone. Thirty-six thousand dollars have already been cited, and $18,000 more will be if the law is upheld. This is from Des Moines alone, and it is impossible to estimate what could be collected from all the other

\(^{270}\)“County Attorney’s Offices to Enforce County Blue Laws,” \(WEC\), May 9, 1917 (2:3).

\(^{271}\)Petition at 2-6, and Appellants’s Brief and Argument at 3, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919). The building owners were very sensitive to this mulct tax procedure because the county attorney would place liens on these properties constituting obstacles to titles until the tax was paid. “Cigaret Tax Case to Supreme Court,” \(DMR\), June 26, 1917 (7:4).

\(^{272}\)“Will Fight ‘Antipill’ Law,” \(DMR\), June 8, 1917 (8:1); “Tobacco Men to Battle Iowa’s Cigaret Laws,” \(DMN\), June 8, 1917 (5:2).

\(^{273}\)Petition at 6, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919). A week earlier District Court Judge De Graff had issued a preliminary injunction restraining Hammond from listing the dealers with the Polk County auditor as subject to the cigarette mulct tax assessment. “Fighting Cigaret Tax,” \(DMR\), May 31, 1917 (9:2).

\(^{274}\)Petition at 9-10, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919).
cities over the state.”

On June 26 Hutchinson upheld the validity and constitutionality of the tax and dismissed the petition. Since the owners of the property on which the illegal sales took place would ultimately be liable in the form of liens, they had only “one hope—the supreme court.” The cigarette sellers pursued a two-pronged response to Hutchinson’s decree. As soon as word of the district court ruling reached them, tobacco dealers rushed to the county courthouse to request a hearing before the Polk County Board of Supervisors, which granted it. The dealers argued that they were entitled to a postponement of the pending tax levy until the court had acted on its petition for an injunction; the board instructed the county auditor not to list the properties in question until after the next day for which it scheduled an extension of the hearing. The plaintiffs also immediately appealed the district court ruling and prevailed on Iowa Supreme Court Chief Judge Scott Ladd to grant their application for a restraining order to prevent the auditor from assessing the tax during the pendency of the case, although the court’s action in no way constituted a ruling on the tax’s legality. The total mulct tax for which sellers and building owners were liable was variously estimated in the press at between $32,000 and $50,000.

The appeal to the Iowa Supreme Court may have been a lengthy process, but the dealers (and property owners) could secure more expeditious relief from the board of supervisors, who already on June 27 began taking evidence in 191 cases involving dealers. At that regular session it was moved that a resolution be adopted that “[o]n account of the stipulation made and entered into by the Board of Supervisors and the parties hereto and on account of the admission of John B. Hammond to the effect that they have no evidence as to the sale or the possession for sale of any cigarettes or cigarette papers or wrappers by any of the parties who

---

275 “Havner Expects to Bag Big Sum by Cigaret Law,” DMN, June 12, 1917 (1:3).
276 Petition at 10-11, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919).
278 “Cigaret Tax Case to Supreme Court,” DMR, June 26, 1917 (7:4).
279 Petition at 10-13, C. C. Taft Co. v. Alber, 185 Iowa 1069 (1919); “Pill Tax Delayed; High Court to Rule,” Des Moines Evening Tribune, June 27, 1917 (4:3); “Cigaret Tax Case Tied Up,” DMR, June 28, 1917 (8:1).
280 “Supervisors Hear Hammond in ‘Pill’ Case,” DMN, June 26, 1917 (2:1).
281 “Cigaret Dealers in City ‘Stuck’ for $32,000 Mulct Tax by Judge Hutchinson,” DMC, June 26, 1917 (2:2); “Cigarette Tax Case to Supreme Court,” DMR, June 26, 1917 (7:4); “Supervisors Hear Hammond in ‘Pill’ Case,” DMN, June 28, 1917 (2:1); “Cigaret Ruling Is Appealed to Higher Court,” DMN, June 26, 1917 (2:3).
282 “Supervisors Hear Hammond in ‘Pill’ Case,” DMN, June 28, 1917 (2:1).
are now applicants for the remission of tax,” it be resolved, “that all the tax
certified or listed for the year 1916 as against any property owner or any vendor
or dealer and against the real estate be...hereby remitted, set aside and held for
naught.” The motion lost by a vote of 2 to 3,283 Charles Saverude, chairman of
the Polk County Republican committee,284 who as a drug store owner285 was
personally interested in mulct tax remission,286 voting Yes, and board chairman
Frank Thornton, who had been in charge of the county roads and bridges before
he was elected to the board287 and stopped smoking following an illness in 1915
but still found “the sight of a cigar...very tempting,”288 voting No. At the
continuation of the hearing the next day on the applications for remission of the
cigarette mulct tax lawyers for the applicants moved that the 1916 tax be
cancelled, but by the same 2-3 vote the supervisors overruled the motion and
decided to continue the hearing on July 5.289 On that date, in the course of the
introduction of testimony relating to the tax remission,290 the county attorney’s
questions to several dealers as to whether they had sold cigarettes during a certain
period prompted Dunshee’s partner Robert Haines and corporation lawyer

283 Proceedings Board of Supervisors (June 27, 1917) (Saverude and John Stewart
Yes, Thornton, Clarence Keeling, and Charles W. Keller No) (copy provided by Polk
County Archive Dept). The text was also published as “Proceedings of Board of
Supervisors of Polk County, Iowa, for the Month of June, 1917,” AH, July 19, 1917 (8:4)
(June 27). The lack of “evidence” to which the resolution referred presumably related
to the year 1916, but Hammond’s Statement for Return of Cigarette Mulct Tax alleged that
he “had credible evidence” that dealers in Des Moines had sold cigarettes between Apr.
1, 1916 and Apr. 1, 1917. Appellants’ Brief and Argument at 3, C. C. Taft Co. v. Alber,
185 Iowa 1069 (1919).

284 “Saverude Sells Soap to County at Good Profit,” DMDN, Nov. 3, 1916 (1:1).

285 R. L. Polk & Co.’s Des Moines City Directory 1917, at 1009 (v. 26) (president of

286 See below this ch.

287 “Announces Candidacy,” AH, Mar. 12, 1914 (1:5).


289 Proceedings Board of Supervisors (June 28, 1917) (copy furnished by Polk County
Archive Dept.). The text in “Proceedings of Board of Supervisors of Polk County, Iowa,
for the Month of June, 1917,” AH, July 19, 1917 (8:4) (June 28), omitted several key
words. Ignoring the motion and vote, the News merely stated that the hearing was
postponed because the county attorney had been unable to summon all the dealers.
“Postpone Cigaret Case,” DMDN, June 29, 1917 (9:3).

290 Proceedings Board of Supervisors (July 5, 1917) (copy furnished by Polk County
Archive Dept.). The text was also published as “Board Proceedings,” AH, Sept. 6, 1917
(2:1) (July 5).
Charles Maxwell to advise their clients that the “incriminatory” questions need not be answered. Even after District Court Judge Dudley on appeal had ruled the question proper and fined the person before him one dollar for contempt of court, dealers continued to be advised to refuse to answer similar questions. With more than 100 dealers still to testify, the hearing was, yet again, continued until July 9, at which time the taking of testimony from 20 dealers and property owners completed the hearing, but the matter was again continued until August 6, and continued three more times until the supervisors finally voted on it on August 24. Unanimously they decided to remit the cigarette mulct tax for 1916 as it pertained to dealers (except Saverude’s case No. 95) and property owners and to instruct the county auditor to cancel the assessment; the supervisors also voted unanimously (with Saverude passing) to remit the tax in Saverude’s case as well. Then after the motion to remit the tax for 1917 as to property owners had lost by the same 2-3 vote as on June 27 and 28, the supervisors agreed to a further hearing on September 1. The press estimated that the board’s action cut about one-third of the whole tax amount of $60,000. When the supervisors met in September, only chairman Thornton voted against reconsidering the vote to refuse to remit the 1917 taxes as to property owners, and then, replicating the earlier procedure for 1916, motions were offered to remit the taxes for 1917 first for all dealers and owners except their colleague Saverude and second for him alone. On the first motion, one of the three-supervisor majority, Clarence Keeling, switched, creating a 3-2 majority for remission; with Saverude unable to vote for himself, a 2-2 deadlock stymied his inclusion in the ranks of the illegal cigarette sellers who would not even have to pay the mulct tax for 1917 until Charles Keller switched, providing a 3-1 majority for Saverude as well. At $75 per

293“Cigaret Tax Hearing Is Continued Monday,” DMN, July 9, 1917 (2:5).
294Proceedings Board of Supervisors (July 9, 1917) (copy furnished by Polk County Archive Dept.). The text was also published as “Board Proceedings,” AH, Sept. 6, 1917 (2:1) (July 9).
296Proceedings Board of Supervisors (Aug. 24, 1917) (copy furnished by Polk County Archive Dept.). The text was also published as “County Board Proceedings,” AH, Oct. 11, 1917 (9:6) (Aug. 4 [sic; should be 24]).
298Proceedings Board of Supervisors (Sept. 1, 1917) (copy furnished by Polk County
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

quarter for each of 125 dealers, these actions “deprive[d] the county” of $18,750 in revenue for the first six months of 1917. To be sure, at the board’s next regular session on Sept. 10, a motion unanimously carried to reconsider the vote by which the cigarette mulct tax for dealers had been remitted as to the year 1917. Although the supervisors did not return to the question, the Des Moines Register reported the next day that “the board rescinded their former resolution providing for the remitting of the cigaret tax as to dealers and propery [sic] owners.

Although the Des Moines press reported these board of supervisors votes, newspapers failed to shed any light on why the board remitted the taxes or why some supervisors voted against remission. The only claim advanced by dealers in support of remission that newspapers mentioned was the judicially discredited assertion that taxing an industry legalizes it. The board’s purpose in remitting

Archives. The text was also published as “County Board Proceedings,” AH, Oct. 25, 1917 (2:2) (Sept. 1). Both motions were made by John Mason Stewart, a longtime resident of Des Moines, where he had also been in charge of streets. “Remit Tax on Cigaretets,” DMR, Sept. 2, 1917 (8:1); Who’s Who in Des Moines 1929, at 247 (Sara Baldwin ed.).

“Remit Tax on Cigaretets,” DMR, Sept. 2, 1917 (8:1). Keller was a farmer and merchant. Who’s Who in Des Moines 1929, at 149 (Sara Baldwin ed.).

Proceedings Board of Supervisors (Sept. 10, 1917) (copy furnished by Polk County Archive Dept.). The text was also published as “County Board Proceedings,” AH, Oct. 25, 1917 (2:2) (Sept. 10).

“County Decides to Pave Road to Camp,” DMR, Sept. 11, 1917 (3:6-7 at 7). The article appears suspect not only because “reconsider” does not mean “rescind”—but rather that the body is willing to reopen the question, as it did, for example, on Sept. 1, before proceeding to vote again and reverse its vote of Aug. 24—but also because the motion did not mention property owners or the year 1916.

Conceivably the board might have rested its vote on a policy decision to focus enforcement on actually prohibiting the sale of cigarettes, but such a claim would have made little sense with regard to past sales and appears hardly to have been in sync with the majority’s real position.

The board unanimously approved a motion ordering that a transcript of the hearing testimony be ordered with an original and four copies, but the Polk County Archivist was unable to locate any such transcript. Proceedings Board of Supervisors (July 9, 1917) (copy furnished by Polk County Archive Dept.); “Board Proceedings,” AH, Sept. 6, 1917 (2:1) (July 9); email from Linda Cunningham to Marc Linder (Sept. 20, 2009).

“Cigaret Tax Case to High Court,” DMC, Sept. 4, 1917 (2:2). This article, in deviation from the published board proceedings, stated that the first remission was limited to the last quarter of 1916 and the second to the first quarter of 1917; According to “Board Remits Cigaret Taxes,” DMN, Sept. 2, 1917 (6:5), the second remission was limited to the
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

the tax for 1916 is especially in need of clarification in light of the fact that, as noted earlier, 1915 was the last year for which Polk County’s annual Financial Report included any statement of revenue from the cigarette mulct tax; indeed, from 1916 forward the rubric itself disappeared from the report. Why formal remission was needed when the tax had already ceased to be paid/collected anyway is unclear. Also unclear is the authority by which the board remitted a tax whose assessment the state legislature made mandatory (“There shall be assessed a tax of three hundred dollars per annum against every person”). Remarkably, neither Attorney General Havner nor anyone else appears to have criticized the supervisors’ act of nullification for subverting enforcement of the state anti-cigarette legislation or undercutting the litigation that he was prosecuting with the additional result that Polk County and the City of Des Moines would lose the significant tax revenues to which he had recently called attention. Likewise, whereas the Des Moines News in 1915 and 1916 attacked Odle and his raids for having indirectly prompted the dealers to stop paying the mulct tax while continuing to sell cigarettes illegally, in 1917 the newspaper did not fault the board of supervisors for directly abolishing this source of local tax revenue.

The national trade journal Tobacco may have declared that the cigarette dealers would make a “determined fight,” but Havner in his brief before the Iowa Supreme Court wasted no time in uttering, once again, his contempt for the plaintiffs. Observing that petitioners for equity, which is granted to do justice between the parties and not strictly as a matter of law, are required to have “clean hands,” he argued that

the very relief asked is bottomed upon the proposition that the plaintiffs are law breakers and that they are entitled to the assistance of the court to protect them against the penalty

first quarter of 1917.


306 Code of Iowa Annotated § 5007, at 1955 (1897).

307 No one, including the attorney general, appears to have challenged the board’s authority in a quo warranto proceeding.

imposed because of their unlawful acts. They entered into this business deliberately, knowing that it was illegal and knowing that the tax which they are attacking would be assessed; they have danced and now object to the fiddler’s bill; and instead of coming into this court with clean hands we find them here with hands stained with this nefarious and unlawful business, yet asking the tender protection of the chancellor.  

Coming to the nub of the plaintiffs’ legal claim, the attorney general pointed out that the mulct tax was not a property tax, but a “deterrent against the cigarette business,” which conferred no right, “but imposes an impediment to the transaction of the business. It is levied to meet the burdens imposed upon the general public by what is thought to be the result upon the human race and particularly upon children of the use of cigarettes.” It was thus more in the nature of a police regulation.  

Concluding right where he had begun, Havner expressed disbelief that the Iowa Supreme Court would “lend its sanction to those who deliberately plan to debauch the youth of this state.”  

Two years later, the Iowa Supreme Court, as it had of the Tobacco Trust’s earlier frivolous litigation, made short shrift of the dealers’ constitutional claim, locating its fatal defect in having characterized the mulct tax as an exercise of the taxing power for revenue. Rather:

No doubt, the legislature, recognizing, or thinking that it recognized, an evil in the traffic in cigarettes, felt that the public good demanded that the restraining hand of the law be placed upon the traffic. Thereupon, the legislature, in its seeming wisdom, enacted Section 5006 of the Code of 1897, through which it undertook to prohibit this sort of traffic, and provided a penalty for any violation of its inhibition. The thought of the legislature evidently was that the traffic in cigarettes was inimical to the public good, and ought to be suppressed. The traffic was made unlawful. This unlawful traffic was carried on in buildings not owned by the person carrying on the illegal traffic. The thought of the legislature seems, then, to have been that, as an additional deterrent to the unlawful business, a penalty ought to be exacted of any person who allowed his building to be used for the unlawful purpose; and so a penalty of $300 was imposed upon the person so permitting it to be unlawfully used, and upon the property permitted to be used. This was in no sense a tax for revenue, though it may afford revenue. Its primary purpose was, not to secure revenue, but to aid in the enforcement of the inhibition found in Section 5006.
At Times Vigorous Enforcement, Legislative Deadlock, Litigation Success: 1910-20

Noting that the case was controlled by its decisions in *Hodge* and *Cook*, both of which the U.S. Supreme Court had affirmed, the decision put an end to more than two decades of unsuccessful legal assaults on the mulct tax. The 135 dealers in Des Moines were said to owe Polk County a total tax “in the neighborhood of $39,000.” The impact of the Iowa Supreme Court’s decision was immediate; the Monday following issuance of the opinion on Friday, April 11, the press reported, for example, that:

Practically all drug and confectionery stores in Sioux City will quit selling cigarettes because of the ruling of the Iowa supreme court that cigarette dealers must pay a mulct tax of $300 annually, a tobacco dealer said.

It was estimated that not more than 10 cigar stands and drug stores will be able to pay the tax because they do not sell enough to warrant carrying them.

Attorney General Havner opined that a U.S. Supreme Court ruling sustaining the Iowa Supreme Court’s decision upholding the cigarette mulct tax’s validity would “put teeth in the present cigaret law,” but C. C. Taft Company—perhaps because its search and seizure case was still pending before the U.S. Supreme Court—failed to “Appeal Fag Decision.” Havner expected that an affirmance in that case would also “further aid enforcement of the present laws,” but on March 15, 1920, just three days after oral argument, the U.S. Supreme Court dismissed the case for want of jurisdiction because Taft, which, with its 18 affected stores, pursued the case to the very end after a majority of the dealers had “bowed to the law,” had failed to file within the statutorily granted three-month period. Briefing of the case may have been a mere rehash of the “original package” arguments that the Iowa Supreme Court had already analyzed and that it was very unlikely that the U.S. Supreme Court would have resolved differently, but Dunshee’s extraordinarily bombastic, undocumented, and false (if not outright

---

313 C. C. Taft Co. v. Alber, 185 Iowa 1069, 1075 (1919). On the cases, see above ch. 12.
317 “Cigaret Case Up in Court,” *DMN*, Mar. 4, 1920 (4:1). This article’s trustworthiness was called into question by its bizarre assertion that the raids in 1917 had been carried out by agents of the U.S. Justice Department.
 mendacious) outbursts on behalf of Taft were suggestive of their hopeless jurisprudential dead-end that presumably did not embarrass the cigarette industry’s well-paid lawyers and served as a seemingly immortally dead horse that could be beaten forever as the linchpin of the firms’ successful 22-year business strategy of resisting payment of the mulct tax. Without any supporting source at all Dunshee launched this untrue, bizarre, and irrelevant attack on the 1897 mulct tax law:

This statute, concededly not passed in response to a public demand for the legislation, but to the end that a certain senator might accomplish the discomfiture of a certain person connected with at the time with the American Tobacco Company in fulfillment of a private purpose, was a dead letter upon the statute books from the day of its passage, being enforced only in isolated instances. Like many other dead letters of a past day, however, it furnished a foundation for certain later [sic] day reformers to build upon,—a structure more to the glory of the builders than to the glory of essential political and civic righteousness.319

Feeling that the U.S. Supreme Court “will be absolutely uninfluenced by the personal bias and prejudice so evident” in Taft’s brief, Attorney General Havner refused to “dignify these sarcastic thrusts by a more detailed answer” than pointing out, under the heading, “The Law Is Not a Dead Letter,” that Dunshee and his co-counsel made “many sarcastic references..., showing plainly that counsel’s view of the question involved in this case is very much influenced by their personal prejudice against this statute.” Then, instead of confronting the fabricated character of Taft’s allegations, Havner mild-mannerly argued that: “If it be true that this law passed in 1897 was a dead letter and remained unenforced, it is also true that the legislature, in 1913, saw fit to put teeth into it by providing for the issuance of a search warrant and for the condemnation of cigarettes that

319 Brief and Argument for Plaintiff in Error at 3, C. C. Taft C.o v State of Iowa, 252 U.S. 569 (1920). The allegation as to the motivation for the legislation was reminiscent of a press account during the debate on the Rule bill in 1919: “Some of the old timers are recalling the fight made against the passage of the bill prohibiting the sale of cigarets when it was presented twenty years ago. The bill probably would not have passed, it is said, had it not been for the delivery to a young member of the legislature of a ‘slush’ fund of $7,000 by persons interested in defeating the bill. The facts became known to the speaker and some of the leaders in the house, who showed the member with the money the error of his ways, and ordered him to return the cash. The word was then passed out that the bill must pass, and it was put thru just as written.” “Cigaret Sale Bill Passed by Senate,” WT-T, Feb. 21, 1919 (2:2). Tho a complete fabrication, the tale bore a resemblance to the passage of the anti-cigarette bill in Indiana in 1905. See vol. 2.
might be seized under such warrant." (Oddly, both Havner and Dunshee referred to the search and seizure bill as having been passed in 1913, when in fact the legislature had acted in 1909; all that happened four years later was that the statute was incorporated into the Code.) Much more important was the attorney general’s gloss on the interaction of legal and cultural change, which had more than a coincidental resemblance to developments in Iowa:

It has been the history of almost all reform legislation, like statutes regulating the liquor traffic, that in the early stages, law enforcement has been extremely difficult, and that for many years such laws have remained a dead letter in certain communities while they have been enforced in others. It has been the history of these same reform statutes that as time goes on public opinion gradually catches step with the reformers and then the law is given a rigorous enforcement, resulting, as in this case, in attempts on the part of entrenched vice to set at naught criminal laws of the state.

The future course of state suppression of cigarettes would depend, in large part, on the extent to which the intensity and patterns of “public opinion” regarding these consumer commodities followed those regarding alcohol as well as on the economic, political, and cultural power of “entrenched vice,” aka the cigarette industry, to shape public opinion and public policy in favor of unencumbered free markets.

The WCTU Staves Off the Tobacco Industry’s Threatened Repeal of the General Ban on Cigarette Sales: The First Postwar Session of 1919

The cigarette is sweeping along. A majority of men who smoke, smoke cigarettes. … However big a nuisance it may be, it is not a nuisance to the majority.
Despite this culminating success within the legal regime and its propitious commercial sequelae, the window of opportunity for achieving at last the long sought-after objective of shutting down the cigarette industry remained only precariously open as a result of two overridingly crucial and interconnected cultural trends featured in the Iowa press during the week following the Taft decision: during World War I the federal government was shipping to the U.S. Army in France 425,000,000 cigarettes a month, while the prevalence of cigarette smoking among women in the United States proliferated in reality and public consciousness, smashing social taboos and fatally expanding the potential market. For the principal driver of the anti-cigarette movement, the WCTU, the mass advent of women cigarette smokers was profoundly problematic. As Carolyn Vance Bell (a syndicated feature writer who a few months later became one of the founders of the Women’s National Press Club) entertainingly reported in numerous newspapers across the country including Iowa:

Only a spiral of blue smoke!
But a pair of pretty lips were propelling it heavenward right next to the W.C.T.U. headquarters in Washington.
“Think of it,” raged Miss Ada Oldfield, in charge of the headquarters, “girl war workers actually sit at the windows of their rooms next door smoking cigarettes and laughing at us.”

The female side of the cigaret problem has just dawned upon the W.C.T.U.


325 It is important to note that the women’s increasing addiction to cigarettes antedated U.S. entry into World War I. At the beginning of 1917, when the data were published revealing that total consumption in 1916 had risen by 40 percent over 1915, the press attributed this “tremendous increase” to rising prosperity and “the growth of the cigaret habit among women. Many millions of cigarettes made for feminine users were produced in this country and imported during the past year, whereas a few years ago production and importation of such cigarettes were negligible by comparison.” “More Whisky Drunk; More Cigars Used; More Women Smoke,” *WEC*, Jan. 25, 1917 (6:4). As early as 1912, in announcing yet another anti-cigarette “crusade,” the WCTU declared: “Not only boys but girls are smoking cigarettes... Let everyone in the state of Iowa who believes in purity, modesty and refined womanhood, as absolutely essential in this age of fast and careless living, fall into line and fight the cigarette for our girls as well as our boys.” “W.C.T.U. Is to Fight Cigarettes,” *National Democrat* (Des Moines), May 2, 1912 (2:2).
All of their anti-cigarette propaganda will have to be revised to meet a new emergency, the growth during the war of the cigarette habit among women. The pamphlets have always been addressed to the small boy, picturing the horrors that befall the cigarette smoker in terms of deaths, heads [sic], snakes, prison stripes, etc.

One-third of all the cigarettes sold in the capitol,” said Miss Oldfield, “are sold to young girls, a clerk at a tobacco counter tells me. They come to his counter, he says, well-dressed and apparently well bred....”

“It seems to me that the use of tobacco by women has increased greatly during the war, just as it has among the soldiers.”

“American women have adopted the European habit of smoking,” says Mrs. Jane Rippin, head of the women’s and girls’ [sic] section of the commission on training camp activities.

“English women, French women, Russian women have been smoking for many years without thinking much about it. It was inevitable that American women should follow.”

The salient public policy conclusion that cigarette manufacturers and those businesses (including newspaper publishers) in economic symbiosis with them drew from these trends and, with increasing plausibility, propagated was, as the Des Moines Capital editorialized: “The case is far enough along in Iowa to make it evident that the cigarette is too thoroughly established to be totally prohibited.”

If the legislative, and especially Senate, proceedings in 1917 themselves did not alert the WCTU to the danger of impending repeal of cigarette prohibition, “[t]he main lawyer representing the tobacco interests made the threat the last of the session, that the Cigarette law would be repealed sure at the next session....” The annual convention in October drew the conclusion that “we must be on our guard and prepared to meet the enemy.” The WCTU was also acutely aware of the cigarette companies’ potentially most potent strategic weapon: “This campaign of ‘smokes for soldiers’ is undoubtedly their first step toward preparing for an assault on our laws at the next session.”

As the 1919 session approached, the WCTU articulated more specifically the character of the looming threat without suppressing its recognition that the World War may have put an end to the quarter-century of realistic opportunity to prevent

---


328 Woman’s Christian Temperance Union of Iowa, Forty-Fourth Annual Convention 124 (1917). The lawyer’s identity is unknown.
cigarette smoking from advancing to a quasi-universal, socially acceptable, behavioral norm. At its 1918 annual convention, one month before the armistice ending the war that had contributed so powerfully to the spread of smoking, President Ida B. Wise Smith bemoaned “the evil that flaunts itself today as never before.” On the uplifting side, she stressed that it had been the WCTU’s “mission...to pioneer in unpopular causes.” Increasingly, over the years of its agitation, it had received help from “scientists and medical men, and later the business world. ... The doors of more than two hundred lines of business are closed to cigarette users.” With such authoritative support, the WCTU did not fear “being called a ‘back number’, as we are.... We want to stand for the battle line gained by society in the past, and not be swept back by the propaganda of the tobacco interests to which so many good people are unwittingly lending themselves.”

The “sob stories” we read of the demand for cigarettes by our soldiers are sent out in plate matter by the Tobacco Trust to any paper that will print them. The drive for “smokes” for the boys netted one tobacco Company a profit of fifteen million dollars [sic] last year. They paid a dividend of 30 per cent and carried forward eleven and one-half millions. If one company makes this, what must be the aggregate of all? Our men in many cases are being made the victims of a misguided public who in their desire to contribute to the comfort of men in the service press cigarettes upon them. Tens of thousands of boys are addicted to the use of cigarettes, who, if left to their own inclination, would be clean of the habit. And tens of thousands of more will join the company tomorrow. It seems like attempting to sweep the Atlantic back with a broom to oppose it, but the W.C.T.U. in its work for welfare and humanity has no other option but to set its face against that which works harm upon these we so tenderly love. The tobacco interests have campaigned so wisely and so well that our army is now issued a tobacco ration and Bull Durham advertises with pride that it can no longer serve civilians but will be back “with medals after the war”. ... The tobacco trust may influence and deceive us now. But science must win in the last analysis because it is true. A brand of tobacco being extensively sold in Iowa and no doubt in other states contains a sticker which reads “What then? If Universal Prohibition becomes a law what would you say if you were deprived of your glass of beer? That’s enough. We heard you. Write your legislators and tell them the same.” Evidently the Brewers and tobacco manufacturers have joined interests.

My comrades, our duty in the face of this danger is unmistakable. Efforts will be made to repeal our tobacco laws. Already Chicago has repealed its ordinance prohibiting the sale of cigarettes within six hundred feet of a school house. That is the first fruit of what is to come, unless the friends of the boys wage an aggressive campaign to protect

them against the prevalent cigarette craze.\textsuperscript{330}

Looking back at the 1919 legislative session in October and recalling the tobacco lobbyist’s threat, the Iowa WCTU’s legislative superintendent assured the members that having been forewarned and thus fore-armed, the organization had been ready.\textsuperscript{331}

The election of 1918 again created huge Republican majorities in the Iowa legislature: in the Senate 45 Republicans faced only five Democrats, while 93 Republicans held House seats against 15 Democrats.\textsuperscript{332} The cigarette industry’s threat to enact repeal at the 1919 session was no bluff: on January 28, Senator Rule, once again, introduced the chief vehicle, Senate File No. 75, which was almost, but not quite, identical to his S.F. 159 of 1917. The two bills differed in three respects. First, the penalty for selling cigarettes to minors, which had been $100 to $300, lost its floor, and now consisted only of the $300 maximum. Second, totally deleted was the power conferred on the state dairy and food commissioner to “withhold a license from any applicant whom he may deem unworthy.” And third, a penalty was imposed on anyone under 21 who smoked (or now had in his possession) cigarettes in public: a maximum fine of $10 and/or maximum imprisonment of five days (with special juvenile court treatment of those under 16).\textsuperscript{333} The bill was referred to the Public Health Committee,\textsuperscript{334} whose chairman, George Ball, a banker, farmer, and manufacturer,\textsuperscript{335} had voted with Proudfoot on every cigarette law-related roll-call vote in 1917. The trade journal \textit{Tobacco} took great license in calling S.F. 75 a “sweeping ‘anti-cigarette to minors’ bill.”\textsuperscript{336}

The filing of such a bill in Iowa and in other states with prohibitory laws prompted the \textit{United States Tobacco Journal} in mid-February to plunge into some would-be self-fulfilling prophecy in the form of a front-page article titled, “Wave

\textsuperscript{330}Woman’s Christian Temperance Union of Iowa, \textit{Forty-Fifth Annual Convention} 21-22 (1918).

\textsuperscript{331}Woman’s Christian Temperance Union of Iowa, \textit{Forty-Sixth Annual Convention} 120 (1919).


\textsuperscript{333}S.F. No. 75 (Jan. 28, 1919) (copy furnished by SHSI IC); \textit{Journal of the Senate of the Thirty-Eighth General Assembly} 220 (1919) (Jan. 28).

\textsuperscript{334}\textit{Journal of the Senate of the Thirty-Eighth General Assembly} 220 (1919) (Jan. 28).

\textsuperscript{335}\textit{State of Iowa: 1919-20: Official Register} 268, 293-94 (28th No., Harrold Klise comp. n.d.).

\textsuperscript{336}“Iowa Legislator’s Idea,” \textit{Tobacco} 67(7):5 (Feb. 6, 1919).
of Welcome Legislation Begins.” Inspired by the Arkansas Senate’s action on February 11 in passing a bill by a large majority to legalize the sale of cigarettes (which had been banned since 1907), the trade journal inflated it into “Arkansas Lifting Ban on Cigarettes” and predicted that a “wave of legislation favorable to the smoking habit and demolishing the Puritanical local statutes that have restricted smoking here and there throughout the United States is beginning.”

Making a virtue of a necessity, the Tobacco Journal welcomed the “nominal tax on the sale” of cigarettes, which was to go to the state educational fund, “the highest purpose,” as “the least animus the state could display in the tax.” Although the legislature had not yet passed the bill, the Journal nevertheless reflected back at the trade the view that Arkansas’ “removal of the cigarette ban is confidently expected to be a fore-runner of similar action in the states of Iowa, Nebraska and Tennessee, which have suffered from more or less rigorous cigarette regulations for some time.” This admission that rigor had characterized the regulation (which was in fact prohibition) of cigarette sales in Iowa was both rare and highly significant for the tobacco trade press, which generally made light of the ban. Finally, the Journal projected its hedged intuition that the public’s attitude was “apparently...strongly inclined toward the most liberal possible personal freedom for millions of returning soldiers, to whom smoking has become second nature during the great struggle overseas. That these boys should not be hen-pecked after having offered their all is the plain sentiment of countless communities.”

After the Arkansas repeal bill had died in the House, but Nebraska did repeal its 14-year-old cigarette sales ban in 1919 (also imposing bans on advertising of cigarettes in public places and cigarette smoking in public eating places), the United States Tobacco Journal published a more sober commentary. Now it disclosed that opponents of the anti-cigarette campaign viewed Nebraska’s action as significant as “the first indication of concerted opposition to the movement against cigarettes,” and expected that this feeling would “spread widely as soon as the voice of the returning soldiers is heard.” In this regard Iowa would not disappoint in 1921. Nevertheless, in spite of these two radical provisions, the Nebraska prohibition repeal statute was less stringent than Iowa’s 1921 repeal law would be by virtue of: imposing less severe punishment for certain violations (although it did punish those who sold cigarettes without a license by fining them


3381919 Neb. Laws ch. 198, §§ 11-12, at 401, 403-404. See below ch. 16.

between $100 and $200 or imprisoning them for 10 to 60 days, whereas the Iowa law lacked any such punishment); imposing lower license fees; not empowering local governments to continue to ban cigarette sales; not imposing a sales tax; not raising the legal age for public smoking from 18 to 21; not making the license fee a lien on the business property; and not providing for a nuisance and injunction procedure. The Iowa Senate Public Health Committee held an open hearing on February 13 to elicit arguments for and against Rule’s bill legalizing cigarette sales. According to the Des Moines Register’s lengthy account—the accuracy and representativeness of which cannot be judged since no official transcript or report is extant—the bill originally provided that cigarettes should not be sold, or given to, or possessed by minors, but: “Out of consideration to the thousands of boys under 21 years of age who have been generously supplied with cigarettes while serving in the army, the bill has been amended by Senator Rule to prohibit the use only up to the age of 18.” Thomas F. Duhigg, a local Des Moines physician—who, interestingly, though returned as a physician at the 1910 population census, by 1920 was listed as a general farm manager—testified: “That the cigaret is unquestionably the least harmful of all the forms in which tobacco is used has come to be universally recognized and conceded by the highest medical authority, and has been thoroughly established by careful tests in the army camps....” A good sense of what Dr. Duhigg, whose motivation for testifying is unclear, regarded as the gold standard for testing the differential health consequences associated with the use of various kinds of tobacco can be gained from his description: “[L]arge numbers of soldiers were tested by means of target practice—that being the finest of all tests of nerves and nervous reaction. Naturally, the men shot their best when they had been denied all forms of tobacco for a period because tobacco in any form is injurious to the nerves. Then they were supplied with cigars to smoke, after which they shot miserably. Better scores were made on the pipe test, and on the chewing tobacco test, but by far the

---

340 1919 Neb. Laws ch. 198, § 1, at 401.
341 See below ch. 16.
343 Email from Meaghan McCarthy, SHSI DM. For a very brief account, see “Defends Cigaretts,” DMN, Feb. 14, 1919 (3:6-7).
344 “Cigaretts Debated in Senate Hearing,” DMR, Feb. 14, 1919 (2:5). This amended version, according to the bill file and Senate Journal, was not introduced until the next day; it was not introduced by Rule, but by the committee, of which he was not a member.
345 Fourteenth Census of Population, T 625, Roll 507, Page 296 (HeritageQuest).
best when the men had smoked only cigarettes.” The Register’s report gave short shrift to the bill’s opponents, quoting only briefly the assertions of a Rev. R. W. Thompson that cigarette sales lowered moral standards and that Henry Ford and Thomas Edison had declared cigarettes to be the worst form of tobacco, but according to an even briefer account in the Des Moines Capital both Thompson and Paul Jones “bitterly attacked” the licensing feature on the grounds that cigarettes were injurious to health. The paper then quickly shifted back to Duhigg, who parried this thrust by claiming that Ford had probably kept his son out of the war to make sure that he did “not acquire the cigaret habit.”

Committee member Senator John Price chimed in that the Chicago Tribune’s medical adviser had declared that cigarettes were the mildest form of tobacco use because of their “almost perfect combustion.”

That same day House debate touched on the issue of the cigarette law in connection with consideration of a bill to triple the appropriation for the attorney general’s hiring of special agents, some of whom were deployed to enforce the prohibition on cigarette sales. After Republican Representative James B. Weaver from Des Moines had strongly urged passage, declaring that the “real Bolsheviks of Iowa are the men who get together at night and plot to promote liquor and gambling,” Burlington Democrat Frank Nebiker asked whether Weaver did not know that cigarettes could be bought in every drug store in Des Moines in spite of Havner’s clean-up. Weaver replied that he was willing for Havner’s force to work in the capital and hoped that they would do everything in their power to uncover every corrupt condition there.

The next day Senator Ball reported Rule’s bill back with the recommendation that Senate File 220 be substituted for it. The Senate gave it a first and second

---

348 “Cigaretts Debated in Senate Hearing,” DMR, Feb. 14, 1919 (2:5). Two days later Thompson published an opinion piece arguing that the world war had made it impossible to evaluate the anti-cigarette law’s efficacy: “It is scarcely fair to make the present non-enforcement of the law a test of its usefulness. It is generally known that under the abnormal conditions of the last two years many laws and customs have been disregarded. Give the law a trial under normal conditions.” R. W. Thompson, “Try Cigaret Experiments under Normal Conditions,” DMC, Feb. 15, 1919 (15:3-4 at 4).
349 “House Battles Havner Fund,” DMN, Feb. 13, 1919 (1:1). Weaver was the son of the Populist candidate for vice president of the same name.
351 “House Battles Havner Fund,” DMN, Feb. 13, 1919 (1:1).
reading and then ordered it passed on file.\textsuperscript{352} The committee bill differed from S.F. 75 only by defining a “minor” as less than 18 years old and substituting 18 for 21 in the public smoking section.\textsuperscript{353}

In response to this gathering threat, the next day, February 15, John B. Hammond, the president of the state anti-cigarette law enforcement committee, called a meeting at the YMCA, which protested the proposed legalization and urged that, instead, cigaret stores be treated like liquor nuisances, subject to the same abatement by injunction procedure.\textsuperscript{354} Among those in attendance were the aforementioned Rev. Thompson, a Presbyterian church minister, Ida B. Wise Smith, the Iowa WCTU president, other WCTU officers, various representatives of mothers’ groups, boards of education, schools, and the state education department, and Edward Paul Jones, a piano store dealer representing the retail merchants bureau (who had also testified the previous day).\textsuperscript{355} The very instructive resolution that Hammond—on whom the WCTU could “always depend to defend our righteous cause”—had drafted\textsuperscript{356} and that they all signed read in part as follows:

Whereas, The present cigaret laws are enforced in many of the smaller cities and towns of the state, and with the adoption of the Rule bill, the right of such towns and cities where the sentiment is against the sale of cigaretts will be taken from them, and such cities will have no recourse to prevent it, and

Whereas, There is no provision in the Rule bill through which citizens may protest against the granting of a cigaret license to any individual however unreliable and objectionable the applicant may be, and no means of knowing of such an application, and

Whereas, Every law ever enacted to permit the sale of any article to adults, such as intoxicating liquors or tobacco and prohibit the sale to minors, or the permission of any act

\textsuperscript{352}Journal of the Senate of the Thirty-Eighth General Assembly 524-25 (1919) (Feb. 14).
\textsuperscript{353}S.F. No. 220 (Substitute for S.F. No. 75, by Public Health Committee) (Feb. 14, 1919) (copy furnished by SHSI IC).
\textsuperscript{354}“Protest Against Cigaret Measure,” DMR, Feb. 16, 1919 (16-M:1). In October Anna McPherson Edworthy, the WCTU’s superintendent of legislation, offered an account of the meeting that differed in several respects from the newspaper’s. In addition to erroneously dating the meeting as Feb. 18, she stated that as secretary of the Anti-Cigarette Committee of Des Moines, of which Hammond was chairman, she had called the meeting. Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).
\textsuperscript{355}“Protest Against Cigaret Measure,” DMR, Feb. 16, 1919 (16-M:1).
\textsuperscript{356}Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).
by adults prohibited to minors, such as playing pool or other games has always proven a
failure, and

Whereas, The enactment of the Rule bill is a backward step in the efforts of the state
of Iowa to protect the children from acquiring the cigaret habit, which this bill itself
acknowledges to be a bad thing for minors, and is a surrender to the American Tobacco
company, therefore,

Resolved, That we, the undersigned, protest against the adoption of the Rule bill and
urge the adoption of a law, as a substitute therefor, declaring places where cigarettes and
cigaret papers are sold to [sic; should be or] kept for sale nuisances and subject to
injunction and abatement in the same way and by the same proceeding as liquor nuisances
are enjoined or abated. 357

A copy of the resolution was given to every member of the legislature, but its
impact on the Senate, which, on February 19, four days after the prohibitionists’
meeting, on Senator Rule’s motion, considered S.F. 220, appears to have been
limited. Republican Senator J. L. Brookhart, who had been a teacher and school
principal before becoming a lawyer, 358 offered the most far-reaching amendment,
which he justified in part by reference to the attorney general’s office’s having
told him that the current law could not be enforced. 359

Rule agreed with Brookhart concerning the law’s unenforcibility, but also
took the floor to deny a statement that had gained circulation that tobacco
interests were behind his bill. Rather, “the idea came to him on the complaint of
a father in Mason City who could no way to stop the use of cigarets by his son.”
In response, Senator Proudfoot revealed that “while it might be true that tobacco
interests were not pushing the Rule bill, nevertheless literature had been placed
on the desks of the senators from tobacco headquarters in New York City
favorable to the cigaret and declaring that it was as ‘harmless as a glass of
milk.’” 360

Brookhart’s lengthy amendment, which was adopted by a non-roll-call vote,
applied to anyone violating any provision of S.F. 220 or selling cigarettes without
a license the nuisance injunction and abatement provisions of the law dealing

357 “Protest Against Cigaret Measure,” DMR, Feb. 16, 1919 (16-M:1).
n.d.).
to another press account, in denying the charge that the tobacco industry had
endorsed his bill, Rule stated that it had been “inspired by the workings of the present
law,” which was not enforcible, whereas his bill was. “Vote in June, But Not in
November,” WEC, Feb. 20, 1919 (2:1).
with houses of prostitution; it also imposed a $300 tax against the owner of any such declared nuisance, which was made a lien on the land.\textsuperscript{361}

Senator Proudfoot attacked the bill on the grounds that Iowa’s policy was to prohibit, not to license, and that the prohibitory law could be enforced if it were properly amended. Senator Rule contested the enforcibility of the existing law,\textsuperscript{362} and the “warm debate...brought out the fact that Attorney General Havner had declared that the present law was unenforceable.”\textsuperscript{363} Proudfoot, attacking the provision that required minors under 18 to reveal the source of their cigarettes,\textsuperscript{364} offered an amendment that deleted the change introduced by S.F. 220 in Rule’s bill that would have legalized sales to minors 18 years old and older. Proudfoot’s amendment made the same age change to the ban on possession of cigarettes or any kind of tobacco, from which he, oddly, eliminated not only the penalties but also the coverage of non-cigarette tobacco. Before the Senate could vote on the amendment, Republican Addison Parker of Des Moines moved to amend the amendment by making the age ceiling 19 years; the change was adopted and then, as amended, so was Proudfoot’s amendment. Also adopted was Proudfoot’s equally odd amendment to the ban on public smoking, which was identical to his use amendment. A succession of amendments was then offered and rejected that would have increased, decreased, or differentiated the license fee by size of city as well as one that would have made issuance of a license contingent on filing an affidavit stating that the applicant had not violated the anti-cigarette law during the previous five years.\textsuperscript{365}

On the final vote the Senate adopted S.F. 220 by a vote of 34 to 13, with four Democrats joining 30 Republicans in favor, and 12 Republicans (including Proudfoot) and one Democrat opposed.\textsuperscript{366} Despite having been forewarned, forearmed, and ready, Anna McPherson Edworthy, the WCTU’s legislative superintendent, later conceded that the vote had been “surprising.”\textsuperscript{367} It was, however, already clear to the press that opponents were planning a “more

\textsuperscript{361}Journal of the Senate of the Thirty-Eighth General Assembly 606-608 (1919) (Feb.19).

