“Inherently Bad, and Bad Only”

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

Volume 1

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

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PART IV

CIGARETTE SALES LICENSURE AND TAXATION IN IOWA DURING THE PERIOD OF LAISSEZ-FAIRE SMOKING: 1921 TO THE 1960S

The state department is planning to have a force of deputies gumshoeing about to pick up violators.¹

Cigarette law is having its trouble. Several town and city councils refused to grant permits for the sale.²

It is true that there has always been more or less opposition among certain groups...toward cigarette consumption, with the result that the tax may have been originally levied in part for regulatory purposes. ... The writer of this dissertation vividly recalls the agitation against cigarette smoking that was rife in the middle-western sector of the United States a few years ago,—an agitation that was based upon the combined grounds of immorality and health deterrents allegedly connected with cigarette smoking.

If the aim in taxing cigarette sales in Iowa had been primarily one of regulation, the revenues from this tax, of necessity, would have been of secondary importance. However, in view of the fact that the Joint Legislative Committee on Taxation recently proposed to the General Assembly of Iowa an increase in the rates on cigarette sales, in addition to a tax on the sales of other forms of tobacco, all for the purpose of gaining more revenue, it may be concluded that the essential purpose of the present tax in Iowa is to raise revenue for the state.³

¹“Iron Clad License Is Necessary to Sell,” Oelwein Register, July 15, 1921 (4:3-4).
²“Neighborhood News,” Adams County Free Press (Corning), July 16, 1921 (1:1).
The Aftermath of Licensure in Iowa: 1921-1939

“[W]hile our victory in the recent anti-tobacco war has been almost complete, the menace has not yet passed, and it is not likely to pass so long as professional agitators are able to pass their hats and collect the coin.”

Because his department had been receiving so many requests for copies of the new cigarette law, which was to go into effect on July 4, 1921, William Burbank, the new treasurer of state, who was in charge of enforcement, on April 30 published a leaflet containing the statute’s full text prefaced by a comprehensive synopsis by Attorney General Ben Gibson. Burbank furnished newspapers with copies of the pamphlet, requesting that they publish the synopsis. From a reading of the act Burbank discovered that it had “two ends in view”: raising revenue for cities and the state and eliminating minors’ use of cigarettes. Interestingly, Burbank’s focus on the goal of insuring that minors stopped smoking cigarettes was broader than Gibson’s more formalistic stress of suppressing sales to minors. Underscoring that this law was definitely worth far more than the “mere scrap of paper” it was written on, Burbank point blank expressed his expectation that “every person, hamlet, city and county” in Iowa would “do its bit in the observance of this measure and earnestly solicit[ed] the hearty co-operation of officers and people in the plain duty of enforcement.”

Before being elected state treasurer in 1920, Burbank had been county treasurer in Black Hawk county (whose county seat is Waterloo) and treasurer of a smaller county as early as 1900, though at the time of the 1910 census he was a bookkeeper of a wholesale grocery. While still state treasurer, Burbank in 1923 self-published a 300-page anti-Catholic screed, The Knighthood of Catholicism, whose title page announced that the book contained a “Map of the Papal State in which the Author Resides,” which midwest papal state turned out to be a large sheet of paper containing only the title page.

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21921 Iowa Laws ch. 203, at 213.
3The law expressly assigned enforcement to the treasurer, who was empowered to “call to his aid the attorney general, the special agents, any county attorney or any peace officer.” 1921 Iowa Laws ch. 203, § 15, at 213, 217.
4“New Cigarette Law Goes into Effect July 4th,” Jackson Sentinel (Maquoketa), June 7, 1921 (4:2-6 at 2-3).
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to extend all the way into Wyoming and the capital of which was Dubuque. When he left the state treasurer’s position in 1924, he unsuccessfully ran as a candidate in the Republican primaries for governor “under a Klan banner” and was “termed the klan candidate for governor.” In March 1924, residents of Waterloo found on their doorsteps copies of The New Menace devoting considerable space to Burbank’s gubernatorial candidacy as well as to a review of his book, the proceeds from which were impliedly to be used for his campaign. In Waterloo, the Ku Klux Klan’s local organizer urged Burbank’s candidacy as a means of replacing three state officials appointed by Governor Kendall whose religious affiliations were objectionable to the Klan. Although Burbank failed by a narrow margin to secure the Republican nomination, the KKK did succeed in winning Polk county for him. By way of hortatory introduction Gibson emphasized that the law “should be enforced by every official” in Iowa and that in order to implement the legislature’s intentions, as expressed in the bill and on the House and Senate floor, there should be no hesitation to bring prosecutions or injunction suits for enforcement. As summarized by Gibson, the law encompassed the following elements:

1. No one is authorized to sell cigarettes except a permit-holding dealer.
2. A permit may be issued by city councils and county boards of supervisors to any person, firm, or corporation complying with the law’s provisions.
3. No permit can be issued until the applicant files a bond of not less than $1,000.
4. The annual permit fee is $100 in first-class cities, $75 in second-class cities, and $50 elsewhere, regardless of when during the permit year the permit is issued; the fees are to be paid to the treasurer of the city or county issuing the permit.

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6W. J. Burbank, The Knighthood of Catholicism as Advertised and as It Really Functions 261 (1923).
10“Ku Klux Organizer Speaks for Burbank,” WEC, May 29, 1924 (5:1).
(5) No cigarettes or cigarette papers maybe sold or given to anyone under 21.
(6) The law applies equally to sales of cigarettes and cigarette papers/wrappers.
(7) Cigarette dealers are required to attach and cancel stamps in all sales of cigarettes and cigarette papers amounting to one mill per cigarettes on those weighing not more than three pounds per thousand and one-half cent per 50 papers.
(8) Any dealer failing to attach stamps is subject to a fine ranging between $100 and $300 and commitment to jail until the fine is paid for up to six months; all cigarettes and papers [in the possession of violators] are to be confiscated and forfeited to the state.
(9) All cigarette packages have to contain specified a number of cigarettes ranging between 8 and 100.
(10) Stamps will be on sale by the treasurer of state, who will redeem unused stamps.
(11) “The permit fees are called mulct taxes,” and anyone, whether a permit-holder or not, who fails to pay the permit fee “may be assessed a mulct tax for the amount thereof,” which is assessed by the assessor, who is “liable for a fine for failure to do so. If the assessor fails to assess the mulct tax the sheriff or three citizens may do so.” After one month failure to pay the mulct tax “results in a penalty beind [sic] added thereto of twenty per cent and [1 percent per month until] the tax is fully paid.”
(12) Minors found possessing cigarettes or papers “are required to furnish to any peace officer, juvenile court officer, truant officer, or teacher information as to where the same was obtained,” refusal to comply being a misdemeanor punishable by a maximum $5 fine or five-day jail sentence or both. Minors under 16 have to be certified to juvenile court for action deemed proper by the court. The court is empowered to suspend the sentence of any minor who afterwards gives evidence in proceedings against the person who furnished cigarettes or papers to him.
(13) The punishment for furnishing cigarettes or papers to minors under 21 is a fine of $25 to $100 for first offense or imprisonment for up to 30 days; for additional offenses the punishment is a fine ranging between $100 and $500, or imprisonment from one to six months, or both.
(14) Anyone violating any of the law’s provisions or maintaining a place where cigarettes or papers are sold or kept with intent to sell in violation of any of the law’s provisions “shall be deemed guilty of keeping and maintaining a nuisance, and the building or place so used...shall be deemed to be a nuisance, and such person, firm or corporation may be enjoined and such building or place abated as a nuisance,” the injunction/abatement procedure as well as that for
contempt for violating such an injunction are to be the same, as far as practicable, as provided for enjoining/abating intoxicating liquor nuisances.\textsuperscript{13}

In addition to omitting mention of the fact that the mulct tax was made a lien on the real estate where cigarette selling business were located, the attorney general failed to specify for citizens and government officials that local governments had the discretion not to issue cigarette permits.

**Cigarette Advertising Becomes Lawful**

Apparently some senators had the idea that newspapers were champions of the [1919 Nebraska cigarette sales prohibition repeal] bill because they saw visions of large additional revenues therefrom. At any rate a strong effort was made to bar manufacturers and dealers from advertising them in the newspapers. It is quite natural that this should occur to them. They simply fail to distinguish between the newspaper business and most others. Even the most greedy of publishers long ago learned that the real source of his advertising revenue lay in the number and character of his subscribers. There are also publishers who daily turn down advertising offered them that offends their sense of propriety and decency or are opposed to their standards of what should be admitted, and the editorial conduct of their newspaper is not swayed by considerations of revenue in the sense that revenue considerations govern what shall appear in the policy making department of the newspaper.\textsuperscript{14}

The day of buying cigarettes under cover is past in Iowa. All over the state bill boards carry advertisements of the popular sellers. Since July 2 [sic] cigarettes have been displayed in cigar store windows in the large towns.\textsuperscript{15}

On July 4 and 5, 1921, the day and day after the repeal of the anti-cigarette law went into effect and cigarettes were therefore no longer an article the sale and advertising of which were prohibited,\textsuperscript{16} Iowa newspapers resumed publishing such advertising. To be sure, even during the four years (July 4, 1917 to July 4, 1921) while the advertising ban was in effect the American Tobacco Company

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{13}“New Cigarette Law Goes into Effect July 4th,” *Jackson Sentinel* (Maquoketa), June 7, 1921 (4:2-6 at 4-6). For a shorter version, which nevertheless included some information omitted from the longer version, see “Recently Passed Cigarette Law,” *Riceville Recorder*, May 18, 1921 (1:1).
\item \textsuperscript{14}“Making Real Progress,” *Evening Standard Journal* (Lincoln, NE), Mar. 17, 1919 (6:1).
\item \textsuperscript{15}“Neighborhood News,” *Adams County Free Press* (Corning), July 16, 1921 (1:1).
\item \textsuperscript{16}On the enactment of the ban in 1917, see above ch. 14.
\end{enumerate}
\end{footnotesize}
in cahoots with receptive publishers skated right up to the edge of the law and over by publishing three-quarter-page ads for Lucky Strike roll cut tobacco for pipe or cigarette that contained the sentence: “This is the same toasting process that made the Lucky Strike Cigarette the greatest success in cigarette manufacturing.”

The 12 weeks between the governor’s approval of the Dodd bill and the law’s effective date proved to be an agonizingly long time for the cigarette manufacturing oligopolists to wait to acquaint potential solvent demanders with their still contraband commodities and for publishers to wait for the advertising revenue to start rolling in. Consequently, at the beginning of May, with two months still to go before the advertising ban was to be lifted, many newspapers, especially small rural weeklies, which had been enticed for a considerable period of time by the Tobacco Merchants Association and its member-cigarette manufacturers with prospects of lucrative advertising if the ban on sales and advertising were repealed and the press contributed to that outcome, began publishing the same relatively small one-column advertisements with the text: “Lucky Strike cigarette Its toasted.” One of these appeared on May 3 in the Newton Daily News and the Waterloo Evening Courier, followed by its appearance in the immediately following days in numerous small weeklies. For example, the next day the Palo Alto Tribune in Emmetsburg, a small rural town in northwestern Iowa, published not only the same ad but one six-times as large for Liggett & Myers’ Chesterfield on the same page. Nor did ATC remain content with breaking the law with smallish Lucky Strike ads: two weeks later, the company began publishing ads almost five times larger that boasted of

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17 Iowa City Daily Press, June 10, 1920 (6:2-7). See also Iowa City Daily Press, Sept. 30, 1920 (7:4-7) (“As in the famous Lucky Strike cigarette, this toasted flavor is delicious”). These ads also ran numerous times between June and September 1920 in the Waterloo Evening Courier, Waterloo Times Tribune, Muscatine Journal, and Des Moines Daily News (search result on NewspaperArchive).

18 See above ch. 17.

19 NDN, May 3, 1921 (2:2) and May 9, 1921 (3:3).

20 WEC, May 3, 1921 (3:2).

21 Palo Alto Tribune (Emmetsburg), May 4, 1921 (8:1, 5-7). The same Lucky Strike advertisement also appeared in Marble Rock Journal, May 5, 1921 (3:1); Anita Record, May 5, 1921 (8:6); Anita Tribune, May 5, 1921 (3:1); Griswold American, May 5, 1921 (2:3); Kellogg Enterprise, May 6, 1921 (3:1); Alton Democrat, May 7, 1921 (2:7); Boydenc Reporter, May 7, 1921 (8:1); Ruthven Free Press, May 11, 1921 (3:6); Progress-Review (LaPorte City), May, 12, 1921 (7:7); Stanion Call, May 12, 1921 (6:6); Victor Record, May 12, 1921 (7:1); Adams County Free Press, May 14, 1921 (4:1). See also ICP-C, May 7, 1921 (9:8).
facilitating and profiting from violations of the still valid sales ban by announcing that “[d]ealers now carry both sizes: 10 for 10 cts; 20 for 20 cts.”22 On May 19 they appeared in two papers in the same small southwestern town of Anita,23 one of which, ironically, in the same issue ran an article published all over the state, titled, “New Cigarette Law Is Most Stringent.”24 During the final days of the old prohibitory regime the American Tobacco Company and publishers launched yet another wave of unlawful advertisements for Lucky Strike.25 One publisher who surely was not ignorant of the law he was violating when his *Winterset Madisonian* published a Chesterfield advertisement on June 15 26 was Edward Smith, who as state senator had voted for the Dodd bill just two months earlier.27

Although no publisher appears to have been prosecuted for any of these violations, the Iowa Press Association was well aware of them. The May 1921 issue of the *Corn Belt Publisher*—an official organ of the Association—published a detailed and accurate exposé, which manifestly failed to deter member-publishers from illegally enriching themselves and the cigarette oligopolies. Written by Grant Caswell, a former state senator who as the Association’s field secretary edited the monthly,28 the article was excerpted by at least one daily newspaper.29

On passage and signing of the new cigarette law...tobacco companies and cigarette manufacturers got busy prematurely to place their goods on the Iowa market and advertise same. Newspapers and bill boards in Iowa for the first time in several years contain prominent mention of cigarettes in connection with tobacco advertising—a thing which we have seen and read here in Iowa only through other mediums and in papers published outside the state but freely distributed in Iowa.

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23 *Anita Record*, May 19, 1921 (2:4-5); *Anita Tribune*, May 19, 1921 (7:1-2).


25 *Sun-Herald* (Lime Springs), June 30, 1921 (8:6) (a weekly in Horace Dodd’s own Howard county); *Rock Rapids Reporter*, June 30, 1921 (6:6) (Lyon County, of which Rock Rapids was the county seat, was represented by Moen, the Dodd bill’s most vociferous opponent in the House).

26 *WM*, June 15, 1921 (6:5-7).

27 See above ch. 15.

28 On Caswell’s position as the Iowa Press Association’s field secretary, see the notice he placed in *Spirit Lake Beacon*, Sept. 15, 1921 (1:1-2). On Caswell’s editing and publishing the *Corn Belt Publisher*, see *N. W. Ayer and Son’s American Annual and Newspaper Directory* 291 (1920).

29 “Cigaret Advertising Not Legal Till July,” *Oelwein Register*, June 1, 1921 (7:7).
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We say prematurely, for at least three and perhaps more agencies began making schedules and placing orders for cigarette and tobacco advertising the first of May when the old cigarette law is still in force and the new law ineffective till after the first of July. Apparently the only information the big concerns handling this advertising had of the illegality of such advertising at this time was by way of a telegram from Field Secretary Caswell to the Newell-Emmett Co., New York, suggesting that our newspapers could not legally run their schedules at this time. They came back with a further inquiry regarding the matter, when we gave them the information that the governor’s office had advised us that the new law cannot possibly become effective until July 4th...

That Newell-Emmett was facilitating illegal advertising was hardly unexpected since it had been the Tobacco Merchants Association’s chief media and propaganda consultant, whose strategy in large part hinged on securing the cooperation of rural weeklies in the anti-anti-cigarette campaign by promising them cigarette advertising revenue. After offering ignorance of the law’s effective date as an explanation of the “premature” advertising, Caswell commented that a bill’s “long and rocky road” had been “particularly hard to travel” in the case of the cigarette bill “because of the prejudice against cigarettes in some people’s minds and the fear that the new law might make it easier for boys to get and smoke the little pills.” He also belittled the violations by referring to the ban on cigarette advertising as “[t]his hidden law,” which was, to boot, “perhaps unconstitutional”; and although he asserted that “nobody wants to violate” it, he was even more certain that no one at that late date wanted to bother to seek its invalidation by the Iowa Supreme Court. (Since his own Corn Belt Publisher had never contested the law’s validity, let alone constitutionality, when it was passed in 1917 or later, Caswell’s newfound interest in this excuse was curious.) Lame and lacking credibility was his closing rhetorical question: “Just why there should be such hurry to get this cigarette advertising started in this state we cannot see. Results cannot be secured for advertising that which cannot be sold, at any rate.” Since Caswell’s syndicated column analyzing weekly developments in the Iowa legislature during the 1921 session had uniformly disparaged the anti-cigarette law, claiming that it was neither respected not obeyed, he was acutely aware that cigarettes were

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30 "Cigaret Advertising Illegal," Corn Belt Publisher 5(9):1 (May 1921).
31 See above ch. 17. On the ambiguous relationship that Caswell, who was supposed to be representing the publishers’ interests vis-a-vis advertising agents such as Newell-Emmett Co., which placed tobacco advertising for Liggett & Myers, maintained with Newell-Emmett, see “Respect Iowa B. R. List,” Corn Belt Publisher 5(8):5 (Apr. 1921).
32 "Cigaret Advertising Illegal,” Corn Belt Publisher 5(9):1-2 (May 1921).
33 See above ch. 15.
being sold in many cities, giving manufacturers every incentive to advertise them. By way of excusing its own “non olet” approach to making money by publishing cigarette ads, the *Upper Des Moines-Republican* in mid-May also sought to distinguish itself both from its openly scofflaw and from its ethical competitors:

[W]hen the cigarette law in this state was changed tobacco factories began sending out advertising. The advertisement of cigarettes under a present law is illegal so few papers accepted the ads not wishing to violate the law. On July 4th the sale of cigarettes will become legal, so will the advertising. Several papers in this state have refused to accept this advertising because they believe the use of tobacco to be wrong. [T]hese editors have the privilege of selling their space to whom they please. It is no worse for a newspaper to advertise tobacco than it is for the groceryman to sell it and they all do. It is probable that this paper will run tobacco ads as we already have several contracts ready and copy for the July 5th issue. We expect to be criticized by some for doing it but the critics are entitled to a square deal and we will sell them space if they so desire to combat the sale of the weed. That is our business.34

On July 4, the veritable flood of lawful cigarette advertisements began to cascade through the state. The *Des Moines Register*, the paper with the largest daily circulation in Iowa, published a large advertisement for Camel and a smaller one for Lucky Strike,35 while the *Dubuque Times-Herald* also published one for Lucky Strike.36 The next day large advertisements for Camel appeared, inter alia, in the Cedar Rapids *Evening Gazette*, *Muscatine Journal*,37 *Iowa City Press-Citizen*,38 and *Ottumwa Courier*,39 while Lucky Strike ads appeared in the *Sioux City Tribune*,40 the *Waterloo Times-Tribune*,41 the *Cedar Rapids Republican*,42 and the *Des Moines News*.43 The *Charles City Press*, Dodd’s hometown paper,

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34“On Advertising,” *Upper Des Moines-Republican* (Algona), May 18, 1921 (2:1) (edit.)
35DMR, July 4, 1921 (6:6-7, 3:8).
36*Dubuque Times-Journal*, July 4, 1921 (3:8).
37*EG*, July 5, 1921 (12:1-2).
38*Muscatine Journal*, July 5, 1921 (6:5-7).
39*ICP-C*, July 5, 1921 (5:6-8).
40*Ottumwa Courier*, July 5, 1921 (4:2-4).
41*SCT*, July 5, 1921 (2:1).
42*WT-T*, July 5, 1921 (3:5).
43*CRR*, July 5, 1921 (3:5).
44*DMN*, July 5, 1921 (2:1).
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published two Lucky Strike advertisements and one for Camel on July 5;\textsuperscript{45} in the same day’s issue of the Marshalltown Times-Republican an advertisement for Liggett & Myers’ Fatima cigarettes appeared,\textsuperscript{46} which that day also adorned the Council Bluffs Nonpareil along with one for Camel.\textsuperscript{47} Nor did Liggett & Myers stint on Chesterfield: the Oskaloosa Daily Herald published a very large one on July 6\textsuperscript{48}—the same day that it reported that the city council had denied the issuance of cigarette permits\textsuperscript{49}—and printed a different one six days later.\textsuperscript{50} The cigarette oligopolists did not renege on their promises to spread their advertising wealth to small-town papers. On July 6 and 7, the Iowa Recorder in Greene\textsuperscript{51} and Rockwell City Advocate\textsuperscript{52} published large Camel ads, while the Albia Republican\textsuperscript{53} and Hamburg Republican\textsuperscript{54} on July 7 and 8 made sure their readers did not forget Chesterfield. The weekly Howard County Times—a leading paper in the county that Horace Dodd, who had made it all possible, represented—published Camel and Chesterfield advertisements on July 6.\textsuperscript{55} The same day the Marengo Republican hit the nicotine revenue jackpot when it carried ads for all three oligopolists’ market-dominating commodities,\textsuperscript{56} a feat matched two weeks later by the Anita Tribune.\textsuperscript{57} Some small-town or specialized weeklies, such as the Riceville Recorder\textsuperscript{58} and the Iowa Farm Republic,\textsuperscript{59} took an extra week to publish their first advertisements. And at least one small-town weekly, the Deep River Record, wanted to have it both ways: On July 1, noting that Grinnell and Newton had “refused to grant the privilege,” it editorialized that the town “council has the right to refuse to issue a permit if it wants to exercise its authority in the matter. Maybe it would be a good thing banish the pill

\textsuperscript{45} CCP, July 5, 1921 (2:7, 3:7, 4:5-7).
\textsuperscript{46} MT-R, July 5, 1921 (7:5-8).
\textsuperscript{47} Council Bluffs Nonpareil, July 5, 1921 (2:1-3, 6:6-8).
\textsuperscript{48} Oskaloosa Daily Herald, July 6, 1921 (2:4-7).
\textsuperscript{49} See below ch. 20.
\textsuperscript{50} Oskaloosa Daily Herald, July 12, 1921 (3:2-5).
\textsuperscript{51} Iowa Recorder (Greene), July 6, 1921 (6:4-6).
\textsuperscript{52} Rockwell City Advocate, July 7, 1921 (3:5-7).
\textsuperscript{53} Albia Republican, July 7, 1921 (7:2-4); it also published one for Lucky Strike (3:2).
\textsuperscript{54} Hamburg Republican, July 8, 1921 (3:3-6).
\textsuperscript{55} HCT, July 6, 1921 (6:4-6, 8:4-6).
\textsuperscript{56} Marengo Republican, July 6, 1921 (2:4-6, 3:4, 7:4-6).
\textsuperscript{57} Anita Tribune, July 21, 1921 (4:1-3, 7:5, 8:4-6).
\textsuperscript{58} Riceville Recorder, July 13, 1921 (7:6, 8:4-6) (Lucky Strike and Chesterfield).
\textsuperscript{59} Iowa Farm Republic, July 14, 1921 (3:1) (Lucky Strike).
Cigarette Sales Permit Mulct Taxes

With the stub of a black cigar clenched firmly between his teeth, Mr. Dushkind tilts back in a swivel chair and speaks frankly.

“Five years ago? Six States then had laws entirely prohibiting the sale of cigarettes...Arkansas and Tennessee, North Dakota, Kansas, Nebraska, and Iowa. [T]oday there are only two states left...which continue to carry on their statute books laws forbidding the sale of cigarettes to adults. They are North Dakota and Kansas. The South Carolina Legislature at its latest session imposed a heavy tax on cigarettes...but this is a measure affecting price, not a prohibition. So on the whole we can’t complain.”

One way of tracing the extent to which local communities made use of their statutory power to deny cigarette sales permits is to examine the data on cigarette license receipts for the hundred or so largest cities published in the auditor of state’s annual *Report on Municipal Finances* to determine whether any cities reported no such receipts. Since the 1921 statute required the mulct tax, which applicants had to pay for the license, to be paid to the city or town treasurer and go into its general fund, the absence of cigarette license receipts in the uniform statewide reporting should be interpretable as the result of a city council’s blanket

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60“Local and General News,” *Deep River Record*, July 1, 1921 (5:1). Deep River (population 487 in 1920) is about 25 miles southeast of Grinnell.

61Unfortunately, from June to October 1921 the *Deep River Record* neither published any minutes of any town council meeting nor referred to any council action on cigarette permits.

62Charles Cushing, “Prohibition as ‘Big Brother’ Fails to Win for Blue Laws,” *NYT*, May 20, 1923 (XX5).

63During the 1920s, there were a total of 107 to 111 first- and second-class cities (based on federal and state censuses), the former having a population of 15,000 or more and the latter of 2,000 to 15,000; the categories were somewhat more flexible inasmuch as once a city’s population reached these thresholds, subsequent population decreases did not cause a city to lose its status unless its population fell below 10,000 and 1,500, respectively. Compiled Code of Iowa §§ 3507-3508 at 1063 (1919); Code of Iowa §§ 5623-24 (1924). Unfortunately, for the approximately 800 incorporated towns (with a population of under 2,000) the auditor of state did not publish separate data on cigarette license receipts.

641921 Iowa Laws ch. 203, §§ 5 and 12, at 213, 214-15, 216.
denial of permits. However, although this procedure eventually functioned as expected, several start-up problems frustrate its use in the earliest years. To begin with, the state did not publish such receipts data for the first partial year of the law’s operation (July 4, 1921 to March 31, 1922). It is known that during the first two months, 3,000 permits had been issued and by February 1, 1922, 3,200, and that during those first seven months in the aggregate permit fees to cities, towns, and counties had amounted to $225,000. Second, even for the first full year, 1922-23, apparently not all cities reported their cigarette license receipts, even though they had collected them. Thus, the state’s four largest cities, Des Moines, Sioux City, Davenport, and Cedar Rapids, and the sixth largest, Waterloo, all lacked entries for cigarette license receipts, although the press reported that they had issued permits for which dealers had paid the mulct tax. It seems implausible that the few cities that failed to report cigarette license receipts intermittently had actually granted, then denied, then granted permits. For example, Dubuque, the fifth largest city, reported receipts of $5,400 in 1922-23, nothing in 1923-24, and $6,600 in 1924-25.

66 “Golden Stream Pours in Iowa’s Coffers from Cigaret Laws,” WEC, Sept. 10, 1921 (8:4).
69 The auditor of state identified several municipalities that had failed to report as required, but the largest cities mentioned below were not among them. Auditor of State, State of Iowa: 1923: Report on Municipal Finances for the Year Ending March 31, 1923: Statistics of Cities and Towns of Iowa 5. However, one of the smallest cities, Hamburg, which was listed as having no receipts of any kind for 1923-24, was among the cities having failed to report as required. Auditor of State, State of Iowa: 1924: Report on Municipal Finances for the Year Ending March 31, 1924: Statistics of Cities and Towns of Iowa 6.
70 “The City Council,” DD&L, July 25, 1922 (8:8); see below.
This methodology identified two cities as likely candidates for further scrutiny: Grinnell, the 32nd largest city, with a population of 5,362 at the 1920 census, which did not report cigarette license receipts until fiscal year 1924-25, when it collected $675; and Indianola, the 55th largest city, with a population of 3,628 at the 1920 census, which reported no cigarette license receipts until fiscal year 1934-35, when, as the 59th largest city with a population of 3,488 at the 1930 census, it reported $525 in receipts. The struggles that underlay these bare chronologies are analyzed below.

Before proceeding to an account of those last open local conflicts over cigarette sales in Iowa for several decades, the growth of the cigarette trade in Iowa during the 1920s can be tracked by reference to the aforementioned total annual permit fees in the first- and second-class cities, which at the 1920 federal population census accounted for 925,152 or 38.5 percent of the total state population of 2,404,021, at the 1925 state census for 987,720 or 40.8 percent of the total population of 2,419,927, and at the 1930 census for 1,038,166 or 42.0 percent of the total population of 2,470,939. Keeping in mind that the receipts for the very largest cities were missing for 1922-23 and 1923-24, the total receipts developed as follows: 1922-23: $101,111.09; 1923-24: $105,038.88; 1924-25:

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73See below ch. 20.

By way of comparison, stray aggregate figures for 1923-24 and 1928-29 revealed statewide local permit fees of about $300,000 and $350,000, respectively.76 During the last five years, beginning with the inclusion of data for the largest cities, the mulct tax rose by about 19 percent, suggesting a modest increase in the number of permit holders. At $100 per permit in the first-class cities—at the 1920, 1925, 1930 censuses the population in 14, 15, and 16 cities, respectively exceeded 15,000—it is possible to estimate the number of permit holders in each city, which only roughly corresponded to the rank-ordering of population. Des Moines, the largest city with a population of 141,441 in 1925, collected $26,700 in receipts (its peak figure during the 1920s) in 1925-26, which would have translated into 267 permit holders. Its only close competitor, Sioux City, the second largest city with a population of 76,411, collected cigarette license receipts of $21,600, indicating 216 permit holders—a gap that by 1928-29 closed to $1,525 or only 15 permit holders. The smallest first-class city in 1925-26, Iowa City, with a population of 15,289, collected $2,275 from (presumptively)


76“Cigarette Revenue Nets $700,078.12 to State in Year,” Davenport Democrat and Leader, July 11, 1924 (10:7-8); W. E. Hawse, “Cigarette Stamp Tax of Iowa and How Administered,” in Report of Proceedings: Third Annual Conference of Administrators of Tobacco Tax Laws 33-40 at 33 (1929). The figure for 1928-29 may have been somewhat overstated since Hawse (who was the Cigarette Revenue Department superintendent) also stated that Des Moines with “a population of 167,000, received in the neighborhood of $30,000.00” in 1928. Id. Yet, in fact Des Moines (whose population was about 25,000 lower) received cigarette permit revenue of $24,875.
about 23 permit holders. The largest second-class city, Keokuk with a population of 14,501, collected $2,300 in receipts, which at $75 per permit was (presumptively) paid by about 31 permit holders. The 15 first-class cities collected $127,775 in cigarette permit fees, which would have translated into about 1,278 permit holders; the remaining $73,355 collected by the 95 second-class cities would have been the equivalent of about 978 permit holders, for a grand total for the state of 2,256. Thus for all 110 first- and second-class cities there was one permit for 438 people, but a greater density of permits in the smaller cities: one permit for 478 people in the first-class cities and only 385 in the second-class cities. Among the first-class cities, the density ranged from one permit for 354 people in Sioux City to one for 672 people in Iowa City.\(^7^7\) Whether the difference was accounted for by the permits issued by the approximately 800 towns and by numerous county boards of supervisors in unincorporated places or by some flaw in the aforementioned methodology, a total of 3,400 retail dealers in Iowa held permits in early 1923,\(^7^8\) which would have worked out to a little more than 700 people per permit.

Shortly before the law went into effect it was assumed that the combined impact of the mulct tax (which amounted to $50 in towns smaller than second-class cities and in unincorporated places) and the required $1,000 bond\(^7^9\) would
The Aftermath of Licensure in Iowa: 1921-1939

prompt smaller groceries and other smaller stores that had been selling cigarettes illegally to stop. And although the financial pressure did in fact eliminate some dealers, the state treasurer’s office later concluded that a smaller number of stores would sell the same number of cigarettes.

Cigarette Sales Excise Taxes

The object of the law is to prevent the sale of cigarettes to minors, and to enable the control of the sale of cigarettes; it was not passed primarily to increase revenue.

[T]he more broadly prohibitive anti-tobacco legislation...has been proven to be unsatisfactory by practical experience. The penumbra of malediction once surrounding the use of tobacco has considerably faded in recent years. [T]here is reason to suggest that further experiments with this type of legislation would result in but little progress. ... It would seem to be by far the more practical course for lawmakers to regard tobacco in the light of a source of revenue only.

Fenton who, although his bank profited from arranging purchase of the bonds (which cost the retailer about 10 to 15 dollars a year), stated that they were a useless nuisance without any administrative purpose because no claim had ever been filed on them. Krause stressed repeatedly that the proposal had been designed as a small business measure to help save retailers money and in no way implied the “rightness of smoking.” After an official at the Revenue Department had looked into the matter and concluded that no claims had ever been filed against bonds, he did not oppose repeal. Krause, who had thought that the bond’s purpose had been to provide a source of money in case a dealer absconded without paying the sales tax, was not aware of the history of the law or that the bond had originally been supposed to function as a financial deterrent as well as to pay for various fines, such as for selling to minors and failure to pay the mulct tax. Telephone interview with Robert Krause, Ames (Mar. 12, 2008).

80 “Twenty-Five Dealers May Sell Cigarettes,” CRR, June 18, 1921 (8:4) (discussing Cedar Rapids).

81 For example, in 1925 the Goreham Hotel in Grinnell requested that its permit “be cancelled on account of not wishing to pay the required tax.” “Proceedings of the City Council,” GR, July 6, 1925 (5:4) (June 30).

82 W. E. Hawse, “Cigarette Stamp Tax of Iowa and How Administered,” in Report of Proceedings: Third Annual Conference of Administrators of Tobacco Tax Laws 33-40 at 36 (1929). The mulct tax’s bite in 1921 can be presumed from the fact that almost 90 years on it remains unchanged, although the consumer price index has risen almost 12-fold in the interim. Iowa Code § 453A.13.3 (2010).

83 “The Cigaret Law,” Evening Tribune (Des Moines), Sept. 9, 1921 (6:2) (edit.).

[I]t must not be forgotten that State tobacco tax legislation approaches something like a blood relationship to anti-tobacco endeavors.\textsuperscript{85}

Iowa was the first state to enact a cigarette sales tax, which quickly proved to be "such a lucrative source of state revenue" that before it had even been in effect for a full year "other states [we]re casting covetous glances its way, and several requests have come to the state treasurer for copies of the law, and a report on its administration."\textsuperscript{86} The sales tax was also a much more sensitive indicator of cigarette sales than the sales permit mulct tax. Table 7 shows the amount collected from July 4, 1921 through June 30, 1932:


\textsuperscript{86}"State Gets Big Revenue from the Cigarets," \textit{DD&L}, June 13, 1922 (2:1).
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Table 7: Annual Collection (in $) of the Iowa Cigarette Stamp Sales Tax, July 4, 1921 to June 30, 1932

<table>
<thead>
<tr>
<th>Year</th>
<th>Collection ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1921-22</td>
<td>593,279.74</td>
</tr>
<tr>
<td>1922-23</td>
<td>640,733.89</td>
</tr>
<tr>
<td>1923-24</td>
<td>700,078.12</td>
</tr>
<tr>
<td>1924-25</td>
<td>777,358.99</td>
</tr>
<tr>
<td>1925-26</td>
<td>828,293.13</td>
</tr>
<tr>
<td>1926-27</td>
<td>902,516.03</td>
</tr>
<tr>
<td>1927-28</td>
<td>1,103,128.04</td>
</tr>
<tr>
<td>1928-29</td>
<td>1,247,997.12</td>
</tr>
<tr>
<td>1929-30</td>
<td>1,371,683.44</td>
</tr>
<tr>
<td>1930-31</td>
<td>1,406,928.59</td>
</tr>
<tr>
<td>1931-32</td>
<td>1,207,137.94</td>
</tr>
</tbody>
</table>

As early as January 1923 the state treasurer’s office had commented that the increased tax collections reflected (not so much a higher rate of compliance but)

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87Executive Council of the State of Iowa, *Census of Iowa for the Year 1925*, at lix (data for 1921-22); *State of Iowa: 1932: Report of the Treasurer of State for the Biennial Period July 1, 1930, to June 30, 1932*, at 41 (data for all other years). The state treasurer initially reported that the excise tax collected on cigarette and cigarette papers during the first year the law was in effect amounted to $590,918.99. *State of Iowa: 1922: Report of the Treasurer of State for the Biennial Period July 1, 1920, to June 30, 1922*, at 5. In the next biennial report the figure for 1921-22 given as $490,918.99 was presumably a typographical error. *State of Iowa: 1925: Report of the Treasurer of State for the Biennial Period July 1, 1921, to June 30, 1922*, at 5. The figure in the table, taken from the 1925 state census volume, presumably corrected the initial figure, just as the 1932 state treasurer’s report corrected the initial published figure for 1922-23. On June 2, 1921, State Treasurer Burbank estimated that one company selling cigarettes in various cities and towns in Iowa “will pay more than $70,000 yearly as their share of the tax due the state from the sale of cigarettes. Another company will contribute more than that....” “Heavy Cigarette Tax,” *Times-Republican* (Bedford), June 6, 1921 (2:4). The article did not identify either company and no other newspaper was found with a more complete report.
increased sales caused by lower cigarette prices during the second half of 1922. 88

Representing a tax of one-tenth of a cent per cigarette, the tax collections multiplied by 1,000 conveniently translated into an approximation of total annual cigarette sales and consumption, which more than doubled during the eight years ending with the onset of the Great Depression. Although the tax also covered cigarette papers, contemporaries typically assumed the full equivalence, as, for example, was expressed in this press account: “The full amount collected for 1928 was $1,183,032. This means that 1,183,000,000 were smoked in Iowa last year.” 89 The periodic publication of cigarette tax revenue data thus finally offered the public for the first time ever the opportunity to gauge the consumption of cigarettes in an individual state—information that theretofore only cigarette companies had possessed but not shared with government officials. 90 For example, in June 1922 the press noted that the $2,000 a day in tax revenue collected on average during the first eight days of the month reported by the assistant state treasurer in charge of cigarette revenue collections meant that two million cigarettes a day were smoked in Iowa, almost the equivalent of one for every man, woman, and child: “This enormous consumption of the slim, white, ‘fags,’ while possibly proving injurious to cigaret addicts, is proving a very profitable source of revenue to the state....” 91 By mid-1924, when the state

88 “Licenses for Cigarettes Give State Million,” DD&L, Jan. 7, 1923 (3:4). How sellers managed to lower prices while having to pay the new sales tax and permit mulct tax is unclear.