\textsuperscript{362}“Senate Committee Neutral on Bill,” CREG, Feb. 20, 1919 (10:1-3 at 1).

\textsuperscript{363}“Cigaret Sale Bill Passed by Senate,” DMR, Feb. 20, 1919 (2:3).

\textsuperscript{364}“Cigaret Bill is Up for Debate in the Iowa Senate,” DMC, Feb. 19, 1919 (1:3).

\textsuperscript{365}Journal of the Senate of the Thirty-Eighth General Assembly 608-10 (1919) (Feb.19).

\textsuperscript{366}Journal of the Senate of the Thirty-Eighth General Assembly 610 (1919) (Feb.19).

\textsuperscript{367}Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).
determined fight” in the House, where passage was in no way assured. In 1919, it seemed to cigarette opponents, as Edworthy, a former school teacher, put it at the organization’s annual convention in October, “a wise provision that we have two different bodies in our Legislature. Our Senate certainly catered to the liberal element. They repealed the Sunday Law, cut down the appropriation to be used in enforcing law, and again licensed the sale of cigarettes. Fortunately the House was a good check for the Senate.”

On the afternoon of February 19, the Des Moines Congress of Mothers and Parent Teacher Association met and unanimously endorsed a resolution protesting the Senate’s adoption of the Rule bill as a step backward. The women also urged strengthening the law on the books by subjecting places where cigarettes were sold to the same injunction and abatement procedures that applied to liquor sales. Senator Rule and the members of the legislature from Des Moines were the intended recipients of the resolution.

In its coverage of Senate passage, the Des Moines Capital noted that although the sale of cigarettes in Iowa was “theoretically prohibited,” it was “no more than a theory in Des Moines and most other Iowa cities” (thus, once again, suggesting that the law was effective in small towns). Precisely this refusal of “public sentiment” to enforce prohibition had persuaded some senators to support Rule’s bill.

Presumably to refute such claims, the WCTU issued a four-page pamphlet, “Iowa Mayors Opposed to Rule Cigarette Bill,” which was based on inquiries it

368 “Cigaret Sale Bill Passed by Senate,” DMR, Feb. 20, 1919 (2:3). This article purported to report the story told by “old timers” about how the original prohibitory bill had been passed 20 years earlier: “The bill probably would not have passed...had it not been for the delivery to a young member of the legislature of a ‘slush’ fund of $7,000 by persons interested in defeating the bill. The facts became known to the speaker and some of the leaders in the house, who showed the member the error of his ways, and ordered him to return the cash. The word was then passed out that the bill must pass, and it was put through just as written.” In 1896 the press circulated no such account, which sounds like a conflation with real events in Indiana in 1905. See vol. 2.

369 At the Twelfth Census of Population (1900), she was returned as a school teacher; by the time of the 1910 and 1920 censuses she had no occupation. Her husband was a traveling salesman in various branches.

370 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).

371 “Mothers Oppose Cigaret Sales,” DMR, Feb. 20, 1919 (12:1). The president of the organization was the wife of the aforementioned Edward Paul Jones.

372 “Mothers Oppose Cigaret Bill,” DMC, Feb. 20, 1919 (15:7-8).

had made of numerous mayors. Although it did not survey the large cities and lacked the time to canvass the whole state, the WCTU received replies from 14 county seat mayors and printed extracts from the 36 mayoral responses, 23 of which unambiguously affirmed that the anti-cigarette law was being enforced in their towns, whereas only three definitely stated that it was not. And even these three supported the law, at least if the larger towns would enforce it too. The pamphlet’s point was empirically to prove to legislators that: “Cities and Towns Now Enforcing Cigarette Prohibition Laws Would Have Sales Forced Upon Them by the Rule Bill.” The detailed reply by John H. Mills, the mayor of Mt. Pleasant, the county seat of Henry county, illuminates the profound suspicion of and contempt for the tobacco trust that still prevailed almost a decade after its formal dissolution:

People get cigarettes here, but I do not know how. The dealers do not sell them. If the cigarette and tobacco trust were capable of flooding China with cigarettes to create an appetite, they would be capable of flooding Iowa with them and then claiming that the law was not enforced and should be repealed, and most likely they have done it for that purpose. Devil’s agents ought to be up to the Devil’s tricks or they are not earning their wages in their master’s business. But “the law is not enforced” has the Devil’s ear-mark. It is the same cry that was used against liquor prohibition.... Do they demand the repeal of the law against stealing because so many automobiles are being stolen? No... Why, then, do they demand the repeal of this law? Because the money of the Trusts demands its repeal and they are able to reward those who manage it. ... Perhaps the question would not have arisen, if it had not been for the action of some papers of national circulation, and a lot of empty-headed silly men and women who solicited contributions during the war for our dear boys over the sea for cigarettes and tobacco.

In the House, the day before S.F. 220 passed the Senate, Democrat Douglas Rogers introduced House File 301, which would have repealed sections 5006 and 5007 of the Code; in their stead, it made the sale of cigarettes conditional on: paying a $100 tax; filing a $1,000 bond and a certified copy of a city council resolution consenting to such sales by the applicant; making no sales to minors; and not permitting minors to smoke cigarettes in the room in which cigarette sales took place. In addition to imposing a maximum $100 fine or maximum 30-day

---

374Woman’s Christian Temperance Union of Iowa, Iowa Mayors Opposed to Rule Cigarette Bill (n.d. [1919]), in Folder: N. E. Kendall correspondence re cigarette bill (SHSI DM). Though undated, the pamphlet bears the handwritten date “1919.”

imprisonment for violating the law, the bill provided for a civil action to recover a $25 forfeiture for each sale to a minor.\textsuperscript{376} After referring it to the Public Health Committee, the House took no action on the bill.\textsuperscript{377}

Having witnessed the speed with which Rule's bill had sailed through the Senate, the WCTU impressively mobilized all of its resources to insure that S. F. 220 met as many “difficulties”\textsuperscript{378} in the House as possible. In her convention report a half-year later, Edworthy set the scene:

The Tobacco lobbyists swarmed in the House, they also sent literature to every member. Our Polk County Representative Hauge, received a petition with over 1,000 business men of Des Moines asking him to support the “Rule” bill. If this bill was not in the interest of the Tobacco trade why did they do these things? To offset these efforts our State President sent an earnest appeal to all the leading educators of the State and others. Mr. Hammond was sent to all teachers’ conventions with our resolution to offset the insidious work of the Tobacco Trust. We presented a package of 25 excellent leaflets on the harmful effects of tobacco and cigarettes to each member as well as other literature. We were exceedingly fortunate in having Hon. Lewis J. Neff of Walnut, Pottawattamie County, as chairman of the Public Health Committee to which this bill was sent.

Mr. Neff is a man of deeds. We have staunch supporters of that committee that deserve mention here—Allen of Ringgold County, Klaus of Delaware County, Bradley of Poweshiek County, Findlay of Webster County, Kepple of Chickasaw County, King of Hardin County, Moen of Lyon County and Mills of Harrison.

As chairman Mr. Neff was fair to all, but he gave us several hearings so that we had a splendid opportunity to present several speakers. This gave us excellent opportunity to get in good work and time for the members to hear from their constituents at home. Mr. Hammond’s address as given before the committee was printed in leaflet form and sent all over the State which brought in a flood of protests. The bill finally fell into the hands of the Sifting Committee[.] But it came out again on the floor of the House. I had written a short appeal on behalf of the boys and girls of the State and our future homes, asking them to vote against the bill. Just ten minutes before they were to vote, I had them given to each member by the pages. Earnest prayers went with the little message.\textsuperscript{379}

\textsuperscript{376}H.F. No. 301 (Feb. 18, 1919) (copy furnished by SHSI IC).
\textsuperscript{377}Journal of the House of the Thirty-Eighth General Assembly 537 (1919) (Feb. 18).
\textsuperscript{378}Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).
\textsuperscript{379}Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120:21 (1919). Republican A. O. Hauge was a bank president and a member of the board of trustees of the American Lutheran Synod. State of Iowa: 1919-20: Official Register 313 (28th No., Harrold Klise comp. n.d.). Lewis Neff had been a school teacher before becoming a lawyer and was also president of the town board of education. State of Iowa: 1919-20: Official Register 321 (28th No., Harrold Klise comp. n.d.). All nine committee
On April 11, a week before the end of the session, the Iowa Supreme Court issued its opinion upholding the validity of the cigarette mulct tax.\(^{380}\) This important prohibitionist victory prompted the aforementioned WCTU ally and sifting committee member Representative S. W. Klaus, to declare that Rule’s bill would die because “now there is no need for the bill.”\(^{381}\) On the last day of the session, the full House took up the sifting committee’s proposed amendment of the bill’s licensing provision (along the lines of the 1894 liquor mulct law) making the issuance of a license contingent on the applicant’s filing a certified copy of the city council’s resolution consenting to cigarette sales.\(^{382}\) At least seven Republicans took the floor to oppose licensing, while only three representatives, also all Republicans, “dishonored their constituents by speaking in behalf of the bill.”\(^{383}\) Unsurprisingly, Findlay proclaimed that “he hated ‘cigaretts as the devil hates holy water,’” while proponents insisted that “many men had acquired the habit while in the army and they should be permitted to continue the practice if they so desired.”\(^{384}\) Edworthy praised Republican Representative Ellis Hook—who had been a school teacher, principal, and city and county superintendent before becoming a lawyer\(^{385}\)—for having “wielded the beheading ax by moving to strike out the enacting clause”\(^{386}\) of S.F. 220; his motion prevailed on a non-party-line vote of 65 to 25, thus staving off licensure and keeping prohibition in the Iowa Code at least until 1921.\(^{387}\) Theologically

members mentioned by Edworthy were Republicans, as were 16 of the 17 committee members. “Allen” was in fact “Allyn.” Unfortunately, no reports of these House Public Health Committee hearings appear to have survived.

\(^{380}\)See above this ch.

\(^{381}\)“Cigaret Bill Dead,” \textit{DMN}, Apr. 12, 1919 (1:1).

\(^{382}\)\textit{Journal of the House of the Thirty-Eighth General Assembly} 2261 (1919) (Apr. 19). A sifting committee was appointed late in the session (April 4) to control the flow of bills. \textit{Id.} at 1647 (Apr. 4). On the final vote on S. F. 220, of the six Republicans on the committee three voted Yea, one Nay, and two were absent or did not vote; of the two Democrats on the committee one voted Nay and one was absent or did not vote. \textit{Id.} at 2261-62.

\(^{383}\)\textit{Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention} 121 (1919).

\(^{384}\)“Bill to Legalize Cigaret Sale Is Killed in House,” \textit{DMC}, Apr. 19, 1919 (1:5).


\(^{386}\)\textit{Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention} 121 (1919).

\(^{387}\)57 Republicans and 8 Democrats voted for and 20 Republicans and 5 Democrats voted against killing the bill, while 16 Republicans and two Democrats were absent or did
reformulated, Edworthy summarized the outcome of the political process: “Again the cause of righteousness prevailed and we thanked God who gave us the victory.”\textsuperscript{388} What divine inspiration failed, however, to give the WCTU or its allies was the capacity and insight publicly to raise, let alone answer, the question as to why it was politically and morally justifiable instrumentally to deny adults access to in-state sales of cigarettes to the end of denying them to minors.

\textbf{The WCTU’s Post-Session Continued State of Mobilization}

The best way to repeal a bad law is to enforce it strictly.\textsuperscript{389}

Law enforcement agencies have never been completely committed to the notion that the best way to repeal a bad law is to enforce it. They have long been aware that a law obnoxious to a large mass of people, and widely ignored, can easily be disposed of by letting it die an administrative death.\textsuperscript{390}

The National WCTU’s publication in 1918 of the not very subtly titled \textit{Nicotine Next}, an anti-tobacco diatribe by Frederick Roman, an economics professor at Syracuse University,\textsuperscript{391} might easily have been interpreted as a signal that with alcohol’s end in sight, the organization was eyeing a new national prohibitory field, especially since the author himself predicted the swift advent of a constitutional amendment.\textsuperscript{392} (Because the title had “confused many people,”

\begin{flushleft}
not vote. \textit{Journal of the House of the Thirty-Eighth General Assembly} 2261-62 (1919) (Apr. 19). The press devoted little or no attention to the vote in the welter of business conducted on the last day. E.g., “Legislature Ends Work of Session,” \textit{DMR}, Apr. 20, 1919 (16-M:1-4). Of the 65 representatives who voted to kill repeal of the cigarette sales ban two days earlier 18 (including Findlay and six of the eight Democrats) had been among the 33 voting against the criminal syndicalism bill (which was enacted), which made it a crime merely to advocate industrial or political reform by means of crime, sabotage, violence, or other unlawful methods of terrorism. \textit{Journal of the House of the Thirty-Eighth General Assembly} 2139-40 (1919) (Apr. 17).

\textsuperscript{388}Woman’s Christian Temperance Union of Iowa, \textit{Forty-Sixth Annual Convention} 121 (1919).

\textsuperscript{389}“Bi-Partisan Hypocrisy!” \textit{III} 61(39):1, 2, 4-5, 24-25 at 24 (Sept. 28, 1916).


\textsuperscript{391}Frederick Roman, \textit{Nicotine Next} (1918).

the WCTU dropped “Next” from later editions).393 By early 1919, the ratification of the Eighteenth Amendment having induced the organization to turn “‘toward ridding the rest of the world of the liquor and strong drink evil,’” National WCTU Vice President Ella Boole had found it necessary to assure men that they need have no fear regarding tobacco: “‘Local organizations may carry on anti-cigarette and tobacco campaigns in their cities and states, but we are planning no nationwide crusade against Lady Nicotine.’” The WCTU was, however, “‘unalterably opposed to women smoking’” and by means of education “‘expect[ed] to prejudice the coming generation against the use of tobacco.’”394

In the summer of 1919, the Association Opposed to National Prohibition disclosed the results of its “exhaustive investigation”: the WCTU had assumed the leadership of an anti-tobacco crusade to enact anti-tobacco laws in every state and to have Congress submit a constitutional amendment before the WCTU’s 50th anniversary on March 20, 1924.395 Two months later the Association founded the Allied Tobacco League of America to combat the WCTU’s alleged campaign for a constitutional amendment to prohibit growing, selling, and using tobacco.396 Determined to learn from the fruitless efforts to prevent the enactment of liquor prohibition, the League would meet this new WCTU constitutional prohibitory campaign “on equal grounds and with full preparedness.” The timing of the mobilization was apparently prompted by the receipt that very day of news of the WCTU’s having caused to be filed in Oregon an initiative petition to outlaw the sale, use, or possession of cigarettes in that state after January 1, 1921.397

The WCTU was riding so high by October 1919 that its “enemies,” according to Iowa WCTU President Ida B. Wise Smith, were seeking to frustrate passage of the implementing Volstead Act by accusing the organization of planning the adoption of a Nineteenth Amendment prohibiting tobacco.398 While echoing the

---


397“Tobacco Opens Fight Against Federalism,” Sun (New York) (Oct. 9, 1919) (typed copy), Bates No. 950297834. See also “Oregon to Hold Referendum Vote Upon Cigarette Question,” USTJ 92(15):16 (Oct. 11, 1919). For further analysis of this initiative, see below ch. 16.

398Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 22 (1919). On the Tobacco Merchants Association as a possible source of these accusations,
national organization’s démenti—the National WCTU denounced this “misstatement” as an effort to “discredit” the organization’s legislative activity 399—she was so flattered that she could not suppress her pride at the annual state convention: “No greater compliment has ever been paid to the forcefulness of the work of the W.C.T.U. than to be ‘investigated’ by the Association Opposed to National Prohibition. ... It promises speed to our work for which we never dared hope, in that it says that we expect to accomplish this by our Jubilee anniversary in 1920. To read this report, one would think that all the W.C.T.U. had to do was to make a demand of Congress and, presto! the deed is done.” 400

The membership of the Allied Tobacco League of America, which the Association Opposed to National Prohibition created during the days of the Iowa WCTU’s annual convention to “wage a militant campaign against the W.C.T.U.’s fight for a constitutional amendment prohibiting the growth, sale and use of tobacco,” consisted of representatives of all branches of the tobacco industry. The League asserted that the WCTU’s strategy was to avoid the tobacco-growing states at first, instead driving the entering wedge in states such as Iowa, Kansas, Nebraska, and Maine, “whose people are not interested particularly in the growth, manufacture, etc., of tobacco, but its use and where the voters will not awaken to the menace in their midst until the constitutional amendment against tobacco arrives.” 401 Oblivious of the WCTU’s failure to persuade most states to enact bans on selling even cigarettes, the League charged that the WCTU, taking a leaf from the book of “‘the old-time Democratic and Republican bosses,’” would “go to Legislatures over which it can ‘crack the whip,’ and not to the people directly.” What made the League confident of success was its belief in the existence of “‘a people weary of fanaticism....” 402 Opponents may have inferred the rise of a national anti-tobacco movement from “the vast amount of reform energy and ability that has been dumped upon the sociological market by the adoption of

see below ch. 17.


400 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 22-23 (1919).


prohibition,” but the Iowa WCTU had its hands more than full with warding off the repeal of the cigarette sales ban to press for the vastly more radical step of prohibiting all tobacco.

Despite the National WCTU president’s denial of the anti-prohibitionists’ accusation, Smith—herself a future national president (1933-45)—seemed exhilarated when she replied to similar press claims:

Recently the press has been greatly disturbed because, prohibition being an accomplished fact, the W.C.T.U. would not have any work, so they were going to make war on tobacco. Indeed, we are not going to do it, for we have been making war upon it for the last thirty years; we are only going to continue hostilities. It is our duty to prevent evil, hence in our last legislature we labored to prevent the repeal of the Anti-Tobacco Law. This we did for the protection, safety and efficiency of our youth. Tobacco, and especially the cigarette, is a foe to efficiency.... The use of it is unclean, unwholesome, and wasteful. “No smoking” signs attest the charge, that all smokers are fire hazards. The loss by fire in 1918, occasioned by cigar and cigarette stubbs, ran up into the millions. Of course, we are going to continue our educative program against its use, and if need be, we will keep up the struggle for thirty years more! We will try to turn the old smokers from the evil of their ways by moral suasion, but we must do our best to save our youth from the pernicious habit, by legislation as well as by persuasion.

---


404 At the national convention in November President Anna Gordon stated: “In August of this year the Association Opposed to National Prohibitions’ (our long-time enemy under a new name) flooded the press...with a statement that the National Woman’s Christian Temperance Union was now to begin a campaign for an amendment to the national constitution prohibiting the manufacture, sale, and use of tobacco. The association hoped to prejudice voters in the state-wide prohibition campaigns in Kentucky and Ohio and to discredit the work of the W.C.T.U. for important legislative matters in the United States Congress. We have been kept busy correcting their misstatement and in doing so we have never failed to affirm the fact that for many years we have been in an educational campaign concerning the harmfulness of tobacco, especially upon children and youth, and that this campaign we shall continue persistently to push.” Report of the Forty-Sixth Annual Convention of the National Woman’s Christian Temperance Union...November 15-20, 1919, at 89-90. For press insistence during the WCTU convention itself that the WCTU was in fact pursuing national prohibition of tobacco, see Frederick M. Kerby, “Here’s the Situation in Connection with Tobacco Fight,” Salt Lake Telegram, Nov. 19, 1919 (3:5). Kerby was a noted reporter, who had played an important part in the Pinchot-Ballinger affair in 1910 when he was a government stenographer. “Frederick M. Kerby, 69, Newspaperman 40 Years,” WP, Feb. 27, 1955 (B2).

405 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 37 (1919).
Astonishingly, Smith seemed to be totally unaware that the law that the WCTU had helped keep on the statute books had not by suasion, but by legislation, injunction, confiscation, destruction, arrest, fine, and imprisonment, sought to prevent “old smokers” from buying cigarettes in Iowa. Perhaps her choice of words was dictated by her admission that although Iowa was one of the states that had statutorily prohibited the sale or gift of cigarettes: “[W]here is the State that, by its Department of Justice, enforces the law! Sadly, we must say that Iowa is not one—Iowa with laws touching every phase of the tobacco questions as it relates to young life.” And that focus on youth assumed ever greater necessity as Smith asserted that during the previous 20 years the “the average age of the beginning of the tobacco habit has fallen from twenty-two to eleven years, with thousands smoking as early as seven years.” This allegation, given the survey instruments available at the time, may have been as inaccurate as Smith’s bizarre assertion that cigarettes’ advent into the United States took place after the Spanish-American War.

Havner’s raids continued beyond the end of the 1919 legislative session. Even in Cedar Rapids, the state’s fourth-largest city, as late as December a tip reached town that “the same crowd of state officers supposed to be working out of the office of Attorney General Havner at Des Moines, who raided and cleaned out the cigaret supply of Waterloo a few days before, was headed this way. Naturally, local cigar stores were taking no chances. It is reported they got rid of their reserve stock, and retained only enough to do business with. In several stores the sale of cigarets actually ceased.” The agents did actually arrive, but the Cedar Rapids Evening Gazette was unable to determine whether they had looked for cigarettes, though they did investigate other prohibited items. The dealers’ attitude in this early postwar period may have been accurately captured by their “belief that the cigaret law had died a natural death, inasmuch as they had been incorporated in the movement during the war to produce every cigaret possible for the soldiers. If the government wanted the doughboys to have their cigarets, there hadn’t ought to be any great complaint right now....”

As late as March 1920, after a “large number of substantial citizens of Cedar Rapids” had “become quite excited about the more or less open sale of

---

406 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 24 (1919).
407 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 23 (1919). Her report of an estimate that 1,500 boys began smoking every day might be more plausible and credible. Id.
408 “Hid Cigarets While Agents Were in Town,” CREG, Dec. 15, 1919 (2:1).
cigarettes, a deluge of letters descended on” Attorney General Havner’s office from residents of Cedar Rapids “renewing their attacks on the open sale of cigarettes” there, providing evidence, and “demanding” that Havner act. Two weeks later, the Evening Gazette reported in an article—whose headline (“Who’s Trying to Take Another Joy from Life?”) suggested the limits of the paper’s objectivity—that the police and county attorney had not yet received any instructions from Des Moines. A month later the trade journal Tobacco added that Havner had conducted an investigation, the evidence from which he had turned over to the local authorities; though enough to “satisfy the most captious police judge,” it had not yet prompted prosecutions. (Interestingly, the very same article reported that ATC’s crew was canvassing stores in Dubuque, featuring Lucky Strike cigarettes.)

But not all news from Iowa inspired optimism on the part of the tobacco industry. Although Women’s Clubs, according to an internal “Summary of Anti-Tobacco Educational Activities” compiled by the impressively vigilant Tobacco Merchants Association of the United States, had apparently not demonstrated much interest in anti-smoking campaigns, the General Federation of the Women’s Clubs condemned the use of cigarettes at its biennial convention in Des Moines in June 1920. In light of the hopes that cigarette manufacturers were placing on women for expanding their market, the adoption of a resolution declaring that “the cigarette habit” was increasing among women and that tobacco use was harmful to them was bad enough. But the Federation’s adoption of another resolution “urging an educational campaign against the use of cigarettes by men” must have come as a blow to the TMA, which, however, as always in its members-only surveillance reports, refrained from passing judgment on the antis’ activities.

---

409 “Is Political Plot Wrapped Up in Cigaret Complaints?” WEC, Mar. 18, 1920 (8:5).
410 “Who’s Trying to Take Another Joy from Life?” EG, Mar. 18, 1920 (2:5). Purportedly, “Havner men claim it is all a plot on the part of Moore men in Cedar Rapids to get Havner in bad with the voters in the Linn county metropolis.” “Is Political Plot Wrapped Up in Cigaret Complaints?” WEC, Mar. 18, 1920 (8:5).
The Great Compromise of 1921:  
The End of Statewide Prohibition and the Beginning of Local Control, Licensure, and Taxation

It has been conclusively proved that cigarettes will be sold in Iowa regardless of any laws prohibiting the sale, and the defeat of the Dodd bill would not change conditions in the least.¹

[T]he preachers of Iowa...may get up and say that men who smoke cigarettes have the minds of six year old children and all that but we have a president of the United States, who smokes a cigarette and enjoys it and no one has accused him of being mentally deficient since the first Monday in November....²

Until enactment of this statute the cigarette law in Iowa has been one of the most anomalous on the statute books.³

Before the war it was quite a crime to smoke cigarettes in the State of Iowa. The W.C.T.U. fought the tobacco habit hard in that State. They tried to put such a high permit on the merchant as to eliminate the sale of cigarettes altogether.⁴

Some authors have called 1921 “[t]he high water mark of anticigarette legislation,”⁵ but the industry (incorrectly) boasted that of the 92 bills dealing

---

⁴W. E. Hawse, “Cigarette Stamp Tax of Iowa and How Administered,” Report of Proceedings: Third Annual Conference of Administrators of Tobacco Tax Laws 33-40 at 39 (1929). Hawse was the superintendent of the Iowa Cigarette Revenue Department. In fact, it was never illegal for adults to smoke cigarettes in Iowa—only to sell them; the WCTU successfully advocated an outright ban and abhorred licensing “evil,” no matter how high the license fee. See above chs. 9-14. That Iowa’s highest-ranking cigarette tax enforcement officer just eight years after repeal of the statewide sales ban was so profoundly misinformed underscores the prevalence of historical amnesia even at the outset of the heyday of cigarette-smoking laissez-faire.
⁵Christopher Cobey, “The Resurgence and Validity of Antismoking Legislation,” U.C. Davis Law Review 7:167-95 at 171 (1974). This claim derived from an unsubstantiated claim in a non scholar article, which was, in turn, presumably derived from Jack Gottsegen, Tobacco: A Study of Its Consumption in the United States 153, 155 (1940), which, was taken from Carl Werner, Tobaccoland 106 (1922).
The Great Compromise of 1921

with tobacco and smoking that were filed in 28 state legislatures only one “of importance,” Utah’s latter-day general cigarette sales ban, passed. 6 That year witnessed the demise of Iowa’s quarter-century-old universal ban on cigarette sales, the country’s longest-standing. It also marked the midway point between 1915, the beginning of the wave of repeals, and 1927, when Kansas repealed the last remaining statute. In that latter year, as annual national consumption reached 85 billion cigarettes, The New York Times commented that the result of “the anti-cigarette war” (which had allegedly been “at its height” between 1870 and 1912) was “legislation in every State—and increased cigarette smoking.”

Sixty-five years after the extraordinarily contentious struggle over retention of Iowa’s cigarette sales ban, Harvey Sapolsky, a political science professor at MIT who received $300,000 from Philip Morris to put together a book on consumers’ fears of product risks that featured his chapter on cigarette smoking, asserted that:

At the turn of the century when cigarette smoking was first becoming popular in the United States, the Women’s [sic] Christian Temperance Union and school principals who were worried about the decay of public morals...succeeded in having fourteen states ban the production, advertisement, and sale of cigarettes. These laws proved ineffectual because cigarette smoking had already become a symbol of maturity, sensuality, and modernity for most Americans. Consumption boomed. The laws were quietly repealed. 9

Just how noisy the repeal process was Sapolsky—who at the same time was urging the tobacco industry to create a Smokers’ Legal Defense Fund to prevent the “terribly unfair” prohibition of smoking at bar exams, in hospital waiting and jury rooms, and during therapist sessions—might have learned had he read even

6Carl Werner, Tobaccoland 106, 108 (1922). Many of these bills, to judge by the indexes to a random collection of state legislative journals for 1921, may have dealt with minors. On the most important laws passed in 1921, see below ch. 16.

7“Consumption of Cigarettes Reaches 85 Billion Annually,” NYT, Aug. 14, 1927 (sect. XX at 5). In fact, the war did not even begin until the 1880s, and, as chapter 16 documents, the war reached a new height between 1917 and 1921.


10Harvey Sapolsky to William Ruder (June 20, 1983), Bates No. T104820027.
a single primary source before making the claim so congenial to his paymaster’s interests. This chapter is devoted to thick description of the pivotally decisive repeal of the Iowa’s prohibitory law.

**Democrats Need Not Apply to the Thirty-Ninth General Assembly**

“Iowa would go Democratic when Hell went Methodist.”

Under the old law violations were the rule...even under the gilded dome of the state house.

The General Assembly that would ultimately decide to terminate Iowa’s prohibitory law verged on being literally a one-party legislature. The two preceding General Assemblies had also been characterized by lopsided Republican majorities, but the November 1920 state election virtually expelled the Democratic party—which was left “a total wreck, with no salvage or insurance”—from the legislative branch. “The unprecedented, overwhelming and smashing victory for the national republican ticket,” declared an Iowa farm weekly, “swept some Iowa candidates into office who would otherwise have been defeated.” The paper’s conclusion that a “horse thief could have been elected to any state office in Iowa, on November 2d, if running on the republican ticket” glossed the Harding landslide: Republicans not only won all 11 of Iowa’s congressional elections—not a single one of which was close—but controlled 48 of 50 seats in the Senate and 101 of 108 House seats in the new General Assembly. Indeed, so endangered had the Democratic party become that a statute requiring that two members of the Joint Committee on Retrenchment and Reform be members of the minority party or parties had to be amended “lest the time should come when, for lack of any minority party members in one branch of the legislature, the organization of the committee would be prevented.”


13 Iowa Republicans Ride into Power on Tidal Wave,” *IH* 65(46):3 (Nov. 11, 1920).


The Great Compromise of 1921

if there had “not for years been a sufficient number of democrats [sic] in the Iowa legislature for any particular division on party lines,” by 1921, whatever conflicts arose on the issue of cigarette sales would be generated by and resolved within the Republican party.\(^\text{17}\)

The day after the legislature had convened the *Des Moines Register* found that 99 percent of legislators and observers opined that the legislature was “conservative,” the more progressive members viewing the new General Assembly as “depressingly ultra-conservative,” especially in its tendency toward “miserliness” regarding improvements.\(^\text{19}\) This structure may have underlain contemporaries’ view of the 1921 session as having been “characterized more by the important measures that failed of enactment than by the constructive legislation which was adopted.”\(^\text{20}\)

Both houses of the Iowa legislature that in 1921 was considering repeal of its quarter-century-old prohibition of cigarette sales had imposed smoking bans in their own space for years.\(^\text{21}\) Thus the Senate rule unambiguously stated: “Smoking in the senate chamber is hereby prohibited, while the senate is in session. And any officer or employe while on duty in the senate chamber or doorways leading thereto shall thereby subject himself to liability of discharge.”\(^\text{22}\) In contrast, the House, under the rubric “Decorum,” provided that no member or officer was permitted to read a newspaper within the bar of the house while the journal was being corrected, “nor shall any person be permitted to smoke on the floor of the house during its session, or in the galleries at any time.”\(^\text{23}\) Despite their important symbolism, there was, by 1921, somewhat less to these bans,

\(^{17}\) "Farmers Lead in Legislature,” *Howard County Times*, Dec. 29, 1920 (1:1).

\(^{18}\) “[I]n a legislature where one party regularly has an overwhelming majority the roll calls will produce no significant party alignments. [T]he large majority party is likely to be divided because it represents such diverse groups and because it has no incentive to maintain party unity.” Malcolm Jewell, *The State Legislature: Politics and Practice* 48 (1963 [1962]).

\(^{19}\) “Economy Plus May Be Menace, Solons Fear,” *DMR*, Jan. 11, 1921 (1:1).


\(^{21}\) A ban had been prescribed since 1884. See below ch. 18. For the texts, see *The Iowa Official Register for the Years 1907-1908*, at 232 (S. Rule 32), 238 (H. Rule 65) (22d No., 1907). In 1923 the House ban was extended to the use of tobacco, but the ban became subject to a suspension by a vote of the majority of members present. House Rule 63, in *State of Iowa: 1923-24: Official Register* 254 (30th No.).


which even antedated the cigarette sales ban, than met the eye.\footnote{See below ch. 18.}

**Story County Resumes Enforcement of the Absolute Ban on Cigarette Sales**

[N]agging at the cigarette is childish or feminine.\footnote{Cigarettes Back in Iowa, *Brooklyn Eagle*, Apr. 12, 1921, Bates No. 950297934.}

Contemporaries ideologically hostile to Iowa’s absolute ban on cigarette sales sought to shore up their call for repeal by asserting that it “had never been enforced”\footnote{Iowa Sets an Example, *Tobacco* 71(25):6 (Apr. 21, 1921) (reprinting undated editorial from the *New York World*).} “or even regarded with respect anywhere in the State.”\footnote{Grant]. Caswell, “Legislative News Letter,” *HCT*, Mar. 16, 1921 (1:1). The author was a former state senator whose column ran in numerous papers. See also Grant]. Caswell, “Legislative News Letter,” *HCT*, Apr. 6, 1921 (1:1-3 at 3).} Less biased observers admitted that while cigarettes were available in the larger cities, the law was in fact enforced in smaller ones.\footnote{George Mills, “A Cigarette Ban in Iowa: 1896 to 1921,” *DMR*, Jan. 13, 1964 (1:2), provided a very rare later confirmation of this fact: “Enforcement was strict in smaller communities....”} For example, even while the legislature was in session in 1921, the proprietor of a near-beer saloon in Tama (population 2,601)\footnote{State of Iowa: 1923-24: *Official Register* 574 (30th No.).} who violated the law was fined and his stock of 10,000 cigarettes was seized and to be destroyed. Although the raid resulted from the owner’s having sold cigarettes to an under-age girl, the county attorney announced that in the future the anti-cigarette law would be “vigorously” enforced.\footnote{Anti-Cigaret Law to Be Inforced in Tama, *CREG*, Feb. 16, 1921 (n.p.:5).} The anti-cigarette movement persisted in calling for enforcement. Thus the annual Consolidated Schools Conference in December 1920 had unanimously passed a resolution favoring the prohibition of cigarettes in general.\footnote{Midland Schools 35(6):201 (Feb. 1921); typed copy in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM) (Fourth Annual Consolidated School Conference at Cedar Falls (Dec. 20)}. A more striking refutation of the unenforcibility of the ban was the *Ames Daily Tribune* five-column banner headline, “Ban on Cigarettes in Story,” detailing the launch of a strict enforcement campaign in Story county—the
location of Iowa State College of Agriculture and Mechanic Arts and contiguous to Polk county, whose county seat is the state capital—while the 1921 legislature was in session. In mid-January County Attorney Arthur Buck served all cigarette dealers with notice that it “will be advisable for them to ‘get out from under’ before February first.” On January 18, Buck declared: “‘The time has come...when the public is clamoring for an adjustment of the cigarette situation. The grand jury thinks it would be no more than fair to dealers, after the leniency of the war period, to give them all a chance to unload their present stock.’” In Ames itself an “epidemic of cigarette buying” was expected to enable the 24 dealers to sell out long before the two-week grace period was over. Iowa’s prohibitory law, the Ames Daily Tribune pointed out, had “generally been enforced in the smaller towns and cities...until the start of the war.” During World War I, however, “[r]ecognition of the cigarette in the service and the general use of it attained made it next to impossible to enforce the law.”32 (In this respect attitudes toward cigarette sales bans differed from those toward prohibition of alcohol, consumption of which various warring countries sought to reduce in a quest for efficiency.)33 Once the war was over and the large number of newly addicted soldiers had returned from Europe, the anti-cigarette agitation that had gone into abeyance reemerged. In Story county the recent “considerable complaint...to officials of the sale of cigarettes to minors” had been brought to Buck’s attention “so forcibly, that the new course of action has been determined on” to enforce the law that made it “illegal to sell cigarettes to anyone.”34 That Buck’s decision to enforce the prohibitory law against sales to adults was animated by complaints that cigarettes “were being promiscuously sold to minors”35 has to be understood in the context of the anti-smoking movement’s often overlooked insight that: “It is a pretty tough job for dad to lay [sic] back in his easy chair with a cigarette perched in his mouth and at the same time keep ‘sonny’ from slipping down the alley and pattern [sic] himself after his living model.”36 To be sure, opponents of repeal argued that the nonenforcement of the statewide ban on cigarette sales in neighboring counties meant that Story county’s resumption of enforcement would “have little, if any, effect on reducing

32. Ban on Cigarettes in Story, ADT, Jan. 18, 1921 (1:5).
34. Ban on Cigarettes in Story, ADT, Jan. 18, 1921 (1:5).
35. “Oh! Woe! It’s February; Black Letter Day Here; Farewell to Your ‘Fags,’” ADT, Feb. 1, 1921 (1:2-3 at 2).
36. People’s Forum,” ADT, Jan. 25, 1921 (4:5-6 at 6) (letter to editor by Fred Randau).
smoking among minors...." These free-marketeers were, however, ignoring the fact that Iowa still had in effect a statute prohibiting minors from smoking in public, enforcement of which could have dealt, at least in part, with the availability of cigarettes imported from surrounding counties.

While Buck was repeating his assurance that "'[t]he law is to be enforced to the very letter'" and "'[t]hat...means that no cigarettes can be sold to anyone,'" smokers reported that the only consequences of this local action would be more frequent (60-mile round-)trips beyond the limits of Buck’s jurisdiction to Des Moines and more purchases of cartons rather than packages of cigarettes. Potentially much more significant were threats of precipitating a legislative backlash in the form of "more or less talk among ex-service men and others of organizing in an effort to assert what they believe are their rights. There is talking of asking aid to go before the legislature...in an effort to have the anti-cigarette law repealed." This reaction suggests the possibility that Buck’s strict enforcement campaign served as the final nuisance that prompted ex-soldiers and the American Legion—after all, the “pro-tobacco army” was already trying to "enlist” legionaires in the battle against anti-cigarette legislation—to lobby the new General Assembly to repeal the general prohibition. Although such speculation overlooks the fact that legislators had already undertaken repeal efforts in 1917 and 1919, when enforcement had allegedly been in abeyance, the revival of real enforcement and the stirring up of resentment against it in the greater Des Moines area might have appeared to some contemporaries to have the potential to change enough Republican votes to forge a legislative majority for repeal in 1921.

Buck’s initiative reignited a debate that had been raging in Iowa for several decades, turning the cigarette question into “the principal topic of conversation in Ames.” One minister, incensed that merchants were being allowed to sell off their stocks in violation of the law, told the Tribune that those selling cigarettes should be treated as the law breakers they were: the leniency shown during the war having been a mistake, the two-week grace period was uncalled for because

---

37."Oh! Woe! It’s February; Black Letter Day Here; Farewell to Your ‘Fags,’” ADT, Feb. 1, 1921 (1:2-3 at 3).
38."See above ch. 13.
40."Fight on Cigaretts in 36 States,” DMN, Jan. 10, 1921 (3:2-4).
41."See above ch. 14.
The Great Compromise of 1921

those committing a crime “‘deserve[] to lose money.’”43 Another minister issued
recriminations against the Christian organizations that had sent cigarettes to U.S.
soldiers in Europe, thus facilitating the “‘nation-wide approval’” of smoking
them. Unsurprisingly, the local WCTU chapter unanimously approved Buck’s
action.44 At least one Tribune reader rebuked those who preferred violating the
law to seeking its repeal as having engaged in “the Bolshevik method law
defiance.”45 At the other end of the spectrum of opinion, the paper interviewed
a college student who, having spent two years of the war in France, where the
“‘little “pill” did any amount of good to the soldiers,’” stood in for many who
could not help but identify a sequential contradiction in policies: “‘[I]f the
Christian organizations such as the aid societies, the Red Cross, Salvation Army,
Y.M.C.A., Knights of Columbus, and others went to the trouble to make up
tobacco funds to provide us with cigarettes and tobacco in France, why do they
object to our use of them after we have done our work and come home?’”46
Despite the fact that businessmen were quick to predict that the only impact of
enforcement would be to siphon the profits of local dealers off to Des Moines or
other neighboring towns to which men would travel to buy cigarettes,47
remarkably, Ames’s 24 cigarette dealers “propose to abide by” Buck’s decision
“if he really intends to enforce it,” so that no trouble was anticipated.48
Editorially, the Ames Daily Tribune took a somewhat more nuanced position,
commending Buck’s move, but questioning the “possibility of a clean up...with
the county as a unit” when, in the wake of the prohibitory law’s having been
“totally ignored” during the war, adjoining jurisdictions continued to sell
cigarettes “unmolested.” Lamenting the war’s having undone “the work of years
of reformers who made the fight against the cigarette and were in a fair way to
exterminate it altogether,” the editor deemed Buck’s enforcement action “a waste
of effort.” Skeptical of the advisability of retaining a law that was so widely
unpopular, but ignorant of the health consequences of smoking, he doubtless
spoke for many in opining that many reforms were “more necessary than that of
depriving the smoker of a cigarette.”49

19, 1921 (1:2).
44 “War Smokes a Mistake Says O. D. Lee,” ADT, Jan. 20, 1921 (1:1).
45 “People’s Forum,” ADT, Jan. 22, 1921 (2:3).
19, 1921 (1:2).
47 “War Smokes a Mistake Says O. D. Lee,” ADT, Jan. 20, 1921 (1:1).
On February 1, a front-page above-the-fold headline in the *Tribune* shouted: “Oh! Woe! It’s February; Black Letter Day Here; Farewell to Your ‘Fags.’” The paper asserted that little attention had been paid to the prohibitory law even before the war in the larger cities, but that since then it had become a dead letter even in the smaller ones. In spite of the law’s having lost its teeth, a potentially powerful new social force for repeal had emerged:

There is a disposition on the part of the American Legion posts over the state to have the cigarette question again brought before the legislature. Efforts are to be made, it is understood, to have the law amended and modified to allow the sale of cigarettes in Iowa to persons of legal age.

The denouement in Story county, however, emerged the very next day from quarters that should not have been unexpected. In spite of the *Tribune*’s report on February 1 that local dealers intended to comply with the ban, on February 2 the relevant subhead read: “Dealers at County Seat Find Way to Sell ‘Fags.’” The two-week grace period that Buck had given them afforded those “so disposed...plenty of time to investigate the law and arrange for interstate shipments to meet their demands.” Although it is much more plausible and consistent with a quarter-century’s worth of experience that it was the cigarette manufacturers that devised this stratagem to insure that other Iowa counties did not adopt Buck’s approach, dealers in Nevada, the county seat, had resumed the sale of cigarettes on the basis of the following adaptation of the original package doctrine (which the Tobacco Trust, despite the doctrine’s definitive rejection as a ruse in the cigarette context by the U.S. Supreme Court more than two decades earlier, had frivolously sought to perpetuate):

Wholesalers outside of the state were instructed to ship cigarettes to dealers here in individual cartons. A carton contains ten packages of cigarettes. Each carton is wrapped, stamped and mailed individually by parcel post. When the dealer receives the cigarettes, he in turn sells them over the counter just as he received them—in the original package.