89 J. Jarnagin, “News and Comment About Iowa People and Events,” Iowa Recorder (Greene), Mar. 27, 1929 (9:1-3 at 3).

90 In 1927 the legislature amended the cigarette law to require (non-wholesaler) retail permit holders to file with the treasurer of state a monthly report detailing the number of cigarettes they had bought during the previous month, the names of the suppliers, and the kinds and brands of cigarettes. 1927 Iowa Laws ch. 33, § 3, at 26, 27 (codified at Iowa Code § 1570-b1). The onset of this reporting requirement in 1927 was associated with a very marked rate of increase in revenue collection. Neil Jacoby, “Statistics of State Cigarette Revenues and Cigarette Sales, with Particular Reference to Iowa” at 2-3 (Address at a dinner meeting of members of the staff of the Iowa Cigarette Tax Administration, Des Moines, June 1931), in Collected Articles and Papers of Neil H. Jacoby, Vol. 1: 1930-1942, at 26-33 at 27-28 (1975) (available only at Rosenfeld Library, Anderson School of Management, UCLA). The monthly reports do not, however, appear to have been published.

91 “State Gets Big Revenue from the Cigarets,” DD&L, June 13, 1922 (2:1). Whereas earlier records had showed the $2,000 a day average for working days only, by August it included Sundays and holidays. “Iowans Smoking over Two Million Cigarets a Day,” DD&L, Sept. 8, 1922 (2:3).
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treasurer’s office was forecasting that annual sales would reach one billion “fags,” it estimated that daily consumption was on the order of 2.5 million.92 A year later state cigarette tax collectors estimated that “Iowans Smoke Up Nearly 3 Million Cigarettes Every Day.”93

A nationally unique contemporaneous opportunity to calculate cigarette sales on a county and even city level was given in 1930 to Neil H. Jacoby, a research assistant at the University of Chicago studying state sales taxation in general and state tobacco taxation in particular (who went on to become dean of the UCLA School of Management and a member of President Eisenhower’s Council of Economic Advisers). Because Iowa’s tax had been in force for the longest period and was also the only one showing tax collections for cigarettes alone,94 and the trends, if there were any to be discerned, had already had time to appear, Iowa, he explained at a dinner meeting with the staff of the Iowa Cigarette Tax Administration in June 1931, afforded “the best evidence for study” of cigarette tax yields.95 At the time there were no other data available on cigarette sales.

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92Ed Dose, “Iowa Launches Drive to Get Cigaret Tax,” DD&L, June 5, 1924 (2:4).
93“Iowans Smoke Up Nearly 3 Million Cigarettes Every Day,” WEC, July 2, 1925 (2:8).
95Neil Jacoby, “Statistics of State Cigarette Revenues and Cigarette Sales, with Particular Reference to Iowa” at 1-2 (Address at a dinner meeting of members of the staff of the Iowa Cigarette Tax Administration, Des Moines, June 1931), in Collected Articles and Papers of Neil H. Jacoby, Vol. 1: 1930-1942, at 26-33 at 26-27 (1975) (available only at Rosenfeld Library, Anderson School of Management, UCLA). In 1975, four years before his death, Jacoby personally assembled and had bound and cataloged at the UCLA business library a set of “all available articles and papers, published and unpublished” that he had written during the previous 45 years; he excluded, however, “unpublished monographic studies of considerable length,” which would have made the collection “far too bulky.” Collected Articles and Papers of Neil H. Jacoby, Vol. 1: 1930-1942, at iii (1975). This informal paper “presented some results of a yet unfinished statistical study on cigarette tax yields and cigarette consumption, with particular reference to the state of Iowa.” Id. at 1 (1:26). It seems likely that the paper was related to a larger study that he wrote the next year: Neil H. Jacoby, “The Estimation of Yields for State Tobacco Taxes,” prepared for the Social Science Research Committee, University of Chicago (Feb. 1932) (unpublished), which was cited a year later by E. Schoenberg, “The Demand Curve for Cigarettes,” Journal of Business 6(1):15-35 at 18 n.5 (Jan. 1933). Since the page number cited by Schoenberg was 116, it is possible that the paper, which does not appear in Jacoby’s collection, was excluded because it fell into the category of “unpublished monographic studies of considerable length.” Neither the UCLA management school library nor dean’s office nor Jacoby’s son was able to find the study; likewise, librarians...
consumption or sales (which he used synonymously) for any state. Jacoby needed such data to estimate cigarette tax yields in various states, determine the volume of evasion achieved by consumers who bought cigarettes in non-taxing states, and discover heavy and light revenue-yielding areas in each state that did tax cigarettes. His first choice as a source for such data had proved inaccessible: “The different cigarette manufacturing companies to whom an urgent application was made for sales data by states or geographical areas, politely refused to divulge any information whatsoever.” The next best sources were the states that required dealers to file reports periodically on their cigarette purchases (of which Iowa had been one since 1927). Fortunately for Jacoby, William E. Hawse, the superintendent of the Iowa Cigarette Revenue Department, gave him
access to the Cardex file reporting individual dealers’ purchases and cigarettes and stamps, enabling him to calculate for 1930 each dealer’s sales and, cumulatively, those for the state and by county. With cigarette sales at 1,340,484,000 in Iowa in 1930, per capita consumption was 543 or about 58 percent of the 940 recorded for the United States in 1929. With no reason to believe that Iowa’s figure was the country’s lowest and knowing that some states must have had averages much higher than 940, Jacoby raised the question as to what made cigarette consumption relatively high or low in any state, and tentatively answered it by reference to relative population density. To test his hypothesis, he constructed a scatter diagram plotting population per square mile and per capita cigarette consumption for each of Iowa’s 99 counties. Unfortunately for purposes of historical research, the fruits of Jacoby’s unique access to this unique data set have been irretrievably lost because Jacoby failed to include any of the charts in the sole copy of his unpublished paper that he left behind. Consequently, all that remains is his very brief discussion of the data, which began by pointing out that since the points were not closely strung out along an upward and rightward slanting line, the relationship between greater population density and high per capital consumption was “not significantly close,” although generally densely populated counties were also characterized by high consumption. However, he did, as another missing scatter diagram revealed, find a close relationship on the county level between total cigarette consumption and total population. Equally interesting to him was whether the deviations from the line of average

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Neil Jacoby, “Statistics of State Cigarette Revenues and Cigarette Sales, with Particular Reference to Iowa” at 4 (Address at a dinner meeting of members of the staff of the Iowa Cigarette Tax Administration, Des Moines, June 1931), in Collected Articles and Papers of Neil H. Jacoby, Vol. 1: 1930-1942, at 26-33 at 29 (1975). Since dealers’ duty to provide monthly data began in 1927, presumably Jacoby had access to the data for all of 1928 and 1929 as well, which are now also no longer extant.


101The Iowa State Archives does not have the underlying data from the Cigarette Revenue Department or any other relevant documents. Email from Jeffrey Dawson to Marc Linder.
relationships were readily explainable. For example, the very high per capita consumption (943 cigarettes) in Johnson county, the site of the State University of Iowa, relative to its total population was “undoubtedly due to the high percentage of cigarette-smoking individuals in its population” (the basis for which he did not mention). At the other end, Dubuque, Des Moines, Lee, Pottawattamie, Appanoose and Page counties’ relatively low per capita consumption—he mentioned no numbers—relative to their population density was explicable by reference to their location on the borders with non-cigarette-taxing states. Finally, Warren county’s especially low (but unfortunately unspecified) per capita consumption relative to its population density he explained as a function of the strong Methodist community there, which had resulted in the cigarettes’ not being purchasable in the county seat of Indianola.

Jacobi also separately compiled the sales data for 21 cities with a population above 10,000. Although this scatter diagram has also been lost, its showed that per capita sales there were much higher than in the counties: with only 29 per cent

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102 Neil Jacoby, “Statistics of State Cigarette Revenues and Cigarette Sales, with Particular Reference to Iowa” at 5-6 (Address at a dinner meeting of members of the staff of the Iowa Cigarette Tax Administration, Des Moines, June 1931), in Collected Articles and Papers of Neil H. Jacoby, Vol. 1: 1930-1942, at 26-33 at 30-31 (1975). In fact, the average difference in per capita cigarette sales between the 36 border (525.4) and 63 non-border counties (552.9) turned out to be a “surprisingly low” 27.5. With population density in both groups being close to each other, the border-county sales shortfall of 5 percent was presumed to represent evasion by personal out-of-state purchases. Jacoby ultimately concluded that mail-order purchases were more important as a source of evasion. Id. at 7-8 (1:32-33). Soon after the law had gone into effect in 1921 it was reported in Muscatine that in addition to bootlegging of cigarettes from Illinois into Iowa cigarettes were being sold on Mississippi River excursion boats without payment of sales or mulct taxes; because the sales were made after the boats left the dock when they were no longer within the state’s jurisdiction, the law (purportedly) did not apply to them. “Cigarette Laws Being Evaded, Is Officers’ Belief,” Muscatine Journal, July 27, 1921 (2:5). With regard to the State University of Iowa, Jacoby may have been presuming that smoking prevalence was above average among students. A few years earlier a columnist speculated that nonsmokers made up less than 20 percent of total male college students. “Mac,” “New Cigarette Law Goes into Effect Tomorrow,” CRR, July 3, 1921 (3:1-2).

of the population, these cities accounted for 33 per cent of permit-holding dealers and more than 50 per cent of cigarettes sold. In particular, the two largest cities, Des Moines and Sioux City, accounted for 23 per cent and 13 per cent, respectively, of all cigarettes sold in all Iowa cities. The diagram indicated that the 21 cities were “grouped fairly closely about a line of average relationship,” meaning that in cities with more than 10,000 inhabitants, once the population was known, per capita sales could be predicted within a small margin of error at about 1,027. Overall, per capital consumption for cities was 944 compared to only 543 for counties.\textsuperscript{104}

\section*{Enforcement}

The new law provides for a tax on cigaret sales which will add materially to state revenues. The danger is that we may be too apt to collect the revenue without enforcing the other and more important feature of the law.\textsuperscript{105}

Mayor Ahrens, of Sac City, has authorized the town marshal “to arrest every boy under 21 years of age seen smoking in public. The boy will be brought before the mayor and required by law to tell where he obtained his cigaret.” ... The same attitude all over the state will make it decidedly interesting with minors who persist in looking with favor upon the seductive coffin nail.\textsuperscript{106}

A corps of secret operatives is constantly on the move in the state seeing that the cigaret law is enforced, Mr. McCoy declares.\textsuperscript{107}


\textsuperscript{105}“The Cigaret Law,” \textit{Evening Tribune} (Des Moines), July 5, 1921 (10:1-2 at 2) (edit.).

\textsuperscript{106}J. W. Jarnagin, “News and Comment About Iowa People and Events,” \textit{Spirit Lake Beacon}, July 21, 1921 (32:3-6 at 3). This paragraph of the article was printed adjacent to a three-column advertisement for Chesterfield.

\textsuperscript{107}“Direct Tax upon All Tobacco Sold Is Provided in Bill,” \textit{WEC}, Mar. 8, 1923 (9:1-2 at 2).
At the beginning of July 1921, when the city council in Decorah, a northeastern Iowa town of about 4,000 with a heavy Norwegian concentration, issued eight cigarette sales permits, the local newspaper remarked that they represented about one-fourth of the dealers who had been selling cigarettes during the prohibition period. In order to market their legality, the next week six of these permittees—including owners of a hotel, a lunch parlor, and two restaurants—took out a large joint advertisement in the weekly paper under the heading: “Buy Your Cigarettes of Decorah’s Licensed Dealers.”

The dealers’ judgment of Decorah’s law-abidingness may have been exceptional. Less than three weeks after the new cigarette licensure and tax law had gone into effect the first arrest in Iowa for selling cigarettes without revenue stamps took place in Davenport on July 23, 1921. A “new situation” arose in state “law enforcement circles” by virtue of the law’s having turned over enforcing powers “entirely” to the treasurer of state’s office. The number of men in the “picked group” in pursuit of bootleggers was kept secret so that, despite having badges numbered from 1 to 19, no one outside the treasurer’s office knew exactly how many. They were, boasted their boss, Clarence C. McCoy, in mid-1922:

“at work all the time. They do not make their presence known in a town until they have evidence they are after, and the tax violators under arrest. They do not cooperate with local officials. Cases are on record where they have gone into a town, secured the evidence, made the arrests, and had fines imposed in less than an hour after their arrival.

“The number of cigarettes sold daily in the state without the revenue stamps is exceedingly small....”

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109 *Decorah Journal*, July 20, 1921 (3:5-7).
111 “State Gets Big Revenue from the Cigarettes,” *DD&L*, June 13, 1922 (2:1). Two weeks after the law had gone into effect one newspaper erroneously reported that Attorney General Gibson would be enforcing the cigarette law because the treasurer of state was given no law enforcement officers. “Gibson to Enforce New Cigaret Laws,” *DMC*, July 18, 1921, 38(174) (8:2).
112 “State Gets Big Revenue from the Cigarettes,” *DD&L*, June 13, 1922 (2:1).
113 “State Gets Big Revenue from the Cigarettes,” *DD&L*, June 13, 1922 (2:1). In at least one instance when agents did cooperate with local officials by requesting that the deputy sheriff in Davenport obtain search warrants for 31 raids, a district court judge, overruling the issuing justice of the peace, later held them illegal because the deputy sheriff, knowing nothing about the facts of the alleged violations, had merely sworn to the warrants at the state agents’ request. “Court Order Holding Writs Illegal Stands,” *DD&L*, July 26, 1925
A year later, reviewing the first 18 months of the law’s operation, McCoy reported that under a “program of rigid prosecution for all violators” 104 had been arrested, of whom 96 were convicted; four cases were still pending and only four dismissed. Local governments had promptly revoked the permits of 53 of the violators, no explanation being given as to why the city and town councils had not complied with the law’s mandate that they revoke the permits of all violators. The state treasurer’s office considered the cigarette act “one of the smoothest working laws of its type” in Iowa because the “fact that revenue stamps must be placed on every package...makes it immediately patent to the purchaser whether the dealer he patronizes is complying with the law.”114 This conspicuousness would have been relevant only if much enforcement had been driven by customers’ denunciations to the agency, but the press did not indicate that the secret treasury agents’ swoops were in fact based on such information.115

The superintendent of the cigarette revenue department of the state treasurer’s office, 47-year-old McCoy,116 was a protégé of William Burbank, the state treasurer. McCoy had also been in charge of the motor license department under Burbank when the latter was Black Hawk county treasurer.117 During World War I, leaving his job as a traveling salesman, McCoy became a Red Cross official. After his election as state treasurer, Burbank hired McCoy to work in the collateral inheritance department in February 1921 and on June 1 transferred him to a clerk position to prepare a new department to collect the new cigarette tax and enforce the law. Then on July 1, Burbank transferred McCoy, who was deemed an expert accountant, to the superintendent’s position, thus making him...
an assistant state treasurer.118 Little more than a month into his superintendency, McCoy found himself the object of a legal action filed in Polk county district court by a Spanish-American war veteran, Fred G. McCutcheon, under the newly enacted Soldier’s Preference law to force Burbank to hire him instead of McCoy.119 That law, which had gone into effect on April 12, provided that in every public department and on all public works on the state level and in all political subdivisions, honorably discharged army and navy soldiers, sailors, marines, and nurses in wars from the Civil War to the world war were entitled to preference in appointment, employment, and promotion “over other persons of equal qualifications”; whenever such a person applied for such appointment or employment, the official charged with filling the position was required, before appointing or employing anyone, to investigate his or her qualifications and appoint or employ him or her if he or she was man or woman of good moral character. A refusal to allow the preference entitled the person to a right of action for mandamus to right the wrong. Excluded from the act was the “position of...deputy of an official or department” or “any person holding a strictly confidential relation to the appointing officer.”120 Arguing at a hearing on Burbank’s demurrer at the end of September were a former Supreme Court judge, speaking for 19 lawyers who volunteered to represent McCutcheon, and Attorney General Gibson for Burbank. Oddly, at the same time, the Iowa branch of the American Legion, while professing interest in enforcing the new preference law, disavowed any interest in this or any similar suit.121

Though district court Judge James C. Hume in October refused to sustain Burbank’s demurrer, thus ruling in McCutcheon’s favor, his “somewhat humorous discussion” of the case openly “ridiculed” the preference law as “freak legislation,” and, since the position in dispute involved enforcement of the new

118“C. C. McCoy Chosen Head Cigaret Tax Collector in Iowa,” WEC, May 4, 1921 (1:8); “M’Coy’s Record thru War Good,” WEC, Aug. 24, 1921 (6:6).

119“Test Recent Iowa Law out on W. J. Burbank,” Sunday Times Tribune (Waterloo), Aug. 7, 1921 (1:1); “M’Coy’s Record thru War Good,” WEC, Aug. 24, 1921 (6:6). The plaintiff was perhaps the Fred McCutcheon of Sioux City who had unsuccessfully run for chief clerk of the Iowa House of Representatives in January. “MacFarlane Choice for Speaker,” ICP-C, Jan. 8, 1921 (1:8). No such person was returned at the 1920 population census; the only person by that name was a 66-year-old laborer in Fairfield. A Fred McCutchhen, an insurance agent born in 1875 was returned in the censuses of 1900 (living in Iowa City), 1910 (living in Onowa), and 1915 (living in Sioux City) and, spelled McCutchinn, of 1920 (living in Des Moines).

1201921 Iowa Laws ch. 166, §§ 2-3, at 162-63.

121“Vets Preference Case Before Court,” CREG, Sept. 28, 1921 (3:5).
cigarette law, threw in his “contempt” for that statute for good measure, characterizing it as “the product of prejudice and conceit.” More generally, he declared that legislatures had long been “subject to ridiculous and illogical enactments.” Rejecting the state’s argument, Hume ruled that if the legislature had intended the person appointed by the state treasurer to enforce the cigarette law to be a “confidential adjunct to the office the measure would doubtless have so stated.” The attorney general’s office immediately announced that it would appeal the decision to the Supreme Court. In the interim McCoy retained his position. Having retained former attorney general H. M. Havner to assist in his defense, Burbank would offer as his main contention on appeal that under the law the soldier must be given preference if other things were equal, which in this case they were not. Since McCutcheon did not replace McCoy, Burbank presumably ultimately prevailed on this claim, which he intended to substantiate in large part by reference to the proceedings in McCutcheon’s divorce case, for which purpose he employed the lawyer who had represented Mrs. McCutcheon to assist the attorney general.

In 1925, when McCoy announced that he would leave the treasurer’s office to become a candidate in the Republican primaries for secretary of state, the press reported that he was being backed by the same Ku Klux Klan elements that had supported Burbank when he ran for the gubernatorial nomination in 1924.

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122“Freak Legislation Ridiculed by Judge,” CREG, Oct. 10, 1921 (3:1). See also “Judge Rules Against M’Coy,” Progress-Review (La Porte City), Oct. 13, 1921 (1:1). The legislature included the broad and unspecific confidentiality provision in the statute when it was first enacted in 1913, eight years before enactment of the cigarette law and creation of the position at issue. McCoy denied the press claim that according to the decision he could remain in his position but not be paid. “C. C. McCoy Explains Opinion Rendered by Judge,” Progress-Review (La Porte City), Oct. 20, 1921 (6:2).

123See above ch. 14 on Havner’s enforcement of the anti-cigarette law.


125“Soldier Preference Law to Be Tested in Burbank’s Office,” WEC, Dec. 19, 1921 (9:1). This article stated that the trial would take place within a few weeks, but the press appears not to have reported on further proceedings. See also “Iowa News Notes,” Adams County Free Press (Corning), Nov. 12, 1921 (6:4-6 at 5). The Polk County Clerks Office was unable to locate any file on the case, McCutcheon in any name index, or a docket number corresponding to the time when the case was filed. Email from Angie Johnson to Marc Linder (Dec. 3, 2007). Fred Clifton McCutcheon’s death on Sept. 17, 1922 may explain why his suit was apparently never prosecuted to conclusion or why, if he was successful, he never replaced McCoy. Http://www.familysearch.org.

126Ed. Dose, “McCoy Backed by Burbank’s Klan Element,” DD&L, May 30, 1925
From the outset McCoy talked and acted tough. He frequently appeared before city councils to persuade them to apply the strict letter of the law. At the beginning of 1922 he asked the council in Cedar Rapids to revoke permanently the permits of two dealers who had recently been convicted of selling cigarettes without revenue stamps\(^{127}\) (although the statute mandated revocation for a violation and merely prohibited reissuance of a permit before two years had passed).\(^{128}\)

In February 1922, about seven months after the law had gone into effect, he reminded “everyone in Iowa dealing in cigarettes and cigarette papers that the law has teeth enough to make itself felt” and gave warning to “‘watch your step.’ Revenue agents are scouring the state at all times and experience shows that the hand of the law is felt in many unexpected places.” While—for reasons unknown—absolving Burbank of any responsibility for the law’s enactment, McCoy stressed that the former’s desire to be fair but firm entailed that violators had to be prosecuted. He was also able to boast of the enforcement successes that the state had already achieved (although the factual basis for some of his claims was not always clear). To begin with, more than 95 percent of 3,200 permit holders were “living up to the letter of the law. A few are violators and they are being apprehended and prosecuted.” During the act’s first half year, the state had “secured conviction in every case of violation except one....” Of unstamped cigarettes sales were “very light”; although he insisted that the “sale of cigarettes to minors in Iowa is practically wiped out,” McCoy made no claims about the suppression of smoking by minors.\(^{129}\)

A squad of the cigarette revenue department’s agents paid special attention to all of Iowa’s county fairs in pursuit of concessionaires who sold cigarettes without revenue stamps. After the first such arrest in 1922 had resulted in a justice of the peace’s meting out a $100 fine, McCoy issued a warning that his department “‘will not countenance any violation of the cigarette law any place in the state during the fair season.’”\(^{130}\) In order to implement the law’s ban on sales to minors, McCoy institutionalized statewide cooperation with the Boy Scouts, which as an organization “does not approve of cigarettes for minors and does not use them, and is ready and willing to assist as pals and help to keep them clean so that they will not form the cigarette habit.” The assistance contemplated by

\(^{127}\)“Asks Cigaret License of Two Dealers Be Revoked,” CRR, Jan. 7, 1922 (10:4).

\(^{128}\)1921 Iowa Laws ch. 203, § 3, at 213, 214.


McCoy and the Boy Scouts, which appears to have involved sting operations, was especially useful in the case of a tobacco dealer who “has what is commonly known as free papers or the ‘makings’ and furnishes them to minors, or puts them into a receptacles or in the back yard of his place of business where they are convenient to minors,” and who was as guilty as anyone selling directly to minors.\(^\text{131}\)

In the course of their zealous enforcement efforts McCoy’s agents were not above entrapment. Thus in 1923 two departmental enforces entered a candy kitchen in the small town of Spencer to buy cigarettes: “as the clerk was about to put the revenue stamps on the state agent told him not to bother as he often bought them without the stamps. After the transaction the officers made their business known.” The owner was fined $100 plus costs.\(^\text{132}\) Pursuant to the new law’s provision mandating the confiscation and forfeiture to the state of all cigarettes in the possession or place of any offender convicted of violating any provisions of the sales tax section,\(^\text{133}\) the agents confiscated $6,000 worth of the proprietor’s cigarettes. Although the 1909 search and seizure law, which the legislature left untouched in 1921, mandated the destruction of seized cigarettes, the state did not destroy the cigarettes, but “usually” disposed of them by sending them to disabled soldiers at the state hospital at Knoxville.\(^\text{134}\) (The next year, after the legislature had revised the Code, requiring seized cigarettes to be sold with the proceeds to go to the county school fund, such lethal gifts presumably...
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In fact, the Cigarette Revenue Department systematically sought to identify dealers who might be inclined to sell cigarettes without tax stamps. When, as field agent J. L. Hicks explained to his counterparts from other states gathered at the Annual Conference of Administrators of Tobacco Tax Laws, which in 1931 happened to take place in Des Moines, auditors determined that a dealer was short on revenue stamps purchased, his name was written down in the “‘Little Black Book’” that all the enforcement agents carried with them, and each time they happened to be in that dealer’s town, they would “purchase a few packages or a carton of cigarettes from him and eventually he gets a little more careless and we are able to make the purchase without revenue and when this happens, we take him into court....**136

Although the press was fond of opining that it had not heard of minors’ having any difficulty buying cigarettes,**137 McCoy’s men also descended upon schools, even in small communities. For example, toward the end of 1923 a state agent and a deputy sheriff raided a school in Gilman (population 490),**138 where in the course of a search they found “‘pills or the ‘makins’s’” on a number of boys, thus providing evidence that they had been illegally supplied with cigarettes, and threw a “‘[s]care” into the local “[l]aw [b]reakers.”**139

In some cities and counties enforcement was rigorous from the outset. For example, the Black Hawk county attorney notified the sheriff in writing the day after the law went into effect that he was to investigate complaints of persons alleged to have sold or kept for sale without a permit: “‘You will report to this office in reference to such investigation and a rigid prosecution will follow to all persons whom the facts show to have been illegally selling cigarettes.’”**140

Contending that it was one of the law’s bedrock purposes to “enable the authorities to check up on the distribution [of cigarettes] at all times, the Muscatine county attorney issued an opinion that it was a violation of the law to distribute them as premiums in games or contests without a permit.**141

The 1921 cigarette sales law provided that any city council that issued a permit “shall revoke the permit of any person who has violated any of the

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135See below this ch.


137“The Cigarette Law,” Evening Tribune (Des Moines), Sept. 9, 1921 (6:2) (edit.).


140“After Violators of Cigaret Law,” WEC, July 6, 1921 (3:1).


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provisions of this act, and no such permit can be issued for a period of two years thereafter." Superintendant McCoy reiterated in February 1922 that the legislature’s intent was to “create a prohibitive measure,” attaching to the conditional privilege to sell cigarettes “a command to city and town councils and boards of supervisors to take these privileges away from anyone on the first offense.” In May 1922, in revoking a cigarette sales permit the Waterloo city council adopted the view pressed upon it by McCoy that not only was revocation mandatory on conviction for a first offense, but that it was “not even necessary to convict a dealer in court in order that his license be revoked” since the statute mandated revocation whenever any permit holder violated any of its provisions, although court conviction was “absolute proof” of violation. (To be sure, McCoy’s more relaxed interpretation became textually impossible once the 1924 Iowa Code changed the language from “has violated” to “has been convicted of violating.”)

It is unclear why an attorney general’s ruling was needed to interpret this unambiguous command, but a dispute broke out in Davenport in 1922 over canceling the license of William Smith, a cigar store owner, who had been convicted of selling cigarettes to minors. When the Davenport city council, pursuant to Attorney General Ben Gibson’s recently issued ruling that it was mandatory to revoke the licenses of those guilty of violating the law, finally ended the dispute by revoking Smith’s permit, his lawyer, Glenn Kelly, insisted that the council had “now made it possible for the state to accomplish what is a virtual cigaret prohibition” in the city. His contention was based on the assertion that under a mandatory revocation regime it was “an easy matter for the state to bring about convictions of practically every local cigaret seller, since there is no certain way of knowing, at the time of the sale, whether a patron is or is not a minor.” To be sure, Kelly’s alarmist claim was untenable: a cigarette dealer

142 1921 Iowa Laws ch. 203, § 3, at 213, 214.
144 “City Smoke Laws Held Sufficient,” WEC, May 23, 1922 (9:3-4). The relevant statutory provision was 1921 Iowa Laws ch. 203, § 3, at 213, 214.
145 See below this ch. By 1924 McCoy also announced that there would be stringent enforcement of the law voiding all permits on which the mulct tax had not been paid by July 1. Ed Dose, “Iowa Launches Drive to Get Cigaret Taxes,” DD&L, June 5, 1924 (2:5).

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intent on not violating the law had means at his disposal to avoid selling to minors by leaning on the side of caution. One means that he did not have was erroneously reported as available under the statute itself by the *Howard County Times*, just two days after the statute’s effective date: “A young man wishing to purchase cigarettes must sign a paper stating that he is at least 21 years of age. Then when the poll-tax collector calls on him and he declares he is not 21 years of age he is at once in the clutches of the law and subject to severe penalty.”*\(^{147}\) In fact, as Walter French, the Black Hawk county attorney in Waterloo, had written to the sheriff the day before: “The merchant sells cigarets to minors at his own peril. Representations made by the minor to the merchant that he is 21 does [sic] not constitute a defense in behalf of the merchant.”*\(^{148}\)

Cigarette dealers soon (unsuccessfully) lobbied the Iowa legislature to amend the law to criminalize such misrepresentation,*\(^{149}\) although at least in Waterloo dealers reported that, knowing that they would be unable to get cigarettes, few minors tried to evade the law by trying to “fool us with their age.”*\(^{150}\) In the meantime, however, an understanding judiciary could be of some help. For example, in Muscatine the first prosecution under the new law took place in September 1921 involving Peter Callas, a cafe owner, who pleaded guilty to selling cigarettes to Robert LaGrille, 19-year-old barber. In offering the plea on Callas’s behalf, his lawyer, Everett Richman, argued that he had not wilfully violated the law because the “LaGrille boy [had] misrepresented his age,” throwing in that Callas did not operate a tobacco store, but “merely keeps cigarettes for the accommodation of the cafe patrons.” In an effort to deflect attention and responsibility from his client, Richman informed Justice Harry Horst that: “I believe that there are several tobacco shops in town where cigarettes are sold to minors...because I see boys smoking cigarettes on the streets...”

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\(^{147}\)“No Cigarettes for Boys,” *HCT*, July 6, 1921 (1:2). Two months later a capital city paper repeated this error by claiming that a “minor who misrepresents his age in order to purchase cigarets is liable to punishment.” “The Cigaret Law,” *Evening Tribune* (Des Moines), Sept. 9, 1921 (6:2) (edit.).

\(^{148}\)“After Violators of Cigaret Law,” *WEC*, July 6, 1921 (3:1). In 1917, after Oregon had enacted a stricter no-sales-to-minors law, one county district attorney sent out a circular pointing out “the fact that since the War Census registration of all males citizens between the ages of twenty-one and thirty-one...the production or non-production, by a civilian seeking to purchase cigarettes, of his blue registration card, will quickly inform the seller whether or not such person may lawfully buy cigarettes.” Walter H. Evans, “To Whom It May Concern” (n.d.), Bates No. 501994501.

\(^{149}\)See below this ch.

\(^{150}\)“Few Minors Try to Buy Cigaretts,” *WEC*, July 20, 1921 (7:4).
every day. The police should be able to see them as well.” In imposing the $25 minimum fine for a first offense against the no-sales-to-minors provision, Justice Horst observed that he had taken the circumstances of the case into consideration. Three years later Attorney General Gibson cut the ground from under another collusive ploy when he opined that a written order from an adult authorizing the minor to buy cigarettes for him or her would not relieve the seller of liability for violating the ban on sales to minors.

In the meantime, however, some held that the law was defective because it failed to impose a jail sentence on minors who refused to divulge the source of their cigarettes. In the small south-central town of Deep River, for example, sensing that more boys were smoking than ever, the town council decided in August 1922 to find out who was selling them the cigarettes. But when it summoned a number of minors to appear at its regular monthly meeting to “tell what they knew about the prevalence of the cigarette habit...the city dads reckoned without their host. When they questioned the boys they found them as dumb as oysters regarding their course of supply, each one refusing to divulge the name.” Confronted with this stonewalling, the mayor assessed a five-dollar fine on each one, but the local press speculated that the threat of jail might induce youngsters to be more forthcoming.

The Onset of the Long-Term Stagnation of Statewide Tobacco and Smoking Regulation

The state senate yesterday...defeated the additional one cent tax proposed to be placed on cigarettes. ... [S]mokers would get their cigarettes by mail from other states, thereby paying no tax whatever on them, except the federal tax. [T]here is now being paid six cents on each package of cigarettes as a federal tax, and in addition to that two cents as a state tax, making a total of eight cents that is already being paid. If this was increased to nine cents, this together with city license of $75 to $100 per year paid by the retailers would almost make the handling of them prohibitive. In view of the fact that these cigarettes are sold now to the retailers for 12 cents a package, it would leave but little profit for the


dealer or manufacturer unless the tax was all passed to the consumer. Then as a matter of equity, is it right to tax a twelve cent article three-fourths of the price? That almost amounts to confiscation. We are not upholding cigarettes particularly...but we do know there are any number of folks who do enjoy them and would be placed at a considerable inconvenience if they had to send out of the state to get them, as many would do. If it resulted in stopping the smoking of them, perhaps this might have some compensation, but it would not.\footnote{154}

The inception of the Dodd-bill regime marked the end of the long period of dynamism and statewide contestation of tobacco and smoking regulation in Iowa. A half-century would pass before the quasi-ubiquitous ascendency of (cigarette) smoking as a social norm would generate sufficient anxieties as a self-destructive and even other-destructive activity that the Iowa legislature would begin to concern itself with intensifying its regulatory hold on tobacco use.

The first effort at amending the cigarette statute took place almost immediately in connection with the first codification since 1897 of Iowa law, which had been pending since 1919, but which the legislature failed to complete during the 1921 session.\footnote{155} Once the Dodd bill had been enacted, the code commissioners had to include that body of law in the codification process. As they formulated it in 1922 in their “brief,” the purpose of Bill No. 257 on cigarettes and tobacco was to “gather into one chapter all the present law relating to those subjects.” However, in 1921 the General Assembly had left five or six sections of the old cigarette law “untouched,” which were “apparently...purposely left as a means of better enforcement.” But since they were “adapted to the former law of absolute prohibition,” they needed “modification to adapt them to the present mulct tax law.”\footnote{156}

The most important changes proposed by the Code Commissioners in the cigarette law were adopted by the legislature and enacted as part of the new Code of 1924. First, the prohibition of the possession of cigarettes by minors under 21 anywhere except on the “premises” of their parents\footnote{157} was modified to apply only to their parents’ “home.”\footnote{158} The commissioners, who here went far beyond

\footnote{154}“Defeated Cigarette Tax,” \textit{ODR}, Feb. 15, 1929 (2:1) (edit.).
\footnote{156}Supplement to the Code Commission’s Report of 1919, at 581 (U. Whitney ed. 1922); Code Commissioners’ Bill No. 257, in File of Code Revision Bills 257-1(1923). The brief of Code Commissioner’s Bill No. 257 was prepared by J. C. Mabry, a lawyer from Albia.
\footnote{157}1921 Iowa Laws ch. 203, § 2, at 203.
\footnote{158}Code Commissioners’ Bill No. 257, § 4, in Supplement to the Code Commission’s
neutral editorial suggestions and presented their own policy judgment in implicit criticism of the legislature, justified this change on the grounds that: “At present a minor can purchase his cigarettes from a ‘bootlegger’ in the alley and rush to an old building or a business block, a vacant lot or a farm building, [belonging?] to his parent and smoke to his heart’s content while the bootlegger plies his trade in security. There should be no immunity anywhere, but we have ventured to propose a change of this newest legislation to the extent of conferring the immunity to [sic] the home alone.” Second, the commissioners raised from 16 to 18 the age at which minors could be sentenced to a fine and/or imprisonment for refusing to reveal the source of their illegally possessed cigarettes. Third, they changed from “has violated” to “has been convicted of violating” any provision of the cigarette law as the mandatory trigger for revocation by local governments of a permit. The commissioners explained the change as designed to “make [the language] more definite and certain so that the authorities could not hesitate about revocation.” While plausible, the revision also undermined Superintendent McCoy’s aforementioned efforts to persuade city councils to revoke permits for violations not based on judicial convictions.