---

50. *Oh! Woe! It’s February; Black Letter Day Here; Farewell to Your ‘Fags,’” ADT, Feb. 1, 1921 (1:2-3).
51. *Oh! Woe! It’s February; Black Letter Day Here; Farewell to Your ‘Fags,’” ADT, Feb. 1, 1921 (1:2-3).
52. *Oh! Woe! It’s February; Black Letter Day Here; Farewell to Your ‘Fags,’” ADT, Feb. 1, 1921 (1:2-3 at 3).
54. See above chs. 10-12, 14.
55. *Evade Cigarette Law,” ADT, Feb. 2, 1921 (1:1).
Although the Tribune apodictically and incorrectly asserted that this simple procedure rendered the Iowa law “ineffective” and ceased reporting on the subject, thus suggesting that County Attorney Buck, too, had acquiesced in the cigarette oligopoly’s renewed machinations, as far back as 1900 the U.S. Supreme Court in Austin v. Tennessee had inflicted a severe defeat on the Tobacco Trust by ruling that the presumption that the actual package of importation was “strong evidence” of being an original package presupposed “honest dealers” and did not apply where the manufacturer puts up the package with the express intent of evading the laws of another state, and is enabled to carry out his purpose by the facile agency of an express company and the connivance of his consignee. This court has repeatedly held that, so far from lending its authority to frauds upon the sanitary laws of the several states, we are bound to respect such laws and to aid in their enforcement, so far as can be done without infringing upon the constitutional rights of the parties. The consequences of our adoption of defendant’s contention would be far reaching and disastrous. For the purpose of aiding a manufacturer in evading the laws of a sister state, we should be compelled to recognize anything as an original package of beer from a hogshead to a vial; anything as a package of cigarettes from an importer’s case to a single paper box of ten, or even a single cigarette, if imported separately and loosely...

If shipping individual cartons to dealers in Nevada, Iowa by parcel post—which presumptively was not a cost-efficient method of transporting cigarettes in interstate commerce—deviated significantly from the normal commercial customs of mass wholesale shipments into states in which cigarette sales were lawful, then such staged transactions constituted precisely the kind of “discreditable subterfuge” that the Supreme Court had long since stripped of original-package protection.

Perhaps reflecting alarm at the debacle in Story county, just a few days later the Story City Circuit Luther League convention adopted a resolution calling on the members of the state legislature to vote against the repeal of the anti-cigarette law.

57Austin v. Tennessee, 179 US 343, 359 (1900).
58Austin v. Tennessee, 179 US 343, 360 (1900).
59Austin v. Tennessee, 179 US 343, 361 (1900).
60Edward D[illegible] and Amanda Hanson to the Senate and House Members (Feb. 28, 1921). RG Secretary of State: Legislative, Series: 39th General Assembly: Miscellaneous Petitions, Folder: Cigarette Law (State Archives: SHSI DM). The convention took place on Feb. 4-6; the letter asked Story county Representative H.
The Woman’s Christian Temperance Union: Not Just a Prohibitionist Organization

Prevented its [anti-cigarette law’s] repeal two years ago. During this session of Legislature more than 10,000 letters have been sent out to ministers, school people, and business men on this subject. It has been necessary to have someone traveling almost constantly to teachers’ meetings and various other meetings where the tobacco agents were in other guise. $1,000 has been spent in actual expense but we count it gain as thereby Iowa’s boys and girls are protected from the American Tobacco Co and its agents. If only officials will enforce the law!!

The long-time president of the Woman’s Christian Temperance Union of Iowa, Ida B. Wise Smith (1871-1952), wrote to Governor Nathan E. Kendall on January 27, 1921, more than five weeks before the cigarette bills were introduced in the legislature, presciently predicting the dangers facing the 25-year-old prohibitory law: “I am very deeply concerned about the Injunction as applied to the Anti-Cigarette law. The opposition to the law as we already have it, will I am sure take the form of a license policy, prohibiting the sale to minors.” Extrapolating from the increasingly menacing experiences of the two preceding sessions of 1917 and 1919, Smith was constrained to “beg” Kendall “to do anything you can to prevent such legislation.” Referring to licensing of other activities anathema to the WCTU, she observed that: “We have had such sorry

---

Donhowe (who later did vote against repeal) to present the resolution; he did so the day Rep. Dodd filed the bill. *State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly* 777 (Mar. 7).

61 Some Achievements of the Woman’s Christian Temperance Union of Iowa Prior to 1920” (n.d. [ca. 1920?]) (copy furnished by Jeanne Lillig, current president, WCTU Iowa).

62 Smith was president of the Iowa WCTU from 1913 to 1933 and president of the National WCTU from 1933 to 1944. Etta Wallace, “Ida B. Wise Smith,” in *Famous Americans* 569-74 (2d ser., Warren Huff and Edna Huff ed. 1941); George Mills, “‘Dry Crusader Was Great Iowan,’” *DMR*, Apr. 4, 1993 (3).

63 The fact that Smith discussed the injunction immediately after mentioning that the WCTU’s lobbyist, John Hammond, had sent Kendall copies of the bills that the WCTU expected to sponsor in 1921 suggests that the injunction was one of them. In fact, Rep. Toleff Moen filed such a bill (H.F. 805) for the WCTU on March 8, the day after Rep. Horace Dodd had filed the chief repeal bill. This timing raises the possibility that the WCTU had been holding the injunction bill in reserve to be filed as a countermeasure only if a repeal bill was filed.
The Great Compromise of 1921

results in like measures in the past. [T]he liquor nuisance, the Red Light districts....” Based on demand for a WCTU pamphlet on the anti-cigarette law, 20,000 copies of which had been sent out, largely to teachers, boards of education, and “officials of the small towns,” Smith sought to impress upon the governor that there had “never been such widespread interest in Iowa in the endeavor to enforce the law as now.” On the pragmatic level, she also advised Kendall that in the wake of the recent enfranchisement of women, who now had “somewhat more force in citizenship,...it would be a bad move politically, if for no higher reason, to weaken the law.” In support of the organization’s position, Wise was able to articulate a strategic principle that at the beginning of the twenty-first century still undergirds the aggressive and most advanced science-based anti-smoking movement: “you cannot prohibit a thing to a minor and let an adult do it.” That she was not blind to the existence of an obstacle to enforcement of this principle, which, after all, had underlain Iowa’s prohibition for a quarter-century, emerged from her recounting to the governor that a man had recently told her in the Statehouse “that we could not expect to pass such a measure when so many members of the General Assembly were smoking cigarettes themselves.”

The political defects of the WCTU’s anti-cigarette program were visibly on display in Smith’s unrealistic-idealistic response, which failed even to contemplate the need for justifying the instrumental use of adults inherent in depriving them of consumer freedom, let alone overcoming the barriers created by addiction: “I refuse to believe that these men will hold personal habits as an excuse to advance better standards of government and for the protection of the young by the power both of law and example.” She closed with a postscript designed to bolster Kendall’s courage by observing that the evening newspaper reported that the legislature in Kansas, which (since 1909 had) also prohibited the sales of cigarettes to adults, had just rejected a bill to license their sale.64 Kendall’s pro forma response—“I am in receipt of your esteemed favor of recent date, and I thank you sincerely for writing me”—should have given as little cause for hope as his stereotypical promise he would give the bills that the WCTU expected to sponsor “most careful consideration.”65

64Letter from Ida B. Wise Smith to Governor N. E. Kendall (Jan. 27, 1921), in N. E. Kendall correspondence, folder re cigarette bill (SHSI DM). Smith would perhaps have been marginally less unrealistic if what she expected was merely that cigarette-smoking adult men would return to the use of other forms of tobacco, which the WCTU never sought to prohibit. On the modern anti-smoking movement’s position on the demonstration effect of adult smoking on children, see, e.g., Stanton Glantz, “Editorial: Preventing Tobacco Use—The Youth Access Trap,” AJP 86(2):156-58 (Feb. 1996).

Kendall (1868-1936), a moderate progressive Republican and lawyer who had completed his ten years in the Iowa House of Representatives as speaker in 1907-1908 and then served two terms in Congress, was elected governor in November 1920 with 50 percent more votes than his Democratic opponent, Clyde Herring, an automobile dealer who urged the application of business corporation methods to state government operations. The Iowa State Federation of Labor had supported Kendall’s candidacy because he was “always found to be fair to labor in every measure that was considered.”

That Kendall might have hesitated to deny anything to, let alone alienate, World War veterans, so many of whom had begun smoking cigarettes in France, was strongly suggested by the fulsome praise he showered on them at length in his inaugural address:

In the colossal war...105,000 of the bravest and best of our gallant boys were enrolled. They enlisted from every city, town and hamlet throughout the State, and every profession, business and avocation was represented in the grand army of freedom. The struggle into which they were precipitated was the most enormous in all recorded history. They met the major danger, and they wrought the supreme decision; met and wrought with muscles of iron and nerves of steel and hearts of pure gold. They left all, chanced all, in the holiest crusade ever chronicled in the annals of mankind, and they did not furl their flags nor sheathe their swords nor stack their guns until the malignant menace of medieval militarism was utterly eradicated from the earth. And then having rescued the world from the thralldom of tyranny...they modestly discarded the uniform they had rendered immortal and quietly resumed the employments of civil citizenship. I venture the prophecy that in the distracted time to come they will be an impregnable barrier against all the insidious forces of communism, anarchy and bolshevism which may challenge the permanency of our national institutions. How shall we requite their inestimable service? We cannot hope that whatever we may do will even partially liquidate our immeasurable debt to them, but surely it is obligatory upon a grateful people to restore, insofar as humanly possible, every returned veteran to the favorable status he relinquished when he was summoned to the colors.

---

67State of Iowa: 1921-22: Official Register at 487 (29th No.).
68Leland Sage, A History of Iowa 257-58 (1974 [1934]).
70State of Iowa: 1921: Inaugural Address of N. E. Kendall Governor of Iowa to the Thirty-Ninth General Assembly and the People of Iowa 13-14 (Jan. 13, 1921).
The Great Compromise of 1921

It remained to be determined whether this unalloyed civic virtue imputed to the newly nicotine-addicted veterans would outweigh the criminal vice underlying the warden’s finding that 97.3 percent of prisoners committed to the state penitentiary at Fort Madison in 1921 used tobacco.71

On February 15, Smith wrote a “Dear Comrades” letter to the membership assessing the course thus far of the session, at which the ubiquitous John B. Hammond represented the WCTU, with Smith, the vice president, treasurer, and the Legislative Superintendent, Anna Edworthy forming a Legislative Committee in charge of “the whole matter....” With the announcement of the prospective filing of the repeal bill only nine days off, virtually every one of Smith’s predictions would soon be proven mistaken: “The cigarette matter has not been touched. It seems probable now that no effort for repeal will be made in which case our friends in the Legislature think it not wise to open the subject, but if it is opened, we shall hope to be able to meet the situation. You will be interested to know that Gov. Kendall is our warm friend in this matter.”72

Smith’s letter to the members was also important for underscoring that the variety of bills that the WCTU was advocating transcended the scope of rigidly moralistic measures that have often been exclusively associated with the organization. Smith herself exclaimed: “Is not this a wonderful array, showing vital interest in Public Welfare.” The bills that had already been filed included: establishing the age of consent at 18 and protecting boys and girls; preventing blindness by using nitrate of silver solution in newborns; providing for townships and municipalities as registration districts for births and deaths (thus removing Iowa from the list of only five states not included in the federal registration area); creating a board of examiners of patent medicines to curb their misuse; requiring a health certificate before issuance of a marriage license; regulating adoption of children while safeguarding their interests; state censorship of motion pictures;

---

71Fortieth Biennial Report of the Warden of the State Penitentiary Fort Madison, Iowa to the Board of Control of State Institutions for the Period Ending June 30, 1922, tab. 8 at 8 (n.d.). For the year ending June 30, 1921, only 5 of 186 prisoners committed were nonusers; for the following year the figures were 19 of 257. Such high rates were typical over an extended period: in 1904 and 1905 they amounted to 89.6 percent and 94.2 percent, respectively, while in 1933 and 1934 they amounted to 96.9 percent and 94.3 percent, respectively. Warden’s Biennial Report of the State Penitentiary at Fort Madison, Iowa to the Board of Control of State Institutions for the Period Ending June 30, 1905, tab. 9 at 18 (n.d.); Forty-Sixth Biennial Report of the Warden of the State Penitentiary Fort Madison, Iowa to the Board of Control of State Institutions for the Period Ending June 30, 1934, tab. 8 at 7 (n.d.).

72Letter from Ida B. Wise Smith to Comrades (Feb. 15, 1921), in Iowa WCTU papers, in University of Iowa Women’s Archives (Feb. 1, 2007, before papers were cataloged).
establishing a minimum wage for women; and establishing a nine-hour day and 50-hour week for women. Bills that had been drafted but not yet filed included: punishment for those contributing to the delinquency of children; divorce legislation; and providing for accommodation of women on juries (and the defeat of two bills to exclude women from jury service). Every single one of them, Smith noted, had been “given cordial endorsement” by a joint Legislative Committee formed by Orie Klingaman, the first director of the Extension Division at the State University of Iowa.\(^{73}\)

The only bill advocated by the WCTU—and it “exerted every possible influence to put [it] over”\(^{74}\)—that did not clearly fit within the mold of these Progressive interventions\(^{75}\) was one to censor motion pictures. The bill, as amended during House floor debate, created a motion picture board, which “shall license such parts or portions [of motion picture films] as are proper and moral; and shall refuse license to all other, including such as are obscene, indecent, vulgar, sacrilegious, those giving undue prominence to unlawful scenes of acts, and those whose exhibitions would tend to corrupt morals or incite to crime or race hatred.”\(^{76}\) Two-thirds of respondents in a statewide straw vote conducted by the \textit{Register}—styled as a “referendum” that would “indicate to the solons how the people stand in regard to the principles and ideas embodied” in various pending

\(^{73}\)Letter from Ida B. Wise Smith to Comrades (Feb. 15, 1921), in Iowa WCTU papers, in University of Iowa Women’s Archives (read on Feb. 1, 2007, before papers were cataloged).

\(^{74}\)Robert Hughes, “39th Assembly Was Good to Legion,” \textit{DMN}, Apr. 18, 1921 (4:3-4).


\(^{76}\)\textit{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly} 1463 (quote), 1613-16 (Mar. 25 and 29) (H.F. 703). As originally filed, H. F. 703 required the Iowa Board of Censors to disapprove films that “exhibit pictures and stories of criminality, obscenity, cruelty, indecency or immorality and such as would reflect discredit or stigma on any race or nationality of people and such as tend to debate or corrupt and such as show details of criminal action and such as hold up to ridicule, discredit or scorn any law or any officer of the law....” H.F. No. 703, § 4 (Mar. 8, 1921, by Olson et al). A Senate bill that had been filed earlier and on which the Senate took no action specified the crimes the depiction of which would require the Iowa State Board of Censors to disapprove them; these crimes included not only rape, burglary, or robbery, but “[s]exual intercourse of any kind.” S. F. No. 414, § 3 (by Greenell, Feb. 4, 1921).
bills—expressed support for movie censorship. Six years earlier the United States Supreme Court had provided constitutional backing for such state intervention by upholding a similar regime in Ohio. Refusing to assimilate film exhibitions to the freedom of speech, writing, and publication and thus to the ban on prior restraint of speech or the press, and refusing to ignore “the facts of the world” regarding the “prurient interest” that “may be excited” and the “evil” of which film was capable, it held that such legislation was not beyond the government’s power because it was not “a mere wanton interference with personal liberty.” In part the Court reached this conclusion by declaring that “the exhibition of moving pictures is a business pure and simple, originated and conducted for profit, like other spectacles, not to be regarded, not to be intended to be regarded by the Ohio constitution...as a part of the press of the country or as organs of public opinion.” Crucial to its ruling was the opinion that “there are some things which should not have pictorial representation in public places and to all audiences.” Bolstered by this ruling, already at the beginning of the 1921 legislative session censorship bills had been or were about to be introduced in 30 states. The National Association of Motion Picture Producers regarded their backers as well meaning women’s organizations and in part as those who had brought about liquor prohibition “and feel they must continue regulating other people’s morals.”

The Iowa bill, H. F. 703, passed the House by a vote of 61 to 34, but died in the Senate. If voting against the Dodd bill to repeal the universal ban on cigarette sales (which passed by a vote of 62 to 41) is interpreted as based in part on moralistic grounds or on the principle of the rightful exercise of state power to interfere with personal behavior, and support for the Dodd bill as based on libertarian-laissez faire principles, then it might be posited that most legislators who opposed movie censorship would also have opposed banning cigarette sales to adults and thus would have voted for the Dodd bill, whereas most who favored censorship would have supported the cigarette sales ban and thus would have

---

77. “What’s Your Vote on These Bills,” DMR, Mar. 7, 1921 (2:1).
79. Mutual Film Corp. v. Industrial Commission of Ohio, 236 US 230, 242, 244, 245 (1915). The Court did not overrule this case until 1952.
82. State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1865 (1921) (Apr. 8) (H.F. 703 rereferred to sifting committee).
The Great Compromise of 1921

voted against the Dodd bill. To be sure, such a clear-cut voting pattern would not have been possible because overall (on the libertarian-laissez faire side) only 36 percent of representatives voted against censorship, while 60 percent voted against the cigarette ban, whereas (on the moralistic-interventionist side) 64 percent voted for movie censorship, while only 40 percent voted for the cigarette ban. In fact, however, within these aggregate constraints a comparison of the House roll call votes for the losing sides (against censorship and for the ban) on the two bills—which took place on two consecutive days—reveals two consistent libertarian-laissez faire and moralist-interventionist blocs: of the 34 representatives who had voted against censorship on March 29, 30 voted for the Dodd bill permitting sales of cigarettes to adults the next day, while only 2 voted against the Dodd bill (and two were absent or did not vote). Looked at from the converse perspective of the 41 members who voted to retain the ban on cigarettes sales to adults, the previous day only two had voted against movie censorship, while 36 voted for censorship. (More impressively still, of the 35 of these 36 who a week later also voted on the political-economically all-important pro-corporate utility bill, 29—accounting for half of all the votes against it—voted to kill it.) The view from the two winning sides (for censorship and against the cigarette ban) was less conclusive: of the 61 representatives who had voted for censorship, the next day 34 voted against and 23 for the Dodd bill; conversely, of the 62 representatives who voted for the Dodd bill 30 voted against and 23 for movie censorship.83 In other words, those favoring censorship and opposing the ban voted predominantly but not overwhelmingly in accordance with the thesis, giving 60 percent and 57 percent, respectively, of their votes to the hypothesized position on the other bill (namely, favoring the ban and opposing censorship, respectively). Eliminating duplication and members who were absent or did not vote: of the 91 legislators who voted on both bills, two cohesive groups of legislators numbering 30 plus 36 or 66 (72.5 percent) voted consistently with the aforementioned thesis (those who opposed censorship also opposed the ban and those who supported the smoking ban also supported censorship), whereas 2 plus 23 or 25 (27.5 percent) voted inconsistently. Since movie censorship appears to have been driven by much more straightforwardly moralistic considerations than the ban on cigarette sales to adults, it might seem puzzling that some of those who voted for what may have been an almost exclusively moralistic cause did not also vote for the less moralistic campaign—especially since advocates of both causes conceptualized the interventions as curbing adults’ liberties to protect children

The Great Compromise of 1921

Speculatively, the explanation as to why about 20 more representatives voted for censorship than for the cigarette ban might simply be not that the cigarette ban was insufficiently moralistic for them, but rather that they themselves smoked cigarettes (or other forms of tobacco and felt solidarity with adult male cigarette smokers), but did not watch “immoral” movies.

Of particular interest are the WCTU’s two labor bills, which—although “[n]either ‘maxy nor minny’ ever came out of committee” “because the money

84For example, one of the chief sponsors of the original House movie censorship bill and the author of the amendment version adopted by the chamber both pleaded for the bill during floor debate “as a means of preserving the children of Iowa from sensual and immoral movies.” “Amend Measure to Censor Movies,” DMR, Mar. 30, 1921 (2:3). Opponents disagreed, insisting that movies were not foisted on children, who saw them largely with the consent of their parents, who could more easily protect them from movies than from improper books or pictures. “Death Blow for Censorship,” Des Moines Sunday Capital, Apr. 17, 1921 (4A:2) (edit. quoting N.Y. Tribune editorial).

85The focus here is on the hours bill both because the minimum wage bill was withdrawn before it came to a vote and because the Iowa women’s organizations themselves devoted less attention to the bill, which was principally sponsored by former Montana Representative Jeannette Rankin, the first woman elected to the U.S. House of Representatives, who was in Iowa as the representative of the National Consumers League, advancing the argument that someone had to pay the difference by which the actual wage fell short of a living wage and no industry was entitled to pass that responsibility on to others. “Women Plead for Limit on Working Day,” DMR, Feb. 25, 1921 (1:1); “Doings Under the State House Dome,” IH 66(12):679-81, 709 at 680 (Mar. 24, 1921). As in other states, the Iowa bill created a Minimum Wage Commission and tripartite wage boards to set a minimum wage “suitable for a female employee of ordinary ability” in industries in which the wages paid to women were “inadequate to supply them with the necessary cost of living, to maintain them in good health and protect their morals.” H.F. No. 442, §§ 13 and 15 (Feb. 5, 1921, by Mills). A few days after the bill was filed the Legislative Committee of the Retail Merchants’ Bureau of the Des Moines Chamber of Commerce declared itself “unalterably opposed” to it. [Tab Retail Merchants] (Feb. 10, 1921), Minutes [Des Moines] Chamber of Commerce, Part 2—Jan. 1, 1921 to Jan. 1, 1922 [bound volume], in Records of the Greater Des Moines Chamber of Commerce, University of Iowa Library, Special Collections. The bill was withdrawn by the author. State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 953 (Mar.11). The identical companion bill in the Senate was withdrawn the next day. State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 627, 819 (Feb. 24 and Mar. 12) (S.F. No. 614, by Pitt by Request).

86Robert Hughes, “Labor Loses in Legislative Swap,” DMN, Apr. 14, 1921 (1:3-6, at 10:4).
interests could still maintain the most ‘pressure’\textsuperscript{87} and “some 500 prominent Iowa manufacturers visited the State House in a body and demanded that these bills be beaten”\textsuperscript{88}—demonstrated not only in their content and function, but also in the arguments used to support them, that whatever else the WCTU may have been, it was also a critic of some forms of capitalist exploitation. In 1921 Iowa was one of only five states that lacked any law regulating women’s working hours, and in which, consequently, an employer “would break no law if he required his women employees to work the physically impossible schedule of 24 hours a day 7 days a week.”\textsuperscript{89} The absence of such regulation was, allegedly, due to the lack of any need for it in a non-manufacturing state. Yet the total number of industrial wage workers had risen by 61 percent from 46,695 in 1913 to 75,249 in 1919\textsuperscript{90} and a survey covering about 10,000 women and 12,000 men employed in 223 firms (employing both men and women) in 21 cities, conducted by the Women’s Bureau of the U.S. Department of Labor—at the invitation of the state labor commissioner, with the governor’s approval, and endorsed by the League of Women Voters and the Iowa Federation of Women’s Clubs\textsuperscript{91}—a few months before the legislative session, a synopsis of which was sent to interested local women, revealed that 45 percent of women (and 59 percent of men) in Iowa industries were employed at least nine hours a day, while 47 percent of women

\textsuperscript{87}Robert Hughes, “39th Assembly Was Good to Legion,” \textit{DMN}, Apr. 18, 1921 (4:3-4).
\textsuperscript{88}“Iowa Legislature Dominated by Corporations and Money Crowd,” \textit{DMN}, Mar. 28, 1921 (1:1-4 at 4).
\textsuperscript{89}U.S. Women’s Bureau, \textit{Iowa Women in Industry} 19 (Bulletin of the Women’s Bureau No. 19, 1922). The other states were Alabama, Florida, Indiana, and West Virginia (two maps preceding \textit{id.}). See also “Forty-Five Per Cent of Women in Industries of Iowa Work Nine Hours a Day or More,” \textit{DMR}, Jan. 18, 1921 (4:6-7); “Doings Under the State House Dome,” \textit{IH} 66(9):523 (Mar. 3, 1921); “Doings Under the State House Dome,” \textit{IH}, 66(12):679-81, 709, at 680 (Mar. 24, 1921); “Hours and Working Conditions of Women in Industry in Iowa,” \textit{Monthly Labor Review} 14(3):133-36 at 133 (Mar. 1922) (sources differing as to whether it was five or six states). Iowa was also one of 35 states without limits on night work and one of 34 states lacking a minimum wage. U.S. Women’s Bureau, \textit{Iowa Women in Industry} 8 (Bulletin of the Women’s Bureau No. 19, 1922) (erroneously stating that Iowa was one of six states without hours regulation). It remains a desideratum of labor, legal, and social history to shed light on the reasons that Iowa never enacted a women’s hours law, has failed to enact an overtime pay law to the present, and did not enact a minimum wage law until 1989.
\textsuperscript{90}U.S. Women’s Bureau, \textit{Iowa Women in Industry} 9 (Bulletin of the Women’s Bureau No. 19, 1922).
\textsuperscript{91}U.S. Women’s Bureau, \textit{Iowa Women in Industry} 5 (Bulletin of the Women’s Bureau No. 19, 1922).
(and 66 percent of men) worked more than 50 hours per week. Significantly, it was the groups that had unsuccessfully advocated bills regulating women’s working hours during the three previous legislative sessions that had requested the assistance of the Women’s Bureau in collecting more recent data so that they might present arguments based on actual conditions.

Senate File No. 474 prohibited employers from requiring, permitting, or suffering females to work more than nine hours a day or 50 hours a week in any mechanical or mercantile establishment, factory, laundry, hotel, restaurant, telephone or telegraph business, transportation business, common carrier, or public utility, but excluded women in “executive positions” as well as in perishable fruit or vegetable canning establishments during the harvesting season. Employers convicted of violations—and each day that a female was employed in violation of the law counted as a separate offense—were subject to fines ranging between $25 and $100 and/or imprisonment up to 30 days. According to the aforementioned Register straw vote—which, before the results were announced, the women’s organizations supporting the bill praised as “a splendid way of testing public opinion”—in a “sweeping victory” 64 percent of respondents

---


93 The Senate in the 1915 and 1917 and the House in the 1919 legislative session had passed a bill capping women’s working hours at 54 per week and 12 per day (with many exceptions), but each died in the other chamber. Journal of the Senate of the Thirty-Sixth General Assembly of the State of Iowa 1882-83 (Apr. 16) (S.F. 133 passed 29 to 6) (1915); Journal of the Senate of the Thirty-Seventh General Assembly of the State of Iowa 1225 (Mar. 27) (S.F. 164 passed 28 to 19) (1917); Journal of the House of the Thirty-Seventh General Assembly of the State of Iowa 2190-91 (Apr. 14) (1917); State of Iowa: 1919: Journal of the House of the Thirty-Eighth General Assembly 2055, 2253 (Apr. 15 and 19) (H.F. 437 passed 63 to 28); State of Iowa: 1919: Journal of the Senate of the Thirty-Eighth General Assembly 2243 (Apr. 19).

94 U.S. Women’s Bureau, Iowa Women in Industry 7 (Bulletin of the Women’s Bureau No. 19, 1922).

95 S.F. No. 474, §§ 1, 5, and 6 (Feb. 10, 1921, by Parker). H.F. No. 481 (Feb. 10, 1921, by Weaver) was the identical companion bill. On the capacious scope of coverage afforded by the “suffer or permit to work” standard, see Bruce Goldstein, Marc Linder, Laurence Norton, and Catherine Ruckelshaus, “Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment,” 46 UCLA Law Review 983-1163 (1999).

96 City Club Women Commend Register’s Poll on Hour Law,” DMR, Mar. 8, 1921 (1:1).
The Great Compromise of 1921

favored the absolute cap on women’s working hours.97

In light of the “[b]itter opposition” by many employers, the Des Moines Register declared that the hours bill would show whether legislators “are reactionary or progressive in matters of social legislation....” To the all-purpose employer claim that enactment of a limit on women’s hours would make it impossible for Iowa industries to compete with those of other states supporters replied that every adjoining state already had such a law, some of them even “more drastic” than the proposed measure.98 On February 24 the House and Senate labor committees held a joint public hearing on the bills in the House chamber itself, which—so great was the interest in the issue—was still not large enough to enable all who attended to find a seat.99 Unsurprisingly, Ida B. Wise Smith and other women representing the League of Women Voters, the Federation of Women’s Clubs, Daughters of the American Revolution, and other groups clashed with manufacturers, who claimed in the alternative that the law was unnecessary or that it would be burdensome to businesses, driving out the few manufacturers in Iowa; hotel owners trivialized the proposal by asserting that although women might be on duty long hours, “the did not actually work.” Perhaps the most striking counterargument hurled back by employers at the hours bill’s proponents was that it excluded domestic workers because coverage would affect the clubwomen themselves.100 In the sarcastic words of pharmaceuticals manufacturer G. D. Ellyson, the drug and chemical industries representative, who was the bills’ most forceful opponent:101 “‘There are hundreds and thousands of maids who are taking care of children until 10 o’clock at night while their mistresses are playing bridge.’” In rebuttal the women stated that they would be “perfectly willing” to cover domestic workers, whom very few clubwomen employed anyway. After stressing that women (in the wake of enfranchisement)

---

97“Industrial Court Upheld in Register Legislative Canvass,” DMR, Mar. 10, 1921 (1:1-2) (211 to 119).
98“Girls’ 9-Hour Day Measure Faces Fight,” DMR, Jan. 31, 1921 (1:1, 2:5).
100“Women Plead for Limit on Working Day,” DMR, Feb. 25, 1921 (1:1, 2:5). The WCTU does not appear to have adopted the maternalistic attitude toward women factory workers regarding hours of work articulated by the first vice president of the City Federation of Women’s Clubs, Mrs. Fred Hunter, who declared that the factory woman was not always capable of judging what was best for her. “Women Voters in Clash over Nine-Hour Law,” DMR, Mar. 6, 1921 (sect. 2, 1:8). According to the 1920 Census of Population Hunter’s husband was a coal mine manager.
were finally addressing their representatives in their capacity as citizens\textsuperscript{102} and bluntly reminding the legislators that if most of the women in Iowa had not voted for most of them, they would not have been elected, Smith, the advocates’ opening speaker, stated that “no nation could be strong when it had a ‘subjected class,’ especially when that class was the mothers of the race.”\textsuperscript{103} Bracketing class and deploying the then more conventionally gendered formulation, she appealed to the legislators “not half so much for the working women of today, even though many of them are working ten and eleven hours a day, as for their children, who are having to do without their mother’s care. Even more I plead for the children of the future, for fatigue affects the potential motherhood of the future.”\textsuperscript{104} 

One speaker introduced a dimension that, by blurring the categorical class lines drawn by the bill, sought to subvert the need for state intervention altogether. Carrie Bell, secretary of the Women’s Affairs Department of the Des Moines Chamber of Commerce’s, argued that a majority of business women in Iowa opposed the bill\textsuperscript{105} because “working women want to do as they please, just as men make their own rules...”\textsuperscript{106} (One of the rules that men made entailed that Bell was the only member at Chamber of Commerce staff meetings “that does not smoke.”)\textsuperscript{107} When the Women’s Affairs Department was formed in May 1920, arising out of a group of business and professional women who wanted to “[i]nculcate right principles in the thoughts and practices of womankind,”\textsuperscript{108} it was the first group of organized businesswomen in the United States to become actively affiliated with a men’s commercial organization and the first women’s department in any chamber of commerce.\textsuperscript{109} The Women’s Affairs
The Great Compromise of 1921

Department—whose membership was “limited to professional and business women holding executive positions”\(^{110}\) and hence by definition was excluded from the coverage of the maximum hours bill—perceived its role in large part as instilling in women who performed manual labor for wages in factories, laundries, hotels, and stores attitudinal and behavioral norms that would promote capital accumulation. Thus, business and professional women (together with leisureed women who were either of means or married to a man who supported them and women who worked at home without specific remuneration) “could not exist without” women wage workers, whom they had to help “obtain justice and also to realize that for value received must service be given.” Similarly, “[f]rom the viewpoint of the business woman...before the women who labor for wages can be recognized as a valuable service to the community” they had to be subjected to the same capitalist discipline as male wage workers: if a man was docked for lateness and fired for being “unfaithful to his duties,” his female counterpart both had to understand what her responsibilities were and to suffer the same punishment. What women workers needed was not “favors”—though “some sympathy” was needed—but “a chance to do an honest piece of work for honest remuneration” albeit “under desirable and sanitary conditions”\(^{111}\) (which apparently may discriminatorily not have been provided to men).

For all its bravado in rejecting “restrictive” wage and hour legislation as hampering industry at a time when it was in no shape to be subject to such measures and in proclaiming that it knew what was best for women, the Chamber of Commerce objectively confirmed Smith’s boast to the legislature about women’s electoral power. The day after the joint Labor Committee hearing, officials of the Chamber as well as of its Manufacturers Bureau charged that the bills would have been sidetracked as soon as they were filed but for legislators’ fear that such action would have endangered their chances of reelection or ascent to higher office by “the combined vote of the women.”\(^{112}\)

The growing size of the fissure within the women’s movement became clearer a week later at a meeting of the League of Women Voters when Lela Gray, a

---

\(^{110}\)“The Department of Women’s Affairs of the Chamber of Commerce Des Moines, Iowa: Organization and Purposes” n.p. [1] (1920), in Records of the Greater Des Moines Chamber of Commerce, Box 14: Women’s Bureau, Folder: Misc. 1920, University of Iowa Library, Special Collections.

\(^{111}\)Miss Bell, “Woman’s Place in the Community” at 2-4 (typescript, n.d. [1920]), in Records of the Greater Des Moines Chamber of Commerce, Box 14: Women’s Bureau, Folder: Misc. 1920, University of Iowa Library, Special Collections.

cashier and manager at the Equitable Life Insurance Company of Iowa, purporting to represent business women, revealed the managerial-careerist and non-working-class orientation of her program: “Just as soon as you make these laws you are hampering women.... No man gets a position of importance without spending hours working overtime and women cannot expect to do differently.” Gray implausibly added that in her search of factories and other industries she had been unable to find women working long hours.¹¹³ (The 45-year-old widowed Gray, who lived with her mother Mary Eva Vanbuskirk together with her sister Lillian Vanbuskirk and her daughter Gladys, both of whom were also insurance company clerks,¹¹⁴ had been the leader with her sister and other women of “a group of militant public spirited business women” who during World War I organized a committee to avoid a transportation stoppage when “Des Moines was threatened by a street railway strike....” From this group arose the Des Moines Business and Professional Women’s Club.)¹¹⁵ In reply to Gray’s claims Blanche Robbins, a clerk in the House of Representatives, stated that it was a business policy of employers to prohibit “‘working girls’” from expressing their views on issues brought before the government: “‘In certain business houses every girl in the employ of the firm has been pledged to write personal letters [to the legislature] voicing the opposition’” to the hours bill.¹¹⁶

A second joint Labor Committee hearing was held on March 8, which was subject to sharply differing contemporaneous accounts, depending on the authors’ political sympathies. According to the syndicated column of former state legislator G. Caswell, the “Club women of the state met the surprise of their lives when they rushed to the aid of the ‘poor working class of women’ to demand that their hours be reduced.... To refute the arguments of the club women the working class of women demanded a hearing for themselves and furnished a surprise that shook the rafters of the state house.” Declaring that they were competent to take care of their own interests, these (allegedly) working class women “suggested that the club women might find a place to work off their pent up energies in coming to the relief of their house maids and kitchen girls....” Insisting that they were now equal to men, they stated that hours too long for women were too long for men too. Revealingly, one of these women admitted that after 30 years of rattling

¹¹³“Women Voters in Clash over Nine-Hour Law,” DMR, Mar. 6, 1921 (sect. 2, 1:8).
¹¹⁴Fourteenth Census of Population 1920 (HeritageQuest). They also all lived together in 1910, Lela Gray being a clerk for an insurance company and Lillian Vanbuskirk a stenographer.
¹¹⁶“Women Voters in Clash over Nine-Hour Law,” DMR, Mar. 6, 1921 (sect. 2, 1:8).
typewriter keys she had become an executive “because she had been ready to work extra hours when such were necessary and had been interested in the prosperity of the business.” Much more plausibly Caswell reported that opposition to the hours bill had largely stemmed from the Business and Professional Women’s League, which had quietly been engaged in reforming women’s working conditions through “harmonious deliberations with employers.”

In contrast, the Iowa Homestead’s legislative column related that, led by two department managers at Equitable, Gray and Luella Clark (who was also chairman of the Women’s Affairs Department of the Chamber of Commerce), and Louise Retz, private secretary to the president of the Iowa National Bank in Des Moines, 150 stenographers and office employees appeared. Interestingly, the author noted that lawyers in the legislature had determined that banking and insurance companies did not fall under the bill’s “mercantile establishments” and therefore such office employees would not be covered; indeed, supporters of the bill were unable to find any of these women who would have been covered. Gray and Clark had appeared before the committee earlier as representing “laboring women, but when pinned down by Senator Price...admitted that they did not represent the factory workers, mercantile clerks or any other class coming under the provisions of the measure.” Moreover, as Price pointed out using somewhat different numbers, whereas three of the 5 executive women spoke at the hearing, not a single one of the 125 “working girls” did. Of these industrial workers whom these women did not represent the aforementioned survey revealed that a 50-hour week would reduce the hours of 50 percent.

In yet another version, the Register’s, more than 200 women and girls appeared in opposition to the bills. The three aforementioned managerial and confidential employees stated that the proposed laws were detrimental to their interests because “they had a right to be on an equal footing with men.” In reply to a question, the women testified that only six of the 200 held executive positions (and would therefore be excluded from the maximum hours law). An apparently

---

118 Fourteenth Census of Population (1920) (HeritageQuest) (26 year-old insurance company department manager); Department of Women’s Affairs, Bulletin No. 10 (Feb. 1, 1921), in Records of the Greater Des Moines Chamber of Commerce, Box 14: Women’s Bureau, Folder: 1920-2 Bulletins, University of Iowa Library, Special Collections.
suspicious legislator wondered whether their employers had put these women up to testifying, prompting denials along with this ambiguous gloss: “‘We have found that our employer is our best friend...but we want it distinctly understood that it was through his efforts or advice that we are here....’”¹²²

On March 18 the Senate killed the maximum hours bill by voting 36 to 13 to adopt the Labor Committee’s report that it be indefinitely postponed.¹²³ Senatorial opponents argued that this particular measure would in fact inhibit the advancement of “working girls,” who, moreover, did not want the bill, which only club women sponsored.¹²⁴ Their rejection of the proposal was presumably based either on their horror of the “‘curse to business and to the labor girls of Iowa’” that Labor Committee chairman Senator Milton Pitt pronounced the nine-hour bill to be or on their refusal to acquiesce in the legislature’s deprivation, in Senator J. L. Brookhart’s words, of “‘their fundamental rights of contract in the matter of how they may wish to labor.’”¹²⁵ The anti-corporate Des Moines News offered a more straightforward explanation of the labor bills’ defeat: although the state labor leaders were interested in their passage, employers—hundreds of whom “‘invaded the State House en masse and wept salty tears for their ultimate fate if

¹²² “Women Rap Wage and Hour Measure,” DMR, Mar. 9, 1921 (2:3). On the exclusion of “executive” employees from hours laws, see Marc Linder, “Time and a Half’s the American Way”: A History of the Exclusion of White-Collar Workers from Overtime Regulation, 1868-2004 (2004). The debate in Iowa was eerily similar to one that had taken place in 1917 in the Oregon legislature, where 28 “business women...holding responsible positions” vigorously protested against being covered by a 48-hour law on the narrow grounds that “‘[o]ffice work cannot be done by the clock.’” More broadly, however, these bookkeepers, stenographers, and cashiers, while admitting that the bill “‘would probably not adversely affect inferior positions which carry little responsibility,’” believed it “‘unjust to legislate privileges to the less capable girls who are usually employed only temporarily, to the detriment of the business woman who prefers to be on a basis of equal compensation for equal service.’” In attacking this measure as “‘class legislation,’” they left no doubt as to which class they were aligned with: “‘It is not the tendency of employers in general to be unjust or unfair in hours of employment or quantity of work expected.’” “Women Fight Bill,” MO, Jan. 25, 1917 (6:2). As enacted, the 10-hour-day/60-hour-week bill did not exclude office workers. 1917 Oregon Laws ch. 163, at 208.


those two bills should become law”—cagily kept the former so preoccupied with defeating an industrial court bill to which employers were “secretly” as opposed as unions that their attention was diverted from the women’s hours and wages measures. The day after the vote the Manufacturers Bureau of the Des Moines Chamber of Commerce stressed the contribution of its own Legislative Committee and of business women in defeating both hours and wage bills.

If the Senate vote on the hours bill is compared with the April 6 vote of 27 to 22 passing the Dodd bill to repeal the ban on cigarette sales to adults, no strong correlation between the WCTU’s positions on the bills is discernible. Of the 13 senators who voted to keep the hours bill alive five voted to retain the cigarette ban; conversely, of the 36 who voted to kill the hours bill 19 later voted to end the sales ban. Since a laissez-faire orientation might explain why some senators voted against the WCTU’s interventionist stance on both bills, it could be speculated that so many more supported the WCTU’s stance on cigarettes than on women’s working hours because they joined the “business interests,” as Democrat B. J. Horchem formulated it on the Senate floor, in fighting the bill because “they were afraid labor might some day get the upper hand and they wanted to keep labor down”—a position not implicated by the cigarette dispute.

Although with the defeat of the maximum hours bill Iowa remained, as one of the leaders of the women’s clubs put it, “an open field for industry to come in and exploit Iowa women workers without restriction,” the WCTU’s advocacy of the maximum hours bill did not end at the close of the legislative session.

---


128 *State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly* 1738 (Apr. 6).


131 Business and professional women successfully continued to oppose wage and hour laws. For example, when the League of Women Voters the following year proposed such legislation, some women in the IBPWC opposed it on the grounds that it deprived women of freedom of contract and, being based on alleged physical disabilities that science had refuted, put them in the same class as children. Iowa Business and Professional Women’s Clubs, Box 1: Minutes of Annual Meetings and Executive Committee 1920-1936, at 26
The Great Compromise of 1921

Several weeks later, at the second annual convention of the Iowa Federation of Business and Professional Women’s clubs Gray and Bell, both of the Women’s Affairs Department of the Chamber of Commerce, were permitted to participate in the debate over special women’s legislation even though the Chamber was not affiliated with the Federation. Denying Gray’s boast that the business women of Des Moines had defeated the nine-hour bill, Ida B. Wise Smith stated that “lobbyists for Iowa industries had come to Des Moines with the express purpose of defeating it. She said it was a fight between dollars and souls, and that the women had their choice between unionization or legalization of hours.”

Enter Representative Horace Husted Dodd—Obscure Electric Utility Capitalist and Cigarette Sales Prohibition Repeal Bill Requestee

The process of legislation is influenced by so many different factors that the history of a single bill, if given in detail, might fill many volumes.

As early as February 24 the Iowa press learned that when the legislature returned from a 10-day recess on March 7 (the day before the deadline for individual legislators to file bills) one of the first bills to be filed would be a repeal of Iowa’s anti-cigarette law. Being prepared by Representative Horace H. Dodd of Howard county and based on the alleged virtual impossibility of the prohibition of cigarette sales (“the present law is openly, flagrantly violated...and prosecution is a joke”), the bill would empower the secretary of state to license...
The Great Compromise of 1921

the sale of cigarettes, thus generating “considerable revenue” for the state.”138 In fact, the novelty of Dodd’s bill, which otherwise incorporated elements of the failed repeal bills of 1917 and 1919, was the inclusion of a consumer tax on cigarettes. It was this feature (“a special tax on smokes”) that properly underlay the characterization of the bill by Robert Hughes, the syndicated state legislative reporter of the Des Moines News, when it was filed on March 7, as “[t]he most startling” among the 55 filed that day,139 though it was left to the Waterloo Evening Courier to highlight this innovation in the headline, “Tax for Cigaret Sales Proposed in Bill by Dodd.”140 Since legislators even before the 39th General Assembly convened had been considering means for raising new sources of revenue beyond direct taxation,141 the inclusion of a cigarette tax in Dodd’s bill was virtually certain to secure some votes for it. To be sure, Hughes and the News later viewed the tax as part and parcel of the legislature’s beholdenness to corporations, which “got away scot free with increased privileges,” while “the people” were burdened with increased taxes.142 Press interest in Dodd’s bill during the recess peaked on March 3, when several newspapers carried the same article asserting that Dodd’s repeal bill was motivated by the view that the prohibitory law was “more or less a dead letter” as well as by many legislators’ feeling that cigarette sales “should net the state substantial revenue.”143

The first revelatory background information about Dodd’s bill appeared in the Sunday edition of the Register announcing its filing the next day:

Although considerable opposition to the bill will undoubtedly be raised, it is believed that it has good chances of passage as at the present time cigarettes are being openly sold everywhere and the sentiment against enforcement of the present law forbidding their sale is overwhelming.

The measure has been rewritten half a dozen times in order to meet the objections of

Dodd).


139Robert Hughes, “May Legalize Cigaret Sale,” DMN, Mar. 7, 1921 (1:5). See also “To Legalize Cigaret Sales,” WT-T, Mar. 8, 1921 (3:1).

140“Tax for Cigaret Sales in Bill by Dodd,” WEC, Mar. 7, 1921 (2:7).

141“Labor to Turn Biggest Guns on Kime Bill,” DMR, Jan. 6, 1921 (1:1).

142Robert Hughes, “Voters Must Be on Guard Against Repetition of Legislative ‘Steal,’” DMN, Apr. 20, 1921 (4:4-5).

143“Under the Golden Dome,” Sun-Herald (Lime Springs), Mar. 3, 1921 (2:3). The article erroneously stated that Dodd represented Delaware county.
different organizations, and its backers feel that in its present form it prevents the sale of cigarettes to minors as well as any legislation could.\textsuperscript{144}

Although the press self-regardingly made sure to declare that the existing law’s ban on newspapers’ publishing cigarette advertisements was “abolished by the terms of the bill,”\textsuperscript{145} the article failed to identify its source, the objecting organizations, their objections, or the text of the original draft. Since the further course of the struggle over the measure nowhere suggested that the prohibitionist forces had ever been either privy to the drafting process or invited to participate in the composition of a consensus bill, presumably the negotiating parties included the cigarette companies, wholesalers and retailers, and elements interested in state and local government revenue from introduction of an excise tax and imposition of a license fee. Another possible participant was the American Legion\textsuperscript{146} as representative of the largest cohesive body of frustrated consumers. To be sure, why they or anyone else, for that matter, should have been willing to allocate scarce political capital to resolving a non-problem—after all, cigarettes were allegedly being sold openly everywhere—contemporaries never explained beyond asserting the desideratum of a law that would “not make criminals of all the Legion men and other users who are going to have them even if they have to ship them in from other states.”\textsuperscript{147} Remarkably, even the WCTU apparently never disclosed the bill’s authors other than the American Tobacco Company.\textsuperscript{148}

When introduced House File 678 was referred to the House Police Regulations Committee,\textsuperscript{149} chaired by Frank Elliott, a chiropractor.\textsuperscript{150} The selection of this particular committee by Speaker Arch McFarlane, a commercial

\begin{footnotesize}
\footnote{\textsuperscript{144} “File Cigaret Bill Authorizing Sale,” \textit{DMR}, Mar. 6, 1921 (sect. 2, 4:3).}
\footnote{\textsuperscript{145} “Legalize Sale of Cigarettes,” \textit{CCP}, Mar. 7, 1921 (6:5).}
\footnote{\textsuperscript{146} The press argued that the revenue from the cigarette tax would suffice to pay the interest on the proposed $22 million soldier bonus bonds, while the American Legionaires, who got their cigarettes from home when they were in France, “would enjoy paying for them here....” “Business Now Rushing Iowa Legislators,” \textit{ADT}, Mar. 22, 1921 (1:2, at 8:1).}
\footnote{\textsuperscript{147} G[rant]. Caswell, “Legislative News Letter,” \textit{HCT}, Mar. 16, 1921 (1:1).}
\footnote{\textsuperscript{148} See below this ch.}
\footnote{\textsuperscript{149} \textit{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly} 792 (Mar. 7).}
\footnote{\textsuperscript{150} \textit{State of Iowa: 1921-22: Official Register} at 338 (29th No.).}
\end{footnotesize}
traveler\textsuperscript{151} who as Speaker in 1919 had voted with the pro-tobacco forces\textsuperscript{152} (and would again in 1921), was, in terms of the bill’s substance, hardly a foregone conclusion: after all, the House at the time had some 63 committees,\textsuperscript{153} and the companion bill in the Senate was referred the next day to the Public Health Committee.\textsuperscript{154} It is unknown whether Dodd, who after the session wrote hypothetically about how, if he were about to file a bill and were friends with the Speaker, he might persuade the latter to refer it to a favorable committee,\textsuperscript{155} was a friend of McFarlane; nor is it clear that the Speaker did him a favor by referring the bill to Police Regulations rather than to Public Health, whose members ultimately voted 15 to 2 for final passage of H.F. 678 compared with 6 to 3 among the former’s.\textsuperscript{156} The very day that Dodd introduced the bill the 830-member WCTU of Black Hawk county urged Governor Kendall to oppose repeal of the cigarette law.\textsuperscript{157}

Horace Husted Dodd (1888-1948), the co-owner and manager of Consumers Electric Company, an electric central station in rural Howard county on the Minnesota border, was a 32-year old first-term Republican. Born in 1888—of, as he phrased it in a job resume two years before his death, “American parents of English descent”\textsuperscript{158}—the year in which his father, Arthur Louis Dodd (1857-1941),\textsuperscript{159} was appointed agent for the Iowa Central Railroad in Charles City\textsuperscript{160} (in

\textsuperscript{151}{State of Iowa: 1921-22: Official Register at 297 (29th No.).}
\textsuperscript{152}{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 2261-62 (Apr. 19).}
\textsuperscript{153}{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 175-86 (Mar. 18).}
\textsuperscript{154}{State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 714 (Mar. 8).}
\textsuperscript{155}{H. H. Dodd, “Working of the Legislative Mill,” HCT, May 4, 1921 (1:5-6) (reprinted from The Elma New Era).}
\textsuperscript{156}{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 183, 1659-60 (Jan. 18 and Mar. 30).}
\textsuperscript{157}{Flora Carter to G. [sic] Kendall, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).}
\textsuperscript{158}{Horace H. Dodd [untitled c.v.] (Apr. 3, 1946) (copy furnished by Lyn Dodd, Horace Dodd’s daughter-in-law).}
\textsuperscript{159}{Allison Dodd, Genealogy and History of the Daniel Dod Dod Family in America, 1646-1940, at 312 (1940). This genealogy incorrectly states that Horace Dodd for a long time was treasurer of Hillsdale county, Minnesota and was living in Minneapolis in 1938. Id. at 360.}
\textsuperscript{160}{“Mrs. Dodd Dies at Charles City,” Mason City Globe-Gazette, Apr. 26, 1933}
The Great Compromise of 1921

neighboring Floyd County), where Dodd was graduated from high school\footnote{State of Iowa: 1921-22: Official Register at 296, 299, 337 (29th No.).} near the top of his class,\footnote{Horace H. Dodd [untitled c.v.] (Apr. 3, 1946) (copy furnished by Lyn Dodd).} and his father was still a railroad labor agent at the 1900 census.\footnote{Twelfth Census of the United States: Schedule No. 1—Population (1900) (HeritageQuest).} Directly after finishing high school, Horace Dodd went to “Indian country”\footnote{Arthur Dodd worked for the Illinois Central for 22 years, the last 13 as station agent at Charles City. He must, therefore, have begun in 1879 and stopped in 1901.} in eastern Oklahoma, where he worked from January 1906 to December 1908 as assistant cashier of the First National Bank in Talihina (which had just been incorporated), his job duties including bookkeeping and being a teller, “looking after live stock and other collateral,” and making small loans.\footnote{In 1908 he attended a social gathering for all the young men and women of Charles City who had ever been enrolled at Grinnell College whether they were at the time students or not or graduates. “Grinnell Students Entertained,” Nashua Reporter, Mar. 26, 1908 (1:2).}  

After this three-year adventure he “resigned to take better job at home.”\footnote{Telephone interview with Philip Dodd, Silverton, CO (Sept. 23, 2007).} Reality appears to have deviated somewhat from this account: in 1907 he in fact entered Iowa College in Grinnell (renamed Grinnell College the next year), only to leave before completing a single course.\footnote{Horace H. Dodd [untitled c.v.] (Apr. 3, 1946) (copy furnished by Lyn Dodd).} However, he never regretted having dropped out of Grinnell to go work for his father, according to his son, because he was an “American businessman.”\footnote{In 1908 he attended a social gathering for all the young men and women of Charles City who had ever been enrolled at Grinnell College whether they were at the time students or not or graduates. “Grinnell Students Entertained,” Nashua Reporter, Mar. 26, 1908 (1:2).}  

In 1906, Arthur Dodd bought into an existing electric light plant and the Charles City Lighting and Heating Company, combined them, and instituted day service.\footnote{Telephone interview with Philip Dodd, Silverton, CO (Sept. 23, 2007).} Two years later, the county directory listed Arthur Dodd as secretary
and manager of the company, which employed Horace Dodd, who lived with his parents, as a bookkeeper. According to his resume, Horace Dodd was the assistant manager of the Cedar Valley Power Company (a name that did not exist until 1914) from January 1909 to June 1915, engaged in purchasing, power and merchandise sales, supervision of accounting and collections, and directing the work of line maintenance of construction crews. Arthur Dodd was still manager of the light company at the time of the 1910 census. Horace Dodd was returned as still living with his parents at the 1910 census, when he was a surveyor for an interurban railway. During the years before 1914 under Arthur Dodd’s management, the Charles City Lighting and Heating Company’s customer base underwent “phenomenal growth,” with practically all of Charles City’s power lines being rebuilt. In June 1914, Arthur Dodd and the other officers of Charles City Lighting and Heating changed the company’s name to Cedar Valley Power Company and bought plants or obtained franchises to supply electricity in ten towns in north central Iowa. At one million dollars it was Charles City’s second most heavily capitalized corporation. On July 2, 1914, Cedar Valley Power Company was incorporated; among the new company’s five directors were Arthur Dodd (who was also secretary and treasurer) and the future state legislator, 25-year-old H. H. Dodd. The state Executive Council having authorized the

Secretary of the company. Amendment to Articles of Incorporation of Charles City Lighting and Heating Company (July 9, 1913) (copy furnished by Floyd County Recorder).

169 The First Floyd County Directory of Floyd County, Iowa 47 (1908).
175 “New $1,000,000 Corporation for Charles City,” FCA-H, June 2, 1914 (1:1-2).
176 Articles of Incorporation of Cedar Valley Power Company (July 2, 1914) (copy furnished by Floyd County Recorder); “Corporation Files Papers,” Floyd County Advocate-Herald, July 3, 1914 (1:2). It seems very unlikely that the two Dodds could have mobilized any amount remotely approaching one million dollars. Of the other three directors, one, Harry Caughlan of Waterloo, was a commercial salesman of an electric company; George May of Charles City, who was also president, was a bank president; and M. A. Harrison of Hampton, IA (vice president of Cedar Valley), did not appear in the 1920 census. May had been president of Charles City Lighting and Heating Company from the time of its incorporation in 1902, when it was capitalized at $75,000; in 1913 the corporation’s capital stock was raised to $250,000. Articles of Incorporation of Charles City Lighting and Heating Company (June 12, 1902); Amendment to Articles of Incorporation of Charles City Lighting and Heating Company (July 9, 1913) (copy
consolidation of water power interests in northeastern Iowa, the Cedar Valley Power bought up power companies in other Iowa towns for a total of $419,000, assumed a bonded debt of $102,000,\textsuperscript{177} and began regional power distribution, supplying several towns more cheaply with power from main stations instead of having to maintain numerous small ones\textsuperscript{178}—all under the general management of Arthur Dodd.\textsuperscript{179} At the end of March 1915, rumors surfaced that Citizens Gas & Electric Company of Waterloo would take over the Charles City electric plant,\textsuperscript{180} but Arthur Dodd, who by this time was the president and principal owner of Central Valley Power, denied it.\textsuperscript{181} However, a few days later he confirmed the deal.\textsuperscript{182} The American Gas Company of Philadelphia (which owned Citizens Gas & Electric) bought the Cedar Valley Power Company, including Dodd’s holdings.\textsuperscript{183} Although no change was initially contemplated in the operation or control of the plants, Arthur Dodd agreed for the time being to perform the same services; nevertheless, it was probable, the buyer announced, that as the details of the consolidation were worked out, Dodd would devote his attention to “other interests of a private nature.”\textsuperscript{184} The 1920 census returned him as manager of a milling company.\textsuperscript{185} Arthur Dodd, according to a letter that Horace Dodd wrote

\textsuperscript{177}“Water Merger Is Authorized,” \textit{DMN}, July 10, 1914 (1:2).

\textsuperscript{178}“New $1,000,000 Corporation for Charles City,” \textit{FCA-H}, June 2, 1914 (1:1-2).

\textsuperscript{179}Past Harvests: A History of Floyd County to 1996, at 34 (Cameron Hanson and Heather Hull eds. 1996); “Arthur L. Dodd Dies After a Heart Attack,” \textit{CCP}, June 2, 1941 (8:1).

\textsuperscript{180}“Electric Plant May Be Erected in Short Time,” \textit{WEC}, Mar. 27, 1915 (1:2).


\textsuperscript{183}“Five Power Plants Change,” \textit{Le Grand Reporter}, Apr. 9, 1915 (14:1). The company’s name was apparently changed to Cedar Valley Electric Company and incorporated in Delaware. “Court House Notes,” \textit{Iowa Recorder} (Greene), May 12, 1915 (6:2); \textit{Moody’s Analyses of Investments, Part II: Public Utilities and Industrials} 134 (1916); \textit{Moody’s Analyses of Investments and Securities Rating Books: Public Utility Securities} 12 (1924). However, \textit{Annual Report to the Stockholders of the American Gas Company} 5-6 (1916), states that the name of the company that American Gas Co. had bought in 1915 was Cedar Valley Electric Co.


to the local Charles City newspaper in 1941 to inform that city’s residents of his father’s death, had built up the lighting company “from a community liability to one of the town’s real assets.”186 At the time of the 1915 Iowa census, Horace Dodd was still living with his parents, the entire family being self-reported as Christian Scientists; he was returned as a clerk who had earned $960 in 1914187—at his father’s electric company188—and had not attended college.189 He resigned when his father sold the property to a “holding company.”190 Almost 30 years old at the time of U.S. participation in World War I, he never performed military service.191

By the middle of the decade, Arthur Dodd, who by this time had become rather prosperous, was personally acquainted with Thomas Edison, and, according to Horace Dodd’s son, Philip Horace Dodd, became and remained a big fish in the little Charles City pond —being appointed, in addition, on July 15, 1918, mayor of Charles City to serve out the unexpired term of the mayor who resigned.193 He also sent his son Horace out to scout for municipal electric plants to buy up.194 Horace Dodd’s resume stated that between October 1915 and December 1921 he bought three small utility properties and operated them, supervising all activities including construction, maintenance, sales, accounting, collections, and purchasing of all equipment and supplies, in addition to securing the new utility franchises in all the towns.195 Thus, on June 6, 1916, the Elma city council voted to submit to the voters the question of whether the city should sell its electric light plant to Dodd, who already owned the electric light plant in Riceville and franchises in the same town and McIntire in neighboring Mitchell county, and

---

186“Arthur L. Dodd Dies After a Heart Attack,” CCP, June 2, 1941 (8:1).
188Grinnell College Alumni and Address Book 158 (1914).
189Iowa State Census 1915, Floyd County, Charles City, Ward 3, Card No. B236.
191State of Iowa: 1921-22: Official Register at 299 (29th No.).
192Telephone interview with Philip Dodd, Silverton, CO (Sept. 23, 2007). Philip Dodd’s recollection that his grandfather had also built the dam to generate the power for the power company appears to be incorrect. Past Harvests: A History of Floyd County to 1996, at 34 (Cameron Hanson and Heather Hull eds. 1996).
193“Arthur L. Dodd Dies After a Heart Attack,” CCP, June 2, 1941 (8:1). Dodd served until April 7, 1919.
194Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
The Great Compromise of 1921

intended to furnish electric current to other towns. By “investing considerably more capital” in order to connect these towns, Dodd could sell much more electricity with “very little more overhead [e]xpense.” Two weeks after the special election on July 10, at which the proposition to sell the plant passed by a vote of 160 to 40, Dodd, acting as secretary, treasurer, and manager, and his father, as president, incorporated the Consumers Electric Company in Elma, Howard county, with a capital stock of $100,000. That year the city of Elma sold the electric light plant to Dodd for $15,000 for 99 years. The electricity for these local systems was, according to his son Philip, being transmitted from Arthur Dodd’s Charles City plant in what was perhaps the first long-distance transmission of electricity in Iowa. According to his 1917 draft registration card Dodd was living in Elma in Howard county with his wife and working as manager of Consumers Electric Company’s electric central station; he claimed an exemption from the draft based on his wife’s being solely dependent on him and his work at the utility plant. At the time of the 1920 census, he was still residing in Elma (population 874 in 1920), and had been in the electrical central station business for ten years. At the 1920 census his brother John R. Dodd, eight years younger, was also the superintendent of a light plant in Herrick, South Dakota. Their father presumably “had a finger” in that operation, according to

197“The Special Election,” ENE, July 6, 1916 (n.p.).
199Consumers Electric Company, Articles of Incorporation, Iowa Secretary of State, Book W-5 at 300-302 (July 26, 1916). The vice president was N[ed]. R[oyal]. Lovrien, a 25-year-old lawyer in Charles City, who by 1920 was city attorney but was not returned at the 1900, 1910, or 1920 population census. Iowa State Census 1915, Floyd County, Charles City, Ward 2, Card No. B399; R. L. Polk and Co., Charles City and Floyd County Directory: 1917-1918, at 123 (1917); R. L. Polk and Co., Charles City and Floyd County Directory: 1920-1921, at 79 (1920); http://www.rootsweb.com/~iahumbol/lovrien.htm.
201Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
202Draft Registration Card (June 5, 1917), on http://www.ancestry.com. Two illegibly written words make it impossible to decipher Dodd’s alleged reasons entirely.
204State of Iowa: 1921-22: Official Register at 337 (29th No.).
Horace Dodd’s son, since he owned a ranch and much property in South Dakota.205

After having been unopposed in the Republican primary,206 Dodd narrowly defeated one-term Democratic incumbent Charles B. Wallace, a farmer, in a county in which Republicans and Democrats had “practically conceded that the farming interests had a right to select” the state representative.207 Running far behind Harding—who in Howard county, which was otherwise “very close politically,”208 outpolled his Democratic opponent by more than two to one—Dodd won by only 203 votes out of more than 5,000 cast,209 in an election in which the entire Republican ticket won in Howard county.210 Dodd even lost in his hometown of Elma by a large margin, the (new) women’s vote in the county seat of Cresco providing him with his small overall majority.211 The local press did not disclose much information about Dodd, but in recommending him a month before the Republican primary as a young man who would be a credit to the office, one paper declared that he was “not a political office seeker but a practical business man and in full sympathy with the farmers of the county and assisted in lobbying through the county agent bill.”212 Dodd apparently then lived up to this billing a few months later when, as point man for Consumers Electric Company, he pushed such a large increase in rates that it caused “considerable agitation” among customers in a Howard county town, who at an informal remonstrance agreed to refuse to pay it.213

Although his father never talked to Philip Dodd (who was born at the end of 1921) about his time as a legislator214—and, remarkably, made only a brief unspecific reference to it on his resume, omitting mention of it altogether under

\[\text{The Great Compromise of 1921}\]

---

205 Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
211 “Twas No Landslide,” Cresco Plain Dealer, Nov. 5, 1920 (1:4).
214 Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
the rubric “Experience”—the son was close to his father, received many typewritten letters from him later in life (carefully collected and bound in leather), and, once he was studying geology, worked summers in the gold mine in Ontario and mercury mine in Arkansas that Horace Dodd managed. Based on his knowledge of his father and information provided to him in 2007 about Horace Dodd’s activity in the legislature, Philip Dodd immediately, intuitively, and firmly concluded that “business politics” had motivated his father to seek a seat in the Iowa House: as an electric utility businessman in his own right and son of a utilities owner, Horace Dodd would have had as his primary business reason for entering the legislature making it friendlier to power companies. Through “family gossip” Philip Dodd had heard that his father, who had been a “medium to heavy cigarette smoker,” had been instrumental in legalizing cigarettes in Iowa, but he doubted very much that such an objective had prompted him to run for office. Rather, he speculated insistently that Horace Dodd’s prominent role in the repeal of the cigarette sales ban had been an example of business-related “back scratching”: in exchange for support for utility bills Dodd filed the cigarette bill for someone else, although Philip Dodd, who was unaware of any connection that his father might have had with cigarette manufacturers or the American Legion, did not know who that person might have been. Ironically, then, whereas Horace Dodd failed to secure enactment of the utility legislation for the sake of which he had probably run for a seat in the House, he succeeded in achieving repeal of the prohibition of cigarette sales, which may have been merely the means by which he hoped to insure passage of the former.

Once in the legislature, Dodd filed only two bills other than the “Dodd cigarette bill” of statewide front-page fame. As an electrical utility capitalist he was strategically catapulted into the chairmanship of the Public Utilities Committee—chairing an important committee, even with the very large number of House committees, was quite unusual for a first-term member—and filed one bill that would have resolved the controversy between cities and street railroad companies by conferring exclusive control over street car service and rates on the state railroad commission, but the House took no action on it (even though it had been referred to his own committee) and Dodd withdrew it. However, as

---

216 Telephone interview with Lyn Dodd, Grand Junction, CO (Sept. 23, 2007).
217 Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
219 H.F. 622 (Feb. 24, 1921, by Dodd); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 736, 1204 (1921) (Feb. 24 and Mar. 18) (H.F. 622);
committee chair he did promote and consistently vote for pro-corporate utility measures. Dodd also gained some prominence by virtue of his appointment to the five-member joint House-Senate committee to study the governor’s plan to merge various state government departments. In addition, his appointment to the key nine-member House Sifting Committee, which controlled the flow of bills to the floor during the final 10 days of the session, thus “becom[ing] virtually a dictator for the balance of the session,” empowered him to exert pressure on members of both houses to vote for his cigarette bill if, in exchange, they wanted their bills to get to the floor. The other cause, which Dodd successfully championed to enactment, was the appropriation of $400 for a constituent in Elma several of whose horses had been killed by the state because their affliction with glanders had been a danger to the community. In addition, he carved out for himself a high-profile role by filing an amendment weakening a bill that would have strengthened the existing wage payment law on behalf of coal miners. Why Dodd, in the absence of coal mines in his district or anywhere in northern Iowa, played such a prominent part in this effort is unclear, but the anti-corporate press reported that the “trusty guns of the [coal] operators

“Kime Bill Urges Radical Changes in Primary Law,” EG, Feb. 25, 1921 (1:5).

See below this ch.

“Solons Studying Merger Schemes,” Evening Courier (Waterloo), Feb. 4, 1921 (12:3).

State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1611 (Mar. 29). Dodd was one of only three first-term committee members; seven of the nine members voted for Dodd’s bill.

Bills that had already reached the calendar were seldom referred to the sifting committee, which favored bills that had already passed one house. John Briggs, “The Legislation of the Thirty-Ninth General Assembly of Iowa,” IJHP 19(4):489-666 at 493 (Oct. 1921).


See below this ch.

1921 Iowa Laws ch. 319 at 354 (H.F. 374).

Dodd’s amendment lost 27 to 62, and Dodd was one of only nine representatives to vote against the bill supported by 84 votes; after being diluted by amendment it was defeated by the Senate. Iowa Code Supplement § 2490 at 978 (1913); H.F. No. 517 (Feb. 16, 1921, by Berry); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1283-85 (1921) (Mar. 21).
brought down” the bill. Perhaps his energetic efforts constituted another example of inter-capitalist back-scratching. The generally progressive orientation of the 41 representatives who on March 30 voted against passage of Dodd’s bill to repeal the ban on cigarette sales is indicated by the fact that only two had voted for Dodd’s coal mine amendment and none voted against the bill.

Not standing for reelection—at the end of the three-month 1921 session he had complained that legislators’ ($1,000) compensation was “not enough to pay their living expenses in Des Moines so they are actually money out of pocket in addition to the time they lose from their own business”—Dodd left the legislature after his first two-year term. Although he initially returned to Elma, by the end of 1921 he sold off the electrical plant to a “holding company and resigned to take better job.” That job, which lasted from February 1922 to August 1924, was managing the Lawton-Duncan Electric Company in Lawton,
The Great Compromise of 1921

Oklahoma at a salary of $400 per month. After a brief stay in Onawa in western Iowa, where he worked for another electric company, probably as a way to return to the business in Iowa, by the mid-1920s he climbed to the position of commercial manager of the Interstate Power Company of Delaware, which was headquartered in Dubuque and owned and controlled 42 million dollars worth of assets in Iowa and other central states. Describing this position in his resume as “actually assistant to General Manager,” Dodd stated that between October 1924 and June 1929 for a monthly salary of $550 he had “handled all political and public relations activities, secured many new franchises and municipal contracts, purchased additional utility properties, negotiated major purchase and sales contracts for power and natural gas, assisted General Manager in hiring and training key personnel." Around 1929, according to his son, Dodd “jumped ship,” switching to the other major electrical utility in Dubuque, Central

---

236Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
237Dodd omitted mention of his job in Onawa.
However, Dodd was neither an officer nor a director. Moody’s Manual of Investments American and Foreign: Public Utility Securities 1708 (1929). Utilities Power and Light Corporation, a Chicago-based firm that controlled Interstate Power, provided power to Howard County. Moody’s Analyses of Investments and Security Rating Books: Public Utility Investments 1560 (1922). Perhaps Dodd had become familiar with its managers when he was running electric plants in Howard county; since Elma was later part of the Interstate Power Company electric grid, perhaps Interstate was the “holding company” that bought the plant from Dodd and offered him a position. Moody’s Public Utilities Manual: American and Foreign 307 (1954). The company that took over the supply of electricity from Consumers Electric Company in Riceville on January 1, 1922 was Consumers Power Company, which was incorporated on September 1, 1921 and does not appear to have been a holding company. In 1924, Consumers Power, which had also been supplying electric power in Elma, was taken over by Northeastern Iowa Power Company, whose officers/owners appear to have had some prior control of Consumers Power. Central States Power and Light Corporation was incorporated in January 1925 in order to acquire Northern Iowa Power Company. Dodd later worked for Central States.
The Great Compromise of 1921

States Power and Light Corporation, a position reflected in the entry at the 1930 population census that he was the general manager of a power and light company in Dubuque. The next year he became an officer in Central States Power and Light, the only company vice president in the main office in Dubuque. As vice president and general manager at a monthly salary of $750 plus bonus from July 1929 to July 1931, Dodd had complete charge of all maintenance and operations in the firm’s 200 locations in seven states. During these Depression years he “[r]econstructed entire personnel, greatly increased volume of business and reduced operating costs.” He also bought many non-utility assets such as sawmills, box factories, cotton gins, and oil wells, and operated them until they were sold; having to learn these different kinds of businesses then gave Dodd a “reputation for being versatile and adaptable.” In spite of the large income he was receiving in the midst of catastrophically expanding unemployment, he purportedly “[r]esigned because I could not conscientiously be a party to a program dictated by holding company officials which ultimately wrecked the company.”

Once the full brunt of the Depression hit, Dodd’s employment became sporadic and demanded considerable geographic mobility. From September 1931 to July 1933 he was in Brownwood, Texas, acting, for only $400 a month, as assistant trustee and manager of natural gas and

---


241Department of Commerce—Bureau of the Census, Fifteenth Census of the United States: 1930: Population Schedule, http://www.ancestry.com. A Horace E. Dodd (but no Horace H. Dodd) was listed in the 1927 and 1929 Dubuque City Directory employed as a clerk at the Inter Power Co., but his wife’s name (Louise) does not match that of Horace H. Dodd’s wife (Marion) at the 1920 and 1930 census. *Dubuque City Directory* 153 (1927); *Dubuque City Directory* 152 (1929). No Horace Dodd was listed in the 1930 or 1934 Dubuque City Directory. In 1930 two newspaper fillers mentioned that Horace Dodd and his wife and son were visiting the “parental home of A[rthur] L[ouis]. Dodd in Charles City.” *CCP*, Apr. 15, 1930 (2:3); *CCP*, May 31, 1930 (9:6).


243Horace H. Dodd [untitled c.v.](Apr. 3, 1946)(copy furnished by Lyn Dodd). Dodd was presumably referring to the Utilities Power & Light Corporation controlled by Harley Lyman Clarke.
ice properties for Chicago Commerce Bank, which had taken them over under a
defaulted trust deed. At this point, Dodd’s life began a downward spiral that
culminated in his premature death at 60 in 1948. His frame of mind during this
period was presumably shaped by his having been “pissed off” by Franklin D.
Roosevelt’s election and never become reconciled to the New Deal.244 From
August 1933 to August 1937 he found “[o]nly casual employment” including a
job with a public accountant during rush seasons and a brief assignment in
personnel and public relations with a management engineering firm that
dissolved.245 During these years Dodd, his wife, and son moved in with his oldest
sibling, Mabel, an unmarried Latin teacher at Evanston High School near
Chicago.246 Though not specified on his resume, when he was not unemployed,
Dodd worked for the “Chicago capitalist”247 Harvey C. Orton—who had been
vice president of Interstate Power Company and president of Central States Power
and Light Corporation when Dodd worked there and by the 1930s was a financier
in Chicago—as a kind of investment counselor. After reading some books on
mine management,248 Dodd from August 1937 to December 1939 was assistant
treasurer and managing director of Midco Minerals Ltd., in complete charge of

244Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
246In 1933 he still lived in Brownwood, Texas, but by 1934 had moved to Evanston,
Illinois. “Mrs. Dodd Dies at Charles City,” MCG-G, Apr. 26, 1933 (12:4); “Charles City
Briefs,” MCG-G, July 18, 1934 (5:5). He appeared in the 1937 Evanston city directory
as living together with his son with his sister Mabel, but he was not listed as having an
occupation. Polk’s Evanston and North Shore City Directory 127 (1937) (as read aloud
by Evanston Public Library reference librarian (Sept. 20, 2007). By 1941 only his son was
listed in the Evanston city directory as living with Dodd’s sister, although he was still
living there. Mabel Dodd died in 1943. Evanston Review, Aug. 5, 1943 (read aloud by
Evanston Public Library reference librarian (Sept. 20, 2007)). According to Dodd’s
daughter-in-law, Mabel Dodd, a strict Christian Scientist and prohibitionist, literally forced
her sister-in-law, Marion Dodd, to leave her house. Horace Dodd acquiesced in this
expulsion, while his son, who idolized his aunt, grew up erroneously believing that his
mother had abandoned him. Marion Dodd returned to her state of birth, Minnesota, where
she became a live-in domestic servant, taking care of other people’s children. The mother
did not see her son again for about 10 years (until after he returned from the war) and
never again saw her husband, although they corresponded and never divorced, and she kept
the name Mrs. Dodd. Telephone interview with Lyn Dodd, Grand Junction, CO (Sept. 23,
2007). Dodd’s resume stated that he had been “[s]eparated from wife since 1936.”
247“U.S.-Alaska Railway Plans Told by Orton,” CT, July 12, 1942 (A7).
248Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007).
exploration and development of several gold mining prospects near Lochalsh, Ontario; this job ended when the project, in which Orton had invested, was abandoned as a result of the war-related excessive difficulty and expense.  

Between January 1940 and September 1941 Dodd maintained a small office in Chicago seeking and financing small mining property for the war effort. This activity led to his managing a mine for the U.S. Mercury Company in Nashville, Arkansas from September 1941 to December 1943; for $350 a month he was in complete charge of the mining and milling operations, which falling prices caused to be closed. Dodd then returned to Chicago, where from March to May 1944 he worked for a public accountant performing several firms’ annual audits. His next job took him to Mesa, Arizona, where from May 1944 to April 1945 he managed another mercury mine, for Midco Reserves, Inc. His even lower monthly salary of $300 came to an end when the mine was closed. Following an unexplained gap of eight months, Dodd resurfaced in the small western Nevada town of Lovelock, where he was employed as the accountant of the Lovelock Mercantile Company, a department store, but this job lasted only from January to March 1946, at which point he “[f]lurished office over to less expensive successor.” His resume, written a few days later, while he was living in Reno (presumably with his youngest sibling, Margaret), ended with the plea to potential employers that he “would confidently undertake any administrative job which did not require specialized technical knowledge.”  

However, the only work that he was able to pick up was taking care of bookkeeping for several smaller companies in Lovelock, where he died, probably of (alcohol-related) ulcers, in his room in a “flop-house” hotel on December 30, 1948, shortly after his 60th birthday—despite the fact that just two years earlier he had boasted on his resume that “[f]allen arches only physical defect. In 40 years of very active business life have lost very few days work on...

---

249 Horace H. Dodd [untitled c.v.] (Apr. 3, 1946) (copy furnished by Lyn Dodd); Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007). According to his son, who worked there as a geologist during summers, Dodd was managing the Edwards Consolidated Gold Mine.


251 Telephone interview with Philip Horace Dodd, Silverton, CO (Sept. 23, 2007); “Horace Dodd Is Found Dead in Hotel Room,” Lovelock Review-Miner, Dec. 30, 1948 (1:6); email from Margaret Tanttila, Pershing County Library, Lovelock, NV (Sept. 27, 2007) (quote from a longtime local resident who had known the Victory Hotel). Philip Dodd added that his father’s death had probably been hastened by Christmas-time drinking. Philip Dodd’s wife also noted that Horace Dodd, whom she had never met, had had a drinking problem. Telephone interview with Lyn Dodd, Grand Junction, CO (Oct. 3, 2007).
account of illness.” Pursuant to his request, his son and siblings held no funeral services, scattering his ashes in an unidentified place.

Introduction of and Initial Skirmishes Around House File 678

Perhaps as many public hearings, petitions and personal letters were bestowed upon the Dodd bill legalizing the sale of cigarettes as any measure before the general assembly.

H.F. 678 as filed by Dodd encompassed the following principal features. Without repealing the code provision (§ 5005) that prohibited the sale or giving of tobacco to any minor under 16 (except on a parent’s written order) subject to a fine of between five and 100 dollars, § 1 of the bill repealed § 5006, the universal ban on sales of cigarettes, replacing it with a ban on selling or giving cigarettes to any minor under 18 (except on a parent’s written order), subject to a fine ranging between $25 and $100 for a first offense and $100 and $500 for additional offenses. The proposed law lacked the code’s alternative punishment of up to six months’ imprisonment in the county jail. Dodd’s bill (§ 2) then repealed code § 5007, which contained the $300 mulct tax (payment of which did not immunize the payor against prosecution for selling cigarettes), replacing it with a $50 license fee administered by the state revenue collector. Manifestly, the very significantly reduced fee was no longer designed, like the mulct tax, to act as a powerful financial deterrent. The state revenue collector was given the discretion to revoke the license of anyone who violated any of its conditions and was required to revoke the license of any licensee convicted of violating any provision of the bill. The bill’s most innovative aspect was its imposition of a tax on all cigarettes and cigarette papers sold to consumers in Iowa to be paid before or at the time they were sold and delivered to consumers. The tax—which no other state had yet levied—amounted to one mill on each cigarette (or two cents for a package of 20). The fine for violating this tax provision ranged from $100 to $300; in addition, all cigarettes in the violator’s possession or place were to be confiscated and forfeited to the state. The funds derived from the sale of such confiscated cigarettes as well as the taxes and

253 “In Memoriam,” Lovelock Review-Miner, Jan. 6, 1949 (6:4) (copy furnished by Margaret Tanttila, Pershing County Library (Sept. 24, 2007)).
254 “Work of Iowa Solons at the State House,” Indianola Herald, Apr. 14, 1921 (7:1).
255 H.F. 678 (Mar. 7, 1921), § 1. The fines in § 5006 were the same except that the maximum for a first offense had been $50.
license fees were to be paid into the state treasury and become a part of the
general fund.\footnote{Dodd’s bill repealed an existing provision under which seized cigarettes were to be
destroyed. Compiled Code of Iowa § 8875 (1919).}
Punishment for counterfeiting any license or tax stamp with an
intent to defraud the state or knowingly having such a license or stamp in one’s
possession was more severe than that for other violations of the proposed
measure—\footnote{\$ 6 altered the existing provision empowering judges to suspend sentences of
minors who gave information leading to the arrest of violators by referring minors under
16 to juvenile court and reduced the maximum fine from $10 to $5 for those over 16
convicted of smoking in public. Whereas Dodd’s bill, by the use of “or,” retained the
force of the 1909 law under which smoking was an independent crime, as enacted, the bill
failed to retain this feature so that, strictly speaking, so long as a minor informed on the
person(s) who supplied him with the cigarettes, he could smoke with impunity. Thus,
whereas under the 1909 law and Dodd’s bill, judges always retained discretion to impose
punishment on minor-informers, under the enacted law, minors who, immediately on being
asked by those empowered to ask, informed, were not exposed to any punishment
regardless of how many times they were caught.}
finally, any building or place used to sell
cigarettes in violation of any of the bill’s provisions was to be deemed a nuisance
subject to abatement by injunction by the same procedure used to enjoin and
abate liquor nuisances. Despite Dodd’s and other supporters’ protestations that
the central purpose of H.F. 678 was to make the ban on smoking by minors
effective, § 5 lowered the age from 21 to 18 at which it was lawful to smoke in
public; at the same time, however, it made the refusal of any underage smoker to
comply with the request of the police or a teacher to identify who gave him or her
the cigarette a misdemeanor.\footnote{As obscure as Dodd’s reason for filing House File 678 was the entity or
person on whose behalf he filed it. The bill itself and its entry in the Journal of
the House\footnote{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly
791 (Mar. 7).} were both designated “(By Request),” but nowhere was it revealed
by whose request. Since the House Rules nowhere mentioned the matter of bills
filed by request,\footnote{State of Iowa: 1921-22: Official Register at 285-95 (29th No.). A large scholarly
tome on the Iowa legislature published a few years earlier mentioned bills filed “by
request,” but failed to present any information about them. O. K. Patton “Methods of
Statute Law-Making in Iowa,” in Statute Law-Making in Iowa 159-284 at 206, in Applied
History Vol. 3 (Benjamin Shambaugh ed. 1916).} the circumstances under which the designation could or had
to be used are unclear. (The identical companion bill that Republican Senator

1218
The Great Compromise of 1921

David Kimberly, a retired farmer from Davenport, filed in the Senate the following day lacked the designation.) Since, however, according to a leading contemporary Iowa legislative analyst, “[o]f course many other bills not so designated were [also] introduced upon the request of individuals or groups of individuals,” it is possible that neither other legislators nor the public was especially curious about the identities of the requesters of the relatively few openly requested bills. Bills filed by request were (are) not peculiar to Iowa: they were (are) fixtures in other state legislatures and Congress (as well as in other national legislatures), where, however, they typically function(ed) as a symbolic means of access to the legislative process for constituents through a legislator who signaled his neutrality toward the bill by the designation “by request,” indicating that he was not endorsing, but merely accommodating a constituent.

In contrast, at least one mass circulation daily newspaper offered a much less innocuous interpretation of legislation by request. Three days after the legislature had adjourned, the party-politically independent Des Moines News (part of the Scripps chain) inaugurated an extended series of articles by its Statehouse and legislative reporter, Robert Hughes, about the legislative machinery revealing “how the people are looted for the benefit of the monied interests.” Under the front-page headline, “Work of the 39th Assembly Dictated by Corporations,” Hughes argued that only in theory did 158 citizen-legislators make laws they deemed best for the state as a whole. In practice: “What really happens is that the 158 lawmakers do as the special interests request. Almost every bill introduced in the 39th Assembly was ‘by request’ or ‘by dictate.’ Bills were introduced,

---

260 *State of Iowa: 1921-22: Official Register* at 282, 326 (29th No.).

261 *State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly* 713-14 (Mar. 8) (S.F. 717, by Kimberly). It is unclear why the Iowa WCTU president stated that in the absence of a companion bill there it had refrained from presenting one. Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).


263 In 1921 only 7 of 529 Senate bills and 30 of 606 House bills were formally designated “by request”; the Senate passed none and the House only four of them. John Briggs, “The Legislation of the Thirty-Ninth General Assembly of Iowa,” *IJHP* 19(4):489-666 at 489, 492 (Oct. 1921).