Two other notable changes proposed by the commissioners and adopted by the legislature revised the search and seizure law that the legislature had enacted in 1909 and did not amend in 1921. First, the commissioners deleted the provision requiring the destruction of all illegally kept cigarettes that were seized, replacing it with one requiring the magistrate who found that the seized cigarettes had been kept in violation of the law to enter an order for their forfeiture to the county in which they had been seized and to direct any peace officer of that county “to sell such forfeited goods to any person having a permit
to keep and sell the same at the highest cash price he can obtain...." The peace officer was then required to pay the proceeds from the sale to the county treasurer, who in turn had to credit them to the county school fund. The commissioners' explanation for the change was that, whereas under the old prohibitory law the cigarettes could not lawfully be sold at all, since they were now "an article of commerce that may be lawfully sold, there is no reason why they should be destroyed." While a certain plausibility attached to this purely monetary viewpoint, by treating cigarettes as a normal commodity, it departed from the underlying legislative judgment—soon to be emphasized by the Iowa Supreme Court—that cigarettes were in principle contraband except under narrow circumstances specified by the legislature. The other change made in the search and seizure law deleted the provision deeming the "discovery of cigarettes or cigarette papers in any public place...prima facie evidence of the keeper's intent to unlawfully sell or give the same as prohibited" in the old law, and substituted for it a provision under which only a dealer's refusal or failure to exhibit his permit to a requesting peace officer constituted such prima facie evidence. Again, the commissioners' explanation was that mere finding of the cigarettes should not by itself be prima facie evidence of guilt, but only when coupled with the refusal to exhibit the permit. Since (voluntarily) permanently displaying a permit was no burden at all and refusal by a legitimate permit holder to show it to an official seemed so irrational as to verge on the empirically improbable, the commissioners and the legislature drained the provision of any efficacy as an enforcement tool that it ever may have possessed.

In considering Code Commissioners' Bill or Senate File No. 257 during the extra session on February 9, 1924, the Senate voted on several significant

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166 Code Commissioners' Bill No. 257, § 27, in Supplement to the Code Commission's Report of 1919, at 655, 656 (1922); Iowa Code § 1580 (1924).
168 See below ch. 21.
169 1909 Iowa Laws ch. 223, §1, at 202, 203.
amendments that went beyond the scope of the commissioners’ proposed changes. Senator Lloyd Thurston, who had been a consistent opponent of the Dodd bill in 1921, offered one to delete imprisonment as punishment for a minor who refused to give information about the source of his illegally possessed cigarettes, but it lost on a voice vote.¹⁷³ Most of the debate on the bill was provoked by an amendment offered by Senator M. L. Bowman¹⁷⁴—who had been a professor in the farm crop department at Iowa’s land grant college at Ames¹⁷⁵—presumably at the behest of cigarette dealers, subjecting, on conviction, to a fine of $25 to $50 or imprisonment of up to 30 days “[a]ny minor who misrepresents his age to a dealer in cigarettes for the purpose of making such a purchase....” Before the chamber voted on the change, it adopted by a vote of 21 to 15 an amendment to the amendment, offered by George Banta, who had voted against the Dodd bill on its final passage, striking the imprisonment provision.¹⁷⁶ Of the 21 senators voting Aye 13 had voted on the final passage of the Dodd bill in 1921, nine of whom favored and only four of whom opposed it; similarly, of the 15 voting Nay, ten had opposed and only three favored the Dodd bill.¹⁷⁷ Although the alignment between the two votes might seem intuitively plausible—those who supported retention of prohibition supported imprisonment of minors who refused to denounce those who supplied them with cigarettes, while those who opposed prohibition opposed imprisonment—the voting patterns may have been somewhat confused by the fact that John B. Hammond, the WCTU’s lobbyist, in 1921 had sharply rejected criminalization of minors’ refusal to testify.¹⁷⁸ Immediately after this vote, the Senate rejected an amendment offered by Perry Holdoegel, who had voted inconsistently on the Dodd bill, providing that “the fact that the minor has misrepresented his age does not in any manner absolve the dealer from responsibility in the sale.” To be sure, since nothing in Bowman’s original amendment implied, let alone stated, that a finding of the minor’s guilt absolved the dealer, the basis of the opposition to the amendment is unclear. When the chamber finally voted on Bowman’s amended amendment, only six senators

¹⁷³State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly 611 (Feb. 9).


¹⁷⁶State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly 611-12 (Feb. 9).

¹⁷⁷State of Iowa: 1921: Journal of the Senate of the Fortieth General Assembly 1738 (Apr. 6).

¹⁷⁸See above ch. 15.
supported it against 31 Nays.\footnote{State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly 612 (Feb. 9).} Why the press characterized the chamber’s action as having “strengthened the law as to the responsibility of the dealers who sell tobacco to minors” is difficult to discern.\footnote{“Gun Toting’ Bill Is Passed,” ICP-C, Feb. 9, 1924 (1:2).} In contrast, the United Press delighted in interpreting the amendment’s defeat as senatorial condonation of lies a darker shade of white: “Boys who lie about their age in order to purchase cigarettes are no worse than their fathers who telephone home that an important business deal will detain them at the office when in reality it is something else....” In the same vein, Senator Ed Smith twitted some of his colleagues by remarking that making it a crime for a boy to tell a falsehood would create a legal standard more drastic than that to which senators were subject. That the gender dimension was becoming more prominent than it had been during the debates in 1921 was highlighted by the proposal by Willis Haskell (who had voted for the Dodd bill on final passage) to increase the legal age for buying cigarettes. Decrying “flapperish tendencies,” he demanded: “‘Catch those who are selling cigarettes to girls.... The girls are leading on our boys and the boys do nearly anything the girls say.’”\footnote{State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly 612-13 (Feb. 9).} In the end, the Senate passed the bill in its entirety by a vote of 33 to 2.\footnote{“House Bill Will Let Only Sheriff Issue Gun Permit,” WEC, Feb. 9, 1924 (1:2).} After making one minor change, the House also passed the bill by a vote of 74 to 7,\footnote{State of Iowa: 1924: Journal of the Senate of the Fortieth General Assembly 832, 879-80 (Feb. 12 and 23).} and the cigarette laws were codified.\footnote{Iowa Code §§ 1552-86 at 246-50 (1924).}

One year later at least one larger city accomplished what the legislature had been unable to pass. Acting at the behest of local cigarette dealers, Marshalltown sought, by means of an ordinance, to deter minors from involving permit holders in sales to them. In 1925 the city council, in response to a petition, decided that “[t]he only way to make the cigaret law effective...and the only equitable way to enforce the law is by placing the cigaret purchaser in the position of violating the law as fully as the man who sells the ‘pills.’” In order to share the responsibility for sales to minors, the council provided that it was unlawful for anyone under 21 not only to buy, accept or receive cigarettes or cigarette papers from any merchant or dealer, but also to “‘represent, pretend to claim that he is 21 or over for the purpose of inducing any merchant or dealer in cigarettes or papers to sell to such minor person, in violation of the law.’” The deterrent consisted in imprisonment...
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up to 30 days or a fine of up to $100. The local ordinance could not override the state statute and absolve dealers of guilt in selling to minors who, for example, lied to them about their age, but might dissuade some from trying.

In 1925, the year after the special session had codified the state’s cigarette and tobacco laws, the House Judiciary Committee filed a bill to introduce several changes, which on balance might have strengthened the law somewhat. First, it prohibited local governments from granting a permit to any person who had twice been convicted of violations of the statute when the second had taken place within two years of the permit application. Second, it conferred on all special enforcement agents all the authority vested in peace officers. Third, it amended the nuisance/abatement section by imposing as punishment for selling cigarettes without a license a fine between $100 and $500. Fourth, giving city councils the flexibility that the law (and McCoy) had denied them, it increased the number of convictions for violations of the statute from one to two after which local governments were required to revoke a person’s permit. And fifth, for the purposes of this section, it construed any violation of the statute by “any manager, agent, clerk or employee of a permit holder during such employment and in connection therewith...to be a violation by the permit holder.” A week later, when the House debated the bill, Volney Diltz, who in 1921 had been one of the American Legion’s most prominent backers of the Dodd bill, filed an amendment designed to undo dealers’ strict liability for the unlawful acts of their workers by making the permit holder liable only for his subordinates’ violations committed with his “knowledge or consent....” The provision having been stripped of its bite, the House adopted the amendment and then passed the weakened bill by a vote of 56 to 14. The effort, however, was for nought: the bill died in the Senate sifting committee, thus leaving the law unchanged.

In his inaugural address at the outset of his second term in 1923, Governor Kendall promoted an expansion of Iowa’s pioneering role as a cigarette taxer by suggesting that its also become the first state to tax other forms of tobacco: “The slave of the cigar—why should he go free while the devotee of the cigarette is

186H.F. No. 374, §§ 2-5 (Mar. 20, 1925, by Judiciary Committee No. 2).
187See above ch. 15.
189State of Iowa: 1925: Journal of the Senate of the Forty-First General Assembly 948 (Mar. 30) (referred to sifting committee).
Kendall’s rhetoric was (inadvertently) ironic: although the proposal was driven by the need for enlarged government revenue by means of a new taxable object of consumption so that the general property tax rate could be lowered, and he alluded to the cigar smoker’s addiction as a justification for the burden, the chief reason that the WCTU and other anti-tobacco groups had shied away from calling for the prohibition of the sale of non-cigarette tobacco to adults was the acknowledgment that since so many more millions of adult men smoked cigars and pipes and chewed tobacco than smoked cigarettes that such a ban would trigger much more widespread and intense resistance, undermining most of whatever support for, or at least acquiescence in, cigarette bans that could be mustered. Yet here was the governor himself, who had refused to rise to the occasion and give a reprieve to the country’s oldest universal prohibition of cigarette sales, attacking and mocking the enslaved adult cigar smoker.

Five weeks later Republican Senator Ben Abben, the youngest bank president ever elected in Iowa, filed a bill that went even farther than Kendall’s suggestion, proposing the imposition of a retail price-differentiated sales tax on cigars, smoking and chewing tobacco, and snuff. Five-cent cigars would be taxed a half cent and 25-cent cigars two cents; the tax on chewing and smoking tobacco costing less than 10 cents would be one-half cent, while snuff containers retailing at 10 cents or less would be taxed one cent and more expensive kinds at 10 percent of the retail price. Abben estimated that the new tax would generate $1.5 million annually, which, together with the cigarette tax, would lower the general millage levy by two mills. It was referred to the Ways and Means Committee as was the identical companion bill in the House. The “blow,” as a newspaper headline put it, may have been “aimed at the users of tobacco,” but it was definitely not designed to depress consumption. By March the press was reporting the belief that the bills, which were popular—after all, according to “the best information available,” such a law would bring in $2 million “and nobody would feel the burden”—would pass both houses. This sum would, according to McCoy, the head of the cigarette revenue department of the state treasurer’s

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190 “Governor’s Inaugural Address,” *State of Iowa: 1923: Journal of the Senate of the Fortieth General Assembly* 149-60 at 156 (Jan. 11).


192 S.F. 482, § 2 (Feb. 17, 1923, by Abben).


194 H.F. 534 (Feb. 19, 1923, by C. Oliver).


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office, have sufficed to lower the general state levy by two mills.\(^{197}\) The chief obstacle was the opposition by tobacco retailers, who claimed that as drafted the measure would require them rather than the consumer to pay the tax.\(^{198}\) Their assertion was, ironically, based on the argument that the tax on “popularly priced cigars” was so small that it might require the sellers to pay it instead of shifting it to consumers.\(^{199}\)

The expected tobacco tax revenue was exposed to one potential threat: “cut-rate mail order houses” had been trying to use the cigarette tax law by advertising in Iowa newspapers lower-priced, tax-free cigarettes available by parcel post. Although this method of competition had, according to McCoy, not yet noticeably affected tax revenues, Iowa retailers, who had paid $50 to $100 for their permits on top of the stamp tax, resented it.\(^{200}\) In order to deal with this problem, bills were filed in the House and Senate at the same time as the Abben tax bill that made it illegal for anyone except dealers with Iowa cigarette sales licenses to solicit orders to sell cigarettes by advertisements in newspapers, magazines, posters, billboards, hand bills, or other printed matter. Likewise, the bills made it unlawful for anyone but licensed dealers to publish or circulate such advertisements or to permit such billboards to remain on his premises.\(^{201}\)

However, in mid-March the House adopted the recommendation of the Committee on Police Regulations to postpone the bill indefinitely,\(^{202}\) and two days later the Senate sponsor asked that his bill be withdrawn from further consideration.\(^{203}\)

Toward the end of March, however, the Associated Press disclosed that growing business resistance had made key legislators pessimistic about passage

\(^{197}\)“Direct Tax upon All Tobacco Sold Provided in Bill,” \textit{WEC}, Mar. 8, 1923 (9:1-2 at 1).

\(^{198}\)J. W. Jarnagin, “Record Broken for New Bills,” \textit{HI}, Mar. 15, 1923 (1:5). Since the tax payment provision was the same as in the cigarette law the basis for the retailers’s claim is unclear.

\(^{199}\)“Direct Tax upon All Tobacco Sold Provided in Bill,” \textit{WEC}, Mar. 8, 1923 (9:1-2 at 1).

\(^{200}\)“Direct Tax upon All Tobacco Sold Provided in Bill,” \textit{WEC}, Mar. 8, 1923 (9:1-2 at 1).

\(^{201}\)H.F. 517, §§ 1-2 (Feb. 16, 1923, by Ralph Rumley); S.F. 474, §§ 1-2 (Feb. 16, 1923, by Ray Scott).


of the tobacco tax bill. Now it was the tobacco wholesalers who were identified as having become “alarmed” and done “highly thoro” work to beat the bill: “When a man buys a cigar, he is asked to sign a letter protesting against the imposition of a tax on his indulgence in the weed. Literally thousands” of these identical letters had in the meantime inundated the state house, most going to the chairmen of the two ways and means committees. As a result of this “widespread opposition,” neither Abben nor Oliver, the House sponsor, was sanguine that the bills would be passed.\textsuperscript{204} By a vote of 16 to 6 the House Ways and Means Committee soon acted in accordance with this sense,\textsuperscript{205} recommending that the bill be totally stripped of its original language, instead of which it recommended the mere licensing, for an annual $10 fee, of the sale of non-cigarette tobacco. The House adopted the committee report, presented by committee chairman Tollef Moen,\textsuperscript{206} who had been the chamber’s most ardent anti-cigarette advocate in 1921 and represented the same county as Abben. Even this proposed “nominal” license fee substitute, which would have generated only “negligible” revenue,\textsuperscript{207} died in the sifting committee.

Therewith Iowa lost the opportunity to become also the first state to tax other kinds of tobacco. Even before the tobacco merchants had killed the Iowa bill, South Carolina not only became the second state to tax cigarettes, but at the same time also subjected cigars and smoking tobacco—though not plug chewing tobacco or snuff—to a license tax measured by sales volume and weight or price.\textsuperscript{208} Two additional states, Utah (which expressly modeled the repeal of its short-lived universal ban on cigarette sales on Iowa’s law) and Georgia, enacted cigarette sales taxes in 1923, followed in 1925 by North Dakota and Arkansas (which also taxed cigars), and in 1927 by Kansas and Alabama (which also taxed cigars). That year South Carolina also became the first state to tax chewing tobacco and snuff, and in 1929 Tennessee became the second state to tax all forms of tobacco.\textsuperscript{209} Thus six of the first nine states to enact cigarette taxes

\textsuperscript{204}“Protest over Tax on Cigars,” \textit{DD&L}, Mar. 27, 1923 (12:6).

\textsuperscript{205}Minutes of the [House Ways and Means Committee] Meeting held April 6, 1923 (SHSI DM). Unfortunately, although the vote was by roll call, the minutes reveal neither how members voted nor whether there was discussion.

\textsuperscript{206}\textit{State of Iowa: 1923: Journal of the House of the Fortieth General Assembly} 1470-72 (Apr. 6).

\textsuperscript{207}“Legislature Divides on 2 Cent Tax,” \textit{Alton Democrat}, Apr. 14, 1923 (1:4, at 10:5).

\textsuperscript{208}1923 South Carolina Acts No. 11, § 10 at 12, 18-19.

\textsuperscript{209}\textit{State of Iowa: 1930: Report of Joint Legislative Committee and State Board of Assessment and Review} 22-23 (1930). In 1926 Louisiana enacted a tax on all tobacco products amounting to 10 percent of the retail price, but it was repealed in 1928. 1926 La.
(Iowa, Utah, North Dakota, Arkansas, Kansas, and Tennessee) had had universal cigarette sales bans and repealed them between 1921 and 1927.\textsuperscript{210}

In order to raise more revenue to make up for a reduction in the state levy two years earlier and to help finance the current year’s increased appropriation without increasing the “millage levy too radically,” at the end of January 1929 Governor John Hammill urged the Senate Ways and Means Committee to increase the cigarette stamp tax by one cent, thus yielding an additional $600,000 in state revenue.\textsuperscript{211} The next day the committee filed a bill increasing the cigarette tax from 1 to 1.5 mills per cigarette.\textsuperscript{212}

The Senate debate two weeks later was the occasion for the resumption of a wide-ranging discussion of a social conflict that the advent of licensure in 1921 had not at all laid to rest. Even the burgeoning question of women smokers arose when (now) Senator Clark, who had contributed so heavily to the amendment of the Dodd bill in 1921,\textsuperscript{213} suggested (albeit jocularly) that a higher cigarette tax “might ‘get women used to paying for equal suffrage.’”\textsuperscript{214} More generally, controversy “resolved into a dispute between smokers and non-smokers” as well as between advocates and opponents of sales taxes.\textsuperscript{215} The intersection of these two issues generated a “strange alignment of votes,” prompting progressives such as Toleff Moen, the Dodd-Clark bill’s most vociferous opponent in the House a decade earlier, and farmer George Patterson, to “follow[ ] the leadership of their arch political enemy,”\textsuperscript{216} William Baird, the committee chair and the bill’s chief proponent, who had consistently voted against the Dodd bill in 1921. Baird, a conservative who typically voted with the sales tax bill’s principal opponent,

\begin{footnotesize}
\begin{enumerate}
\item “Governor Pushes Tax Measures,” Adams County Union-Republican, Feb. 6, 1929 (1:5). The governor also requested an increase in the state inheritance tax rate generating $240,000.
\item S.F. No. 109 (Feb. 1, 1929, by Ways and Means Committee).
\item See above ch. 15.
\item “Iowa Senate Votes Against Cigarette Tax Boost,” DD, Feb. 14, 1929 (1:1, at 12:1).
\item “Iowa Senate Votes Against Cigarette Tax Boost,” DD, Feb. 14, 1929 (1:1).
\item Byron Allen, “Legislative News from Des Moines,” PAR, Feb. 21, 1929 (3:2-7 at 3). Allen was a sitting state representative, who included important insider information in his column.
\end{enumerate}
\end{footnotesize}
Joseph Frailey, who had consistently voted for the Dodd bill, charged that the latter had “a personal interest in this matter” because he smoked “all the time.” Demanding to know “why don’t you fine us instead of calling it a tax,” Frailey, making a not so “veiled threat[ ] of an uprising similar to the Boston tea party,” hinted at the nicotine addiction issue: “Cigarettes are necessary to 80 per cent of the smokers. You remember what happened in the colonies when England taxed tea?” Frailey, who railed against those who “want to tax our cigarettes,” also turned empirical: characterizing the measure as “unscientific,” he argued that it would be self-defeating because the tax increase would merely cause smokers to buy their cigarettes by mail.217 Not coincidentally, this argument about interstate leakage was made by Frailey and Senator J. O. Shaff, both of whom represented Mississippi River counties.218 To be sure, this claim, especially when intertwined with the related claim that the increase in out-of-state mail order business would redound to the detriment of “many folks in Iowa making their daily income off the sale of” cigarettes,219 was not confined to the border counties.