The Great Compromise of 1921
defeated, or passed, all by order of the special interests.”265 Nor was this anti-corporate blast the first of the session: two days before the House voted on the Dodd bill, the News had published a front-page article under the eight-columned screaming headline: “Iowa Legislature Dominated by Corporations and Money Crowd,” which declared:

They have hung a huge Dollar Sign over the doors of the Capitol of Iowa.
It signifies the brutal slaying of the interests of the people of Iowa by the 39th General Assembly....
It advertises to the world the complete domination of the legislative machinery of the state by the corporations and vested money crowd.
After nearly three months of activity the Iowa legislature has to show a brilliant record of achievement in behalf of the financial barons.
The other side of the legislative ledger displays a shameful betrayal of the people of the state by their elected representatives.
... The common people of the state have been crucified on a scaffold erected by themselves but operated by the corporations.
Never since the palmy days when the railroads and other monopolies dictated the policies of lawmakers has any Iowa Legislature enacted legislation as favorably as the 39th General Assembly has treated the monied interests.
The corporations might as well paint the words, “Our Exclusive Property” on the gilded dome of the Iowa State House.
...
Practically every measure that the “powers that be” thought dangerous has been sandbagged and, strangely enough, almost every bill that was drawn up by the corporations has appeared on the calendar early and then passed.266

Such sensationalist (but for all that empirically accurate) charges were de rigueur for the Scripps chain, which, as part of its working-class-oriented market segmentation strategy, battled against all manner of enemies of the common people, including big business, trusts, combinations, and greedy monopolists.267 The chain’s political orientation derived from that of its owner, Edward W. Scripps, who, without being a socialist, viewed capitalism as a “tragedy.” Under these circumstances it was scarcely a stretch for Scripps to articulate an anti-Hegelian program: “As against the old thesis that ‘whatever is, is right,” I have

266“Iowa Legislature Dominated by Corporations and Money Crowd,” DMN, Mar. 28, 1921 (1:7).
set up the antithesis that ‘whatever is, is wrong’ and must be changed.” 268 His only “principle” was “to make it harder for the rich to grow richer and easier for the poor to keep from growing poorer.” 269 The infusion of such understandings into his chain’s journalism left Scripps with the fixed opinion that, except for his newspaper, the whole U.S. press was dominated by capitalism. 270

Against the background of Scripps’s mandatory anti-capitalism, the only question raised by the consistently anti-corporate legislative reporting in the Des Moines News in 1921 is: Why did it not extend to the cigarette oligopoly’s dictation of the repeal of cigarette sales prohibition? That it did not was clear from Hughes’s comment in his report on Dodd’s filing of the bill that it “was the first effort along lines urged by The News....” 271 The newspaper’s anti-tobacco prohibition stance presumptively flowed from the fact that Scripps himself was a self-professed tobacco addict who smoked so constantly that he did not attend church because he could not smoke there. 272 To be sure, even Scripps’s laissez-faire attitude toward tobacco knew limits: in mid-1920 even the News joined the proliferating nationwide battle over place restrictions on smoking 273 by editorializing against smoking on Des Moines’ street cars. Although its editor, Walter E. Battenfield, himself used tobacco, he declared that there was “nothing quite so obnoxious as a crowded street car filled with smoke from pipes, cigars and cigarettes.” Insisting that breathing such air was actually “unhealthful,” Battenfield argued that women, children, and non-smokers had after all “some rights which should be respected.” 274

271 Robert Hughes, “May Legalize Cigaret Sale,” DMN, Mar. 7, 1921 (1:5). No editorial was found in the News earlier in 1921 proposing such a repeal.
272 Negley Cochran, E. W. Scripps 275 (1933).
273 See below this ch.
274 “Smoking on Street Cars,” DMN, June 8, 1920 (8:1) (edit.). Remarkably, the editor admitted that he did not know whether any Des Moines ordinance prohibited smoking on street cars. In fact, as early as 1886 the Des Moines City Council had passed an ordinance imposing a fine ranging from $5 to $10 on anyone who failed immediately to desist from smoking or spitting tobacco juice in a street car when requested to do so by an employee of a street railroad company or the person operating the road. Revised Ordinances of the City of Des Moines: 1932, § 2649 at 784 (passed May 10, 1886).
Whatever the custom may otherwise have been about bills by request in the
Iowa legislature, Dodd was anything but neutral about H.F. 678, which he floor
managed. Remarkably, among the dozens of Iowa newspapers reviewed for the
period March-April 1921, not a single one raised, let alone tried to answer, the
crucial question as to the identity of Dodd’s principal. Without posing that
query, one paper at least took a stab at figuring out Dodd’s purpose. The
Waterloo Evening Courier editorially had “a sort of hunch” that he wanted to stir
up a “rumpus” and “wake people up.” It speculated that: “No doubt he takes the
view that if cigarettes are to be sold openly, not only to adults but to school boys
in the grades and high schools, the state might just as well get some revenue out
of the transaction.”275 If this goal could be attributed to Dodd—and there is no
evidence to support that claim—the cigarette companies opposed taxes because
they either reduced demand or deprived the manufacturers of the price increase
that the tax represented. To be sure, the tax was possibly the detriment that the
cigarette companies had to suffer in exchange for repeal of prohibition; perhaps
it was even a central aspect of the drafting negotiations that the Register
mentioned. The Courier’s apparent sheer speculation may have had less to do
with Dodd and more with the editor’s own ideological hobby horses, which
favored enforcement of all laws regardless of their contents because “[a]ny other
attitude is anarchistic and revolutionary.” Although it had never been tried in
Iowa, rigid enforcement of a bad law was the way to bring about its repeal; if
attitudes towards cigarettes were so overwhelmingly favorable that jurors and
police winked at an unpopular law, then it would be better to repeal it.276

In view of the contemporaneous opacity of the bill’s origins and of the fact
that it was by far his most important bill, which kept his name on the front page
of newspapers all across the state for more than a month, it is deeply ironic that
when, shortly after the end of the session, Dodd was asked by the editor of the
local Elma weekly to write something about the session, he “felt there was little
left I could say” because the newspapers had published so much about it.
Disingenuous was his excuse that “perhaps a disinterested spectator is better
qualified to speak than one who is too closely mixed up in the affair for one on
the inside is too busy working to gain much more than a hasty impression of how
things really look.” Since presumptively only Dodd (and the requester) knew
who had requested that he file the repeal bill, dispassionate observers lacked the
crucial inside knowledge without which a full understanding of the bill was
unattainable. Instead, Dodd wrote hypothetically about how, if he were about to
file a bill and were a friend of the Speaker, he might persuade him to refer the bill

275“The Cigaret,” ECR, Mar. 9, 1921 (4:2) (edit.).
276“The Cigaret,” ECR, Mar. 9, 1921 (4:2) (edit.).
to a friendly committee, whose chairman, if Dodd were friends with him, could, in turn, let Dodd choose a favorable subcommittee, and so on, culminating in the wisdom that “the man who has the ability to make and keep friends has much the advantage over one who has not this faculty.” It could be surmised that Dodd belonged to those legislators who were on the go from six a.m. to one a.m. doing “the important work of the session...at the hotel in the evening” networking for four to six hours.277

Although the president of the Iowa WCTU, Ida Wise Smith, as discussed below, charged, on rather shaky empirical grounds, that the cigaret manufacturers had drafted the bill, the only express inquiry into the identity of the bill requester uncovered in the extant record is the text of the remarks that John B. Hammond made at Governor Kendall’s hearing on the Dodd bill on April 8 that opponents sought in order to persuade him to veto it.278 Hammond, the WCTU’s lobbyist, expressly and directly formulated the question that the press had ignored:

Who is behind this bill which was introduced “by request”? Who made the request? It was not the W.C.T.U., who were battling every evil influence against their children. It is not the Parent-teachers Association nor the Mother’s Clubs. It is not the American Legion, about whom some of the financially interested gentlemen are so much concerned. The Chairman of the State legislative Committee of that great organization authorized me to repudiate any such insinuation and I am glad to do it here and now.

There is no one interested in the promulgation of this bill excepting the men who are profiting off of our boys and satisfying an appetite or habit they created and who now desire a little more security in their unlawful business. Are they asking for this law that they may curtail their sales and make less money? That would be a most unique position for the American Tobacco Company to take. This Company is behind this bill and it is not for the purpose of accumulating [sic] less gold but more. Patriotism and law enforcement do not appear in its Articles of Incorporation.280

---

277H. H. Dodd, “Working of the Legislative Mill,” *HCT*, May 4, 1921 (1:5-6) (reprinted from *Elma New Era*). Only a few scattered issues of *The Elma New Era* from 1920-21 are extant (at the SHSI DM) and they do not include the weeks immediately following the close of the session.


279See below this ch.

280[No author], Letter to Your Excellency (n.d. [Apr. 8, 1921]), Folder: N. E. Kendall Correspondence re cigarette bill (SHSI DM). The letter’s salutation, “Your Excellency,” was identical to that used in Hammond’s signed letter, which immediately precedes it in the archival folder and was designated a supplement to his “argument and brief” submitted on the 8th.
The Great Compromise of 1921

Given Hammond’s central position in lobbying against H.F. 678 and his many years of experience advocating for and against similar measures, it is difficult to imagine anyone in the anti-tobacco movement in Iowa who could have been better informed about the bill’s provenance—and yet even he was remitted to (circumstantially compelling) conjecture that did not even raise the question as to why the successors to the tobacco trust had chosen Dodd as its tool.

The same day Dodd filed the bill Des Moines educators and ministers “declared war” on it. Proposed by a member of the Iowa League of One Hundred for Law Enforcement, the matter was discussed at a meeting of the Ministerial union at the YMCA, which appointed a 10-man committee (including an insurance salesman, a district court judge, and an assistant school superintendent) to “‘invade the hill’ and ‘go after’ proponents of the bill.” The committee was “‘the vanguard of the fighting force’”—composed of several hundred educators, ministers, and YMCA workers—that would be placed in the field. The president of the ministers’ association, Rev. J. P. Burling, expressed the group’s hope to kill the bill while it was still before the House Police Regulations committee. Two days later, a hundred board and committee members of the Iowa Federation of Women’s Clubs meeting at their annual spring conference, after endorsing the proposed maximum hour law for women, “strongly condemned” the new cigarette bill in unanimously adopting a resolution offered by Iowa WCTU president Ida B. Wise Smith. In her “stirring talk” she had declared that the cigarette bill and that to legalize boxing were both “hangovers of the recent war,” the “‘pathos of it all’” being that the American Legion stood behind them. Calling the two bills “the most pernicious ever presented” to the Iowa legislature, Smith was able to persuade the club women to oppose the bills because they “‘weaken the moral defenses of our young people....’”

The day after Dodd had filed his bill two other House members filed cigarette-related measures. John Rankin, a lawyer from Keokuk, filed House File 784, also by (anonymous) request, which also repealed the general prohibition on selling cigarettes, replacing it with a compulsory licensing regime that covered

---

281 “Educators Oppose Dodd Cigaret Bill,” WEC, Mar. 8, 1921 (1:7).
282 “Join in Move to Kill New Cigaret Bill,” DMR, Mar. 8, 1921 (1:1). The judge was Hubert Utterback, the superintendent John Studebaker, and the salesman Paul Jones. Department of Commerce-Bureau of the Census, Fourteenth Census of the United States: 1920—Population (HeritageQuest). Two days later the Iowa Public Welfare League also announced its opposition to the Dodd bill. “Condemn Two Bills,” DMN, Mar. 10, 1921 (10:2).
The Great Compromise of 1921

cigars and tobacco as well, under which any form of tobacco could be sold to anyone 18 or older; anyone selling or giving it away to the underaged was subject to a minimum fine of $25 and a maximum fine for repeat offenders of $300. The bill provided that the licenses, which cost $5 to $25 annually depending on the population size of the town, “shall be issued by the county auditor” (on whom, apparently, the legislature conferred no discretion to deny permits for any reasons not spelled out in the bill). H.F. 784 was referred to the Police Regulations Committee, which took no action at all on it.284

The other bill was filed by Toleff Moen, a farmer, grain elevator operator, and bank director from northwestern Iowa born to Norwegian immigrant parents in 1870; a Lutheran, he lived in Minneapolis for four years, where he was a member of the Chamber of Commerce. Moen had been a member of the Lyon county board of supervisors for eight years285 before entering the Iowa House in 1919, at which time the Iowa WCTU singled him out as a staunch supporter on the tobacco issue as a member of the Public Health Committee.286 Ironically, although Moen’s bill was not designated “By Request,” he apparently did file it on behalf of the Iowa WCTU, which had drafted it earlier and had presumably been holding it back as a countermeasure in case a repeal bill was filed; it was no coincidence, then, that Moen filed a day after Dodd.287

House File 805 declared that anyone using any building or place for the purpose of selling or giving away cigarettes was guilty of maintaining a nuisance and was to be enjoined. The injunction procedure also applied to any cigarette bootlegger defined as anyone who sold or gave cigarettes to or bought them for a minor, or who left cigarettes or cigarette papers for a minor in a place where a minor could procure them. The bill authorized the bringing of injunction actions in equity not only by the state, attorney general, county attorney, and any peace officer, but also by any citizen of the county. The violation of any permanent or temporary injunction constituted contempt of court; the judge was empowered to try and punish the offender summarily, punishment ranging from a fine of $100 to $500 or one to three months in county jail for a first offense to imprisonment

284 H.F. No. 784 (Mar. 8, 1921); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 855-56 (Mar. 8).


286 Woman’s Christian Temperance Union of Iowa, Forty-Sixth Annual Convention 120 (1919).

287 See above this ch.
The Great Compromise of 1921

for six months to one year or a minimum fine of $1,000 for each additional offense. Finally, the bill made it the express duty of every county attorney and all peace officers to enforce the law and mandatory for the county attorney to prosecute all injunction and contempt actions unless the plaintiff chose another prosecutor.288 Although the WCTU-Moen injunction bill died in the Police Regulations Committee, which took no action on it, a diluted version of this very capacious and strict measure was eventually incorporated into the Dodd bill and enacted.289 Even then the WCTU rejected the bill “since its fundamental principal [sic] is the thing to which we object—license.”290

On March 10 a three-member subcommittee of the House Police Regulations Committee was appointed to consider Dodd’s bill consisting of Frank Lake, a newspaper reporter who had played a prominent role opposing anti-cigarette measures during the 1917 session,291 Dr. John Kime, a 66-year-old physician specializing in tuberculosis, and O. A. Hauge, president of the Iowa Trust & Savings Bank of Des Moines.292 (Whether Dodd was friends with committee chairman Elliott, who let him choose a favorable subcommittee, is unknown, but all three of its members did vote for H.F. 678 on its final passage.) For whatever its worth in terms of representativeness, the same day the Register published the results of its straw vote on the “leading questions” before the legislature to which 400 people responded. The fact that half (172) of the (345) respondents opposed legalizing the sale of cigarettes to persons over the age of 18 was inconsistent with supporters’ refrain that the ban lacked the backing of public opinion. The only bills that a (small) majority of those polled opposed were the American Legion-sponsored measure to legalize boxing and the establishment of a minimum wage for women, neither of which was enacted.293

Within three days of its having been filed, “prominent officials of the American Legion” had endorsed Dodd’s bill, which, the press reported, advocates of legalization would “probably concentrate on...as offering the best chances for

288H.F. No. 805 (Mar. 8, 1921); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 860 (Mar. 8).
2891921 Iowa Laws ch. 203, § 16, at 213, 217.
290Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
291See above ch. 14.
292[Iowa House] Police Regulations Committee Minute Book, Mar. 10, 1921, at 101 (SHSI DM); State of Iowa 1921-22: Official Register 344-45 (29th No.).
293“Industrial Court Upheld in Register Legislative Canvass,” DMR, Mar. 10, 1921 (1:2-3).
If the Legion as an organization was refraining from taking a position on the bill—in nearby Kansas the Topeka post of the Legion, reportedly "'inspired by certain big interests,'" was in early 1921 the main force demanding the repeal of that state’s ban on cigarette sales—but individual members of its legislative committee strongly urged its enactment, basing their predictions of passage on claims that: (1) the existing law was "nowhere enforced and...the people don’t want it enforced"; (2) H.F. 678 was enforceable; and (3) Dodd’s bill would increase state revenues by several hundred thousand dollars—an "enticing source of ‘untapped revenue’" in the view of many legislators, who were already being inundated with hundreds of letters from legionaires as well as opposing petitions from the WCTU and other organizations. At this point the bill’s supporters did not expect the committee to report it back to the House with more than minor amendments, its existing text being deemed “the most effective possible” measure to check cigaret sales to boys under 18 while substantially increasing state revenues—as if those were its chief purposes rather than necessary means of securing the votes required to repeal the ban on sales to adults so as not to “make criminals of all the Legion men and other users who are going to have them even if they have to ship them in from other states.”

By March 15 the Register had learned that efforts would probably be made to amend Dodd’s bill to increase the legal age at which persons could be sold cigarettes from 18 to 21, although its supporters, who were now estimating that H.F. 678 would add $1,250,000 to state revenues annually, hoped to retain the bill in its original form. The Police Regulations Committee had also decided to hold a public hearing on the bill the following week.

Before the committee had taken any action on the bill, President Smith of the Iowa WCTU launched a full-scale attack on it and its presumed authors ("Says Tobacco Kings Behind Dodd Bill"). Without offering any examples, she charged that Dodd’s bill “shows eastern phraseology and was drafted by the cigaret


295 “Kansas Row on Cigarettes,” NYT, Jan. 4, 1921 (18). See below ch. 16.

296 Frank Miles, who is prominently mentioned below, was a member.

297 “Rally to Support of Cigaret Bill,” DMR, Mar. 14, 1921 (10:5).


299 “To Hold Hearing on Cigaret Bill,” DMR, Mar. 15, 1921 (1:3).
manufacturers” because it was recognizably “‘written by someone not familiar with the legal phraseology of Iowa laws. The tobacco interests write bills like this and then exploit people who have fallen victims to the habit to put temptation before others.’’ Pooh-poohing the claim that the license fee and stamp tax would propel “[m]oney into Iowa’s treasury,”\textsuperscript{300} Smith, from the perspective of Progressive-era paternalistic anticapitalism, insisted that these state revenues were:

“Small sums in comparison with the millions of dollars made by tobacco companies, who in this way hide behind the brave defenders of our country whom we honor too much to permit them to be made a screen for the enrichment of these capitalists. Money can never count against men. The body is the temple of God’s own spirit.”\textsuperscript{301}

With an eye to the cigarette-smoking veterans of the world war, Smith observed: “‘When the interests are able to hide behind some popular movement or popular class of people they are dangerous.’”\textsuperscript{302}

As for the content of Dodd’s and Rankin’s bills, the WCTU president sought to subvert their purported principal goal of insuring more effective denial of accessibility of cigarettes to minors by stressing the core flaw of all age-hinged laws: “‘Experience proves that prohibiting a thing to minors while adults are permitted to buy it, has never succeeded.’” In order to prevent the kind of “bootlegging” to minors in which saloonkeepers engaged before saloons were outlawed, Smith defended the position that “the only way to prevent the sale to minors is to prohibit the entire sale” (and to supplement that ban with the Moen bill’s strict injunctive and abatement provisions).\textsuperscript{303}

The defect in the WCTU’s analogy was rooted in the unacknowledged disanalogy between the role of minors in the cases of alcohol and cigarettes: whereas the principal alleged evil in the former was the deleterious impact of alcohol on adult men and derivatively on their families and society at large, in the latter the failure (in part of science and medicine) to identify and focus on the


\textsuperscript{301}“Says Tobacco Kings Behind Dodd Bill,” \textit{DMR}, Mar. 16, 1921 (6:5).

\textsuperscript{302}“Says Tobacco Kings Behind Dodd Bill,” \textit{DMR}, Mar. 16, 1921 (6:5).

\textsuperscript{303}“Says Tobacco Kings Behind Dodd Bill,” \textit{DMR}, Mar. 16, 1921 (6:5). Smith also criticized Dodd’s bill for setting the legal age for buying cigarettes at 18 because it eliminated three years of parental authority. In addition, the age-setting failed to reach college students “now so lamentably affected by the cigaret habit.”

1228
harm done to adult men by cigarettes meant that they were to be deprived of cigarettes not because of the injuries inflicted on themselves by this form of tobacco, but almost exclusively in order to prevent minors from becoming addicted to cigarettes during the vulnerable maturation process. The anti-cigarette movement’s failure to develop a plausible and persuasive justification for demanding self-sacrificing curtailment of consumer freedom from men for the (personal and collective) sake of their sons created a major political-rhetorical obstacle for the struggle to enforce and ward off repeal of prohibitory laws in Iowa and elsewhere.

The next day, in response to Smith’s charge that the cigarette manufacturers had drafted his bill, Dodd went on the offensive, declaring, on the contrary, that they “were fighting his bill.” Even more aggressively:

he asserted that he had personally seen a telegram sent by a member of the tobacco trust to its Iowa agent, in which it was stated that under no consideration should the Dodd bill be pushed, and that nothing should be done to disturb the existing status of the cigarette in Iowa.

Under present conditions, Dodd declared, the tobacco men are receiving higher prices for their cigarettes than they are in other states for the simple reason that in Iowa cigarettes are supposedly banned. This fact is used as a pretext for higher prices for their goods on the grounds that they might sometime have to undergo heavy legal expenses, which excuse is used to profiteer off of Iowa smokers.

(Dodd’s reference to “the tobacco trust” was, despite the U.S. Supreme Court’s landmark anti-trust ruling a decade earlier and the ensuing decree dividing the American Tobacco Company’s assets among several successors, not an anachronistic slip of the tongue, since many contemporaries had concluded that the result of the court-ordered dissolution was merely that “monopoly was replaced by oligopoly.” Progressive and Republican insurgent and former Iowa Governor Albert Cummins spoke for many in observing on the Senate floor in 1912: “There is no more competition in the tobacco business now than there was before. There is even less competition now than before. ... Every independent tobacco dealer, whether producer or manufacturer or seller, with whom I’ve been able to come into contact...declares that the grip of the monopoly held by the American Tobacco Co. has been strengthened instead of weakened by the

---

304 “Says Tobacco Kings Fighting His Bill,” DMR, Mar. 17, 1921 (12:5-6).
305 “Says Tobacco Kings Fighting His Bill,” DMR, Mar. 17, 1921 (12:5-6).
In the same vein, to the bill’s two frequently trumpeted chief virtues—effectively checking sales to minors and “fatten[ing]” the “dangerously thin” “state pocketbook” to the tune of at least $1.25 million annually—Dodd now added a third: putting cigarette sales on a “legal, orderly, state regulated basis” would deprive “the tobacco trust” of any grounds for “gouging the Iowa smoker.” Although Dodd said that he would be glad to discuss his bill with the WCTU, it is implausible that he or any informed contemporary could have taken such negotiations seriously when he praised H.F. 678 for “tak[ing] the cigaret out of the class of bootleg whisky, in which the present law has placed it, and put[ting] it on a decent, state regulated plane.” After all, the nub of the WCTU’s critique, as articulated the previous day, was precisely that not even the present law had effectively treated cigarettes as bootleg commerce.

Perhaps Dodd imagined that a basis for compromise, or at least discussion, could be found in his assurance not only that: “‘I have just as much desire as Mrs. Smith to check the sale of cigarets to minors,’” but that by means of the “‘simple machinery created by my bill, such sales can be effectively stopped.” Rather than criticizing either the behavioral foundation of the WCTU’s argument—namely, that children would smoke cigarettes as long as they saw their fathers and other adults smoking them—or the political-philosophical underpinnings of the curtailment of consumer freedom implicit in the WCTU’s demand that adults not be permitted to smoke cigarettes for the sake of the next generation, Dodd merely lauded his bill’s machinery and the alleged quasi-strict liability that it imposed on dealers for selling to minors:

“Every package of cigarets sold under the provisions of this bill would have a state revenue stamp plainly marked with the dealer’s individual number.

If a young boy were found with cigarets, all that would be necessary would be to look at the number on the package, which would be prima facie evidence that the dealer whose number the package bore had violated the law, and so he could be easily convicted and fined, or subjected to revocation of his license.”

---

307 CR 48:4708 (Apr. 13, 1912). Cummins traced this result to the fact that the “same men who had held the control of the American Tobacco Co.” held “the very same proportions” of the stock of the successor entities. Id. at 4707.

308 “Says Tobacco Kings Fighting His Bill,” DMR, Mar. 17, 1921 (12:5-6).

309 “Says Tobacco Kings Fighting His Bill,” DMR, Mar. 17, 1921 (12:5-6).

310 “Says Tobacco Kings Fighting His Bill,” DMR, Mar. 17, 1921 (12:5-6). Dodd’s bill did not impose strict liability; if a third person (over the legal age) bought the cigarettes and gave them to the minor without indicating this intent to the dealer and no witness testified to seeing the alleged transaction, it is doubtful that the dealer could have
Despite the self-assurance with which he presented his legalistic program shorn of all societal understanding of the underlying problems of smoking, Dodd ultimately bowed to realism by conceding that “‘[n]o one can stop the sale of cigarettes in Iowa,’” although checking the sale to minors could be accomplished effectively and easily. 311

Combining two of the bill’s three alleged “advantages,” Dodd asserted that under his bill (annually) the state of Iowa “would receive more than a million dollars that now goes to the tobacco trust in profiteer prices.” 312 Dodd offered no evidence that such gouging was taking place or why the higher price and concomitant lower consumption would not have been welcome. (That the entire argument was fallacious would be revealed on July 4 when the new law went into effect and merchants raised prices to recoup the tax and permit fee and to increase their profit.) 313 How Dodd came into possession of the tobacco trust’s unpublished and proprietary data of the number of cigarettes sold in Iowa in order to make this fiscal estimate he did not divulge. If his estimate had been correct—in fact, the first year’s tax attained only one-half the predicted level—Iowans would have bought 1.25 billion cigarettes in 1921 or about the same proportion of total U.S. production as Iowa’s population bore to total U.S. population. That per capita consumption of cigarettes in Iowa approximated the national average was both implausible and—as Iowa’s tax data would soon reveal—empirically false. 314 Since the data on cigarette sales before that time could have come only from an industry source, the 100% overstatement suggests the possibility that the claim was intentionally inflated in order to make the tax revenues and thus repeal of prohibition itself politically more attractive. In the event, as early as July the State Treasurer estimated that the annual cigarette tax revenue would amount to only $500,000. 315

Strangely, however, in the welter of his counter-barrage, Dodd failed to make public the single most persuasive piece of evidence to refute the WCTU’s claim that would also have been easiest for him to produce—namely, the identity of the

---

312 “Says Tobacco Kings Fighting His Bill,” DMR, Mar. 17, 1921 (12:5-6).
313 See below this ch.
314 See below ch. 17.
315 “Gibson to Enforce New Cigaret Laws,” DMC, July 18, 1921, vol. 38 no. 174 (8:2). Inconsistently, his estimate was based on sales of 10,000,000 packages, which would have amounted to 200,000,000 cigarettes instead of the 500,000,000 that would have generated the estimated revenue.
The Great Compromise of 1921

person or entity that had requested him to file the bill. Although on the face of it Dodd’s denial might have seemed highly implausible, one circumstance possibly lent it credibility: cigarette manufacturers then as now opposed taxes. Unfortunately, very few internal, publicly accessible cigarette company documents from 1921 have survived, but memoranda of the Tobacco Merchants Association of the United States from 1922 shed considerable light on the industry’s attitude toward the Dodd bill as enacted. 316

The WCTU’s Attack on House File 678 and Alleged Preparation of a National Prohibition of Tobacco

Our assemblies will be cursed with business of this caliber so long as the people vote cigarette-sucking drunkards into public office. The remedy may lie in electing women to all offices. 317

The public’s association of the anti-cigarette movement with the WCTU was highlighted shortly before the public committee hearing—which the press did announce 318—when WCTU president Smith received an anonymous threatening letter warning her: “If you want to keep safe...do not butt into this cigaret fight.” Signed “A Former Service Man,” the letter declared that it was “a queer thing that you women persist in sticking your noses into things that don’t concern you....” Smith made good on her declaration that she would ignore the letter 319 by appearing at the hearing.

At 3 p.m. on March 21, five of the ten members of the House Police Regulations Committee held a 70-minute public hearing on H.F. 678, which, according to the committee minute book, “was opened by those opposing the Bill. The first one speaking being Z.C. Thornberg [sic] 2nd Dr. Carson 3rd Paul Jones 4th Judge Hutchinson 5th Mr. Lee and 6th Shelby Weber. Volney Diltz spoke for

316See below ch. 17.
319“Cigaret Foe Gets Threatening Letter,” DMR, Mar. 20, 1921 (2-L:4). A week later she received another letter warning her to “quit on the cigarettes and boxing, and call off your helpers before Tuesday night or you will not see Wednesday.” “Anticigaret Head Is Threatened,” DMR, Mar. 29, 1921 (8:6) (article did not appear in the microfilm edition but was published in the bound copy at the SHSI IC).
The press’s attitude toward the anti-smoking movement’s zealous participation in the hearing was captured by the headline: “Anti-Cigaret Folk Storm Des Moines.” Zenas C. Thornburg, 48, had been superintendent of the Des Moines Public Schools from 1913 to 1920 and later Des Moines postmaster until his death in 1926; his involvement in the anti-cigarette struggle was signaled by the fact that his wife Laura L. Thornburg had for many years been chairman of child welfare for the state PTA and was also a prominent member of the Iowa WCTU: she was superintendent of its Polk county local union Sabbath School Work department in 1923, vice president of the statewide organization from 1927 to 1930, and editor of its organ, The W.C.T.U. Champion from 1927 to 1934. Dr. Andros Carson was a 56-year-old Des Moines physician and a Republican, who was associated with the WCTU. Jones was a member of the aforementioned 10-member anti-Dodd bill committee created on March 8. Charles Hutchinson, who would also appear on April 8 at the governor’s hearing on the cigarette bill, was a 56-year-old English-born lawyer who as a district court criminal bench judge for Polk county in 1917 had issued search warrants and ruled against merchants in a high-profile cigarette law enforcement case before resigning to accept an “attractive proposition” from his old law firm that “I could not afford to reject” and unsuccessfully running

321[Iowa House] Police Regulations Committee Minute Book, Mar. 21, 1921, at 127 (SHSI DM).
322“Anti-Cigaret Folk Storm Des Moines,” Cedar Rapids Republican, Mar. 23, 1921 (2:2).
325Women’s Christian Temperance Union of Iowa, Fiftieth Annual Convention, held at Shenandoah, Iowa, October 2 to 5, 1923, at 158.
326Women’s Christian Temperance Union of Iowa, Fifty-Fourth Annual Convention, held at Indianola, Iowa, October 4 to 7, 1927, at 158.
327Polk’s Des Moines City and Valley Junction Directory: 1921, at 260 (v. 29, 1921); Who’s Who in Des Moines: Biographical Sketches of Men and Women of Achievement 52 (1929).
328From 1926 on he provided free service to residents of the Benedict Home, which was run by the WCTU. “Dr. Carson Nominated,” DMT, Dec. 22, 1939 (1A:2-3).
329See above ch. 14.
330“Hutchinson Back to His Law Firm,” DMR, Jan. 3, 1918 (8:1). Hutchinson’s law
The Great Compromise of 1921

as a Republican candidate for a seat on the Iowa Supreme Court in 1919. His membership on and presidency of the Des Moines school board (1913-24)—the same page of the Register describing his appearance at the hearing announced his appointment as vice president of the board of education—and membership on the YMCA state committee (1915-25) presumably brought him into anti-cigarette circles, though he was also vice chairman of the Legislative Committee of the Des Moines Chamber of Commerce. Lee (whom newspaper accounts failed to mention as having spoken at the hearing) was presumably 26-year-old Alvin Joseph Lee, a clergyman who was a member of the WCTU, PTA, and YMCA as well, interestingly, as of the American Legion. No Shelby Weber appeared in the 1920 population census or 1921 Des Moines City Directory; nor did the press identify him as a speaker at the hearing. Volney Diltz, a 32-year-old Iowa native and lawyer, who had attended the University of Chicago and the University of London, fought in France during World War I, was a member of the Legislative Committee of the Des Moines Chamber of Commerce, and—presumably most relevantly—was the first commander of the Argonne Post of the American Legion in Des Moines, the largest in Iowa, and a leading candidate for state adjutant. As commander he worked closely with Frank F. Miles, the editor of the post’s newspaper and in 1921 of its successor, the

partner was Howard W. Byers, who led the anti-corporate forces at the hearing before Governor Kendall on April 1, 1921 on a pro-corporate public utility bill that Dodd supported and that the governor ultimately vetoed. “Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:2-7, 5:2-3). As attorney general (1907-11), Byers had strongly supported the anti-cigarette law, against the enactment of which he had voted in 1896 as House Speaker. See above ch. 13.


332 [Tab Legislative], Minutes [Des Moines] Chamber of Commerce, Part 1—Jan. 1, 1921 to Jan. 1, 1922 [bound volume], in Records of the Greater Des Moines Chamber of Commerce, University of Iowa Library, Special Collections.


334 Both the News and the Register listed a J. B. Weede as having spoken at the hearing without mentioning the topics he dealt with. John Brown Weede, treasurer of the American Abstract Company in Des Moines, was returned as a real estate agent at the 1920 population census. Fourteenth Census of Population 1920 (HeritageQuest); Polk’s Des Moines City and Valley Junction Directory: 1921, at 1363 (v. 29, 1921).
The Great Compromise of 1921

statewide paper, who less than three weeks after Diltz was the sole supporter of Dodd’s bill at the governor’s hearing on H.F. 678. After his appearance before the House committee, he was himself elected to that chamber as a Republican the next year, serving as a member for two terms.335 During his second term he successfully moved to amend a bill by eliminating the strict liability it would have imposed on cigarette sales permit-holders for violations committed by their employees.336

From the coverage of the hearing in the Des Moines press some sense of the antagonists’ arguments can be reconstructed. To be sure, the account in the Des Moines News revealed more about its editorial views of cigarettes and misogyny than about the substance of the prohibitionist position:

Armed with their tatting and knitting, 40 members of the W.C.T.U. reinforced by several male reformers stormed the House Police Regulations Committee Monday, and protested against any repeal of the Iowa cigaret laws.

If any evil, crime or disease on earth could not be traced directly to the obnoxious “pill,” it was because the ladies and their friends had yet to discover any more earthly troubles. The cigaret is the right hand buddy of the undertaker and hangman, according to the W.C.T.U.337

Without any content specification, the paper observed that five men (Thornburg, Carson, Jones, Hutchinson, and J. B. Weede) and Ida B. Wise Smith unleashed a “verbal barrage” against “the little white cylinder of joy to the doughboy,” which was “reviled, desecrated, denounced and exposed in all its iniquities.”338 In contrast, the description of the spokesman for repeal was sympathetic and specific (although it did not mention that Diltz had been an American Legion


The Great Compromise of 1921

Against all this, one lone ex-service man, Volney Diltz, entered the lists for his overseas comrade. Diltz presented the soldier’s viewpoint of law enforcement and showed the ridiculousness of the present repression laws and urged they be repealed, new laws with teeth in them enacted and the sale of cigarettes be legalized.339

To its own relief, the News predicted that, “despite the W.C.T.U. delegation,” the committee would “probably” recommend passage of the Dodd bill, while proposing that Moen’s bill placing cigarets “in the bootleg class” be indefinitely postponed (i.e., killed).340

In comparison, the Register’s account (“Foes of Cigarettes Invade Capitol”) was virtually a model of objectivity. If, as the newspaper reported, Dr. Carson actually explained tobacco’s deleterious effects on the human body, that focus would have been, in terms of both biology and social policy, very different than cigarets’ negative effects on adolescents’ bodily and mental health. Such an approach could have gained even greater traction in connection with the overtoweringly important point that both Thornburg and Hutchinson made—that “the only way to prevent minors from obtaining cigarettes is to deprive adults of the habit” and that “it will be impossible to enforce the law...as long as adults smoke....” Unsurprisingly, there was no indication that either prohibitionist had proposed a moral-political justification for what may have been a unique social intervention of depriving adults of a product solely for the benefit of children. Nor, apparently, did Diltz—who was careful to assure the committee that he was not acting in any official Legion capacity—attack that argument on the grounds that it violated adults’ freedom. Instead, offering “himself as a voluntary sacrifice in order to express the reasons why the American Legion is endorsing licensing of the sale,” he urged the committee to focus on the question of whether cigarette sales should be legal or not, since “they would be sold in either case.”341

Just at this critical juncture in the progress of the battle over the Dodd bill a public relations fiasco erupted for the WCTU: on March 21 the organization’s national president, Anna Gordon, announced in Chicago a war on tobacco that would begin on April 3, with April 10 scheduled as anti-tobacco Sunday.342 The

341“Foes of Cigarettes Invade Capitol,” DMR, Mar. 22, 1921 (6:8).
Iowa press immediately reported that, according to state leaders, this announcement of a national campaign against all forms of tobacco was “embarrassing the effort of the state W.C.T.U. to kill” the bill. In an effort at damage control, they “assured legislators that they are not warring against tobacco generally, but only against cigarettes.”\(^{343}\) Reflecting both the anti-tobacco movement’s deeper insight into the health dangers of and the moral superficiality of its attack against cigarettes as well as the inconsistency of not attacking other forms of tobacco use, Ida B. Wise Smith’s statement was manifestly designed to signal to the legislature that the WCTU was not a hopelessly utopian social critic, but a reformist organization offering practicable proposals:

“[T]he anti-narcotic department of the W.C.T.U. for all these years has urged the instruction of children in the evil of alcohol and narcotics, which includes tobacco. The legislative relation is to the cigaret and the cigaret only. There has been no designation of April 10 as anti-tobacco Sunday. It is the anti-cigaret Sunday designated by the International Sunday school committee.”\(^{344}\)

This episode did not mark the first time that the WCTU had stood accused of preparing such an assault.\(^{345}\) Perhaps because of the ambiguity of the WCTU’s denials, the organization outside Iowa was forced in 1921 to repeat them, insisting that education and prayer would be “the only weapons” it would use to “eliminate the cigarette.” Asserting “positively,” according to the industry magazine *Tobacco*, that “there was no campaign on foot at present to obtain anti-cigarette legislation,” the WCTU charged that statements announcing such campaigns were “inspired by the wets, who are seeking to alienate public sympathy from prohibition and its enforcement.” The New York State WCTU—whose president Ella Boole (the then national vice president and future national president) was—went further than Smith, explaining that the reason that it had never even contemplated starting a legislative campaign against tobacco was that “‘the question of the use of tobacco is not a normal [sic; should be moral] question. Its use does not affect the morality of the nation or the social welfare of the people as does the use of intoxicating liquor. Therefore it is not a question of legislation.”\(^{346}\)

---

345 See above ch. 14.
The Crucial Clark Substitute Bill

Every Congress and Legislature is all but suffocated with bills, and all too many of them are passed. Take, for example, the absurd anti-cigarette acts that the persistence of well-meaning fanatical counterblasters and legislative timidity or good nature have inflicted upon the people of certain States. They are null, despised, a joke.347

Whether such fine distinctions reassured men in Iowa that the WCTU would not one day seek to take away their cigars, pipe, and chewing tobacco as the law whose repeal they were desperately trying to thwart had outlawed cigarette sales is not clear. But at a 20-minute meeting of the Police Regulations Committee two days later on March 23, Republican Representative Charles F. Clark introduced a substitute for Dodd’s bill that was less discontinuous with the existing prohibitory law and was adopted by a vote of six to one.348 Characterized by the press as “very drastic,” the amendments would occupy the center of the “big fight” that would be “staged on these bills.”349 Clark, a 49-year-old lawyer and Judiciary Committee chair in his second term, was a pillar of society in Cedar Rapids, where he was a member of the Chamber of Commerce, Cedar Rapids Country Club, trustee of Coe College, and YMCA president, in addition to being a member of the Sons of the American Revolution.350 That Clark was in no way averse to moralistic state intervention to control adults’ behavior was eloquently on display in his hardline position on movie censorship: when asked during floor debate whether he would also advocate a law to empower a state board to censor in advance what newspapers published, he replied that “he would if newspapers printed matter as objectionable as some films.”351

Clark’s proposal, while retaining the repeal of the general ban on cigarette

347“Respect for Law,” NYT, May 25, 1921 (13) (edit.).
348[Iowa House] Police Regulations Committee Minute Book, Mar. 23, 1921, at 127 (SHSI DM).
349“Our Legislative Letter,” Palo Alto Reporter, Mar. 24, 1921 (4:3-4 at 4). Though not corroborated by the House Journal, the article stated that Clark and another lawyer, Julian Calhoun, had filed the amendments.
The Great Compromise of 1921

sales, was generally more restrictive than Dodd bill.\textsuperscript{352} To begin with, it raised from 18 to 20 the age at which both cigarettes could lawfully be sold or given to minors (while eliminating the exception for written parental permission in Dodd’s bill and existing law)\textsuperscript{353} and minors could lawfully smoke in public (though Dodd and Clark both lowered the latter age from 21 in existing law).\textsuperscript{354} However, unlike the Dodd bill and the then-existing law, Clark’s substitute (and the bill as enacted) eliminated underage smoking as an independent crime: thenceforward any minor who, upon being required by any police, quasi-police, or teacher to reveal the source of his illegally obtained cigarette(s), immediately informed on the person(s), was guilty of no crime and could, theoretically, continue to smoke, so long as he continued to reveal his source(s). In other words, only the refusal to inform constituted a misdemeanor.\textsuperscript{355} Potentially the most important innovation in Clark’s amendments was the shift from Dodd’s centralized statewide issuance of licenses to sell cigarettes subject to a mandatory ministerial duty to issue once the applicant had satisfied certain conditions to a decentralized, localized, and discretionary system under which the “permit may be granted and issued by the council of any city or town”\textsuperscript{356}—or not, if the council chose not to exercise its discretion in that way. In addition to presumably reflecting the specific purpose of some legislators at least to retain the ban locally if it was no longer possible statewide, the amendment conferring exclusive power on local governments to issue or not to issue cigarette sales permits may have been designed to gain votes from legislators who could then assure constituents and others opposed to prohibition repeal that their communities could thus continue to ban cigarette sales. Since expansion of home rule in general had been on the legislative agenda since before the opening of the session and been given a chance of passage,\textsuperscript{357} inclusion of such a provision in the amended Dodd bill

\textsuperscript{352}Since Clark’s amendment has apparently not been preserved with the rest of the H.F. 678 file, its provisions have been reconstructed from the amendments adopted by the committee, the amendments to Clark’s amendment, and newspaper accounts.

\textsuperscript{353}H.F. 678 § 1; Committee Substitute for House File 678 § 1; Compiled Code of Iowa § 8866 at 2422 (1919).

\textsuperscript{354}H.F. 678 § 5; Committee Substitute for House File 678 § 2; Compiled Code of Iowa § 8879 at 2425 (1919).

\textsuperscript{355}H.F. 678 §§ 5-6; Committee Substitute for House File 678 § 2; Compiled Code of Iowa §§ 8879-80 at 2425 (1919). In this sense, it was incorrect to state that under the new law it was “a criminal offense for minors to smoke cigarettes.” “The New Cigaret Law,” \textit{WEC}, June 28, 1921 (6:1) (edit.).

\textsuperscript{356}H.F. 678 § 2; Committee Substitute for House File 678 § 3.

\textsuperscript{357}“No Factional Divisions Seen over Policies,” \textit{DMR}, Jan. 7, 1921 (1:8).
might have attracted votes from legislators who were indifferent to the cigarette issue but prioritized local control in general.

Clark’s home rule provision was not novel. Iowa could have followed its neighbor Nebraska, which in 1919, when it converted its 1905 prohibitory statute to a licensing regime, provided that cigarette sales licenses “shall be issued” by local governments without conferring home-rule powers on them. Clark, however, chose to pursue the model that Minnesota had created when it repealed its four-year old cigarette sales ban in 1913 and replaced it with a licensure system: the legislature provided that licenses “may be granted” by the city council or county board with jurisdiction over the place “wherein such right is sought to be exercised....” This home rule principle became clearer still in 1919 when the Minnesota legislature provided that: “No license shall be granted in or for any city, village or county, if the governing body of such city, village or county shall by ordinance or resolution prohibit the sale of cigarettes....” Moreover, a week before Clark offered his substitute bill, the Shenandoah World had editorially proposed adding a local control provision to the bill: “Let the Dodd measure be passed, and then if any city or town want to prohibit the sale of cigarettes within its limits, let it pass its own laws affecting the people and see to the enforcement.” To be sure, Clark’s initiative was not nearly so radical as a bill that had died on a tie vote in the Arizona Senate on March 8: like local option liquor laws that had once flourished before prohibition, it would have empowered counties, cities and, towns to prohibit absolutely the sale of all tobacco, cigars, and cigarettes by an election ordered by the county board of supervisors or mayor and city council either on its own or in response to a petition by 25 percent of the voters.

Clark additionally required applicants to file a $1,000 bond out of which taxes, fines, costs, and damages arising out of cigarette sales could be paid, and

---

358 1919 Nebraska Laws ch. 180, § 2, at 401.
359 1913 Minn. Laws ch. 580, § 6, at 870, 871.
360 1919 Minn. Laws ch. 348, § 6, at 373. See vol. 2.
363 Committee Substitute for House File 678 § 4.
raised the license fee (now called a mulct tax and payable to the city) from $50 to $100. 364 Finally, the Clark amendment provided for a process—modeled on that for enjoining and abating intoxicating liquor licenses—to deem the building in which cigarettes were sold in violation of the law a nuisance. 365

The Iowa press offered two versions of the committee’s action—one by the Des Moines News (whose Scripps chain also owned the United Press news service) and the other distributed by the Associated Press. 366 The News pictured the committee substitute as “radical amendments,” which “practically make[,] the sale of cigarettes a matter of local option.” In turn, Dodd declared that he would oppose the committee bill, whose excessively high $100 permits would effectively kill his bill, and insist that his original bill be passed. Interestingly, he did not object to the local option provision, 367 although it presumably must have been anathema to the Tobacco Trust because it would have permitted the perpetuation of the old prohibitory regime wherever majorities supported sales bans. The AP version prematurely stressed that the committee had “worked out” a “compromise,” which, it erroneously predicted, would probably be reported out late that afternoon. Without identifying the substance of any criticism, the article, which failed to point out which provisions were new, stated that “[m]uch opposition developed to the Dodd bill in its original form.” 368 Little wonder that the press concluded that the Dodd bill “was having difficulties, but may get through.” 369

That same day the sheriff of Polk county heightened the pressure on legislators by announcing that cigarettes would be “doomed” in the capital if the legislature refused to legalize their sale because it would be enforcement officers’ duty to insure tobacco dealers’ compliance. Without explaining why they had failed to perform their duty in the past, W. E. Robb declared: “‘I am just waiting to see if the people of Iowa want cigarettes sold. If they do and the laws

364 H.F. 678 § 2; Committee Substitute for House File 678 § 5; [Iowa House] Police Regulations Committee Minute Book, Mar. 28, 1921, at 128 (SHSI DM).
365 Committee Substitute for House File 678 § 15.
366 The Register, which was generally covering the Dodd bill extensively, failed to report on the amendments.
367 “‘Smoke Option,’” DMN, Mar. 23, 1921 (1:2). Dodd also faulted the substitute for failing to provide for a revenue tax collector with direct responsibility for enforcement.
The Great Compromise of 1921

are changed the dealers will not be molested."**\textsuperscript{370}\)

The next day, March 24, the committee met again, this time for almost an hour; the absent Representative Frank Lake—who had played a prominent anti-prohibitionist role during the 1917 session**\textsuperscript{371}\)—submitted a request for a rehearing on the substitute for H.F. 678, which was voted down. After the six members of the committee present had again adopted the substitute, a request by Dodd, who was not a committee member, for another public hearing was also voted down.**\textsuperscript{372}\)

In the interval between this committee meeting and its final meeting on H.F. 678 four days later, the president of the Northwestern Iowa Teachers’ Association condemned the Dodd bill (as well as the American Legion-backed bill to legalize boxing) at the opening of its annual convention in Waterloo. Adopting a decidedly advanced emulationist position, Fred Miller declared to the more than thousand teachers in attendance that “the smoking of cigarettes by men had a demoralizing effect on the boys of the country...”**\textsuperscript{373}\)

The House Police Regulations Committee met one last time, on March 28, for only ten minutes, to straighten out the “tangle”**\textsuperscript{374}\) on H.F. 678. First, an amendment to strike out section 12 (the text of which has not survived) and add what was known as section 14 (which appears to have accommodated Dodd’s demand for a designated official in charge of the tax) was moved; then the mulct tax was reduced from $100 to $60 (which was $10 higher than the amount set in the Dodd bill). The seven members present then unanimously recommended the

---

\textsuperscript{370}“Robb Awaits Action,” \textit{DMN}, Mar. 23, 1921 (1:2).

\textsuperscript{371}See above ch. 14.

\textsuperscript{372}[Iowa House] Police Regulations Committee Minute Book, Mar. 24, 1921, at 128 (SHSI DM). The committee records do not support a news service article stating that the committee had made recommendations that the compromise for the Dodd bill approved by the subcommittee be passed. “Picture Censorship Bill on Calendar for Next Tuesday,” \textit{ICP-C}, Mar. 25, 1921 (10:5).

\textsuperscript{373}“Teachers Fight Against ‘Pill’ and the Boxing Bills,” \textit{DMR}, Mar. 26, 1921 (10:8). WCTU President Wise had apparently requested that the association issue a statement against passage of the Dodd bill, but, Miller informed her after the end of the convention that it had not taken any “definite action.... I feel sure they would have taken action if it had been brought up, but it was overlooked.” Miller then expressed a jaundiced view of enforcement: “I certainly feel that the law we had was good enough if it was enforced. If they will strictly enforce the new one conditions will be better than they have been, but of course you and I know that it will not be enforced.” Fred J. Miller to Ida B. Wise Smith (Apr. 5, 1921), in N. E. Kendall correspondence re cigarette bill (SHSI DM). It is unclear how or why a copy of this letter wound up in the governor’s file.

The Great Compromise of 1921

bill for passage. Chairman Elliott reported the committee’s recommendation that H.F. 678 be amended by striking out everything after the enacting clause and inserting the substitute in its stead, which report the House adopted the same day. The compromise bill, according to the Des Moines Capital, was supported by many House reformers as well as by the “Dodd group of liberals,” although the liberals would not have voted for provisions in Clark’s substitute that deviated from the original Dodd bill.

Legislative Floor Action

One of the most conspicuous issues before the people of Iowa at this time is the cigarette question judging from the interest taken in the Dodd bill to legalize the sale. There is really a greater effort being put forward in behalf of the bill than against it but both sides are busy and never a mail arrives but what brings to the law makers some advice from home touching one side or the other.

It purports to protect a boy of 20, by legalizing the sale of cigarettes to his chum who is 21; - the present law offers protection to all.

By the time the Dodd bill reached the House floor at the end of March, Iowans had presented “petitions galore” on both sides of the question. Of the 18 petitions still extant in the Iowa State Archives, only one advocated repeal.
of the ban on cigarette sales to adults: world war veterans in Mason City, claiming that the existing law was unenforcible because it was against public sentiment, requested enactment of a “reasonable license law” that would “permit others [than boys] to exercise their right to purchase” cigarettes and sellers to handle them “without appearing as criminals under the law.”

Significantly, only one of the 17 petitions opposing repeal stemmed from a similarly large city (Waterloo)—and that one was also unique in having been sent by boys at a high school.

Among the other 16, all from residents of small towns, which also represented the core of compliance with the prohibitory regime, the center of zealous advocacy was Winterset, the county seat of Madison, five of whose churches in addition to the local WCTU chapter submitted petitions to their representative and senator. Four churches (Methodist, Church of Christ, Baptist, and United Presbyterian) sent identical typed texts supplemented by statements that the congregations had adopted the petition by unanimous vote. Apart from arguing that the Dodd bill would not be any more effective than the existing law, the churches “earnestly protest[ed] against our state being financed by money received by the sale of cigarettes [sic] to our young people.” The text of the WCTU’s petition deviated slightly from the churches’, adding that inasmuch as the use of cigarettes had been “proven beyond question...harmful physically, mentally and morally,” the officers, representing more than 100 “mother-hearts,” “protest[ed] against being made partners under the law in the sale of them.”

In a more utilitarian formulation, a non-church group of residents of Clarksville, just two days after Dodd had filed his bill, asked their representative to vote against the license fees, which would “never compensate for the loss in service and efficiency that the encouraging of this filthy habit entails” and from which only
The Great Compromise of 1921

The fifth church, the Methodist Episcopal (and Sunday school), 91 of whose members voted unanimously to ask their representative and senator to vote against licensing the sale of cigarettes to those above 18, observed that the community of Winterset had “expressed themselves [sic] in no uncertain terms that this Bill should be killed” and that the existing law should be enforced. Although the appointed writer had no doubt that the two legislators would vote against the bill, he knew that they could “do it with a better feeling when you know the people are behind you.”\footnote{Frank Zeller to W. H. Vance (Mar. 21, 1921). RG Secretary of State: Legislative, Series: 39th General Assembly: Miscellaneous Petitions, Folder: Cigarette Law (State Archives: SHSI DM). Presumably a separate letter was sent to the senator, but it was not preserved in the House records.} Ironically, despite this deluge of Christian opposition, both Rep. H. W. Vance and Sen. Ed. Smith voted for the Dodd bill.\footnote{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1653 (Mar. 30); State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1643 (Apr. 4).} (The intensity of Winterset’s opposition to cigarettes can be gauged by the fact that when repeal went into effect on July 4, but local governments were empowered to continue the sales ban, the WCTU and the same churches successfully petitioned the Winterset city council to deny sales permits, but a week later proponents of licensure prevailed upon one councillor to change his vote, thus bringing about approval of permit applications.)\footnote{“Cigarets Turned Down,” \textit{WM}, July 6, 1921 (1:1); “Council Reverses on Cigarets,” \textit{WM}, July 13, 1921 (1:5). See below ch. 20.}

\textit{The House: Two-Fifths of the Members Oppose Repeal}

It is of course, useless to restate the evils that have resulted from the use of cigarets. You recognize them, and have for years, but, why is it that when once in a position of responsibility, members of the legislature think their chief duty is to cater to depraved appetites?\footnote{Sara C. Wilbur to Gov. N. E. Kendall (Apr. 6, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). At the 1920 census Wilbur was returned as a 77-year-old newspaper reporter.}
The Great Compromise of 1921

The House began its debate on H.F. 678 on March 30 by adopting Clark’s pre-filed amendment to insert a provision from the original Dodd bill making it illegal to forge permits or stamps or knowingly to possess forged permits or stamps. Three members then proposed substituting for the uniform $60 mulct tax for the permit a graduated tax ranging from $25 in towns with a population under 1,000 to $100 in cities of over 20,000. The amendment lost by a large majority, 17 to 75, with both Dodd and the chamber’s strongest opponent of repeal, Moen, voting Nay. Moen then tried to restore the $100 mulct tax from Clark’s original amendment, but it, too, lost, though by the smaller margin of 37 to 58. Of the 37 members who voted to make the tax more onerous and thus possibly to reduce the number of stores selling cigarettes 30 voted later that day against the bill on final passage. The last amendment to be voted on before the noon recess was offered by John Bradley—a farmer whom the WCTU had singled out for special mention as one of the staunchest supporters of cigarette sales prohibition during the 1919 session—and proposed raising to 21 the age at which cigarettes could be legally sold or smoked in public (thus restoring existing law). Ayes outnumbered Nays 63 to 32, thus administering a defeat

391Oddly, both the handwritten House minutes and the Journal erroneously stated that the debate was scheduled for Wednesday March 31 (Wednesday was March 30). House Minutes (Mar. 28, 1921) (SHSI DM); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1578 (Mar. 28). Unfortunately the press provided even less coverage of the speeches made during the Dodd bill debates than it usually did, thus making it almost impossible to get any feel for the quality of the arguments. For example, the Register’s article on House action on March 30 did not even mention the Dodd bill (though it did mention Dodd’s successful objection to a motion to block a pro-industry utility bill). “Fail to Upset Utilities Bill,” DMR, Mar. 31, 1921 (6:7). A less discursive account called the Dodd bill “[t]he outstanding bill” passed by the House that day, but mentioned no arguments developed during the debate. “Day’s Proceedings in the General Assembly,” DMR, Mar. 31, 1921 (9:3). The skimpy reporting stands in sharp contrast to the overwhelmingly detailed coverage in the Salt Lake Tribune and Deseret News of the contemporaneous legislative debates in Utah on the Southwick bill to ban cigarette sales and advertising and to prohibit tobacco smoking in enclosed public places. See vol. 2.


395See above ch. 14.

396State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly
The Great Compromise of 1921

and an insult to the American Legion. Of the 32 (including Clark himself) who voted against the higher legal age only two later voted against final passage of the bill.

After the House had voted to adopt the legal age of 21 and adjourned for lunch, the press was already reporting that the morning’s votes indicated “conclusively that the bill would be approved by the house with several votes to spare over a majority.” The basis for such a conclusion is not intuitively clear. The almost two-thirds majority for the higher legal age could have represented both a dissent from and a compromise with the bill—as in fact it did since 39 of the 63 voting for it voted against the bill’s final passage. To be sure, the defeat of the proposed increase of the mulct tax to $100 may have been viewed as a better gauge of sentiment for the bill.

After the recess, the House, on a voice vote, adopted an amendment offered by Julian Calhoun, a Methodist lawyer who in the morning had voted against both amendments to differentiate and increase the mulct tax, to fix it at $50, $75, and $100 in incorporated towns, cities of the second class, and cities of the first class, respectively. Moen and the other anti-smoking legislators thus achieved a modest victory, which he replicated by securing a voice vote in favor of an amendment to prohibit a city council from issuing for a period of at least two years a permit to anyone whose permit it had revoked. All the amendments having been disposed of, the House passed the bill on a roll-call vote of 62 to 41. That two-fifths of the members voted to retain the 25-year-old sales prohibition in spite of the considerable restrictions that they had been able to force on the repeal bill—in particular, local prohibition, a high mulct tax, and a ban on sales to those under 21—was a striking symbol of the anti-cigarette movement’s deep roots in Iowa even in the aftermath of the world war.

1655-56 (Mar. 30).

397 “Victory in Sight for Cigaret Bill,” DMC, Mar. 31, 1921, vol. 38 no. 81 (4:3).

According to “Senate Debates the Holdegel License Bill,” PDC, Mar. 30, 1921 (1:8), it was the bill’s friends who believed that the bill would pass.


401 Four of the five House members whom the WCTU had singled out for praise as
The Great Compromise of 1921

The Senate Defeats Repeal, But Then Tergiversates

For the Great State of Iowa, to license the sale of cigarettes, and go in partnership with the Great Tobacco Trust, in collecting a revenue from the people addicted to the use of the cigarette, would in my opinion be a step backward, and this Grand Old State cannot afford for a money consideration to go into such a partnership.\textsuperscript{402}

Shocked by the bill’s passage in the House, the WCTU and ministerial and teachers associations undertook a concerted effort to defeat it in the Senate.\textsuperscript{403} On its arrival in the Senate on March 31, H.F. 678 faced the possibility of having to make its way through the sifting committee, but Senator Kimberly, whose identical companion bill had been reported by the Public Health Committee two weeks earlier without recommendation,\textsuperscript{404} successfully moved to substitute the Dodd bill for his on the Senate calendar and made a special order for April 4.\textsuperscript{405} One newspaper flatly stated that the Senate’s vote on suspending the rules “indicates quite conclusively that the measure has a senate majority.”\textsuperscript{406} Nevertheless, even as late as the first week of April a syndicated newspaper column on the legislature was predicting that no cigarette bill would pass and that the law would be left as it was.\textsuperscript{407}

Sunday April 3, literally the eve of Senate debate, marked the opening in Des Moines and throughout the country of the national WCTU’s Sabbath observance week, which was to culminate in anti-cigaret Sunday on April 10. The accompanying literature urged strict Sabbath observance, a ban on smoking by minors as well as in public places by adults, and “the creation of sentiment

\textsuperscript{402}William R. Cooper to Gov. N. E. Kendall (Apr. 10, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.

\textsuperscript{403}“General Assembly Closes Friday,” SLB, Apr. 14, 1921 (11:2).

\textsuperscript{404}State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 908 (Mar. 16).

\textsuperscript{405}State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1486 (Mar. 31); Robert Hughes, “Iowa Legislature Begins Probe of Coal Industry to Find Profiteers,” DMN, Mar. 31, 1921 (10:3).

\textsuperscript{406}“Senate to Vote on Cigaret Bill,” DMC, Apr. 2, 1921, 38(83), (6:5). Neither the Senate Journal nor the article revealed what the vote was.

\textsuperscript{407}“Under the Golden Dome,” Adams County Free Press, Apr. 9, 1921 (4:3-4)
against allowing women to sell tobacco in any form.” Nevertheless, the national organization, while opposing unnecessary Sabbath commercialism, denied that it was pursuing a campaign to enforce blue laws: “It is merely a coincidence that our annual antitobacco and anticigaret Sunday come at the close of this week of prayer. We are striving to convince people under 21 years old of the deleterious effect of tobacco and cigarettes.”408 Whether this explanation was plausible and whether the national intervention redounded to the benefit of the last-ditch defeat of the Dodd bill in the Senate would soon be revealed.

Senators offered a large number of major and minor amendments most of which were offered by opponents and failed;409 the few that passed the press characterized as “perfectly harmless.”410 One of the most interesting losing amendments was offered by Senator James McIntosh, a member of the Methodist Episcopal church and former school teacher and county and town school official from a rural county along the Missouri border who voted consistently against legalizing cigarette sales.411 Doubtless in an effort to restrict the potential pool of applicants, create transparency, and put local communities on notice so that they could object to licensing, McIntosh proposed requiring that everyone seeking a license file a petition stating that the applicant had: been conducting a lawful business for the previous six months in a building whose location was described; paid all mulct taxes assessable under section 5007; not been convicted of violating any law for two years; and advertised his intention to apply for the permit in a newspaper of general circulation in the county between 10 and 30 days before filing the petition, which had to be co-filed by the owner of the business premises. This intervention on behalf of community participation in and supervision of the licensing process lost—or, as the WCTU’s lobbyist told the governor, was “promptly crushed with the steam roller.”412 Probably the least

408“Week of Prayer Fight Cigaret,” DMR, Apr. 4, 1921 (2:7-8).
409“Cigaret Bill Is Beaten by 1 Vote,” DMC, Apr. 5, 1921 (3:3).
410“Senate Beats Cigaret Bill; May Revive It,” DMR, Apr. 5, 1921 (1:4).
411State of Iowa: 1921-22: Official Register at 327 (29th No.). McIntosh was nevertheless returned at the 1910 and 1920 population censuses as owning a clothing store; clothing merchant was also his occupation according to Handbook: Iowa Legislature: Thirty-Ninth General Assembly n.p. (1921).
413Untitled, undated, and unsigned typescript addressed to “Your Excellency,” in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Hammond added that a similar amendment had been “offered the author of the substitute bill [Rep. Clark?] which was emphatically refused....”
innocuous among the successful amendments was one offered by Byron Newberry, a 67-year-old lawyer and progressive, a six-term senator who had first been elected in 1903 and was responsible for introducing Iowa’s first pure food and other purity bills, to confer on county boards of supervisors the same power that the House had granted city councils. Too extreme, and hence defeated, was Newberry’s amendment to “enable ‘anti’ communities to prevent the sale of cigarettes” by authorizing city councils to levy an additional $500 mulct tax against those selling cigarettes. However, since the House bill already empowered cities to achieve this end by simply denying all permits, it is unclear how even such a severe financial deterrent would have enhanced this power—unless the councillors were formalist libertarians who bridled at denying a permit outright but were willing to tolerate the same result forced by economics. What tactic Newberry was pursuing in offering another losing amendment to outlaw the sale of cigarettes to “any female” is likewise unclear: although of a piece with other postwar legislative efforts to suppress smoking by women and with the WCTU’s profound health- and morality-based animus against smoking by women (“a menace to the coming generation”), there is no direct evidence that the Iowa WCTU in fact pushed for inclusion of such a provision in 1921.

In fact, Ida B. Wise Smith aggressively took the stance at an Iowa

---


415 State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1641 (Apr. 4).

416 “Senate Beats Cigaret Bill; May Revive It,” DMR, Apr. 5, 1921 (1:4).


418 State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1643 (Apr. 4).

419 For example, the House of Representatives held a hearing in July 1921 on a bill to prohibit females from smoking in public in Washington, D.C. “Women of Washington Fight Ban on Smoking,” NYT, July 28, 1921 (1:4-5); “Oppose Bill Against ‘Female Persons’ Smoking,” Tobacco 72(14):28 (Aug. 4, 1921). See also Cassandra Tate, Cigarette Wars: The Triumph of “The Little White Slaver” 115-17 (1999).

420 “Education Versus Tobacco,” Tobacco 71(24):14 (Apr. 14, 1921). On the WCTU’s unrelenting campaign in 1928 against a speaking engagement at the State University of Iowa by the British suffragette Reverend Agnes Maude Royden because she smoked, see Benjamin Shambaugh Correspondence (Jan.-Feb. 1928) (SHSI IC).

421 Nevertheless, a press report on the Dodd-Clark compromise bill voted out by the House Police Regulations Committee tantalizingly stated without any context that it made
**The Great Compromise of 1921**

WCTU county convention that women had as much right to smoke cigarettes as men, but neither had a moral right to do so. In the event, a majority of the Senate believed that “if women wanted to smoke and the bill passed...those over 21 could purchase the ‘pills.’” The only amendment that went to a roll call vote would have struck out the section of the bill outlawing public smoking by minors. Offered by a farmer, Jonas Buser, it was defeated 18 to 26. Oddly, although its effect would have been to legalize smoking by minors, Buser—who was an opponent of the bill—according to the Register, wanted merely to delete the provision for obtaining information from minors as to the identity of those who sold or gave them the cigarettes, “on the ground that the youth of Iowa should not be taught to be ‘tattle tales,’ and that the fine or jail sentence...would cause boys to become criminals....” Unsurprisingly, the opposition pointed out that the amendment would “take the teeth out of the bill” and make it impossible to determine which dealers were selling to minors.

When the Senate voted on final passage of H.F. 678, the outcome was initially 25 to 23 in favor, but before the result was announced, Senators Campbell, Holdoegel, and Price switched their votes from Aye to Nay, thus bringing about the bill’s defeat by a vote of 26 to 22. The Des Moines News explained this reversal as stemming from the fact that the “Senate frankly fears

---

“[n]o distinction between men and women....” “Compromise on Cigarette Bill,” ICP-C, Mar. 23, 1921 (1:8).

422 “Women As Good Right to Smoke As Men, But Neither Moral Right,” CREG, July 18, 1921 (7:1).

423 “Beat Cigaretts,” DMN, Apr. 5, 1921 (2:5).


426”Senate Beats Cigaret Bill; May Revive It,” DMR, Apr. 5, 1921 (1:4). That 17 of the 18 senators who voted for the amendment voted against the bill on its final passage strongly suggests that it was designed to kill the bill. *State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly* 1642 (Apr. 4).

427 *State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly* 1643 (Apr. 4); “Senate Beats Cigaret Bill; May Revive It,” DMR, Apr. 5, 1921 (1:4). According to another account, the “bill hinged on Senator Adams and he voted ‘no.’” The three senators then changed their vote. “Beat Cigaretts,” DMN, Apr. 5, 1921 (2:5). Since arithmetically Adams could not have changed his vote, this report presumably meant that the three senators took their cue from Adams, who, however, must have voted after them. The Senate Roll Call sheet shows that the marks in the “Ayes” column next to the names of the three senators had been erased; no such erasure appeared next to Adams’ name. House File 678: Senate Roll Call, Senate Minutes, Apr. 4, 1921 (SHSI DM).
The Great Compromise of 1921

the influence of the W.C.T.U.” Ida B. Wise Smith may have been “jubilant” after
the Senate defeated H.F. 678 on April 4, but friends and observers of the Dodd
bill were hopeful of reversal of the vote because Dodd was “one of the most
influential members of the House sifting committee, and several Senators may
vote ‘aye’ on a reconsideration ballot if they wish to get pet measures thru the
House sifting committee.” Supporters of the bill believed that they would be
able to pass the bill before the end of the session because opponents’ motion to
lay on the table the motion to reconsider failed 22 to 25, thus leaving the bill open
for reconsideration.

Two days later more than enough senators changed their minds and votes to
pass the motion to reconsider the vote by which H.F. 678 had failed by a vote of
28 to 21. The “keynote” in the Senate proceedings, according to the Register,
was the speech by Milton Pitt, a farmer and former House Speaker, who ignored
health considerations: “If it wasn’t immoral for the Iowa boys who were fighting
in France to smoke cigarets, then it isn’t immoral now.” On final passage,
with Ida B. Wise Smith and Lucy Page Gaston sitting silently by, five

428 “Beat Cigaretts,” DMN, Apr. 5, 1921 (2:5).
429 State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly
1643-44 (Apr. 4); “Beat Cigaretts,” DMN, Apr. 5, 1921 (2:5); “Cigaret Bill Is Beaten by
1 Vote,” DMC, Apr. 5, 1921 (3:3). Twenty of the 22 votes cast to lay the motion to
reconsider on the table were cast by senators who voted against the bill.
430 State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly
1736-37 (Apr. 6).
432 Gaston had been in Kansas (which did not repeal its ban on cigarette sales until
1927) supporting a House bill (which did not pass) to ban tobacco smoking in churches,
school buildings, or any public place adjacent to them. When she left Kansas for Iowa the
Times sarcastically observed that the “loss of Kansas is Iowa’s gain. The war against paper
cigars will be waged relentlessly in the region of the Iowa Idea.” “A Fruitful Pilgrimage,”
NYT, Jan. 25, 1921 (11); House Journal: Proceedings of the House of Representatives of
the State of Kansas: Twenty-Second Biennial Session 81 (Jan. 25, 1921) (H.B. No. 68).
On Gaston’s career, see “Lucy Page Gaston, Reformer, Is Dead,” NYT, Aug. 21, 1924
(11); Frances Warfield, “Lost Cause: A Portrait of Lucy Page Gaston,” Outlook and
Independent, Feb. 12, 1930, at 244-47, 275-76. The press did not report that prior to her
appearance in the Senate Gaston had made any contribution to defeating the repeal bill.
433 “Both Houses Pass Dodd Cigaret Bill,” DMR, Apr. 7, 1921 (4:4). In addition to
Pitt, Senators Parker, Price, and Horchem “made the chief speeches” for the bill, while
Buser spoke against, but the Register failed to report on their content. Two days later Ida
Wise Smith wrote Kendall that three of the bill’s supporters had made speeches, but that
opponents had been ruled out of order when desiring to speak. Ida B. Wise Smith to N.
The Great Compromise of 1921

senators who had voted Nay on April 4 voted Aye, while only one switched his vote in the opposite direction, producing a final result of 27 to 22,\(^{434}\) thus inflicting a “bitter blow” on the WCTU leadership, which had believed the bill dead two days earlier.\(^{435}\) The see-saw battle in the Senate, even more so than the House proceedings, impressively demonstrated the enduringly broad support for a cigarette sales ban in Iowa and gave the lie to the claim two months later of the Report of the Special Committee on Anti-Tobacco Movements of the National Cigar Leaf Tobacco Association that the “antis” in Iowa had been defeated by a “decisive” majority.\(^{436}\)

The press detected a causal relationship between the Senate’s passage of the cigarette bill and its defeat of the bill to legalize boxing, the other measure posing a direct confrontation during the 1921 session between the WCTU and its political-ideological adversary, the American Legion, which “was unfortunate in having the boxing bill come up for a vote” after the Dodd bill: “senators then felt they had done enough for the liberal element in one day.” And with Ida B. Wise Smith and Lucy Page Gaston present and “considerably infuriated,” the chamber “did not wish to arouse the anger of the women voters too much.”\(^{437}\)

After watching the Senate pass the Dodd bill on April 6, Gaston, the self-professed “‘extremist of extremists,’”\(^{438}\) proceeded to the House, where she asked “to be given an opportunity to talk ten minutes. ‘Too busy,’ said the House,”\(^{439}\) which, despite Gaston’s and Smith’s infuriation, then overwhelmingly concurred in the Senate’s amendments by a vote of 72 to 6.\(^{440}\)

---

E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). The report that appeared in the DMN and other papers not only asserted that “[n]o discussion was made on the bill,” but also got the names wrong of the senators who had switched their votes. “Senate OK’s Cigaretts,” DMN, Apr. 6, 1921 (1:3-5); “Senate Gives Approval to Cigaret Bill,” WT-T, Apr. 7, 1921 (1:5).

\(^{434}\)State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1737-38 (Apr. 6). One of the two senators who had not voted on April 4 also voted Aye.

\(^{435}\)“Senate OK’s Cigaretts,” DMN, Apr. 6, 1921 (1:3-5).

\(^{436}\)“National Cigar Leaf Men Hold Notable Meeting,” Tobacco 72(6):1, 4 (June 9, 1921).

\(^{437}\)“Solons Vote Against Legion; Kill Boxing Bill,” DMN, Apr. 7, 1921 (5:1-2 at 2). The WCTU and church members had purportedly alleged that legalized boxing would flood Iowa with gamblers and “other undesirables.” “Legion Rallies Aid to Lake Bill,” ADT, Apr. 1, 1921 (1:2).


\(^{439}\)“Refused Talk on Cigaret Bill,” DMR, Apr. 7, 1921 (1:5).

\(^{440}\)State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly
The Great Compromise of 1921

None of the intense passion in favor of retaining the ban made an impression on the editor of the Burlington Hawk-Eye, who charged that it had been “conclusively demonstrated” that the anti-cigarette law was such a “total failure” that even the sharpest opponents of cigarettes conceded not only this point, but also that more of them were smoked in Iowa in 1921 than before the prohibitory law had been enacted. Since the editor was resigned to a future of unstoppable cigarette smoking, he dismissed the merely “theoretical” objection to the bill’s licensing sales, and joined advocates in welcoming the state and municipal revenue flow (that in Burlington would be generated by the 15 or 20 places that “more or less openly” sold cigarettes without paying any fees or taxes) at a time of high government expenses and taxes.441

Gubernatorial Hearing

Women are opposed to licensing any evil. This bill coerces an unwilling half of your citizenry into partnership with alien and greedy corporations to destroy life for the purpose of helping pay taxes.442

The law-abiding, law-loving citizenship of Iowa are [sic] not ready to surrender to these outlaw interests. They never owned a white flag, sir, and they are not contemplating the purchase of one now.443

In the wake of the WCTU’s failure to prevent Senate approval of the Dodd bill on April 6 and the House’s quick action concurring in the Senate’s minor amendments that same day, uncertainty prevailed as to whether the governor would sign or veto the measure. Because the bill had been sent to him the day before adjournment,444 Kendall had 30 days after adjournment (April 8) to act;445 if he vetoed it after adjournment, the legislature would have no opportunity to

2003 (Apr. 6). Two of the five House members whom the WCTU had praised as staunch anti-cigarette supporters in 1919 and who were still in the House in 1921 were among the six voting against the Senate amendments—Moen and W. C. Edson.

441“The New Cigarette Law,” BH-E, Apr. 8, 1921 (4:1) (edit.).
442Lulu Catherine Jones (president, Parent Teacher Council of Des Moines) to Nathan E. Kendall (n.d.), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
443[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 5, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
445Iowa Constitution Art. III, sect. 16.

1254
override the veto. Already late on the afternoon of April 6, supposedly at the request of Lucy Page Gaston, who had been in Des Moines organizing against the bill, Kendall “granted to opponents of the cigaret bill the right to be heard before he takes final action on it.” The Register reported that Dodd, “drafter of the bill, and several other friends of the measure will attend the hearing,” which would “probably” take place at 2 o’clock on April 7 (though in fact the date turned out to be April 8) in the governor’s private state house office.

A somewhat different version of the events leading up to the hearing emerges from correspondence between Kendall and George Cosson, a former state senator and unsuccessful Republican gubernatorial nominee who, before becoming attorney general himself, had written an opinion for the attorney general concluding that payment of the mulct tax did not immunize the payor against violation of the cigarette prohibition. The tone and style of their exchange were those of Republican party political confidants. On April 6 Cosson hurriedly and sloppily handwrote on lined paper without letterhead or date a brief note to Kendall on the Dodd bill, the first and last sentences of which dealt with the same issue: “The cigarette bill was backed by the press boys. ... If there is any doubt about it [i.e., as to whether Kendall will sign the bill] the press boys want to be heard.” Since Cosson’s law office was located in the Register and Tribune Building, he may have been especially well situated to be familiar with publishers’ views of prohibition repeal. If the governor was not yet similarly acquainted, he was very quickly apprised by telegrams and letters with which newspaper owners inundated him between April 7 and 9 while he was purportedly making up his mind about whether to sign or veto the Dodd bill.

On April 7 the publisher of the Republican Ottumwa Courier, James Powell—who was close enough to Kendall to have received a “Dear Jim” reply—wrote a detailed letter to the governor prompted by the hearing the next

---

446 “Iowa Assembly Rejects Report of Committee,” BH-E, Apr. 9, 1921 (1:7).
447 “Cigaret Bill Still in Balance,” DMC, Apr. 9, 1921 (1:8).
449 See above ch. 13.
450 C to Governor (n.d. [Apr. 6, 1921]), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). The author and date are reconstructed from Kendall’s reply. Cosson’s handwriting matches that of his courtship letter to his future wife. George Cosson to Jennie Riggs (July 24, 1904), in Jennifer Riggs Cosson Papers, Box 1, Folder: Jennifer Riggs Cosson: Courtship Correspondence July 1904, Iowa Women’s Archives, University of Iowa.
451 NEK to Jas. F. Powell (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
The Great Compromise of 1921

day. Since some of Powell’s phrasing and reasoning made their way into Kendall’s ultimate work product, the letter merits close attention:

I think that one of the most necessary things for the people to do now is to recognize the fact that we have to deal with actual conditions and not with things as we might theoretically like to have them. I think that in some form the sale and use of cigarettes in this state must be recognized and legalized. ... Cigarettes are sold and used by thousands and thousands of people of all ages, in business, on the streets, in the homes and every where [sic] and it is not regarded by anybody as illegal or immodest or disgraceful. We, as a people, are buying and selling and smoking cigarettes constantly. That being a fact, what is the use of having a law that absolutely ignores that fact and condition?  

Powell’s factual assertions were a melange of truth and falsity: while cigarette sales and use were widespread, sales were not ubiquitous and many in Iowa not only regarded sales as what they in fact were—illegal—but had charged for years that cigarettes were far worse than disgraceful. (For example, the president of the 4,000-member Parent Teacher Council of Des Moines, informed Kendall that the Dodd bill was “an attempt to legalize an act which the law and a majority of your constituents has [sic] long considered illegal and offensive.”)

More importantly, Powell’s positivist or laissez-faire attitude failed to distinguish between current societal reality and models of how future reality should be shaped. His incontrovertible historical point was that the war had changed attitudes toward cigarette use (though his claim “that there are probably three or four times as many cigarette smokers now as there before the war” appears implausible since national cigarette production had increased by only 84 percent from 1916 to 1920, exactly the same increase that had been recorded between 1912 to 1916).

It was this “condition,” “this fact,” that “we have to deal

---

452 Jas. F. Powell to N. E. Kendall (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

453 Ironically, one of the letters requesting that Kendall veto the bill expressly stated that “[c]igarettes is [sic] a mind destroyer and a disgrace for any sane person to use,” Judson Brush to Governor of Iowa (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Brush was returned as a laborer living in Cedar Rapids at the 1920 census.

454 Lulu Catherine Jones to Nathan E. Kendall (n.d.), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

455 Jas. F. Powell to N. E. Kendall (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

456 Calculated according to Arthur F. Burns, Production Trends in the United States Since 1870, tab. 44 at 298-99 (1934).
with...in a practical way instead of the foolish way in which it is now.” Although Powell personally thought that cigarettes should be subject to the existing regulation of cigars and smoking tobacco\(^{457}\)—which encompassed merely prohibition of sales to minors under 16 and of advertising within 400 feet of public schools\(^{458}\)—he was willing, “if the majority feel that there should be an extra measure for the sale of cigarettes,” to “handle it in that way,” provided that this approach (which apparently Kendall glossed as “license” in the only marginal comment written on any of the correspondence) be embedded in a recognition “that there is such a thing in the world as a cigarette and that people are using them and that they are going to keep on, for some time to come, using them” and that “the law that says anything to the contrary” should be eliminated.\(^{459}\)

Here Powell built a straw man: neither the law nor the anti-cigarette advocates were unaware that cigarettes were being sold (and in part smoked) illegally; on the contrary, the WCTU and its allies had pushed for stronger injunctive proceedings precisely in order to deter dealers from selling them. The real differences between him and them were two. First, as he made clear in an editorial the day after Kendall, in conformity with his advice, had signed the Dodd bill, he trivialized the alleged health consequences of cigarette smoking (even by the standards of medical-scientific knowledge then available) by classifying it with “eating too much candy and sleeping with the windows closed.” And second, he insisted that “volumes of laws will not stop” people from doing and continuing to do “a great many injurious things....” Curiously, however, despite his libertarian opposition to anti-paternalistic betterment campaigns, Powell, while asserting that it was “absolutely impossible to prevent” the use of cigarettes by adults, accepted national liquor prohibition, which “in time will be generally respected.” In fact, he went so far as to declare that the “legislature’s course as to cigarettes,” that is, passage of the Dodd licensure bill, “would not be a popular nor [sic] proper one to follow with respect to intoxicating liquors.”\(^{460}\) Experience may have prompted Powell to think better of his support for alcohol prohibition, but in the meantime, he made his contribution to Iowans’ continued use of cigarettes by publishing (profiting from) large three- and four-column advertisements for Camel and Chesterfield as soon as they became

\(^{457}\)Jas. F. Powell to N. E. Kendall (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

\(^{458}\)Compiled Code of Iowa §§ 8866 and 8881 at 2422, 2425 (1919).

\(^{459}\)Jas. F. Powell to N. E. Kendall (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

\(^{460}\)“Sensible Law Making,” *Ottumwa Courier*, Apr. 12, 1921 (3:1) (edit.).
Another one of the “press boys,” John H. Kelly, publisher of the independent *Sioux City Tribune*, manifestly felt no embarrassment in revealing to the governor the press’s real motivation for advocating repeal. In his telegram sent Saturday morning April 9, Kelly laid bare the economic basis for the alliance between newspaper owners and cigarette manufacturers:

[W]e feel that the newspaper [sic] of the state are justified in asking for a real cigaareete [sic] law[.]. stop [I]f it were only a question of whether or not they could sell them in the state we would not take the stand we do[,] stop [T]he old law really put the hardship on the papers [stop] it kept us from getting a considerable amount of national advertising[.]

Kelly’s brother Eugene, manager of the *Tribune*, apparently did feel the slightest twinge of unease over John’s letter: three days after Kendall had approved the bill, he wrote the governor to thank him:

Although it was more or less of a selfish matter, nevertheless, it seemed like a clean business move. To us it was not a question of whether there would be cigarettes or not....

We know from our experience with tobacco advertisers that it has merely kept them from using the daily newspapers of the state to cry their wares. To us, this seemed neither fair to the newspapers nor to the tobacco merchants.

Unsurprisingly, the Kelly brothers began publishing cigarette advertisements as soon as they became lawful.

Other publishers advanced the cigarette industry’s position without trumpeting their own self-interest. Luther Brewer, the owner-publisher of the *Cedar Rapids Daily Republican* and an important figure in the Republican party, claiming that “all daily newspapers in the state are for the new law,”

---

461 *Ottumwa Courier*, July 5, 1921 (4:2-4), July 6, 1921 (6:3-7). The newspaper, the only extant copy of which appears to be a microfilm at the Ottumwa Public Library, appears not to have been published on July 4, the day the new law went into effect.

462 Telegram from Capt. John Kelly to N E Kendall (Apr. 9, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Kelly’s name was handwritten; the sender was The Sioux City Tribune. John H. Kelly had recent become a director of the Sioux City Chamber of Commerce. *Sioux City: Spirit of Progress* 1(5):52 (Mar. 10, 1921).

463 Eugene Kelly to Gov. N. E. Kendall (Apr. 14, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

telegraphically urged Kendall to sign the licensing bill in order to stop the loss of thousands of dollars in state revenue. Verne Marshall, the editor of the independent Cedar Rapids Evening Gazette, argued the same point to the governor. Brewer and Marshall both began publishing cigarette advertisements as soon as it became lawful.

Sandwiched in between the references to newspapers were two other points that Cosson pressed on Kendall in an effort to persuade him to sign the bill. First, Representative Clark, who had pushed the major amendments, had letters from three people in Cedar Rapids supporting the bill—the pastor of the largest church, the general secretary of the YMCA, and the president of the board of education—who could have been imagined to be leaning in the opposite direction. Although Clark did not want to give them to the press, he would let Kendall see them. And second, Senator Edward Campbell had voted against the Dodd bill (only) “because of the pool hall proprietors who prefer to bootleg.” The precise inference that Cosson wanted Kendall to draw from Campbell’s motivation is not clear, but plausibly the point was that the close vote in the Senate may have concealed the fact that some Nays did not represent opposition to repeal of prohibition at all, thus dispelling any compunctions the governor might have had about approving the bill. (Ironically, since the Dodd bill as passed contained no punishment for bootlegging to adults, it is unclear why the pool hall proprietors opposed it.) In a “Dear George” note the next day the governor informed Cosson that: “The objectors of the Cigarette Bill have asked for a hearing and I suppose it will occur today or tomorrow. I will notify Dodd, and he in turn can advise all the friends of the measure.” Later that day Kendall did explain to Dodd that “[i]f those proposing the measure desire to be heard, I shall be glad to have them present” at the hearing that the objectors had requested for April 8 at 2 o’clock. That same day, April 7, Kendall purported, at least to a vehement opponent of the
The Great Compromise of 1921

Dodd bill, that “I am not entirely familiar with its provisions as it finally passed the Senate and House.”

A number of prominent organized women who communicated their views to Kendall would have fit the notion of extremist articulated by 67-year-old Sam C. Westcott, retired, of Keokuk—who “felt free to talk” with the governor because he had “worked hard” for his election and would always like cigars “regardless of any law”—in a letter telling the governor not to veto the cigarette bill because “it would be very unpopular” and “the women are going entirely too far.” For example, the president of the Iowa Federation of Woman’s Clubs, Aimee Spaulding, the 51-year-old wife of a 74-year-old manufacturer, telegraphed Ida B. Wise Smith that she could use her name in urging Kendall to veto the bill “for the sake of our children and young people,” adding her belief that the “majority of fine legion men” did not favor it. Lucy Page Gaston, the founder and superintendent of the International Anti-Cigarette League, though representing what might be considered an “outside organization,” “beg[ged] leave” to inform the governor that a “great majority of states have license-minor laws passed through the work of the cigarette producers, whose aim is to have an open market for the product of their factories. In no state are these laws enforced successfully.” Consequently, the existing Iowa law, “with an organized sentiment behind it,” was “the only law” that protected youths. Like other proponents of prohibition, Gaston pleaded that enforcement, not repeal, was the answer.