Provoked by Frailey into calling cigarette smokers immature,220 Baird, who admitted that the precedential character of the bill’s passage would probably lead to the introduction of bills to tax other kinds of tobacco, chewing gum, near beer, and cosmetics,221 incautiously suggested that the cigarette sales tax “would be paid by those who complain the least.”222 (This remark came back to haunt Baird later that day as he presided over a joint Ways and Means Committees hearing on S.F. 80, Moen and Patterson’s income tax bill, in the course of which Baird asserted that its advocates “desired to cripple industry and take unjust revenues from those who were successful in the management of their business,” prompting Patterson to allude to Baird’s earlier comment and add that proponents of the income tax also wanted to tax those with the greatest ability to pay. Patterson then parried Baird’s charge that he was a socialist by countering that Baird’s stand and the current tax system were the world’s best breeding ground for socialism.)223 Even Moen, a progressive with impeccable anti-cigarette

218“Iowa Senate Votes Against Cigarette Tax Boost,” DD, Feb. 14, 1929 (1:1, at 12:1).
219“Exceeding the Limit,” ODR, Feb. 1, 1929 (2:1) (edit.).
221“Iowa Senate Votes Against Cigarette Tax Boost,” DD, Feb. 14, 1929 (1:1, at 12:1).
222Byron Allen, “Legislative News from Des Moines,” PAR, Feb. 21, 1929 (3:2-7 at 3).
credentials, justified the cigarette sales tax on the grounds that increased revenue was needed to pay for increased appropriations and the enactment of special taxes was superior to an increase in the general property tax. When the cigarette tax bill came up on its final passage, the Senate defeated it by a vote of 21 to 28, thus signaling rejection of the principle of the sales tax as a general state revenue policy. Later in the session the House Ways and Means Committee introduced a more wide-ranging sales tax, which included an additional tax on cigarettes amounting to 25 percent of the existing tax. Though endorsed by the governor and many legislative leaders, it faced “tremendous opposition” from businesses at a joint Ways and Means Committees hearing and never came to a vote.

During the Depression, towards the end of the 1931 legislative session—when there were already over 5,000 permitted dealers in Iowa—the Senate sifting committee introduced a bill to increase the cigarette tax to 1.5 mills per cigarette (or three cents per pack of 20). At the same time, it would have required dealers in all other kinds of tobacco to obtain permits, which would have cost $15 in first-class cities, $10 in second-class cities, and $5 elsewhere. The bill would also have imposed a sales tax on all non-cigarette tobacco amounting to 10 per cent of the retail price. Unsurprisingly, Senator Moen voted for the bill, but only eight other members joined him, and the Senate resoundingly defeated it by a vote of 9 to 33. What little discussion preceded the vote focused on the claims of Clark, now chairman of the tax revision committee, who supported it, but in order to reduce personal property taxes. He estimated that the non-cigarette tobacco tax would raise an additional million dollars annually; since there was little opposition to the cigarette tax, which brought in even more revenue, he saw no reason for not taxing other forms of tobacco. Opponents,

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231 S.F. 421, §§ 3-4 (Apr. 6, 1931, by sifting committee).
especially Senator Joe Frailey (from the Mississippi river town of Fort Madison), alleged that the new taxes would both prompt Iowa tobacco users to make their purchases in Illinois, Nebraska, and other neighboring states and promote shipments into Iowa by out-of-state mail order houses, driving local dealers out of business with the net result that state revenue would be lower than under the then existing law.233

In the event, decades would pass before the Iowa legislature finally enacted a non-cigarette tobacco tax.234

The Aftermath: The 1939 Code Amendments

By 1939, according to estimates, 40 percent of the cigarettes smoked in Iowa were evading the tax stamp system run through the state’s 8,000 permitted dealers.235 This porousness was a function of Iowa’s being surrounded by states without cigarette tax laws. Moreover, the perception of a lax law and comparisons with cigarette tax revenues in other states left administrators in little doubt that bootlegging and shipments of unstamped cigarettes into Iowa were the causes.236 In 1939, the legislature, which the Republicans, after a brief New Deal hiatus, once again dominated by huge majorities (38-12 in the Senate and 89-19 in the House),237 was driven by the goals of suppressing the bootlegging of cigarettes from other states and increasing tax revenues—by $800,000 to $1,000,000 above the $1.8 million then being collected annually238—by making manufacturers (distributors) and wholesalers responsible for affixing stamps to packages before they entered the state rather than continuing to require retailers to attach the stamps.239 After having failed to achieve these objectives during the

2341967 Iowa Laws ch. 348, § 2, at 666, 667.
238“Senate Sends Governor Reorganization Bill,” ODR, Mar. 6, 1939 (1:1); “Vote to Curb Bootleg Cigaretts,” ICP-C, Mar. 8, 1939 (1:8).
239“House Adds Approval to Senate Measure to Curb Bootlegging of Cigaretts,” MCG-
1937 session, the General Assembly amended the cigarette sales statute to establish a bifurcated permit structure under which “they shall obtain a state and/or retail cigarette permit.” S.F. 128 also provided that on the state level, “[t]he treasurer shall issue state permits to distributors, wholesalers, and retailers, subject to the conditions hereinafter provided.” In contrast: “Cities and towns may issue retail permits to dealers within their respective limits.”

The 1937 bill was also designed to stop bootlegging and increase tax revenues. “Cigarette Tax Paid by Jobber,” ODR, Apr. 9, 1937 (1:7, 6:5). The measure, which was similar but not identical to the bill that passed in 1939, specified that the state “shall” issue permits to distributors and wholesalers (but the state was also empowered to deny licenses to those known to be unreliable), whereas city and town councils and county boards of supervisors “may issue retail dealer’s permits.” S.F. 465, § 8.2 (Apr. 3, 1937, by Manufacturing, Commerce, and Trade Committee). The bill passed the Senate by a vote of 40 to 0, but died in the House. State of Iowa: 1937: Journal of the Senate of the Forty-Seventh General Assembly 1018 (Apr. 9). In 1939 the same structure marked H.F. 27, which was withdrawn. H.F. 27 (Jan 17, 1939, by Scott and Kohlhaas); State of Iowa: 1939: Journal of the Senate of the Forty-Eighth General Assembly 343 (Feb. 10).

1939 Iowa Laws ch. 72, § 9.1, at 102, 107. The current structure of the law, under which the Department of Revenue “shall issue state permits to distributors, wholesalers, and cigarette vendors,” whereas “[c]ities may issue retail permits to dealers within their respective limits,” was introduced in 1980. Iowa Code § 453A.13.2.a (2007); 1980 Iowa Laws ch. 1029, § 6, at 211, 212.

1939 Iowa Laws ch. 72, § 9.2, at 102, 107. The bill as it passed the Senate included the provision that: “The treasurer shall issue state permits to distributors, wholesalers and retailers...who, in the opinion of the treasurer based upon the past record and history of the applicant, can be relied upon to comply faithfully with the provisions of this act.” S.F. 128, § 9.2. However, the House deleted the “who” clause and the Senate concurred in the amendment. State of Iowa: 1939: Journal of the House of the Forty-Eighth General Assembly 661 (Mar. 7) (amendment by Phil Roan), 677 (Mar. 8) (adopted); State of Iowa: 1939: Journal of the Senate of the Forty-Eighth General Assembly 578 (Mar. 10).

this slightly modified language (which was now in the active mood rather than casting councils in the role of passive agents) against the background of high-profile Iowa Supreme Court decisions\textsuperscript{244} was visibly on display later that year in Keokuk’s new municipal code. It explained that under the new statute “permits to sell cigarettes are to be granted by the City Council but it shall have absolute discretion as to the granting of all permits.”\textsuperscript{245}

One other aspect of S.F. 128 is relevant because it imposed a prohibition on a very convenient form of cigarette sales and purchases in a period marked by the dismantlement rather than the erection of such barriers. As early as 1931 the treasurer of state had asked the attorney general for an opinion as to whether it was lawful for a cigarette permit holder to dispense cigarettes by means of a vending machine and whether, if a minor used the machine to buy cigarettes, the permit holder would be liable. The attorney general failed to respond to the first question at all, limiting himself to the seemingly foregone conclusion that the permittee would indeed be just as liable as if had sold the cigarettes “personally” to the minor.\textsuperscript{246} In 1938, a county attorney asked a successor attorney general whether it was permissible for a city council to issue permits to people considering the sale of cigarettes through vending machines. If it was, the attorney wanted to know whether it would also be permissible for the council to deny a permit to “reputable people, with the express intention” of using vending machines, on the grounds that they would enable minors to buy cigarettes and make it more difficult to police permittees properly. After noting that the earlier attorney general opinion “inferentially approves” cigarette vending machines,\textsuperscript{247} the new opinion, based on the \textit{Ford Hopkins} and \textit{Bernstein} cases,\textsuperscript{248} pointed out that since city councils did have discretionary power with regard to granting

\textit{Convention: National Tobacco Tax Conference 21-22 at 21 (1939).}

\textsuperscript{244}See below ch. 21.

\textsuperscript{245}Municipal Code of Keokuk, Iowa: 1939, § 339, at 146, 147. This language was retained in the 1970 Municipal Code. Keokuk Municipal Code: 1970, ch. 4.12.010. By 1984, “shall have absolute discretion” was replaced by: “The chief of police shall investigate the location wherein it is proposed to sell cigarettes, ascertain if the applicant is a person of good moral character, and make a recommendation to the city council. The city council shall either issue the license or deny the license, stating in writing the reason for any denials.” Keokuk Municipal Code: 1984, ch. 4.12.010


\textsuperscript{248}See below ch. 21.
permits—though whether that discretion was absolute or limited was uncertain—they were empowered to “refuse to grant a permit where such refusal is substantiated by facts which establish that the granting of such permit may be inimicable [sic] to the health or morals of the community or where such granting may hinder law enforcement.” Evading as studiously as his predecessor the primary question of whether cigarette vending machines were per se legal, the attorney general dealt only with the subsidiary question as to whether a city council had the discretion to deny permits to applicants wishing to use them. Focusing on the improbability that the operator could constantly observe all transactions as easily and the fact that a “machine would not refuse to deal with a child as would a reputable merchant,” the opinion concluded that machine sales fell into a different classification than ordinary personal sales, which it would not be unreasonable or arbitrary for a council to use as the basis for denying a permit.\footnote{State of Iowa: 1939: Journal of the House of the Forty-Eighth General Assembly 1963 (Feb. 23).}

Treading where attorneys general had feared to, S.F. 128—presumably in response to what Attorney General John Mitchell had called “questions of considerable public interest”\footnote{S.F. 128, § 32.6.}—as it passed the Senate by a vote of 47 to 0\footnote{State of Iowa: 1938: Twenty-Second Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1938, at 711.} made it “unlawful to sell or vend cigarettes by means of a device known as a vending machine.” Then in the House, Mrs. Isabel M. Elliott, a 49-year-old farmer and Democrat,\footnote{State of Iowa: 1939: Journal of the Senate of the Forty-Eighth General Assembly 236 (Feb. 9).} filed an amendment to delete the ban.\footnote{State of Iowa: 1939: Journal of the House of the Forty-Eighth General Assembly 530 (Feb. 23).} Whereas the amendment’s sponsors called the “‘death sentence’” imposed by S.F. 128 on vending machines “‘confiscation without due process of law,’”\footnote{“House Buries Cigaret Bill,” ICP-C, Mar. 6, 1939 (1:6).} those opposed to the amendment argued that it would facilitate sales to minors.\footnote{“Senate Sends Governor Reorganization Bill,” ODR, Mar. 6, 1939 (1:1, at 2:7).} The House then “expressed itself very clearly on the matter of cigarette vending machines”\footnote{“Action Delayed on Cigaret Bill,” DMR, Mar. 7, 1939 (5:5).} by its overwhelming defeat of Elliott’s amendment by a vote of 15 to 79.\footnote{State of Iowa: 1938: Twenty-Second Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1938, at 708.}


\footnotetext[250]{State of Iowa: 1939: Journal of the Senate of the Forty-Eighth General Assembly 236 (Feb. 9).}

\footnotetext[251]{S.F. 128, § 32.6.}

\footnotetext[252]{State of Iowa: Official Register: 1939-1940, at 53 (38th No., David Brown ed.).}

\footnotetext[253]{State of Iowa: 1939: Journal of the Senate of the Forty-Eighth General Assembly 236 (Feb. 9).}

\footnotetext[254]{State of Iowa: 1939: Journal of the House of the Forty-Eighth General Assembly 530 (Feb. 23).}

\footnotetext[255]{“House Buries Cigaret Bill,” ICP-C, Mar. 6, 1939 (1:6).}

\footnotetext[256]{“Senate Sends Governor Reorganization Bill,” ODR, Mar. 6, 1939 (1:1, at 2:7).}

\footnotetext[257]{“Action Delayed on Cigaret Bill,” DMR, Mar. 7, 1939 (5:5).}
the House had passed the bill by a huge majority (92 to 5)\textsuperscript{259} the ban on vending machine sales of cigarettes went into effect, remaining in place until 1963 when, Iowa, which for years was the only state with such a prohibition, finally repealed it.\textsuperscript{260}

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\textsuperscript{259}State of Iowa: 1939: Journal of the House of the Forty-Eighth General Assembly 677 (Mar. 8). The Senate, as already noted, concurred in numerous House amendments.

\textsuperscript{260}See below ch. 22.
City Councils that Actually Used Their Discretionary Power to Perpetuate the Ban on Cigarette Sales in the 1920s and 1930s

The new cigaret law places in the hands of the city councils absolute power either to grant or deny licenses.¹

Several towns in the state have refused to allow any licenses whatsoever to be issued.²

The governor has held that cities have discretionary power regarding the issue of permits....³

Even during the 12-week interim between the law’s approval and effective dates the 25-year-old law, which opponents had declared long dead, continued to be enforced in places in which it had always been enforced. For example, in Indianola, a Methodist sanctuary of prohibitionism, just days after Governor Kendall had signed the bill into law, a number of members of the high school YMCA organized sting operations by buying cigarettes; they informed the county attorney, who drafted an information against cafe and confectionary store owners, who pleaded guilty and paid the $25 fine.⁴

More importantly, if localities chose not to authorize cigarette sales, essentially the 1896 prohibition would continue in perpetuity. As James Powell, the publisher of the Ottumwa Courier, who editorially proclaimed that it was “practically impossible to prevent” the sale of cigarettes to adults, put it, “[i]f there is a community in Iowa where the local officials find it possible and practicable to prevent the sale of cigarettes, even to adults,” then “for practical purposes the condition is unchanged....”³

Nevertheless, despite the emphasis that Governor Kendall had placed on the home rule powers unambiguously conferred by the legislature, there were, according to a front-page, above-the-fold article in the Des Moines Capital in mid-May, to judge by the number of inquiries that newspapers and the secretary had received, “quite a few folk in Iowa who don’t understand all about the new

¹“Council Inaction on Cigaret Permits,” DMC, June 23, 1921, 38(153) (9:8).
³Cigaret Hearing Tomorrow,” T-WS-P, July 18, 1921 (8:3).
⁴“High School Boys See Cigaret Law Is Enforced,” DMR, Apr. 17, 1921 (10M:2-4); New Era (Humeston), Apr. 20, 1921 (4:1) (untitled). It appears that the students may have focused on stores that sold to minors rather than adults.
⁵“Sensible Law Making,” OC, Apr. 12, 1921 (3:1) (edit.). On Powell’s letter to Kendall urging him to sign the Dodd bill, see above ch. 15.
law....” And it turned out that “[o]ne of the particularly foggy points” was whether it really provided for local option in granting permits. The paper affirmed that indeed city councils and boards of supervisors did have “arbitrary power in the matter”: nothing in the law abridged their right to grant or deny a permit to anyone.6

The Special Case of the Skeptical Des Moines City Government

During the almost three months before the Dodd bill went into effect local communities and governments had the opportunity to discuss and determine whether they would avail themselves of the power afforded them by the new law to ban cigarette sales within their borders. Already the day after Governor Kendall had signed the bill, members of the city council of the state’s largest city, Des Moines, stated that licenses would probably be granted. Despite his reservations, Mayor H. H. Barton, a building contractor committed to a nose-counting approach to democratic local control, concurred:

“Personally, I wish there were no cigarettes...but I do not intend to be narrow and attempt to force my prejudices on other people.

The war and the change in public opinion during the last few years has done away with the stigma and opprobrium which was formerly attached to a cigaret smoker. The use of them by so many men, among them many of our best business men, indicates...that the public desires them to be sold.

City Council wants to be governed by the wishes of the people and I believe if the matter comes to a vote in Council meeting the licenses will be granted to dealers.”7

The very next day Des Moines dealers declared that on July 4 they would increase the price of a package of cigarettes—which in April cost 16 cents at the factory and retailed for 20 cents—by five cents in order to enable them to “make any profit” after the imposition of the two-cent stamp tax and the $100 annual permit.8 As of June 23, the city council still had not adopted a policy and only two applications for permits had been filed.9 On July 1 the city council rejected the Des Moines corporation counsel’s plan for a $75 surcharge to finance

6“Cigaret Licenses Local Question,” DMC, May 12, 1921 (1:2).
7“License Fags,” DMN, Apr. 12, 1921 (6:1).
8“Dodd’s Bill May Increase Cost of Fags,” DMN, Apr. 13, 1921 (1:8).
9“Council Inaction on Cigaret Permits,” DMC, June 23, 1921, 38(153) (9:8).
enforcement on top of the $100 statutory permit fee on the grounds that “very little extra police work will be occasioned by the cigaret law, and that practically no extra clerical work will be required for permits.”