[471][Nathan E Kendall] to Sara C. Wilbur (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

[472]Fourteenth Census of Population (HeritageQuest). Westcott was returned as having no occupation.

[473]Sam C. Westcott to Hon Nate Kendall (Apr. 6, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).

[474]Fourteenth Census of Population (HeritageQuest).

[475]Telegram from Mrs H W Spaulding to Mrs Ida B W Smith (Apr. 7, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Smith appended several communications to her own letter to the governor.

[476]Lucy Page Gaston to Nathan E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). The folder contains no reply by Kendall. The International Anti-Cigarette League’s letterhead stated that its vice president Hudson Maxim was the inventor of “smokeless” gunpowder. However, Maxim was chosen presumably not for this feat, but because he opined that the “wreath of cigarette smoke which curls about the head of the growing lad holds his brain in an iron grip which prevents it from growing...just as surely as the iron shoe does the foot of the Chinese girl.” State Dairy and Food Commission, State of Minnesota, Bulletin No. 77: Cigarette Law and Comments 7 (Dec. 1, 1919) (quoting without source), Bates No. TIMN0098545/51.
Emphasis on enforcement of general prohibition as a realistic approach was the hallmark of the communication from the most important women’s organization. On the same day that she attended the hearing with Kendall, Ida B. Wise Smith sent him a letter with Iowa women’s “last appeal.” On behalf of the Federation of Women’s Clubs, Congress of Mothers and Parent-Teachers Associations, the WCTU, Juvenile Probation Officers, school organizations, and churches, she urged one point on the governor beyond the three (the fallacy that licensing ever bettered conditions, “the influence of example of men as a determining factors in boys[’] lives and habits,” and the bill’s constitutionality) that had already been presented to him—namely, that women now voted:

[T]he largest number of people interested in the prohibition of the cigarette are the women of this state. Hitherto they have not been able to function in matters of law enforcement. They have so recently become electors they have not yet been able to manifest themselves. It is not the political psychological moment to repeal a law in which this large group of new citizens is more interested possibly than in any other social legislation just at that time when they have arrived at that state when they can function in securing better enforcement. If the present prohibitory law is held I can assure you that practically every woman’s organization in Iowa, and in this I know I can speak for the schools and the churches of the State, will use their best efforts to secure an adequate enforcement of the law during the next two years.

The intense public interest in the question of repeal was reflected in the front-page piece in the Iowa City Press-Citizen on Friday April 8 that “up to noon” Kendall “had given no indication...as to whether he will approve or veto the bill to legalize the sale of cigarettes in Iowa.” Whether because of the nature of the news cycle at that time, or because the news came too late to be included in Saturday’s editions, many papers did not publish Sunday editions, or Kendall’s announcement on Monday April 11 had made the hearing three days earlier journalistically moot, only few newspapers reported Friday’s public gubernatorial hearing—which was not the first or largest such that Kendall had held—which

---

477Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
478Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
479“No Indication of Kendall Action,” ICP-C, Apr. 8, 1921 (1:7).
480The previous Friday the governor had presided over a standing room only hearing on a utility bill, which became the only bill that he vetoed that session. See “Governor Holds Special Hearing,” ADT, Apr. 1, 1921 (1:6); “Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:1-8 at 3-4).
The Great Compromise of 1921

at least one reporter must have attended. This lacuna in the record is especially unfortunate since the brief and sketchy report that the press did publish tantalizingly suggested that the confrontation of arguments may have illuminated the real motivating forces behind the Dodd bill. (Although Governor Kendall’s papers on the Dodd bill in the state archives contain no notes, let alone minutes, of the hearing, they do include materials submitted to him by some of the attendees, which will be analyzed below.) In anticipation of the hearing, the Iowa City Press-Citizen reported on April 8 that Lucy Page Gaston and Ida B. Wise Smith had “staged their final assault on the Dodd bill” before the hearing, adding intriguingly that: “Cigar store and pool hall men all over the state are said to be fighting side by side with the ladies. They declare the bill will place too stringent restrictions on their business. Governor Kendall’s attitude is not know [sic]. It is believed he will be guided largely by developments at the session this afternoon.”

In a front-page account on Saturday April 9, the Register provided this precis, which appears to be the most detailed extant account:

In an open hearing before Governor Kendall yesterday afternoon friends and enemies of the Dodd cigaret bill alternately praised and condemned the measure.

Judge Charles Hutchinson, Mrs. Ida B. Wise Smith, head of the W.C.T.U., and John B. Hammond of the Antisaloon league protested that the bill was iniquitous, while Representative Dodd, author of the measure, and F. F. Miles, editor of the Iowa Legionaire, defended it.

The governor gave no intimation as to whether he would sign or veto the bill...

Hutchinson contended that the measure was unconstitutional, Hammond that it was unstatesmanlike, and Mrs. Smith that it was contrary to the wishes of the great majority of women of the state. All of them contended that if this bill became a law it would be a step backwards.

Miles, who said that as an individual he represented the overwhelming sentiment of the American Legion, declared that the bill was a forward step, in that it would provide means for preventing the sale to minors, a thing which he said the present law could never do.

Representative Dodd, the author of the bill, asserted that his aim in introducing the measure had been to prevent the sale of cigarets to young boys, and that this bill would prove a great improvement over the existing law.

Although this utility bill hearing was attended by all the circumstances mentioned in the text as possibly explaining the spotty press coverage of the Dodd bill, newspapers covered it much more intensively. See below this ch.

481 “Hearing Today on Dodd Bill,” ICP-C, Apr. 8, 1921 (6:3).
482 “Cigaret Debated Before Governor,” DMR, Apr. 9, 1921 (1:7). On the microfilm copy at the SHSI IC of what appears to be the same edition of the newspaper the article
The nub of Charles Hutchinson’s claim that the Dodd bill was unconstitutional may have been contained in his half-page submission to Governor Kendall consisting exclusively of holdings extracted from two Iowa Supreme Court decisions without any commentary. The lesson that Hutchinson apparently wished to impart to the governor was that the Dodd bill was unconstitutional because, unlike the mulct tax upheld in *Hodge v. Muscatine*, it failed to afford owners of the real estate on which the cigarette sales business was carried on due process in the form of recourse to the county board of supervisors to apply for a remission of the tax.  Even if this hypertechnical interpretation of the very expansive decision in *Hodge v. Muscatine* had been sustainable, it was an oddly opportunistic last-ditch argument for the principled anti-cigarette movement to stave off defeat by charging that the bill was infirm because it did not cut the property-owners sheltering cigarette businesses enough constitutional slack.

Fortunately, the text of Hammond’s remarks to Kendall at the hearing have been preserved in the Iowa State Archives folder containing correspondence to and from the governor dealing with the Dodd bill. By a large margin they were
The Great Compromise of 1921

the most comprehensive and closely argued contemporary criticism of the bill that has survived. Hammond, the WCTU’s lobbyist, was the state’s foremost advocate and drafter of laws prohibiting ‘immoral’ behavior during the first decades of the twentieth century, his ire being drawn not only to liquor and prostitution, but to boxing and marathon dancing as well. Overall Hammond charged that the Clark-Dodd bill was so “carelessly” drafted that it could not even “meet the purposes for which it is pretended to have been” passed. Of equal importance was his caustic response to the question as to who was expected to enforce the new law: “Shall it be the gentlemen who have defied our present law and are now pointing their fingers at its failures, for which they alone are responsible?” Hammond told Kendall that it was obvious that it would be the “same class of men and women who went down into their own pockets to enforce the mulct liquor law because, contrary to the liquor interests’ promises to enforce that law, in the quarter-century of its “unholly [sic] existence” they were never responsible for a single prosecution: “Instead of enforcing that law they met the men and women attempting it with mobs, bribery, perjury, the boycott, threats of personal violence, and blackhand letters. With the latter they have already begun their campaign against cigarette law enforcement.”

Interestingly, Hammond characterized the provision criminalizing minors’ refusal to inform on those who provided them with cigarettes as “the most vicious feature of this bill” because it would “make liars and criminals out of thousands of boys instead of law-abiding and law-respecting citizens.” Alternatively, if they inform, they “would lose all self respect and be ostricized [sic] by [their] associates.” Not only, in his opinion, would competent officials, who cared about the boys’ welfare, not resort to this method of gathering evidence, but it was also unnecessary because “there are plenty of boys in every town ready to play the detective and procure such evidence and while doing so can maintain their self-respect.”

Because it thwarted local grassroots participation in the process, Hammond sharply objected to the bill’s failure to provide a procedure for applying for a sales permit. Adroitly highlighting the requirement that pharmacists, proprietary

Cigarette Bill (SHSI DM).

487See above ch. 13.

488[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 4, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). By threatening letters Hammond was presumably referring to a recent incident targeting Ida B. Wise Smith. See above this ch.

489[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 1, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
The Great Compromise of 1921

medicine manufacturers, and ministers file petitions setting forth their qualifications to sell or use intoxicating liquor or wine, Hammond pointed out that the Dodd bill’s lack of transparency was by design anti-democratic: “The public is to be kept in the dark. The applicant need have no other qualification than the possession of $50.00, $75.00 or $100.00.... The public is given no opportunity to enter an objection or protest however undesirable the applicant may be, as a citizen, to be entrusted with such permit.” Hammond did not expressly draw out his implication that the legislative majority was not seeking to interfere at all with cigarette sales to adults.

A prime example of careless drafting was the bill’s failure to repeal section 5007-a of the existing law providing for the search and seizure and destruction of cigarettes. Although the Dodd bill as passed did not so provide, Hammond surmised that section 5007-a had presumably been left intact in order to fulfill that purpose, but it was in fact nullified by virtue of being based on section 5006, which was repealed. Similarly, the new bill included a nuisance provision without, however, providing a penalty for maintaining the nuisance. Consequently, if Kendall signed the bill into law, there would be “no penalty of any kind for selling cigarettes without a license” to adults and no penalty for bootleggers.

Frank Miles’s appearance as the bill’s sole advocate other than Dodd himself belied his implausible claims during the previous month that the

---

490[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 2, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
491[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 3-4, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). In a supplementary submission to the governor Hammond explained that “[i]n the rush of the hour a close scrutiny of the section was not made, and instead of redrafting a new Search and Seizure Section they accepted the old law, with the evident intention of adding it to the Clark-Dodd law.” John B. Hammond to Hon. N. E. Kendall (n.d. [ca. Apr. 8-9]), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
492[John B. Hammond], Untitled, undated, and unsigned typescript addressed to “Your Excellency” at 3-4, in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
493A week after the hearing Miles published a piece on Legion-supported legislation stating that “at one hearing before the governor the speakers for the [Dodd] bill included George Cosson, former attorney general of Iowa, an ex-presidential of the Cedar Rapids Y.M.C.A., and a member of the Legion legislative committee who made it clear that he was there as an individual.” After describing Hutchinson (“a well known jurist”), Hammond (“a professional reformer”), and Smith (“a noted W.C.T.U. leader”), Miles added that: “Arrayed behind these two factions were veterans, Y.M.C.A. men and others
The Great Compromise of 1921

American Legion was indifferent to the outcome of the controversy. Miles’s testimony, assuming that the newspaper accurately reported it, was, since cigarette-smoking soldiers were focused on unimpeded access to nicotine rather than inaccessibility for minors, similarly implausible. A month earlier, in the second issue of the Iowa Legionaire, whose founder and editor he was, Miles published a lengthy editorial responding to the repeated questions that had been directed at it during its brief existence on the Legion’s position on cigarettes that organizationally it had never considered the question. He insisted that the Iowa Department, American Legion, would not take sides because its legislative committee, of which he was a member, was operating under the instructions it had received at the 1920 state convention: “Nothing was said about cigarettes there, though several thousand were smoked.” Miles thought it safe to say that more than half of world war veterans smoked cigarettes, which had become “quite the most common custom” during the war. Uncritically repeating industry propaganda that “[t]ime and experience have proven that the stories of the harmful effects of cigarettes told twenty years ago were largely bunk,” he argued that the Iowa law was unenforcible because it lacked public support: “Veterans who smoke cigarettes can see no more reason for legislating against them than...against plug, pipes and cigars.” Miles then sought to undergird his claim that the Legion was disinterested by asserting that the Legion as an organization of smokers and abstainers would be unaffected by passage or defeat of the cigarette bill. To be sure, smoking veterans would be pleased by passage “because cigarettes cost more when ‘outlawed.’ But if the bill fails, no one will hear a growl from those same smokers.”

Although Miles did not explain how illegality increased prices, the next week a veteran did charge in a letter to the editor that: “The way cigarettes are sold at present the only man that sells cigarettes is the one that can put up enough money in case he is arrested to pay a big fine and to make the profits big enough to take the chance. He charges the fellows an extra five or ten cents a package.” Since opponents of prohibition reflexively alleged that the law had been an unenforced dead letter since the war began, it is unclear how any seller could have been fined, let alone arrested. Regardless of the empirical accuracy of the charge, the resentment of Iowa “preachers and a gang of Y.M.C.A. workers” “butting into
something that don’t [sic] concern them,” expressed by the ex-corporal on behalf of the 90 percent of Iowa’s 100,000 veterans who smoked cigarettes, suggested the intensity with which Iowa legionaires backed repeal.495

To be sure, Miles’s chief argument in support of his claim of the Legion’s non-involvement in the Dodd bill’s passage was the formality that the 1920 convention at Cedar Rapids—the welcoming address at which was, ironically, delivered by James Trewin,496 the author of the cigarette mulct tax in 1897497—had passed a resolution creating a legislative committee to urge the Thirty-Ninth General Assembly to enact several measures (a bonus, preference in state employment, and certain tax exemptions for world war veterans, as well as the legalization of boxing and the prohibition of teaching foreign languages before the eighth grade),498 but had taken no action on cigarettes.499 And although in his article in the Iowa Legionaire on the legislature’s record on the Legion’s proposals Miles kept formal score only for the aforementioned measures, he did stress that several other bills were pending “in which veterans are interested but which were not endorsed at the state Legion convention.” Here he inserted the article’s only bolded capitalized subhead: “Cigaretts Legalized,” explaining that: “With Lucy Page Gaston, noted anti-cigaretswerker, directing opposing forces in the state house lobbies,” the Dodd bill had been passed.500

In the absence of an intuitively obvious reason that might have prompted the Legion to conceal its successful organizational lobbying of the legislature for passage of the Dodd bill,501 Miles’s disclaimer may be taken at face value.502

497 See above ch. 12.
498 “Legion Favors Preparedness for Next War,” EG, Sept. 4, 1920 (1:4); Jacob Swisher, The American Legion in Iowa: 1919-1929, at 145 (1929). The legislative committee, the state legion’s historian noted, “was constantly on the job throughout the session endeavoring to secure such legislation as was deemed beneficial and in which the Legion was interested.” Raymond A. Smith, “American Legion History: 1921” at 4 (Aug. 27, 1921), in American Legion, Department of Iowa, R 67, Records 1919-1976, Box 7, Folder 2 (SHSI IC).
500 Frank Miles, “Three to One Is the Score of Legion in Legislature,” IL 1(6):1:1, 6:3-4 at 4 (Apr. 8, 1921).
501 When the Legion’s state legislative committee, “[s]purred by the reported coolness of the legislature toward” bills it advocated, met three days before the House voted on the Dodd bill and decided to push all its measures and try to bring them all to a recorded vote, it did not mention the cigarette bill. “Legion Group to Lobby for Bills,” DMR, Mar. 28,
Nevertheless, individual lobbying by Miles—who presumably knew the legislators well by virtue of having interviewed the General Assembly’s members before the session—and other Legion officials and rank and file may have been a close substitute for group pressure. It appears that not until several months after the 1920 state convention did Legion posts around the state, perhaps actuated by the announcement of renewed prohibitory enforcement in Story county a few days after the legislative session opened in January, begin, in a decentralized fashion, to push their representatives in the House and Senate to undertake another effort at repeal. Thus, for example, on March 25, the American Legion post in Boone unanimously voted to go on record favoring a change in the prohibitory law so that it would apply only to minors and informed the state representative and senator for Boone county of their action. To be sure, in this particular case, the post’s activism was to no avail: despite the Register’s impression that “Boone county seems almost unanimous for the change,” Representative W. S. Criswell and Senator Charles Olson, both Republicans, farmers, and Methodists, were among the legislature’s most consistent opponents of repeal, voting Nay on every single occasion. The Legion’s potential political influence in Iowa can be gauged by the fact that its 522 posts and more than 35,000 members in mid-1920 made it the fourth and seventh largest state organization, respectively, in the country.

1921 (1:6). After the close of the session, the chair of the Legion’s legislative committee, in acknowledging the assistance of numerous House and Senate members in managing the Legion’s measures, nowhere mentioned Dodd or his cigarette bill. Casper Schenk, “Schenk Reports on Legion Work in Legislature,” IL 1(8):7:1-6 (Apr. 22, 1921). Similarly, Schenk’s report at the September 1921 state convention omitted any mention of the cigarette bill. “[Proceedings of the] Third Annual Convention of the Iowa Department of the American Legion, held at the High School Building, Spirit Lake, Iowa, Sept. 1, 2 and 3, 1921,” Friday, September 2, 1921, at B-27-B-32, in American Legion, Department of Iowa, R 67, Records 1919-1976, Box 1 (SHSI IC). The minutes of the executive committee meetings between Nov. 13, 1920 and Feb. 12, 1921 also do not mention the cigarette bill. Executive Committee Minutes, in American Legion, Department of Iowa, R 67, Records 1919-1976, Box 7 (SHSI IC).


State of Iowa 1921-22: Official Register 328, 337 (29th No.).

Miles’s denials to the contrary notwithstanding, the Des Moines News regarded the American Legion and the WCTU as having “fought it out” over the Dodd bill with the result that the former, “acting unofficially very efficiently checkmated Mrs. Wise-Smith and her band....” The News, which ignored the cigarette manufacturers’ role, speculated that the reason that the Legion’s bills had passed so easily was “[p]robably” that “they did not affect the corporations who so closely scanned other proposed legislation.” In turn, the newspaper noting that the WCTU had been “on the job thruout the session with a very active lobby” consisting, among others, of Wise-Smith, Gaston, and Hammond, inferred that “these club women are learning the science and politics of legislation.” Indeed, since in 1921 they had already “showed that they understood ‘pressure’ and veiled threats,” once they had brooded over their “smarting defeats,” by the next session, they would “undoubtedly show some of the corporation lobbyists some novel methods in railroading a bill thru.” To be sure, given the paper’s defeatist view that the WCTU’s mistake was having tried to “pass anything that affected the money interests of the state” (such as the maximum hour and minimum wage bills for women, which “the money interests” had been able to kill because they “could still maintain the most ‘pressure’”) or was “too strongly tinged blue” (such as cigarette bans), it is unclear what part of its agenda the WCTU would ever be able to enact.

---

507 Robert Hughes, “39th Assembly Was Good to Legion,” DMN, Apr. 18, 1921 (4:3-4). At times the News adopted a very expansive and undifferentiated notion of “lobbying and ‘lobbyist,’” indiscriminately subsuming “reform” organizations such as the WCTU and the “[p]rofessional reformers” they engaged under the same rubric as the “money bags” and “sinister and avaricious interests....” “Lobbyists Infest Iowa Legislature,” DMN, Mar. 29, 1921 (1:5-8). No reason existed to exempt reform groups such as the WCTU from the newspaper’s proposal that lobbyists be required to register and reveal their principals, the bills for which they were lobbying, and how much money represented organizations were paying for lobbying, but the identity of the WCTU’s lobbyists and of the bills it advocated was public knowledge. Robert Hughes, “Lobbyists Cracked Whip in 39th Assembly and Solons Did Bidding,” DMN, Apr. 19, 1921 (3:5-6). Unsurprisingly, that session the Senate Judiciary Committee killed a bill to regulate lobbying. State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 717, 1034 (Mar. 8 and 19) (S.F. 734, by James Johnston).
The Great Compromise of 1921

Governor Kendall Approves the Repeal Bill, But Stresses Local Government Power to Continue the Prohibition of Cigarette Sales

Cigarettes Win in Iowa.\textsuperscript{508}

Iowa volunteers and drafted men who came back from France, where they had found relief from trench and camp hardships in a quick smoke, to find that they couldn’t buy cigarettes in their own State, owing to a blue statute put on Iowa’s books, may have had something to do with a change in the law.\textsuperscript{509}

Passage of the law was opposed by the W.C.T.U. and other organizations, but had the backing of business organizations.\textsuperscript{510}

Despite his non-committal reaction during the hearing, Governor Kendall—who, according to former state senator Grant Caswell, was opposed to cigarette smoking\textsuperscript{511}—may have tipped his hand when the \textit{Legionaire} the same day published a front-page piece by the governor extolling the Legion and expressing his inability to understand why any veteran would hesitate to join the organization.\textsuperscript{512}

Much less speculative was an article appearing in Saturday’s \textit{Register} right next to the report on the governor’s hearing. It turned out that as its final act before adjournment the legislature had adopted a resolution raising state revenues by $1,650,000 a year above the sum generated by general taxation during the previous biennium, necessitating an increase in the setting of the general tax levy from 7.5 to 9 mills. This calculation presupposed, however, that into the state

\textsuperscript{508}“Cigarettes Win in Iowa,” \textit{NYT}, Apr. 12, 1921 (5). Four years later the newspaper of national record erroneously claimed that the Iowa legislature had not legalized the sale of cigarettes to adults until 1923. “Feeble Knees in Iowa,” \textit{NYT}, May 8, 1925 (18) (edit.).

\textsuperscript{509}“Cigarettes Back in Iowa,” \textit{Brooklyn Eagle}, Apr. 12, 1921, Bates No. 950297934.

\textsuperscript{510}To be sure, the statute had been put on Iowa’s books before most of the soldiers were born.

\textsuperscript{511}“Cigaret Advertising Illegal,” \textit{Corn Belt Publisher} 5(9):1 (May 1921).

\textsuperscript{512}Governor Kendall, “Kendall Asks All to Boost Legion,” \textit{IL} 1(6):1:3 (Apr. 8, 1921).
The Great Compromise of 1921

treasury would be flowing an additional $750,000 a year from the new cigarette tax imposed by the Dodd bill. This arithmetic “produced perhaps a conclusive indication of the governor’s intention upon the cigaret bill. Senator Foskett... chairman of the appropriations committee, told the committee that he had been assured, when he told the governor that he must know whether the cigaret bill was or was not to become a law in figuring the next tax levy, that the bill would be signed and that he should reduce the levy by the amount that it had been calculated the cigaret stamp tax would bring in.”513 The same day the Des Moines News, which viewed the legislature’s action as “a sure indication” that the governor would sign the Dodd bill because he had “surely indicated that he would sign,” reported that conversations he was said to have had Saturday morning with (unnamed) “close advisers” reinforced this belief: “It is said the governor will sign the bill disregarding the attitude of the W.C.T.U. and club women on account of the mockery of the present prohibitory laws.” At the same time, he was “also remembering the tremendous amount of revenue the stamp tax will bring into the needy coffers of the state.”514 Somewhat less positive the next day was the Cedar Rapids Sunday Republican, which (perhaps derivatively) reported that Governor Kendall’s “silent assent to the nine mill levy is taken by solons to mean that he will ratify the Dodd measure,” though the subhead, “His Silence Seems Golden and Speaks Volumes, Say Those Who Profess to Know,” enhanced the certainty.515 On Sunday the Register diminished the suspense still further by divulging in one article that Kendall had “told the committee that they could count on the cigaret revenue” and that “he will probably sign the bill soon”516 and in another that “it is practically certain the governor will sign” it.517 These

513 State Tax Levy 9 Mills for 2 Years,” DMR, Apr. 9, 1921 (2:5). A typographical error in the sentence (omitting its opening words) in the article from which the first sentence above is quoted required an educated guess as to the subject of “produced.” What the press called a resolution was in fact S.F. 799, which both houses passed. State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly 1947-48 (Apr. 8); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 2224-26 (Apr. 8). The increase in state revenue was said to be a compromise between a request for large increases in appropriations for state educational institutions and state employees’ salaries on the one hand and “a universal command to exercise economy in every direction” on the other. “Iowa Legislature Worked Under Many Handicaps,” IH, Apr. 14, 1921, at 3.

514 “Increase State Taxation; Expect O.K. on Cigarettes,” DMN, Apr. 9, 1921 (1:2-3).

515 “Predicted That Kendall to Sign Cigaret Measure,” Cedar Rapids Sunday Republican, Apr. 10, 1921 (sect. 2, 1:3).

516 “Kendall Will Sign Cigaret Bill Soon,” DMR, Apr. 10, 1921 (sect. 2, 2:5).

517 “State Levy 9 Mills Next 2 Years,” DMR, Apr. 10, 1921 (sect. 2, 2:6). Perhaps this
The Great Compromise of 1921

accounts very strongly suggest that Kendall’s hearing on Friday was a charade since the timing of the events indicated that he had apparently already assured the Senate Appropriations Committee chairman that he would sign the bill. 518

On Sunday April 10, the day before Kendall announced his decision on the cigarette prohibition repeal, tax, and permit law, a thousand boys in Sioux City participated in the WCTU’s aforementioned anti-tobacco Sunday by signing an anti-tobacco pledge in what that city’s principal newspaper oddly called “the first skirmish of the W.C.T.U. with the forces of King Nicotine. The sortie was the first move in the war which the women’s organization has declared on cigarettes.”  Part of a national movement launched by the WCTU, the campaign initiated an anti-tobacco week resting on an “ultimatum...by the militant anti-nicotine crusaders” embodying “the edict that the sickly ‘pill’ must go.” 519

As heralded in an eight-column, front-page banner headline on Monday, April 11, 1921, “Gov. Kendall Signs Dodd Cigaret Bill.”  A typical reaction of the press, which would soon be profiting from a flood of cigarette advertisements, which would become lawful together with cigarette sales on July 4, 521 appeared the day after Kendall’s announcement in the Davenport Democrat, which editorially opined that a law with “some sanction of public opinion” was “much better” than one “that was being universally ignored.” 522 Kendall’s approval of the prohibition repeal and licensure law was important enough that 15 years later it was his most prominent action mentioned in his obituary in The New York Times. 523 Equally important was the explanatory statement—printed in whole or in part in many newspapers across the state, often on the front page—that the

sense of certainty prompted the Register two days later to relegate to page 12 a very brief piece on Kendall’s having signed the bill and his accompanying explanation. “Kendall Signs Cigaret Bill,” DMR, Apr. 12, 1921 (12:7-8).

Perhaps Kendall’s signature had become such a foregone conclusion that, without editorializing, the brief piece in the trade magazine Tobacco merely mentioned the local option for any community to regulate cigarette sales to adults. “Cigarettes Win in Iowa,” Tobacco, Apr. 14, 1921, at 20.

“Start War on Cigaret,” SCJ, Apr. 11, 1921 (6:1).


See below ch. 19.


“N. E. Kendall Dead; Ex-Iowa Governor,” NYT, Nov. 5, 1936 (27).
The terms of the measure...may be summarized as follows:

(1) It prohibits under drastic penalties the sale of cigarettes to minors, and provides that any minor discovered in the possession of cigarettes shall disclose the identity of the person from whom he obtained them, or be himself proceeded against for a misdemeanor.

(2) It empowers local governing authorities, viz, city councils and county supervisors, upon payment of license fees and mulct taxes as specified in the bill, to issue revokable permits for the sale of cigarettes to adults, and fixes substantial forfeitures for any infraction of the regulations imposed therein.

Two or three important considerations are to be constantly remembered. First: In no circumstances whatsoever is the sale of cigarettes to minors in any manner legalized. On the contrary, such sale is expressly forbidden under punishments which may extend to a money fine of five-hundred dollars and a jail imprisonment for six months. Second: The sale of cigarettes to adults in any community is entirely within the discretion of the citizens of such community, speaking through their selected representatives on the city councils and county boards. If the people of any locality are hostile to the traffic, they can easily enforce their opposition by electing municipal officials instructed to refuse permits.

Third: It is conservatively estimated that if the present volume of cigarette consumption be maintained, revenues will accrue to the State aggregating annually several hundred thousand dollars. In the disordered state of fiscal affairs at this juncture, with the burdens of government increased and the ability to bear them reduced, so material a contribution to the treasury would be especially welcome.

The subject is one of infinite difficulty, and I am not unaware that there is a radical disagreement respecting its solution. Our experience with the perplexing problem has demonstrated two propositions beyond controversy: (a) That a legislative enactment is effective only so far as it is supported by an aggressive public opinion; and (b) That the disregard of a restrictive law because it is unpopular entails discredit upon all laws of similar character. The original statute was sufficiently rigorous to banish the cigarette utterly, but the majority sentiment of the people was averse to its observance. Thus we are confronted not by an attractive theory, but by a practical condition. After the maturest deliberation the General Assembly determined that a new method of dealing with the cigarette question should be inaugurated, and I am constrained to acquiesce in its conclusion.524

---

524 Untitled and undated carbon copy typescript, in Folder: N. E. Kendall correspondence re cigarette bill (SHSI DM) (italics added). The statement was apparently included in this file because Kendall included it with the reply letters he sent to several people who had written to him urging him to veto the Dodd bill. The single page begins: “After signing the Dodd cigarette bill today Governor Kendall discussed it briefly.” The
The Great Compromise of 1921

Kendall’s analysis focused on several topics, only one of which belonged to the legislative history in the narrower sense of textual interpretation. This latter point dealt with the unlimited power and discretion that the legislature conferred on local communities and their governments to perpetuate the quarter-century-old prohibitory regime regarding cigarette sales to adults. The antithesis of state preemption of local action, this establishment of home-rule, which the governor declared absolutely, unreservedly, and open-endedly, appeared to rest textually on a single word—namely, that the permit without which it was illegal to sell cigarettes in Iowa “may be granted and issued” by the city council of any city or town or the board of supervisors of any county.\(^{525}\) In terms of the canons of statutory construction, the use of “may” expressed the requisite discretion: local governments might also choose not to grant permits. This choice was precisely the element that use of the word “shall” would have denied. That this mandatory regime was also possible in a decentralized regulatory system was unmistakably on display in the prohibition repeal statute that neighboring Nebraska had enacted in 1919 and that offered itself as a model to Iowa legislators in 1921: Licenses “shall be issued...by the Clerk of any city, town or village, and by the County Clerk of any county, upon application duly made as hereinafter provided.”\(^{526}\) But Kendall, though a lawyer, was not engaging in statutory-textual exegesis, teasing vast powers out of a single word. Rather, the governor was explaining the politics of local popular control that had been a necessary component of the compromise that was repeal in Iowa, where large numbers of organizationally cohesive proponents of prohibition had been able to place their stamp on the enduring configuration of the post-repeal system. Oddly, some organizations that had urged Kendall to veto the bill did so in part because they failed to understand that it conferred home-rule power. For example, the president of the Parent Teacher Council of Des Moines claimed that the bill “forces the sale of cigarettes into thousands of Iowa communities where they are not now sold. This is un-American (19 counties now enforce the present law).”\(^{527}\) By the early 1930s the

\(^{525}\)\text{1921 Iowa Laws ch. 203, §§ 3, 6, at 213, 214, 215 (italics added).}
\(^{526}\)\text{1919 Neb. Laws ch. 180, § 2, at 401. The centralized license regime created by the Arkansas repeals of 1921 lacked such a discretionary element. 1921 Ark. Acts 490, § 4, at 450, 452. Similarly, the decentralized privilege tax payment regime for selling cigarettes enacted by Tennessee separately but at the same time as repeal provided no discretion to county court clerks 1921 Tenn. Laws ch. 81, at 135.}
\(^{527}\)\text{Lulu Catherine Jones to Nathan E. Kendall (n.d.), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM) (not identifying the 19 counties). Similarly,}
The Great Compromise of 1921

Iowa Supreme Court, availing itself both of the aforementioned canon of construction and the history of statutory prohibition that survived under repeal, would flesh out the exact contours of this power to vindicate city councils’ exercise of the power to deny cigarette sales permits. Such a hybrid juridical-political analysis was persuasive so long as decisionmakers were old enough to have experienced the battles over cigarettes. In contrast, by 1991, when historical amnesia insured that virtually no one even knew of from books, let alone remembered from life, the roots of Iowa’s existing cigarette sales regulation in a more than a century-old prohibitory law, the cigarette company’s lawyers and lobbyists could persuade the legislature to amend the 70-year-old cigarette sales law to preempt local action without, ironically, even realizing that their amendment was impotent to cancel the conferral of local powers embedded deeper in the statutory text and legislative history than their pricey legal minds could peer.

Kendall broke no new ground in implicitly conceding that the urgent need to locate a source of additional state revenue, the extraction of which did not burden business profitability or capitalist incomes across the board, was, as it were, an “attractive...practical condition.” Remarkably, the governor did not boast of Iowa’s first-in-the-nation state consumer tax on cigarettes; unremarkably, neither he nor anyone else recommended the tax as a means of marginally depressing solvent demand for cigarettes, for which no one other than the cigarette industry had a good word. Decades would pass before the anti-smoking movement perceived the effectiveness of this disincentive, although the cigarette companies had always been sensitive and opposed to federal excise taxes, more, to be sure, because of their penny-for-penny negative impact on profits than on aggregate demand.

---

the Iowa Branch National Congress of Mothers and Parent-Teacher Associations wrote: “Under the present law many towns in the state have prohibited the sale of cigarettes to minors and the license of the Dodd bill would no longer give such localities any choice.” Mrs. S. E. L[illegible] (chairman of legislative committee) (n.d.), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Since this undated and unaddressed handwritten letter on the organization’s letterhead was included in the folder with the letters urging the governor to veto the bill, it was presumably written after its passage; if it was written earlier, it was an accurate but unusually prescient critique.

528See below ch. 21.
529See below ch. 28.
530By the time of the Depression, counsel to the Tobacco Merchants Association was complaining “that the addition of even a small State tax is enough to cause a serious cut in consumption.” Charles Roberts, “Tax on Cigarettes Opposed for States,” NYT, Dec. 6,
The Great Compromise of 1921

In his more wide-ranging commentary, the governor, unlike the “perplexing problem[s]” partisans, who radically disagreed, confessed that he perceived “infinite difficulty.” He argued, however, that even the protagonists would have to agree that a law was “effective only so far as it is supported by an aggressive public opinion” and that the “disregard of a restrictive law because it is unpopular entails discredit upon all laws of similar character.” Here Kendall failed to distinguish between compliance and enforcement. Why public opinion would have to be “aggressive” to insure passive compliance is unclear. By virtue of failing to distinguish between voluntary compliance and successful enforcement in smaller towns and non- or only spasmodic enforcement in larger cities, he deprived himself of the ability to probe the issue of whether governmental non-enforcement drove popular disregard or vice versa. Kendall’s claim that “the original statute was sufficiently rigorous to banish the cigarette utterly, but the majority sentiment of the people was averse to its observance,” was based on no firm empirical basis: though surely some significant proportion of adult men wanted to buy and smoke cigarettes, it was far from clear that they represented a majority of the population, let alone of the electorate, especially after women’s enfranchisement. The governor’s counterposing of “an attractive theory” and “a practical condition” was a pithy way of aligning himself with repealers’ claim that prohibition simply had not worked, would not work, and could not work. Yet, as their opponents had pointed out repeatedly, prohibition had worked in some places all the time and in other places some of the time, and could have been more effective had the legislature buttressed it with a rigorous nuisance and injunction procedure. Indeed, Ida B. Wise Smith had called the governor’s attention to “information that the Attorney General of Iowa can supply as to that portion of the state where the law is now being enforced.”

Remarkably, in letters that he wrote to several people who had urged him to veto the bill, Kendall was somewhat more forthcoming about the biases that underlay his decision. On April 9, the day after the hearing, three residents of Lamoni (a center of the Reorganized Church of Jesus Christ of Latter Day Saints), a bishop of the church, a bank cashier and director, and the long-time mayor, telegraphed Kendall that “Lamoni overwhelmingly opposes Dodds [sic] cigarette bill.” (The town’s attitude toward smoking was signaled in June by its campaign

---

1931 (X11). See also “Cigarettes Hit by Taxes,” NYT, Mar. 14, 1933 (C26).

531Ida B. Wise Smith to N. E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM). Unfortunately, she did not disclose the information in the letter.

532A. M. Carmickael [sic], Oscar Anderson, Mayor Geo Blair to Governor Kendall (Apr. 9, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
to eliminate smoking by minors.)^{533} Two days later, the very day on which he announced that he had approved the bill, the governor replied that it was “almost unanimously agreed that the present law is unenforceable,” adding his belief that the new law would provide “more effective regulation.”^{534} Yet the governor was acutely aware that his claim was false since the large anti-cigarette movement had beseeched him to permit the prohibitory law, fortified by the Moen-bill’s nuisance-injunction process, to be enforced. After all, Kendall confided to a druggist two days later that “I am conscious that in many quarters my action in approving the cigarette bill will be severely condemned.”^{535} When lawyer and former Republican state legislator William Cooper informed the governor that the Civic League Committee in Newton, representing two or three thousand constituents of all the town’s churches, had voted unanimously against the Dodd bill as had 78 members of the men’s bible class of the Methodist Episcopal Sunday School,^{536} Kendall, claiming that “no man in Iowa detests more heartily than I the entire cigarette business,” once again wrote what he knew or at least

---

On the three residents, see J. Howell, *History of Decatur County Iowa and Its People* 2:81, 170 (1915); Fourteenth Census of Population: 1920 (HeritageQuest). Blair was a Democrat and Anderson a Republican.

^{533} In mid-June a “good start” was made when an information was filed by the marshal against a boy and a warrant issued; after pleading not guilty he was tried, found guilty, fined $5 plus costs of $4.05, for which he gave a note and “agreed to work it out for the town.” The local paper reported that the “officers are very anxious to eliminate this evil from our town and can do so with the aid and cooperation of the parents and citizens.” Since there was “a lot of cigarette smoking going on among the young boys,” who, however, were on the look-out for the police, citizens would have to report them when they saw them. “Getting After Cigarette Smokers,” *Lamoni Chronicle*, June 16, 1921 (1:5) (defendant Lee (Bud) Traxler may have been Irving Lee Traxler, son of Moroni Traxler, returned at 1920 census as 15 years old). A week later the paper reported that another person charged with cigarette smoking on the streets pleaded guilty and was fined $3.50 plus costs. “More Cigarette Trouble,” *Lamoni Chronicle*, June 23, 1921 (1:3) (defendant Ralph Smith not returned in 1920 census as living in Lamoni).


^{536}[William] R. Cooper to Gov. N. E. Kendall (Apr. 10, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.
The Great Compromise of 1921

had heard repeatedly to be untrue—namely, that “the present law has demonstrated itself to be almost a complete failure in every locality in the commonwealth.”

The most revealing observation that Governor Kendall penned his post-approval anti-cigarette correspondents was the realist-resignationist admission that he had been unable to see his way clear to adopting their conclusions because “the habit is so universal that I think complete prohibition cannot be effective.” Had the legislative and executive branches of Iowa made this alleged fact of “universal” addiction the public cornerstone of the state’s tobacco policy, they would have created the kind of transparency that governments attained decades later when they and (virtually the entire anti-smoking movement) expressly disavowed prohibition both at the zenith of smoking prevalence in the 1960s and even in the first decade of the twenty-first century when only one-fifth of the adult population smoked. To be sure, Kendall’s claim of universality was a reckless exaggeration. Although no statewide consumption data are available for 1921, a few years later, once Iowa’s cigarette sales tax was operating, per capita consumption in Iowa was calculated to be only half of the national average.

And thus if what was perhaps the first national survey of cigarette smoking prevalence, conducted in 1935—when national output had almost tripled since 1920—found that 62.7 per cent of the adult population, including 47.5 percent of men and 81.9 percent of women, were “not yet cigarette smokers,” the levels obtaining in Iowa in 1921 were with certainty very far from universal. Moreover, since prohibition in Iowa referred only to sales (and not to smoking by

---

537 [Nathan E. Kendall] to Hon. W. R. Cooper (Apr. 11, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.

538 [Nathan E. Kendall] to Sara C. Wilbur (Apr. 13, 1921), and [Nathan E. Kendall] to W. M. Stull (Apr. 13, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.

539 See below ch. 19.


541 “The Fortune Survey: III: Cigarettes,” Fortune 12(1):66-136 at 68 (quote), 111 (July 1935). According to the survey, 65.5 percent of men under 40 and 39.7 percent of men over 40 smoked, while the corresponding figures for women were 26.2 percent and 9.3 percent (whether people exactly 40 years old were really omitted is unclear). Fortune concluded that: “[N]ot only has the cigarette industry a tremendous exploited field of new customers, but...it may expect a mathematical increase in consumption as the younger generation carries its cigarette habit to the nether side of forty and new young cigarette smokers grow up to fill their ranks. Each year in this country 2,200,000 boys and girls come of age.” Id. at 111.
adults), and even sales were not completely prohibited since adults lawfully could individually arrange for cigarettes to be shipped to them from other states, the governor’s seemingly realistic basis for approving a licensing system was deprived of much of its robustness. Nevertheless, Iowa’s population of more than 2.4 million in 1921 surely included many tens, if not several hundreds, of thousands of adult cigarette smokers, whose potential reactions to quasi-prohibition the legislature should have considered. Instead, it articulated a policy based largely on cigarette companies’ right to profit from catering to adult men’s right to buy and smoke cigarettes.

In turn, the narrow legislative majority’s “new method of dealing with the cigarette question” boiled down to vindicating adults’ right of access to an addictive drug in the hope that cutting off minors’ access would either somehow magically insure their aversion to cigarettes at age 21, despite years of observing their fathers and other adult role models smoking, or generate initiation in adulthood when smoking’s growth-stunting properties would allegedly no longer be operative.542

In 1888, a subcommittee of the WCTU’s National Executive Committee, chaired by its president, Frances Willard, stated that it “would come and help to float Iowa out of the “dry-dock of Republicanism” into the “broad sea of national prohibition.”” Her opponent, Judith Ellen Foster, the head of the Iowa WCTU who led a small group to bolt from the national WCTU the following year over the issue of that organization’s election alliances with the Prohibition party, replied in 1889 that “if the defeat of the Republican party in Iowa be deemed by her desirable, and the repeal of the prohibitory law is the result, the ship—Iowa—will float in the full docks of whisky and beer, and the groans of women and the sobs of little children will mingle with the shouts of the demons of the still.”543 The Republican party in Iowa was never defeated during the entire existence of the anti-cigarette law, and the majority of Republicans in the legislature voted to repeal it in 1921, leaving Iowa, if not to float in, then at least to inhale cigarette smoke into the twenty-first century.

542See, e.g., Letter from W. L. Kuser, Superintendent, Iowa Training School for Boys, to Ida B. Wise Smith (Mar. 17, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill, SHSI DM.