Unlike city councils in most cities and towns in Iowa, which merely approved or rejected applications for permits, the Des Moines city council on July 1 passed a kind of framework ordinance, which shed interesting light on the lingering skepticism about the entire enterprise of selling cigarettes even in the state’s largest city on a council that decided to issue permits. The preamble to the ordinance underscored the administrative, enforcement, and economic burdens that licensure would impose:

Whereas, by Chapter 203, Acts of the Thirty-ninth General Assembly...authority is given to cities to issue permits for sale of certain commodities heretofore prohibited by law; and if permits are granted therefor large expense will be caused to this city for clerical work, printing and postage, and for extra police and other inspection and regulation, and for litigation in the Municipal and other courts, in connection with such business and the regulation thereof...; and

Whereas, numerous inquiries have been received, and some bonds have already been filed with the City Clerk preparatory to asking the issuance of permits to engage in such business; but this city is unwilling to issue such permits, or incur the expense incident to said matters, without being assured adequate protection against loss or expense in connection therewith and the inspection regulation of such business and enforcement of the laws respecting same...  

The two most salient sections revealed the council’s perception of the broad array of looming and lurking dangers and risks, its apparent impatience with the need for the permit system altogether, and its desire to put applicants on notice that its deeply rooted suspicion of them meant that they enjoyed virtually no

10 “Drop ‘Fag’ Fee,” DMN, July 1, 1921 (1:6).
11 “Cigaretts to Cost Dealers $100 Year,” DMC, July 1, 1921, 38(160) (16:1).
12 Many of the formal ordinances passed by other city councils merely tracked the statute, adding no local restrictions. E.g., “Cigaret Ordinance Adopted by Council,” Rockwell City Advocate, June 9, 1931 (1:5); Rockwell City, Ordinance No. 188, Rockwell City Advocate, June 30, 1921 (3:2-4) (passed June 6, 1921); “Council Proceedings,” Rockwell City Advocate, July 7, 1921 (7:5-7) (unanimous); Lytton, Ordinance No. 27 (Aug. 2, 1921), in Lytton Star, Aug. 4, 1921 (8:1).
13 Ordinance No. 3124, in Ordinances of the City of Des Moines: Passed During the Fiscal Year Ending March 31, 1922, at 79-82 at 79. These provisions remained identically in place in the city’s revised ordinances 11 years later. Revised Ordinances of the City of Des Moines: 1932, ch. 99 at 362-63.
vested right in the permits, which could be revoked at any time by new rules necessitated by as yet unforeseen interference with the public interest:

Sec. 6. No permit shall issue for such a business to be conducted in a residence district, unless the City Council is fully assured that there is no objection thereto by residents of the neighborhood; nor to a person or party not of good character; nor to one who is found guilty of violation of such act or of this ordinance. And any such permit may be revoked for violation of said act of this ordinance, or for other cause arising whereby it is deemed to the public interest or welfare to have same revoked or canceled. And further provisions may be made as to the terms on which and the persons to whom permits may issue, and the causes for revocation thereof.

Sec. 7. No loud or boisterous conduct, no loafing or lounging, and no immoral or illegal act, shall at any time be permitted in any place for which a permit is held under this ordinance. Especially shall no violation of said act be permitted in any such place. 14

After the council had passed the ordinance, about 30 dealers filed their bonds and paid their fees so that they could be issued permits and secure state tax stamps in time to do business on July 4. 15 Dealers’ self-fulfilling price prophecies came true: after “flocking” to city hall, dealers made sure that on July 4 the price of a package rose by the two-cent tax that kicked in that day, and it was anticipated that within a few days dealers would increase the price by an additional three cents because their “margin of profit is so narrow they are unable to make an adequate profit at the lower price.” 16

Despite the Des Moines city council’s refusal to provide financially for strict enforcement and to use the surcharge to restrict the number of permit holders, the anti-smoking movement continued the struggle in other forums. On July 5, the day after the Dodd-Clark law had gone into effect, the Des Moines school board, under the leadership of Charles Hutchinson, who had testified against the Dodd bill before the House Police Regulations Committee and the governor, 17 passed a resolution prohibiting teachers, principals, and employees from smoking on duty or while on school grounds. 18 The ban applied as well to “coaches and

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14 Ordinance No. 3124, in Ordinances of the City of Des Moines: Passed During the Fiscal Year Ending March 31, 1922, at 79-82 at 81. These provisions remained identically in place in the city’s revised ordinances 11 years later. Revised Ordinances of the City of Des Moines: 1932, ch. 99, §§ 1411-12, at 364.
15a Cigarettes to Cost Dealers $100 Year,” DMC, July 1, 1921, vol. 38 no. 160 (16:1).
16a “New Law Raises Cost of Cigarettes,” DMR, July 5, 1921 (1:4).
17 See above ch. 15.
18a “Don’t Smoke, Board Says to Its Teachers,” DMC, July 6, 1921, vol. 38 no. 165 (2:3).
assistants, whether paid or not, at any game or public exhibition given by or participated in by any of our Des Moines schools, whether held on premises controlled by the school board or elsewhere.”19 Moreover, according to another resolution sponsored by Hutchinson, which was also imbued with the WCTU’s strategic insight into youths’ emulation of adult behavior, the “board will ‘look with disfavor’...upon the smoking of cigarettes in any public place where persons of school age are present. The resolutions were passed because the State law prohibiting the selling of cigarettes to minors will be very difficult of enforcement if teachers and others with whom they come in contact at school, are allowed to smoke....”20 As the Oskaloosa Daily Herald’s front-page article put it the same day that it reported the Oskaloosa city council’s mass denial of cigarette sales permits: “Woe to the school teacher, principal or other employe of the board of education who is caught with a cigaret in his mouth while on duty or, in fact, most any place except in the privacy of his own room.”21 The intrusiveness of this rule, which regulated employees’ conduct during nonworking time in myriad public places away from their workplace—even though the board acknowledged that it had no control of employees during such time or in such places22—revealed that the intensity of the anti-smoking movement’s efforts to prevent the formation of the next generation of cigarette smokers had in no way been diminished by the signal defeat that enactment of the Dodd bill had inflicted on it.

But the movement, even as applied to the schools, was unable to gain the upper hand everywhere in Iowa. A few days before the new law went into effect, the board of education in Cedar Rapids submitted an objection to the city council regarding the granting of cigarette permits to businesses located within 400 feet of school buildings.23 The board was referring to the 400-foot rule in a 1904 law, still on the books, prohibiting tobacco advertisements.24 It took the city council only two days to decide that dealers in tobacco, “particularly the wicked cigaret,” would be permitted to sell their commodities. The council reasoned that since the

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19.“Teachers Cigaret Placed Under Ban by School Board,” *DMR*, July 6, 1921 (1:6).
20.“Don’t Smoke, Board Says to Its Teachers,” *DMC*, July 6, 1921, vol. 38 no. 165 + (2:3).
21.In her letter to Governor Kendall back in April, Lucy Page Gaston had mentioned that when schools reopened in September, the Des Moines school authorities were planning a citywide campaign to eliminate smoking in the schools. Lucy Page Gaston to Nathan E. Kendall (Apr. 8, 1921), in Folder: N. E. Kendall Correspondence re Cigarette Bill (SHSI DM).
22.“Teachers Cigaret Placed Under Ban,” *Oskaloosa Daily Herald*, July 6, 1921 (1:6).
24.“Many Will Sell ’Em,” *CRT*, June 30, 1921 (1:6).
25Compiled Code of Iowa § 8881, at 2425 (1919); see above ch. 13.
law did not prohibit selling tobacco near schools and permit-holders had to post a $1,000 bond to insure compliance with the new law, including its ban on sales to minors, it was “unnecessary to take further precautions.”

Since the chief purpose of the two laws acting in concert was to prevent children from starting to smoke—and not to increase municipal revenues from bond forfeitures—the council’s argument was irrelevant. Even if, implausibly enough, the advertising were all inside the store and not visible to those outside, the city council could nevertheless have exercised its absolute discretion not to issue permits to tobacco stores within 400 (or any number of) feet of schools on the grounds that they were a species of attractive nuisance to children. In this sense the speculative claim made two days earlier that the city solicitor would hold that the courts would construe denial of a permit as discriminatory because “minors are barred and none others attend school” was irrelevant under the new law, which conferred absolute discretion on councils to deny all permits.

**Frictionless Issuance of Permits in First-Class Cities**

The city councils of numerous towns are just now wrestling with the question of whether their town shall license the sale of cigarettes...

In none of the 14 first-class cities (with a population of 15,000 or more) did the city council decide in 1921 not to issue any cigarette permits. The largest city in which any form of resistance was recorded was Fort Madison, the seventeenth largest with a population of 12,066. There, when the eight-member city council met in special session on July 6, 1921 to deal with 20 applications for permits, it voted 6 to 1 to approve each of them. One member, William H. Benbow, voted against each resolution. Benbow, a 65-year-old retired farmer, had been born...
in Utah, the son and grandson of English-born Mormons. Presumably his religion’s prohibition of tobacco and smoking underlay his across-the-board opposition to the issuance of any cigarette permits.\(^\text{29}\)

Initially, the lead in issuing permits appears to have been gained by the state’s second largest city, Sioux City (population 71,227), where by June 14 applications for permits were already coming in steadily and predictions were for 120 to 150 to be issued.\(^\text{30}\) By June 30 the city government, which was pushing permits—the city clerk announced that they “may be taken out at any time”—had already been “enriched by the sum of $12,800” from the sale of 128 permits. With five days to go before the law even was to go into effect, 150 dealers were expected to be engaged in the sale of cigarettes.\(^\text{31}\)

Typical for the process was Council Bluffs, the seventh largest city, with a population of more than 36,000. Two weeks before the new law went into force, when 20 to 25 people had already made known their interest in buying a permit, the city council held a special meeting to consider their applications.\(^\text{32}\) After approving the first 16, the council held a second special meeting a week later to act on 14 more that had been filed in the meantime with the expectation that another 10 to 15 would be filed later.\(^\text{33}\) In fact, 33 were filed and 33 approved, “the councilmen run[ning] across none...that should been denied in their opinion of the matter. This makes a total of forty-nine permits issued and none denied....” The total of $4,900 in mulct tax paid into the city treasury\(^\text{34}\) was “unexpected income to the city...which was not figured on when the city budget was made out.”\(^\text{35}\) If the windfall pleased the city government, by the time the law went into effect the “Cigaret Dealers Are Smiling Now”: indeed, they were so filled with “proper confidence in their own rectitude” that most of the dealers who had not

J. Pollpeter (button company manager), and Anton Schmidt (Schmidt Bros. fish market).

\(\text{Leshnick’s Fort Madison, Iowa City Directory: 1921-1922, at 144, 148, 151, 176, 183, 210; Leshnick’s Fort Madison, Iowa City Directory: 1919-1920, at 215.}\)


\(^\text{30}\) \text{“Nine Fag Permits Issued,” SCJ, June 14, 1921 (7:5).}\)

\(^\text{31}\) \text{“Cigaret Law Enriches City,” SCJ, June 30, 1921 (7:6). Ten days earlier the city council had approved dealers’ bonds. “Parking Law New to Mayor,” SCJ, June 19, 1921 (30:3).}\)

\(^\text{32}\) \text{“Council to Discuss the Cigaret License,” CBN, June 21, 1921 (6:1).}\)

\(^\text{33}\) \text{“Special Meeting of City Council,” CBN, June 27, 1921 (5:5).}\)

\(^\text{34}\) \text{“More Licenses to Sell Cigarets,” CBN, June 29, 1921 (7:4).}\)

\(^\text{35}\) \text{“Special Meeting of City Council,” CBN, June 27, 1921 (5:5).}\)
yet received their revenue stamps from the state treasurer went ahead and (illegally) sold cigarettes anyway, allegedly charging buyers for the tax and keeping track of sales “with the idea of setting aside the requisite number of cigaret stamps” after they received them.36

In Cedar Rapids, the state’s fourth largest city with a population of almost 46,000, the local government was so eager to facilitate issuance of the greatest number of permits that it announced a month before the law was to go into effect that permits would be available at city hall on June 6. Indeed, it “urged that dealers obtain permits and bonds immediately as a duplicate of the permit must be sent to the secretary of state [sic] before stamps can be issued to the applicant,” adding that dealers’ “[q]uick action” would “insure that they will be inside the law when the new law goes into effect....”37 Mayor Rall—who, ironically, as justice of the peace exactly a quarter-century earlier had presided over the first prosecution under the sales prohibition law38—was so impatient to initiate licensure that he had arranged to have permits ready a month before the new law went into effect and had to seek an opinion from the attorney general as to whether dealers could be officially licensed before that date.39 By June 17, with two and a half weeks to go, 25 dealers had already made the city $2,500 richer with estimates of another 25 to be issued by July 4;40 by July 24 the number of permits issued had reached 47.41

Two days before the law went into effect, the city council in Mason City, the eleventh largest city, with a population just over 20,000, had already issued 32 permits to a broad array of businesses, including hotels, drug stores and pharmacies, cafes, a grocery store, a soda grill, a chocolate shop, and a pool hall in addition to cigar stores. The local government may have shared the (erroneous) view of the local newspaper that the new law’s primary purpose was

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36“Cigaret Dealers Are Smiling Now,” CBN, July 5, 1921 (7:5).
37“Cigaret Dealers Must Get Permits to Sell,” CREG, June 4, 1921 (8:5-6).
38See above ch. 11.
39“Issue Permits Soon for Sale of Cigaretts,” CREG, June 11, 1921 (5:6). The official opinions of the attorney general for 1921 contain none on this subject, but the treasurer of state did send instructions to city clerks at about this time stating that: “‘City or town councils or boards of supervisors may use their pleasure in issuing permits prior to July 4, but in each and every case the issuance of each permit must be confirmed by the said city or town council or board of supervisors immediately after July 4, 1921.’” “Date Here on Cigaret Sale,” OC, June 20, 1921 (2:2).
40“City Gets $2,500 from Cigaret License Sale,” CREG, June 17, 1921 (15:5).
41“Defer Action on Bids for Paving,” CREG, June 24, 1921 (3:1).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

to “raise the revenue of the city....”42 In Iowa’s sixth largest city, Waterloo, whose population exceeded 36,000, the city council already in May decided not to require dealers to post more than the statutory minimum bond of $1,000;43 before the end of June it had already issued about thirty permits,44 approving still more later.45 In mid-June the city council of Muscatine, the thirteenth largest city with a population of 16,000, unanimously46 passed a framework ordinance authorizing in principle the sale of cigarettes by holders of permits.47 It then promptly approved 14 petitions for permits.48 In Burlington, Iowa’s ninth largest city, whose population exceeded 24,000, dealers had already been granted 22 $100 permits by June 25, prompting officials to predict that mulct tax revenue would reach $3,000 before July. In fact, by the time the law went into effect during the first week of July the “substantial present” that the legislature had given the city49 had already reached $4,900.50

Davenport, with a population of almost 57,000 the third largest city, favored mass processing. At its July 6 session, the city council, on motion of one of the aldermen, authorized the city clerk to issue permits to 102 cigarette dealers who had furnished bonds in the proper amounts. Among the permit holders was, beyond the usual array of cigar stores, drug stores, pharmacies, pool room, and a wholesale grocery store, one especially interesting location: the Palmer School of Chiropractic, the first and largest in the world. Of note, too, was that the Davenport Chamber of Commerce also received a permit.51 (Later, the city

42“Permits Issued to 32 Dealers Here,” Mason City Daily Globe-Gazette, July 2, 1921 (2:1-3).
43“Local Cigaret Dealers Must Post $1,000,” WT-T, May 29, 1921 (2:1).
44“New Bus Line Given License,” WT-T, June 28, 1921 (7:1); “Council Proceedings,” WEC, July 2, 1921 (11:4) (June 27, 5 permits ordered issued).
46“War on Motorists Shifts to City Council Chamber,” Muscatine Journal, June 17, 1921 (4:1).
47“Official Proceedings of City Council,” Muscatine Journal, June 20, 1921 (5:3-7 at 6) (June 16).
49“Cigarets Aid City,” BH-E, June 25, 1921 (2:2).
51Davenport City Council. Council Proceedings, Regular Session, July 6, 1921, at
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council restricted the issuance of cigarette sales permits to applicants “engaged otherwise than incidentally or as an adjunct to some other occupation not...listed” in the following listed “occupations”: retail grocery, retail tobacco, restaurant, or hotel business, selling of malt beverages, or operating a private club.)52 In Dubuque, Iowa’s fifth largest city with a population in excess of 39,000, at the end of June the city council, on the city manager’s recommendation, authorized him to issue permits to 30 applicants who had already filed applications as well as to all dealers who filed applications and posted the proper bonds between then and the next council meeting on July 3.53 During the ensuing days many more dealers than expected applied.54 Unlike their counterparts in Council Bluffs, dealers in Dubuque, who had failed to receive their tax stamps by Monday morning July 4, law-abidingly resisted the importunings of would-be buyers who were “unable to satisfy their cravings for the weed,” who were forced to wait until late afternoon when some dealers received the stamps.55

In Ottumwa, the tenth largest city (population 23,003), the council on July 5 unanimously granted 32 permits.56 The city council in Clinton, the eighth largest city with a population of 24,151, approved 37 permits on July 1, 1921.57 Fort Dodge, the twelfth largest city with a population of 19,347, issued six permits to cigar, candy, and grocery stores on June 21.58 Boone, the sixteenth largest city with a population of 12,451, issued two permits on June 22.59

Nor was the quasi-automatic granting of permits confined to the larger cities. Kalona (pop. 632),60 Lake Park (789),61 Lime Springs (595),62 Lytton (278),63

13396 (copy furnished by Karen M. O’Connor, Special Collections, Davenport Public Library).

521943 Municipal Code of the City of Davenport, Iowa, ch. 16, Ordinance No. 107, at 347. Existing permit holders were grandfathered in regardless of a change in occupations.

53“Grant Manager Authority to Issue Permits,” DT-J, June 29, 1921 (3:1).


56Email from Ann Cullinan (Ottumwa City Clerk) to Marc Linder (Jan. 15, 2008).

57“New Cigaret Licenses to Be Taken Out,” Clinton Advertiser, July 2, 1921 (10:1).