The Great Compromise of 1921

The Pro-Corporate Public Utilities Bill:
A Sideshow to the Pro-Corporate Cigarette Bill

The public utility corporations applying yet another crunching headlock to the submissive legislature, achieved their ambition of years standing when the Senate subserviently acquiesced in the passage of the measure. 544

The bill is air-tight for the public utility corporations and leaves not a single loop-hole for the people. 545

This public utilities court bill is the greatest steal ever perpetrated by an Iowa Legislature. It is a crime against the people of Iowa. It is one of the blackest splotches on the history of this great state. 546

Immediately after its concurring vote on the Dodd bill on April 6 the House rejected another “attempt of the public utilities to force through some legislation that would take control of these public servants out of the hands of the people.” 547

An examination of what in 1921 were arguably the most high-profile and intense corporate and populist anti-corporate legislative campaigns and of the legislature’s and the governor’s responses sheds important comparative light on the nature of capitalist lawmaking and anti-capitalist opposition in Iowa.

Introduced on February 24 by Arthur Springer, a lawyer from southeastern Iowa—but purportedly drafted by the chief counsel for a Cedar Rapids utility corporation 548—the public utilities bill, which covered water, gas, heat, electricity, and street car service to the public, 549 contained two especially

544“Corporations Win in Sensational Fight on Floor of Iowa Senate,” DMN, Mar. 30, 1921 (1:4-7 at 4).
545“Governor Alone Can Now Thwart Big Legislative Coup of Corporations,” DMN, Mar. 31, 1921 (1:7, at 5:1).
546“Coal Barons Win Again in Senate,” DMN, Apr. 1, 1921 (1:2, at 10:2).
548“Governor Alone Can Now Thwart Big Legislative Coup of Corporations,” DMN, Mar. 31, 1921 (1:7).
549H.F. No. 623, § 1 (Feb. 24, 1921, by Springer). Springer’s original purpose, according to some press accounts, had been to protect “progressive” farmers’ investments in, and help them extend electric lines to, their communities, but both utilities and municipalities prevailed on him to broaden the bill’s scope to include all utilities. “Springer Has Plan to Bring City Conveniences to Farmer,” Muscatine Journal, Mar. 18, 1921 (5:2-3). See also G. Caswell, “Legislative Letter,” Adams County Union-Republican, Mar. 16, 1921 (n.p.: 1-3 at 2) (NewspaperArchive).
The Great Compromise of 1921

explosive provisions. First, utilities were entitled to appeal the fixing by city councils or county boards of supervisors of rates\(^{550}\) (which were required to be “just, reasonable, compensatory and adequate”)\(^{551}\) to a newly created Court of Public Service, whose three members were to be selected by the chief justice of the Supreme Court from among the state district court judges, none of whom, however, was permitted to serve in any matter that had arisen in the judicial district in which he had been elected.\(^{552}\) This last provision would prevent affected citizens from defeating for re-election judges who in handing down pro-corporate rulings “should betray their interests.”\(^{553}\) For the anti-corporate opponents the second provision was even more provocative: any owner of a franchise to provide utility service was empowered to convert its franchise into one indeterminate in term by filing with the Court a waiver of all rights under the franchise to occupy streets, highways, or public places for a fixed term of years.\(^{554}\)

Legislative efforts by corporations to deprive citizens and their local governments of control of utilities by transferring it to a “friendly tribunal” were “nothing new,” but “never before” the 39th General Assembly, as far as the anti-corporate forces were concerned, had they introduced a bill more “brazenly indefensible” or planned and executed a campaign more “cunningly.” In previous sessions the corporations had tried measures that would have created a utility commission to resolve local rate and service disputes, “but the municipalities, knowing that it would be much easier for utilities to control or influence a commission than all the city councils, boards of supervisors, and courts of the state, [had] always opposed such a commission.”\(^{555}\) In order to thwart this

\(^{550}\) H.F. No. 623, § 8 (Feb. 24, 1921, by Springer).
\(^{551}\) H.F. No. 623, § 2 (Feb. 24, 1921, by Springer).
\(^{552}\) H.F. No. 623, §§ 10-11 (Feb. 24, 1921, by Springer).
\(^{554}\) H.F. No. 623, § 9 (Feb. 24, 1921, by Springer).
\(^{555}\) “People Win Hard-Fought Battle with Utility Companies,” \textit{IH} 66(14):763 (Apr. 7, 1921) (edit.). For example, in 1919 the utility corporations’ chosen legislative vehicle was S.F. 365, which would have “take[en] rate-making power from the cities and place[d] it in the hands of the railroad commission.” “Utilities Bill Meets Defeat,” \textit{MJ}, Mar. 21, 1919 (12:1-3 at 1). Individual municipalities and the League of Iowa Municipalities opposed it on the grounds that such controversies could be best handled locally, whereas under the bill utility corporations “can better expect to get what they desire than at the hands of city councils.” “Ready for Action on Utility Board,” \textit{WT-T}, Mar. 21, 1919 (3:1). After test votes on amendments had revealed that opponents controlled far more votes, backers withdrew the bill. \textit{State of Iowa: 1919: Journal of the Senate of the Thirty-Eighth General
opposition, the farm weekly *Iowa Homestead* editorialized, in 1921 the corporations hit upon the aforementioned Court of Public Service, which—for reasons not explicated—succeeded in “allay[ing] the suspicions of many municipal officials, who overlooked the fact that such a ‘court’...would be subject to the same corporate influences as a ‘commission’....” The Springer bill was also more radical than earlier measures by virtue of the indeterminate franchise provision, which empowered the new court to “annul existing franchise contracts,” which had been agreed to by city councils and ratified by voters, thus effectively giving the corporations “a vested right in the streets and highways of the state without binding them to any specific performance in return....”  

At the March 10 meeting of the House Public Utilities Committee, Rep. William Blake, chairman of the subcommittee to which the Springer bill had been referred, reported back the recommendation of several amendments, only two of which were specified and only one of which was relevant in the present context—namely, that the word “compensatory” be struck from the criteria that local rate-fixing governments were required to satisfy. The committee minutes merely stated that “[o]ther amendments were proposed” without disclosing their wording. The committee adopted the subcommittee’s report and the motion carried that the bill as rewritten with the suggested amendments be reported out for passage, but the minutes included no information on the vote, let alone on any discussion. In fact, two other undisussed amendments were of great significance. First, the vital section 9 on indeterminate franchises was amended, in response to objections concerning the length of the franchise in Springer’s bill, to provide that: “The term of the indeterminate permit shall continue in force until such time as it shall be surrendered, or otherwise terminate, according to law.” Second, the Court of Public Service, the creation of which, according

---

*Assembly* 144-47 (Mar. 20).


559“Council Not in Love with Service Bill,” *EG*, Mar. 12, 1921 (2:8). William Chamberlain, a utility lawyer and owner, had pointed out that under the Iowa Code the legislature had the power to terminate franchises at any time. *Id.*

560Committee substitute amendment to House File No. 623, by Springer, § 9 (n.d.) (SHSI DM). The section also contained a typographical error, substituting “intermediate” for “indeterminate.”

1282
to the *Des Moines News*, utility corporations had been seeking for years, was given the power, in actions brought on behalf of the municipality, to cancel or annul indeterminate permit or franchise only “for non-user, or when public necessity requires.” On March 11 chairman Dodd reported to the House that the Public Utilities Committee had recommended a substitute bill, which amendment the House, on Springer’s motion, adopted during debate a few days later.

The aforementioned limited and indirect cancellation provision prompted the Cedar Rapids city solicitor in a legal opinion to the mayor to raise an objection, which included the suggestion that the operative term be changed to “when public welfare requires.” Otherwise, if a city, such as Iowa City, which did not own its water works, wanted to municipalize ownership, brought suit, and was unable to convince the court that “public necessity require[d]” the action, it would be “absolutely powerless” to take the step: “Municipal ownership of public utilities at the expiration of the franchise, which is permissible under the present law which preserves the right of condemnation and purchase[,] is practically eliminated under the bill.” In fact, Iowa law at the time both prohibited cities and towns from granting public utility franchises for terms in excess of 25 years and required approval by a majority of legal electors of such grants and extensions of franchises.

During House debate on March 16, opponents tried to eliminate the indeterminate franchise altogether by amendment, but it was defeated by a large majority (18 to 73) and the margin on final passage was greater still (90 to 13).
At this point the focus shifted to the Senate, but before that chamber could debate and vote, a seismic shift in opinion in the House erupted in the wake of two sensationalist articles splashed across the front page of the sensationalist Des Moines News on March 28 (“Iowa Legislature Dominated by Corporations and Money Crowd”) and March 29 (“Lobbyists Infest Iowa Legislature”). The first piece, whose screaming generalities and epithets were excerpted above, illustrated “[how zealously] the legislature had ‘guarded the interests of the corporations...and rallied to the slaughter of every bill designed to benefit the public’”. A small annual franchise tax on corporate net income; an increase on taxation of insurance companies; requiring mortgage holders to give 30-day notice of their intentions; grade crossings to eliminate danger at railroad crossings; maximum hour and minimum wage; a tonnage tax on coal mine operators to finance schools attended by miners’ children; an occupation tax on railroads; workers’ compensation; and requiring employers to pay for short courses for apprentices. As far as passing measures that corporations wanted, the News mentioned a bill that “almost nullifies” limited hotel keepers’ liability for guests’ losses, before highlighting the public utilities’ success in securing passage of a public utilities court bill after years of “gum-shoeing for the establishment of a public utilities commission.” The result was that “one more dollar sign is chalked up on the legislative record of the 39th Assembly.”

It is difficult to reconstruct why legislators would or could have been ignorant of what the public took to be the newspaper’s revelations, but apparently some had not fully appreciated how they had been hoodwinked by corporate lobbyists. After all, the News itself had failed to cover the Dodd committee’s amendment of the bill or even the House floor vote on March 16, and never reported that...
The Great Compromise of 1921

the utility corporation owners had one of their very own in the legislature in the person of House Public Utilities Committee chairman Dodd in addition to identified legislators who were “trained corporation warriors” “completely under the domination of...the utility plutocrats.” Alternative, perhaps the reaction that the News provoked was not legislators’ enlightenment, but their embarrassment once their constituents had caught wind of the “wonderful ‘Punch and Judy’ show, which the Iowa Legislature ha[d] staged” in which members had been “but puppets in the hands” of corporations seeking privileged legislation. However, since the newspaper itself admitted that lobbyists’ methods had “not changed materially thru many sessions,” and the tactics it described could hardly have surprised anyone, let alone the very legislators who were their objects, the galvanizing force exerted by the disclosure that “[t]he senators liked the affable lobbyist with his vest pocket full of cigars too well to give him any embarrassment” such as even considering a bill to require lobbyists to register and identify their principals and the bills they were monitoring remains puzzling.

In the event, on March 29 Rep. Joseph Anderson, a farmer and former school principal, who had voted consistently against H.F. 623 on March 16, moved that the bill be recalled from the Senate immediately. Easily overcoming the procedural hurdle created by the Speaker’s ruling that a two-thirds majority would be required (since a motion to reconsider had already been laid on the
The Great Compromise of 1921

table), the newly enlightened secured 79 Ayes against only 20 Nays including those cast by Dodd, Springer, and Clark.\(^573\) That same day, Senator Edward Smith, publisher of the *Winterset Madisonian*,\(^574\) moved that the Senate comply with the House request, but the bill’s backers, acutely aware that returning it to the House was tantamount to killing or amending it to death, indignantly asserted that “‘the public interest demands that this constructive measure be enacted....’”\(^575\) Following a “violent debate”\(^576\) the “‘corporation-controlled Senate’”\(^577\) overwhelmingly rejected the motion by a vote of 11 to 37\(^578\)—a harbinger of a series of votes on the bill that followed immediately afterwards.

Senator Frank Thompson, a lawyer from Burlington who had been the floor manager of the corporations’ unsuccessful utilities commission bill in 1919,\(^579\) apparently did not believe that he was subverting his credibility by declaring H.F. 623 “one of the most equitable bills ever presented to the legislature....”\(^580\) Yet, despite the uproar caused by the *News* in the House, only a “pitiful handful” of senators, as that paper put it, “remained true to the interests of the people”\(^581\) in the votes on decisive amendments and final passage. Senator Buser, who charged that the bill was “just what the corporations had been working for years to secure,”\(^582\) managed to garner only 12 of 48 votes when he offered an amendment to strike out the entire section conferring the indeterminate franchise.\(^583\) Senator


\(^{575}\)“Service Firms Win Battle in State Senate,” *DMR*, Mar. 30, 1921 (1:4) (Senators Thompson and Frailey).


\(^{577}\)“Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” *DMN*, Apr. 2, 1921 (1:2-4 at 3).


\(^{581}\)“Corporations Win in Sensational Fight on Floor of Iowa Senate,” *DMN*, Mar. 30, 1921 (1:4-7 at 4).

\(^{582}\)“Service Firms Win Battle in State Senate,” *DMR*, Mar. 30, 1921 (1:4).

\(^{583}\)*State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly* 1401-1402 (Mar. 29).
The Great Compromise of 1921

John Tuck, another farmer, fared even worse in offering an amendment to entitle municipalities to buy any utilities covered by the bill at a fair and reasonable value and to use their condemnation powers: he gained only seven of 43 votes cast\(^\text{584}\)—even after denying “the charge that municipal ownership was socialistic.”\(^\text{585}\) Yet another farmer, T. C. Cessna, was able to mobilize but 15 of 49 votes for his amendment to condition the granting of indeterminate franchises on approval in a municipal election.\(^\text{586}\) Despite opponents’ pointing to the walls lined with lobbyists there to insure passage and warnings that with the indeterminate franchises and guaranteed profits the corporate utilities “would get an eternal hold on the cities,”\(^\text{587}\) predictably, the vote on final passage was an overwhelming 39 to 10.\(^\text{588}\) The \textit{News} explained that about a hundred utility corporation workers and lobbyists were at the statehouse and “surrounded every solon who was ticketed in the doubtful column, and prevented opponents of the measure from getting within speaking distance of any wavering statesman.”\(^\text{589}\) Thus “the corporations,” in \textit{News}-speak, “by the most high-handed buccaneering methods ever witnessed in Iowa legislative history, railroaded their pet scheme thru the Senate....”\(^\text{590}\)

In an effort to prevent what seemed to be the inexorable passage of H.F. 623 to the governor, on March 30, some elements of the “very large majority” of House members who “after more mature reflection”\(^\text{591}\) realized that they had exercised poor judgment in voting for it on March 16 sought to stop the process until the Senate honored the House request to return the bill so that the House could amend it. After several of these procedural moves had been ruled out of order, the movant, Anderson, appealed from the chair’s ruling and asked for a roll

\(^{584}\) \textit{State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly} 1400-1401 (Mar. 29).


\(^{586}\) \textit{State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly} 1402 (Mar. 29).

\(^{587}\) “Corporations Win in Sensational Fight on Floor of Iowa Senate,” \textit{DMN}, Mar. 30, 1921 (1:4-7 at 4).

\(^{588}\) \textit{State of Iowa: 1921: Journal of the Senate of the Thirty-Ninth General Assembly} 1405 (Mar. 29).

\(^{589}\) “Governor Alone Can Now Thwart Big Legislative Coup of Corporations,” \textit{DMN}, Mar. 31, 1921 (1, at 5:1).

\(^{590}\) “Corporations Win in Sensational Fight on Floor of Iowa Senate,” \textit{DMN}, Mar. 30, 1921 (1:4-7 at 4).

The Great Compromise of 1921

call, but utility owner and industry friend Dodd “jumped to his feet” and, since a member had begun speaking on another pending bill before Anderson made his appeal, was able to raise the point of order that no appeal could be taken once other business had intervened, which the speaker ruled was well taken, thus blocking the majority’s bid to overrule the speaker.

House opponents of the public utilities bill made a “frantic” effort to pull out all the procedural stops in their drive to defeat H.F. 623. On April 1 four members (all of whom had voted against the Dodd cigarette sales bill) offered a resolution to request Governor Kendall to return the bill without his signature because it made public utility corporations’ existing franchises indeterminate or in effect perpetual without giving the people the opportunity to vote on them, whereas previously they were both time limited and subject to popular votes. The resolution therefore proposed that the bill be amended so as not to apply to existing franchises, but only to those granted by popular votes. If, on the contrary, the Springer bill became law, the municipalities and the people would be denied the right of local self-government. However, after overcoming a motion to table the motion to consider the resolution by the large majority of 77 to 16, the anti-corporate forces ran into their own insuperable procedural problems: the 68 to 38 vote in favor of suspending the rule requiring that the resolution first be printed in the Journal so that a vote could be taken on the resolution then and there fell short of the required two-thirds majority. The

595 “Coal Barons Win Again in Senate,” DMN, Apr. 1, 1921 (1:2).
597 State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1729-31 (Apr. 1). In fact, at first the motion to suspend the rule did secure two-thirds of the votes (67 to 32), but an opponent invoked the rule compelling all members to vote, producing the additional Nays. After the vote, Rep. Harrison moved directly that the House request the governor to return the bill, but the Speaker ruled the motion out of order because its subject matter was identical to that of the resolution. “Carry Utilities Fight to Kendall: State House Is Stormed by Legal Lights,” DMR, Apr. 2, 1921 (1:8, at 2:2-3); State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1731 (Apr. 1). Although members’ “sympathies were with the motion,” they acknowledged that, by a strict interpretation of parliamentary rules, Speaker McFarlane was in the right; they
The Great Compromise of 1921

vote on the resolution would, therefore, be postponed until the next day.

In its discussion of the public utilities bill on April 1 the Executive Committee of the Des Moines Chamber of Commerce assured itself both that the indeterminate-term franchise was quite different than the popular understanding of it and that public rights were left intact. Apparently used to instant access, the committee directed the Chamber’s general secretary “to call personally upon the Governor this afternoon and advise him that the Chamber favored the measure.”598 Regardless of whether Kendall granted the organizational personification of Iowa’s corporate capital an immediate audience, that same morning Kendall did meet with a delegation of public utility leaders, headed by William Dows, “public utilities boss and millionaire of Cedar Rapids” (and himself a former two-term House member),599 who “stormed the governor’s office” to persuade him to sign the bill.600 Among the avalanche of letters and telegrams he had received were resolutions from the city council in Waterloo and Cedar Falls urging a veto, while Cedar Rapids delegates met with him seeking a signature.601

To help him decide whether to approve or veto H.F. 623, on the afternoon of April 1 Kendall held a special hearing in his state house office, against whose west wall he was backed from two until well after five o’clock.602 The standing-room only public presence was in large part composed of utility corporation lobbyists and representatives “in full retinue,”603 including Mayor Julius F. Rall.

---


599“Utility ‘Steal’ in Balance,” DMN, Apr. 1, 1921 (1:2-5 at 4). Dows (1864-1926) was the preeminent capitalist of Cedar Rapids and a leader of the electrical utility industry in Iowa. He was president of the Iowa Electric Co., Central States Electric Co., Iowa Railway and Light Co., and Cedar Rapids and Iowa City Railway. Edgar Harlan, A Narrative History of the People of Iowa 4:203-204 (1931). The positions adopted and votes cast by Rep. Clark of Cedar Rapids were presumably in tune with Dows’s interests.


601“Governor Holds Special Hearing,” ADT, Apr. 1, 1921 (1:6).

602“Carry Utilities Fight to Kendall: State House Is Stormed by Legal Lights,” DMR, Apr. 2, 1921 (1:8). According to another account, the hearing ended at 4:30 p.m. “Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:2-4 at 2).

603“Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:2-4 at 3).
of Cedar Rapids—who in 1896 as justice of the peace had presided over the first proceeding under the new anti-cigarette law—604—in his dual capacity as leader of a delegation selected by the Cedar Rapids Chamber of Commerce to support the bill and as head of the Iowa League of Municipalities.605 Rall, according to the News, in endorsing the bill was acting as mayor under Dows’s domination subject to the threat that otherwise his utility companies would not extend service in the city.606 Similarly, the News accused Rall of having done “the bidding of the utility barons” by having “jammed thru a resolution indorsing the bill” at a meeting of a “‘packed’ delegation” of municipal officials right before the hearing.607 Some city officials denounced Rall’s “‘caucus...as a joke.’”608 Nor was Rall alone: the News reported that all over the state city officials, under the utilities’ domination, “felt the edge of the corporate ax, and were hastily dispatched to Des Moines to bolster up the utility fighting forces.”609

Also in attendance was a small delegation of opponents led by the City of Des Moines’ special corporation counsel H. W. Byers—as attorney general a dozen years earlier he had strongly supported the anti-cigarette law—who for many years had been an “active opponent of corporations and public utilities.”610 Byers’ main contention was that the bill’s provision for creating a public utilities court composed of district court judges was unconstitutional because it would confer a second office on them. He also declared to Kendall that rates would be raised as soon as his excellency signed the bill because the companies would file with the new utilities court financial statements and appraisals of the value of their property showing a deficit and lack of adequate return on investment, leaving the judges with no choice but to raise rates, inasmuch as the judges would lack the appropriate mechanism to secure an accurate appraisal of these two

---

604 See above ch. 11.
605 “Carry Utilities Fight to Kendall: State House Is Stormed by Legal Lights,” DMR, Apr. 2, 1921 (1:8).
606 “Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:2-8 at 5:2); “Utility ‘Steal’ Blocked,” DMN, Apr. 4, 1921 (1:3-8, at 8:1-3 at 2).
607 “Utility ‘Steal’ Is Blocked,” DMN, Apr. 4, 1921 (1:3-8, at 8:1-3 at 2).
609 “Utility ‘Steal’ Is Blocked,” DMN, Apr. 4, 1921 (1:3-8, at 8:1-3 at 2).
610 See above ch. 13.
611 “Carry Utilities Fight to Kendall: State House Is Stormed by Legal Lights,” DMR, Apr. 2, 1921 (1:8). The mayor of Oskaloosa and city of attorney of Mason City were among the small number of opponents present. Id. at 2:2.
variables. The precise manner in which the Springer bill would lead to higher rates against which the people would be lawfully powerless to protect themselves was straightforward: all that utility corporations with franchises having one to 25 years left to run—that is, 90 percent of utilities in Iowa—had to do was file a waiver under section 9 with the city clerk extinguishing their contracts and then request a rate increase from the city council; on being denied the increase, the company could appeal to the Public Service Court “and get it.” By providing for an “adequate” rather than a “just and fair” rate for the companies, Byers argued, this innovation in Iowa utilities legislation created “the joker by which the corporations expect to crush the people.” Before finishing his presentation, Byers sought to demonstrate the utilities’ real intent by directly asking Robert Healy, one of the corporation attorneys, what the bill’s purpose was: “Is it not true that the bill is designed to increase utility rates?” After considerable evasion, Healy finally stated that its sole object was to “decent service...at a reasonable profit.” The essence of Byers’ critique was that the benefits conferred on the companies was “out of all proportion” to “any return to the public....”

Among the “many legal lights of statewide renown” presenting arguments on behalf of the utility corporations was William Chamberlain, who was an attorney, director, and shareholder in United Lights and Railways of Cedar Rapids and other firms. Called Dows “henchman” by the News, Chamberlain had been widely regarded as the author of the Springer bill, and, unsurprisingly, “the ace of the corporation men...displayed a marvelous knowledge of the bill.” He took charge of presenting the corporations’ position after Healy’s arguments—which culminated in the implausible claim that referring all cases to the Public Service Court would “insure peace between utilities and the public” by avoiding “all litigation”—had been “torn to shreds by Byers’ superior questioning....”

---

613 “Utility Barons Buy Hotel Dinner for Solons and House Drops Fight on Utility ‘Steal,’” DMN, Apr. 2, 1921 (1:2-4 at 4).
615 “Carry Utilities Fight to Kendall: State House Is Stormed by Legal Lights,” Des Moines Register, Apr. 2, 1921 (1:8, at 2:2).
616 “Public Utilities Trying to Put Over New ‘Steal,’” DMN, Apr. 6, 1921 (1:3-8).
Chamberlain’s central claim was that corporate utilities would be unable to obtain bank credit if the bill did not become law because banks were not willing to lend money for maintenance or improvements to short-term franchisees. "‘In the case of my own company,’” Chamberlain warned the governor, “‘[u]nless this bill is signed by your honor there will be no possibility of extending light and power service to farms not now served and there will be a great danger of utter inability of the United to supply the minimum amount of light and power now required.’” After Chamberlain issued his plea on behalf of “the poor farmers of Iowa,” Byers asked him point blank whether the mere filing of a waiver created an indeterminate franchise. With Chamberlain’s “‘Well, yes’” admission the hearing ended.

Following the hearing the governor announced that he would take the full three days (until Monday) allotted to him to make the decision (after which the bill automatically became law if he failed to sign or veto it) in order to study the bill, though the News reported the “common belief” that he would sign it. Moreover, the press reported that after being advised that a majority (68 members) of the House had opposed the bill, at least with respect to the indeterminate franchise, “he remarked that the wishes of the house would be regarded”—at least to the extent of returning the bill for correction or amendment, if the chamber could agree on the aforementioned resolution.

On April 1, not long after the vote on the resolution to memorialize Kendall was postponed, numerous House members found on their desks sealed invitations from two of their farmer-colleagues, Edward Knickerbocker and Fred Ingersoll, to a banquet at the Fort Des Moines Hotel that evening. Once the attendees arrived at the feast, “they found the guests were mostly farmer representatives suspected” of opposing H. F. (Farmers made up almost half of the House members.) After “a most sumptuous repast” Knickerbocker—representing

---

622 “Carry Utilities Fight to Kendall: State House Is Stormed by Legal Lights,” DMR, Apr. 2, 1921 (1:8).
625 “Farmers Lead in Legislature,” HCT, Dec. 29, 1920 (1:1). Farmers, retired farmers,
The Great Compromise of 1921

Linn County, whose county seat is Cedar Rapids—announced that his “good friend” Dows happened to be in town from whom he was sure his colleagues would gladly hear some remarks. Of all possible topics the Cedar Rapids utility magnate proceeded to enlighten the farmer-lawmakers on the importance of electricity for farmers and how the Springer bill would facilitate rural utility connections. On finishing, Dows handed the baton off to Robert Healy, the lawyer who had spoken on behalf of the corporations at the Kendall hearing that afternoon, who, after discoursing on the same subject, introduced his friend, Charles McNider, president of the First National Bank of Mason City, who at great length also conveyed his appreciation for the bill. The point of focusing on farmer-legislators was transparent: the punch-line of the speeches was that as soon as the bill was passed, “the utilities could get plenty of money to extend their service lines to the rural districts.”

On Saturday morning, April 2, when the House took up the Edson resolution to request that the governor return the bill, Representative Willis Criswell, a farmer, in order to embarrass the utility corporations and some of his colleagues, let the cat out of the bag about the banquet designed to influence the outcome of the impending vote on the resolution. In the event, Representative Willis Edson, a former county attorney and mayor of Storm Lake, one of the four members who the day before had unsuccessfully sought to suspend the rules to push through the resolution calling on Kendall to return the bill, called up the resolution, which ran into further procedural barriers (including one raised by Clark), until finally the Speaker ruled that it was out of order on the grounds that if a single house’s resolution sufficed to request a recall, then a majority of the Senate could hold up every measure passed. (That same day Kendall asked the

and those combining farming with other occupations ranging from grain dealer to banker and lawyer accounted for somewhat more than half of the House. *Handbook Iowa Legislature: Thirty-Ninth General Assembly* (W. Ramsay comp. n.d. [1921]).


628“Doings Under the State House Dome,” *IH* 66(14):766, 768 (Apr. 7, 1921). Four days later, when the House was debating H.F. 871, the sifting committee’s substitute for H.F. 623, Criswell tried to “tell a little inside story” about the Dows dinner for the House members on April 1, but was prevented by a point of order raised by Clark, ever the agent of the implicated Cedar Rapids utilities tycoon. “Substitute Bill on Utilities Loses,” *DMR*, Apr. 7, 1921 (4:2).


630*State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly*
The Great Compromise of 1921

attorney general for an opinion as to whether one chamber could recall a bill from the
governor, and by the start of that day’s afternoon session Dodd successfully
moved to print in the Journal Attorney General Ben Gibson’s opinion that the
house in which a bill originated could not recall it from the governor without the
other house’s consent.\footnote{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1786, 1788 (Apr. 2); “Governor Vetoes Springer Public Utility Measure,” WEC, Apr. 2, 1921 (1:8).} Unable to mobilize all those who now opposed H.F. 623 to overturn the Speaker’s ruling, Edson’s appeal was soundly defeated by a
vote of 66 to 25.\footnote{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1807-1809 (Apr. 2).} A member of that majority then moved that it was “the sense” of the House that H.F. 623 “ought not to become a law unless the provisions for
the indeterminate franchise be eliminated and that the governor be memorialized
to that effect....”\footnote{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1789-91 (Apr. 2).} Opponents found no better argument than that asking to recall
the bill was tantamount to a “confession that they were negligent in passing it....”\footnote{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1788-89 (Apr. 2).} Obviously alluding to the exposes in the News, Clark joked that some of
his colleagues “had been having bad dreams which...were unjustified, and
probably induced by sleeping with newspapers under their pillows.” After the
Speaker had ruled that this informal approach was the proper procedure,\footnote{State of Iowa: 1921: Journal of the House of the Thirty-Ninth General Assembly 1789-90 (Apr. 2) (motion by Charles Aldrich).} it narrowly survived a motion—made by Ingersoll, one of the inviters to the
previous evening’s utilities feast—to table by a vote of 47 to 50 (Dodd, Clark, and
Springer voting Aye), but following more procedural wrangling, including a
failed attempt to refer the sense of the House motion to the sifting committee, it
was defeated 49 to 52 because more of those who had not voted on the tabling
motion voted Nay than Yea and two more of those who had voted against tabling
switched sides than of those who had voted to table.\footnote{“Doings Under the State House Dome,” IH 66(14):766 (Apr. 7, 1921).}

The defeat of the resolution, as far as the News was concerned, demonstrated
that Dows had spent his money with precisely the desired effect of undoing the
advantage that the public had gained at the hearing and of depriving Kendall “of

1294
all moral support” against the bill. In its inimitable persiflage, the paper denounced the “solons” who had “sold the people of Iowa for a bowl of soup and a chicken wing,” allowing themselves to be “swayed into complaisance by a sumptuous feed and big fat cigars purchased by plotting plutocrats.” Dows, Healy, and McNider had “coaxed the pliable solons into a state of semi-slumber,” which “plastic ‘representatives’ proved traitor to the public and exhibited all the symptoms of a utility ‘hangover.”

In the event, the governor did not need the full three days to make his decision. Later on Saturday he exercised his veto for the first and last time during the session, prompting the United Press to call the message “the great event of the present legislature.” At 2:45 in the afternoon the House, to which the governor had returned the bill as the originating chamber, broke into cheers when the Chief Clerk read the governor’s reasons for the veto. The governor’s non-approval of the bill—closely tracking Byers’ analysis—was based not only on the constitutional violation created by conferring an additional “office” on judges but also on the bill’s “complete reversal” of state utilities policy: “It deprives the people and their representatives on city councils and boards of supervisors of every vestige of power to protect the interest of the public in its streets and highways” by virtue of conferring on the already established utilities “a perpetual right to enjoy the benefits and privileges secured to them under contract franchises granted by a vote of the people for definite terms.” The bill’s mechanism for terminating such indeterminate franchises was “wholly inadequate” because the only grounds open to the new court for cancelling them was “‘non-user and when public necessity requires,’” but the former would only rarely occur and it was difficult to imagine a situation in which “‘public necessity would require’ the termination of a franchise no matter how inefficiently the corporation enjoying it was operating.”

The veto plunged the News into a veritable orgy of bathetic and bombastic
The Great Compromise of 1921

self-adulation stressing above all its own role and victory in thwarting “the greatest campaign of loot ever attempted or ever conceived in Iowa” by “smashing with all its might at the monster” and “crushing the tentacles of the utility octopus already grasping at the throat of an unsuspecting public” and thus insuring that the utility “plutocrats” went “down to the most smashing defeat in history....” Stripped of the News’s pomposity, the credit that the paper deserved for relentlessly riveting the legislators’ and the public’s attention on and making transparent the Springer bill’s “vicious provisions” was appreciatively expressed by Byers—in the News.641

Governor Kendall’s effective protest against a persistently and intensively lobbied corporate capitalist demand suggested, with a view to what his position on selling cigarettes might be, that he was by no means big business’s rubber stamp. Indeed, the veto immediately triggered prophecies by “political dopesters” of its effects on Kendall’s re-election chances in 1922, which made it clear that he could not have been unaware that he was forfeiting “some of his staunchest oldtime political support,” including that of some of “the most powerful wielders of power,” who had “undoubtedly broken” with him over the veto; chief among them was Colonel Dows of Cedar Rapids, who had been one of the bill’s principal behind-the-scenes advocates. To be sure, in addition to principle, it was unclear whether Kendall had weighed these blows against the “many thousand new votes” that few doubted his veto would secure for him. In any event, a potential rival for the Republican nomination had already emerged.642 Senator Milton Pitt—who had thunderously and dichotomously framed the issue on the Senate floor as “‘Either pass the bill or have public ownership’”—had gained the backing of some of the party “biggest political chiefs, while the bill’s enraged senatorial supporters declared that Pitt “would surely be put forward as a candidate,” even though as a farmer he had burned his bridges to the Farm Bureau and many farmers over the assistance he had rendered the public utility corporations.644

The Register viewed the governor’s veto as a “substantial defeat” of the bill, considering it “extremely improbable” that both chambers could muster the two-thirds majority needed to override it.645 Instead, on April 5 Dodd’s House sifting

---

641“Utility ‘Steal’ Is Blocked,” DMN, Apr. 4, 1921 (1:3-8).
642“Speculation Rife over Kendall Veto,” DMR, Apr. 4, 1921 (1:5).
643“Service Firms Win Battle in State Senate,” DMR, Mar. 30, 1921 (1:4).
644“Speculation Rife over Kendall Veto,” DMR, Apr. 4, 1921 (1:5).
committees—which the News called “apparently well ‘packed’ with corporation friends” without knowing that Dodd was himself a utility capitalist—a at the behest of “utility magnates and lawyers,” fashioned and filed a new bill, H.F. 871, which was similar to the Springer bill but omitted the provision of the indeterminate franchise; although it dropped the name, Court of Public Service, it nevertheless retained the controversial procedure under which the chief justice of the Supreme Court assigned three district court judges—none of whom was permitted to have been elected in the district in which the dispute arose—to hear appeals of utility actions taken by city councils. This “sugar-coated” version of the Springer bill, also drafted by Chamberlain, was, from the News’s perspective, just as “pernicious” and “vicious,” and still designed to “enable the predatory utilities to crawl out from under their franchise contracts.”

The next day the new bill was immediately attacked on the House floor with an amendment requiring utilities to file with local rate-setting governments information such as a property statement and operating costs to provide them with a basis for setting rates. Dodd (whom the News singled out as one of “the friends of the corporations”) objected to the amendment on the grounds of the expense it would cause utilities. Clark joined Dodd in taking the lead in speaking for the bill, but the anti-corporate majority, apparently agreeing that the utilities were trying to “ram the bill down members’ throats at the last minute,” held in the House, 59 voting to kill the bill (by striking out the enacting clause) against 35 die-hard industry followers. The News luxuriated

---

646 “Public Utilities Trying to Put Over New ‘Steal,’” DMN, Apr. 6, 2021 (1:3-8).
649 H.F. No. 871, §8 (Apr. 5, 2021, by Sifting Committee). The Register misleadingly reported that the reference to the Public Service Court had been omitted. “Substitute Bill on Utilities Loses,” DMR, Apr. 7, 2021 (4:2).
650 “Public Utilities Trying to Put Over New ‘Steal,’” DMN, Apr. 6, 2021 (1:3-8).
655 State of Iowa: 2021: Journal of the House of the Thirty-Ninth General Assembly
in having “wrecked the corporation juggernaut” by virtue of having warned the House of the “sinister contents” that the “money barons” had “camouflaged” in the new bill. The neo-Lincolinian lesson to be learned from this “slaughter[ ]” was that the utility corporations “can fool part of the Iowa House...all the time—and the whole House part of the time—but they cannot hoodwink the whole House all the time.”

In editorializing against “the complete domination of the state’s law-making body by the corporations” “as the gravest threat to the interests of the producers and consumers of Iowa,” the farm weekly Iowa Homestead adduced the “boldness and monumental nerve of the utility magnates” as the prime example of “unscrupulousness” in action: they asked the legislature to pass a bill that would have given them at the very least “a cool 20 millions of dollars of franchise rights belonging to the people for which the utilities were to give not one penny in return”—a sum “equal to the entire amount that will be raised by direct taxation for state purposes in the next two years...”

The generally progressive orientation of those opposing repeal of the cigarette sales ban can be gauged by the extent of their opposition to the pro-corporate public utilities bill. Of the only 18 representatives who on March 16 had supported the amendment to delete the conferral of indeterminate franchises on utility companies, two weeks later 13 voted against and only four for the Dodd bill; similarly, of the only 13 representatives who had voted against the utilities bill on its final passage, seven voted against and only three for the Dodd bill. Moreover, only three of the 20 representatives (including Dodd and Clark) who voted on March 29 against requesting that the Senate return to the House the utility bill that the House had passed but that a majority then regretted having passed (after the expose in the Des Moines News of the bill’s real import as well as of the utilities’ tawdry lobbying methods) voted the next day against H.F. 678. Finally, 34 of the 41 representatives who had voted against final passage of H.F. 678 also voted against the substitute pro-corporate utilities bill a week later, while only seven of 35 who voted for the latter also voted against the

2009-10 (Apr. 6).

The Great Compromise of 1921

Likewise, of the 12 senators—whom the Des Moines News singled out for praise as having “held out for the rights of the people”661—who on March 29 voted for the amendment to strike out the indeterminate franchise from the bill, nine voted on April 4 and April 6 against final passage of the Dodd bill; of the 11 senators who had voted to agree to the House request to return the Springer bill before acting on it because a large House majority had repented of passage seven voted against the Dodd bill; of the 15 senators who voted for an amendment requiring approval through an election for a franchise to be declared indeterminate 11 voted against the Dodd bill; and, finally, of the 10 senators who voted against final passage of the first utilities bill, seven voted against the Dodd bill’s final passage a week later.662

The battle over the utilities bill differed in numerous striking and fundamental ways from that over repealing the universal ban on cigarette sales, which also went a long way toward explaining why opponents prevailed in the former but were defeated in the latter. To begin with, enemies of the utility companies succeeded in constructing their campaign as pitting greedy corporate capital—personified in Dows and other named tycoons—against the people, who not only individually as consumers faced being fleeced through higher rates, but also stood in danger of being collectively dispossessed of their statutorily anchored power to veto franchise contracts entered into by city councils—an impressive element of non-workplace-based, community-centered economic democracy. In contrast, in spite of the WCTU’s efforts to focus attention on the eastern cigarette oligopolists’ conspiracy to increase their profits at the expense of Iowa children’s health and well-being, the anti-cigarette movement failed to secure sufficiently widespread public acceptance of this way of framing the underlying economic antagonism. (Ironically, the anti-corporate utility groups appear not to have availed themselves at all of the propaganda value of the fact that by this time eastern gas and electric


661 “Corporations Win in Sensational Fight on Floor of Iowa Senate,” DMN, Mar. 30, 1921 (1:4-7).

corporations had gained control of numerous utility systems in Iowa.) Instead, the successors to the Tobacco Trust, if they did not vanish altogether behind the thousands of front-line local retailers and wholesalers whose illegal shenanigans were much more prominent, appeared to all too many legislators as merely passively responding to the market demand of adult men, who were being deprived of the freedom to consume.

Whereas the national cigarette companies’ role in repealing the sales ban was covert and only briefly and speculatively alluded to by opponents, the utility corporations, while not loudly boasting that their lawyers had drafted the Springer bill, hardly made a secret of their central involvement. They were manifestly not in the least embarrassed by their management of the April 1 banquet, which was tantamount to a bribe on public display to half the members of the House of Representatives. Such tawdry shenanigans only made the firms, already under attack for tricking legislators into taking back citizens’ legal rights to second-guess their own city councils’ franchise agreements, even more inviting political targets. The cigarette industry was careful never to let itself be associated with any operations even remotely resembling such machinations.

In part as a result of the wide disparity in visibility of the capitalist actors in both legislative campaigns, general press coverage, but especially critical and even investigative reporting, of the Springer bill was significantly deeper than that of the Dodd bill. Although even the state’s leading paper, the *Des Moines Register*, paid more attention to the utilities debate, the decisive consideration was the editorial attitude of the *Des Moines News* (and of its owner, the Scripps chain), which programmatically and sensationally attacked corporate greed in general and the Iowa utilities in particular, but—presumptively because of Edward Scripps’ own tobacco addiction—virtually ignored the proceedings surrounding repeal of the cigarette sales ban. Its only contribution was to add its indistinguishably conventional rejection of adult prohibition to the chorus of its avowed capitalist enemies—namely, the editors and publishers whom the cigarette oligopolists had primed with lures of advertising as soon as the ban on the product was lifted. Whereas the rambunctiousness of the *News’s* coverage of the utilities bill, of which even its competitors were forced, directly or indirectly, to take note, was designed to mobilize further reaches of the population in the legislative process, its staid reporting on the cigarette bill would hardly have inspired anyone to take further interest, let alone participate, in the debate.

This unmistakable divide also and especially left its mark on the governor’s hearings, which took place on two successive Friday afternoons near the end of the session. The first, the utilities bill hearing, was heavily attended, boisterous,

---

663 See the discussion above of the Dodds’ sales and Horace Dodd’s employment.
and, in its publicness, verging on the circus-like. In contrast, the relatively scanty and subdued coverage of the Dodd bill hearing—whose outcome was widely awaited with great interest—failed even to make absolutely clear that it had been open to the public, let alone to convey a solid sense of the substance of the parties’ arguments. Emblematic of the gulf separating the two proceedings was the (apparent) absence at the cigarette hearing of the kind of feisty interrogation to which Byers had subjected the utility corporations’ lawyers. The reason was straightforward: no representative of the oligopolies behind the nationwide repeal movement was present at the hearing for Hammond, Hutchinson, or Smith to examine. Indeed, other than Dodd himself, the only advocate of H.F. 678 to speak was Miles, who denied that the American Legion had even lobbied, let alone pushed, for the filing of the bill—a claim that Hammond accepted. With no agent of economic interest in sight to acknowledge responsibility for having launched the repeal movement in Iowa, the inherent dynamic and blatantly open conflict and tension of the utility hearing lacked any basis at the cigarette hearing. To that extent TMA’s strategy of ensuring that its cigarette-member bosses kept a low (or, better yet, no) profile in state legislative battles proved to be prudent.

Finally, the fact that virtually everyone in Iowa (except utility shareholders) would perceive him- or herself as benefiting from preventing the corporations from raising rates created a considerably larger and broader base for the struggle against the Springer bill, which, moreover, did not lend itself to being distorted as largely busybodies’ moralistic interference with adults’ freedom to make their own consumption choices. Similarly, this cross-class anti-corporate utility movement did not suffer from the liability that, despite the fact that numerous WCTU locals, parent-teacher organizations, and churches composing the anti-cigarette campaign were located in the larger cities, the press conveyed the impression that if the antis possessed any grass-roots support, it was to be found in the smaller towns, where the law might still be enforced. No such urban-rural split fatally sapped the strength of the fight against the utility barons.