61“Council Proceedings,” Lake Park News, July 14, 1921 (12:4) (2 applications approved July 7); “Council Proceedings,” Lake Park News, Nov. 17, 1921 (10:4-6 at 5)
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Milford (908), Renwick (501), Riceville (960), and Stanton (749) were just a few of the small towns that followed that same path. One town with fewer than a thousand residents may have won the race to the bottom in terms of the laxity of its regulation. The town council of Victor, a town of 802 located a few miles from the even smaller Ladora and 20 miles from Grinnell, both of which banned cigarette sales, already on June 9 unanimously passed a resolution effectively waiving the council’s power to vet each application individually. Instead, the resolution provided that beginning on July 4 “it shall be lawful for any persons engaged in business in the Town of Victor, who shall pay to the Town Treasurer the sum of Fifty Dollars per year in advance and file with the Town Clerk a good and sufficient bond in the sum of One Hundred Dollars to have, keep for sale and sell...cigarettes...and the Town Clerk is hereby authorized and empowered to issue permits to such person, persons, firm or firms as comply with the conditions hereof.” Not only did the council permit applicants to bypass council scrutiny, but it grossly violated the law by requiring a bond of only $100 whereas the statute unambiguously imposed a minimum bond of $1,000. Similarly, at a special meeting a month later, the town council of Sidney (pop. 1,154)—which was founded after the discovery of gold in California and initially served as a way station to the West—in Fremont county, the state’s southwestmost and a WCTU stronghold of prohibition, by majority vote decided to grant permits to “all reputable dealers.”

(Nov. 5).

64. “New Cigarette Law in Force, Milford Mail, July 14, 1921 (1:1).
67. “City Council Met Last Night in Regular Session,” Stanton Call, July 7, 1921 (two permits).
68. “Council Minutes,” Victor Record, June 9, 1921 (8:2). The occupations of three council members at the 1920 census were building contractor (Ellis Bowman), salesman (Charlie McAninch), and retail farm implement merchant (Samuel Steffy); a fourth had no occupation (Steven Smith), and the fifth did not appear in the census (Jas. Lawlor).
69. 1921 Iowa Laws ch. 203, § 4, at 213, 214.
71. “Council Licenses ‘Fags,’” Sidney Argus, July 7, 1921 (1:1) (only 1 permit issued to the Nix brothers who owned a restaurant, but 2 more applications anticipated at next meeting). In this first issue in which cigarette ads became lawful the Argus ran two large...
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

In small many cities, too, city councils acted expeditiously to approve applications for cigarette sales permits. Among them were Anita (1,236), Chariton (5,175), Charles City (7,350), Cherokee (5,824), Colfax (2,504), Decorah (4,039), Emmetsburg (2,762), Hamburg (2,017), Hampton (2,992), Hawarden (2,491), Humeston (1,214), La Porte City (1,443), Leon (2,193),

ones for Chesterfield and Camel. Sidney Argus, July 7, 1921 (2:4-6, 6:4-6). The article was also reprinted as “Cigarettes Sold at Sidney,” T-WS-P, July 11, 1921 (3:6). The expression “majority vote” suggests that it was not unanimous; unfortunately, exploration of the presence, magnitude, and character of the resistance to issuing permits has become impossible because the Sidney town council lost its minutes from 1921 to the 1930s.

Email from Sidney Town Clerk (Suzanne) to Marc Linder, Feb. 13 and 14, 2008. The brief article in the Argus provided no other details and, even if the newspaper did publish the council minutes, they were not published through the issue of July 21, 1921, after which a three-year gap in holdings by any library opens. The Fremont County Herald, which was also published in Sidney in 1921, printed neither the council minutes nor any article on the permit issue. Presumably one of the two additional permits in Sidney was for C. M. Ambler Drug Co., a drug store, which by the end of the month was advertising that it sold cigarettes in the county paper, which in the same issue also ran ads for Camel, Chesterfield, and Lucky Strike. Fremont County Herald, July 28, 1921 (2:1-2).

72“Council Proceedings,” Anita Tribune, July 14, 1921 (3:2) (July 6, 4 permits).
73“Chariton Men Get Cigaret Permits,” OC, July 7, 1921 (2:3) (6 permits).
74“Cigarettes Not Legalized in Rockford, Ia,” WEC, June 30, 1921 (3:2) (4 permits).
75“Dealers Apply for Cigaret Licenses,” Semi-Weekly Democrat (Cherokee), June 27, 1921 (1:5) (5 permits granted).
76“Colfax City Council Gives Cigarette Permits to Six Dealers,” Newton Record, July 15, 1921 (2:3).
78“Council Proceedings,” Emmetsburg Democrat, July 20, 1921 (7:3-6 at 4) (NewspaperArchive) (June 27, 1921, 4 permits). To be sure, at least one newspaper asserted that because the new law was “very drastic…very few who have been handling cigarettes have been taking out licenses.” Only three had applied in Emmetsburg because “[m]any dealers here do not figures [sic] that they can get enough out of the cigarettes to pay this license fee and have anything left over.” “Take Out Licenses for Cigarettes,” PAR, June 20, 1921 (1:2).
80“License Pill Dealers,” Hampton Chronicle, July 14, 1921 (12:4) (5 permits).
81“City Council Meets,” HI, June 30, 1921 (8:1-2) (June 22, 2 permits, June 27, 5 permits).
82“Four Cig Licenses Granted,” Humeston New Era, July 13, 1921 (1:1) (unanimous).
83[Untitled], Progress Review (La Porte City), July 7, 1921 (3 permits granted to only
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Maquoketa (3,626), Oelwein (7,455), Red Oak (5,578), Rockwell City (2,039), Sac City (2,630), Spencer (4,599), Spirit Lake (1,701), and Tama (2,601).

The press depicted both large and small cities as eager for the windfall largesse of the permit fees. For example the Ottumwa Courier reported that the city clerk was “beginning to ‘recover’ this afternoon from the ‘effect’ of eight $100 checks submitted to the city this morning for the first cigaret licenses ever distributed in Ottumwa.” Town councils in the smaller towns were especially receptive to the mulct tax revenue, which municipalities of all sizes turned into a purpose in its own right (“Cigarets Aid City”). The council, as one member of the Humeston town council put it, “thought the town had ‘just as well have that $50 per.’” Many smaller municipalities were no more immune than the bigger cities to uncritical appreciation of the “Golden Stream” that was pouring into their coffers thanks to the cigarette law.

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3 applicants).

86. “Cigarette Sale Permits Issued,” Oelwein Register, June 29, 1921 (1:4) (6 permits).
87. “Red Oak Dealers to Sell Cigaretts,” CBN, July 1, 1921 (2:2) (“almost unanimous.”)
93. “$800 Cigaret Money Filed,” OC, June 24, 1921 (4:1).
94. “Cigarets Aid City,” BH-E, June 25, 1921 (2:2).
95. “Four Cig Licenses Granted,” Humeston New Era, July 13, 1921 (1:1).
96. “Golden Stream Pours in Iowa’s Coffers from Cigaret Law,” WEC, Sept. 10, 1921 (8:4).
Resisting Localities

However eager most city and town governments may have been to obtain as much mulct tax as possible from issuing permits, battles over these decisions did take place in councils in numerous smaller cities and towns, some of which in fact refused to countenance cigarette sales within their limits. The largest such city was Oskaloosa, Iowa’s nineteenth largest, with a population of 9,427 in 1920. Table 8 shows all cities and towns (with their population and rank for cities in 1920) in which opposition (defined here minimally as the casting of at least one vote on the council against issuance of permits) is known to have manifested itself in 1921; in many instances the opposition was much more intense.

This list in no way purports to be complete—councils in (perhaps even many) other, especially smaller, towns, may have resisted or even prohibited cigarette sales. For example, a newspaper in neighboring Shenandoah reported that the town council in Farragut, a town of 494 people in southwestern Iowa founded in the early 1870s, was “laboring with the cigarette question,” but had not yet decided “whether to license the so-called ‘coffin nails’ or not.” In order to put the town’s indecision into context, the Tri-Weekly Sentinel-Post presented the hostile extreme view:

Most of the people who believe in the welfare of the human race would like to see the cigarette abolished from the face of the earth but they are divided in opinion as to the attitude a town council should take. Some say that a public official should [not] make any compromise with evil, no matter what course might be taken elsewhere. Others say that if the state legalizes the use of cigarettes and provides the way to secure them the people will get them and use them and the town council might as well be in position to regulate the sale and to derive some revenue from it.

A weekly in neighboring Sidney added that: “Many of the citizens are opposed to license and circulated petitions asking the council not to grant licenses.” Unfortunately, the council’s ultimate action is unknown because none of the newspapers covering Farragut followed up on it in the following weeks, and, even more fatally, the Farragut town council lost all of its minutes for meetings from

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98 “Council Undecided,” T-WS-P (Shenandoah), July 8, 1921 (9:1).
100 “Farragut,” Fremont County Herald (Sidney), July 14, 1921 (7:2-4 at 4). See also “News Notes from Farragut,” Hamburg Reporter, July 14, 1921 (3:1-6 at 4).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

1915 to 1934.\textsuperscript{101}

The information about resistance derives from reading scores of bound and microfilmed contemporaneous Iowa newspapers and systematic computerized searches of a web-based, full-text facsimile of many, but far from all, Iowa newspapers from 1921 and 1922.\textsuperscript{102} Since newspapers often reported on denials of permits in other towns,\textsuperscript{103} including quite small ones, it is plausible that the list more than scratches the surface. Thus a small-town weekly in Stanton in extreme southwest Iowa, after reporting that the town council had approved two permits, noted that “[p]ractically all our neighboring towns” had granted permits, but that the council in Shenandoah had “decided that ‘fags’ cannot be sold legally” there.\textsuperscript{104}

\begin{table}[h]
\centering
\begin{tabular}{|l|c|l|}
\hline
City/Town (County) & 1920 Population/Rank & Action \\
\hline
Albia (Monroe) & 5,067/36 & Mayor briefly delayed issuance \\
\hline
Cedar Falls (Black Hawk) & 6,316/25 & 1 council member opposed issuing any permits \\
\hline
Cumberland (Cass) & 561 & Ban for 11 weeks \\
\hline
Earlham (Madison) & 803 & Ban until 1931 \\
\hline
Fort Madison (Lee) & 12,066/17 & 1 Mormon councilman voted against issuing all 20 permits \\
\hline
Grinnell (Poweshiek) & 5,362/32 & Ban until 1924 \\
\hline
Indianola (Warren) & 3,628/55 & Ban until 1933 \\
\hline
\end{tabular}
\caption{Iowa Cities and Towns in which Resistance to Issuance of Cigarette Sales Permits Took Place in 1921}
\end{table}

\textsuperscript{101}Telephone interview with Farragut town clerk Marilyn (Feb. 14, 2008).
\textsuperscript{102}NewspaperArchive.
\textsuperscript{103}For example, a weekly in Corning in one column on its front page reported on denials in three towns within about 50 miles. “Neighborhood News,” Adams County Free Press, July 16, 1921 (1:1).
\textsuperscript{104}“City Council Met Last Night in Regular Session,” Stanton Call, July 7, 1921 (1:3).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

<table>
<thead>
<tr>
<th>Location</th>
<th>Population</th>
<th>Year</th>
<th>Status</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ladora (Iowa)</td>
<td>340</td>
<td></td>
<td>Ban at least thru 1924</td>
</tr>
<tr>
<td>Lamoni (Decatur)</td>
<td>1,787</td>
<td></td>
<td>Issued no permits until 1935?</td>
</tr>
<tr>
<td>Newton (Jasper)</td>
<td>6,627/24</td>
<td></td>
<td>Ban, reversed 2 wks later</td>
</tr>
<tr>
<td>Oskaloosa (Mahaska)</td>
<td>9,427/19</td>
<td></td>
<td>Ban, lifted (1922?)</td>
</tr>
<tr>
<td>Perry (Dallas)</td>
<td>5,642/30</td>
<td></td>
<td>Mayor vetoed ordinance; council overrode veto</td>
</tr>
<tr>
<td>Rockford (Floyd)</td>
<td>1,031</td>
<td></td>
<td>Ban (until 1927)</td>
</tr>
<tr>
<td>Rockwell (Cerro Gordo)</td>
<td>800</td>
<td></td>
<td>Unanimous vote against issuing permits</td>
</tr>
<tr>
<td>Shannon City (Union)</td>
<td>333</td>
<td></td>
<td>Ban</td>
</tr>
<tr>
<td>Shenandoah (Page)</td>
<td>5,255/34</td>
<td></td>
<td>Refused then granted permit, but mayor vetoed twice; then in Sept. 1921 permits issued</td>
</tr>
<tr>
<td>Winterset (Madison)</td>
<td>2,906/68</td>
<td></td>
<td>Ban, reversed 2 days later</td>
</tr>
</tbody>
</table>


Remarkably, most of these towns were located in Iowa’s southwestern area in which the group was especially strong. In 1921 WCTU membership was 13,030—or, in relation to the state population, one member for 184 Iowa residents. This statewide average density concealed very large county-level differences: whereas the ratio for most of the counties with the largest cities far exceeded the statewide average, in most of these southwestern counties the ratio was much lower. Map 3 and Table 9 show WCTU membership and density by county as well as the percentage of voters in each county who voted for the (failed) Iowa state constitutional amendment on liquor prohibition in 1917 and against ratification of repeal of the 18th Amendment to the Constitution in 1933.

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105Since the WCTU was a women’s organization (with a small number of male honorary members) this ratio should be halved, but presumably the gender ratios among counties did not vary sufficiently to skew the averages.
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Table 9:
Iowa WCTU Membership (1921) and Votes on Liquor Prohibition in Iowa (1917 and 1933) by County

<table>
<thead>
<tr>
<th>County</th>
<th>% Voting for State Liquor Prohibition Constitutional Amendment in 1917</th>
<th>WCTU Members in 1921</th>
<th>County Population 1920/WCTU Members in 1921</th>
<th>% Voting Against Repeal of National Prohibition in 1933</th>
</tr>
</thead>
<tbody>
<tr>
<td>Adair</td>
<td>56</td>
<td>133</td>
<td>107</td>
<td>59</td>
</tr>
<tr>
<td>Adams</td>
<td>66</td>
<td>102</td>
<td>103</td>
<td>74</td>
</tr>
<tr>
<td>Allamakee</td>
<td>31</td>
<td>25</td>
<td>691</td>
<td>21</td>
</tr>
<tr>
<td>Appanoose</td>
<td>60</td>
<td>35</td>
<td>872</td>
<td>53</td>
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1982
| City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s |
|---------------------------------|-----|-----|-----|-----|
| Clayton                         | 52  | 133 | 188 | 18  |
| Clinton                         | 31  | 96  | 452 | 7   |
| Crawford                        | 36  | 81  | 254 | 24  |
| Dallas                          | 63  | 184 | 137 | 56  |
| Davis                           | 71  | 4   | 3144| 65  |
| Decatur                         | 71  | 71  | 233 | 64  |
| Delaware                        | 47  | 92  | 198 | 37  |
| Des Moines                      | 38  | 151 | 235 | 28  |
| Dickinson                       | 58  | 166 | 62  | 50  |
| Dubuque                         | 19  | 117 | 498 | 6   |
| Emmet                           | 57  |     | 57  |     |
| Fayette                         | 49  | 324 | 90  | 37  |
| Floyd                           | 51  |     |     | 43  |
| Franklin                        | 46  | 30  | 527 | 46  |
| Fremont                         | 61  | 178 | 87  | 58  |
| Greene                          | 63  | 9   | 1830| 70  |
| Grundy                          | 43  | 50  | 288 | 49  |
| Guthrie                         | 63  | 146 | 121 | 61  |
| Hamilton                        | 66  | 100 | 195 | 58  |
| Hancock                         | 53  | 57  | 258 | 43  |
| Hardin                          | 61  | 103 | 227 | 55  |
| Harrison                        | 56  | 293 | 84  | 43  |
| Henry                           | 61  | 124 | 148 | 44  |
| Howard                          | 38  | 72  | 190 | 45  |
| Humboldt                        | 61  | 12  | 1079| 48  |
| Ida                             | 45  | 162 | 72  | 31  |
| Iowa                            | 42  | 117 | 159 | 31  |
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

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City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

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City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

Thus, whereas the population/membership ratio for Polk (Des Moines), Pottawattamie (Council Bluffs), Scott (Davenport), and Woodbury (Sioux City) counties was 238, 275, 302, and 357, respectively, the ratio for Madison (Earlham and Winterset), Page (Shenandoah), Mahaska (Oskaloosa), Warren (Indianola), Union (Shannon City), and Jasper (Newton) counties was 64, 67, 70, 75, 87, and 125, respectively. To be sure, above-average WCTU density and opposition to alcohol did not translate into resistance to, let alone prevention of, cigarette sales. Thus, the city council of Bedford, the county seat of Taylor, a southwestern county, whose dry voting record was exceeded by none, nevertheless immediately issued a cigarette permit to a cigar maker. Yet, in other counties and towns the WCTU’s strength was on display even where its exercise failed of its purpose. For example, in Clarinda (population 4,511), the county seat of Page county, in which Shenandoah is also located, the city council unanimously issued a permit to one firm and sent word to other dealers that it was prepared to act on their applications, too, as soon as they paid their fees and

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106 The total membership was calculated by adding the members reported by the individual county chapters to the annual convention in October 1921. Total membership was probably somewhat higher since some counties (e.g., Cass, in which Cumberland is located) failed to file a report, while others (including Floyd, in which Rockford is located) were unorganized and may not have had a complete count. The convention report also included (without methodological explanation) an alternative total membership of 15,250, which would have produced a statewide density of 158. Woman’s Christian Temperance Union of Iowa, Forty-Eighth Annual Convention 31-51 (1921). WCTU membership in 1921 is used as a gauge of the group’s strength during its battle against repeal of the cigarette sales ban that year. There are no membership data for a number of counties for 1921 either because the county was unorganized or the county organization failed to submit a report. In the latter instance data have been inserted (in square brackets) from 1920 (when the total membership was 11,556), if available, but they have not been included in the statewide totals. In a few unorganized counties a few residents nevertheless paid dues directly to the state WCTU, producing very low membership densities for those counties.

107 To be sure, several counties were outliers. For example, Black Hawk, which included Waterloo as well as Cedar Falls and had the largest membership (1,127), exhibited a very low ratio (50). Decatur, in which Lamoni is located, had only 71 members and thus an above-average ratio (233). Poweshiek, in which Grinnell is located, had a slightly below-average ratio (165).

108 “One Cigarette License,” Times-Republican (Bedford), July 11, 1921 (1:3) (permit issued to L. D. Willman at July 9 meeting); 1920 Census of Population (HeritageQuest). Two more applications were to be presented at the next council meeting.

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posted their bonds. The council took this action despite having on file remonstrances from nine local organizations and the presence at the meeting of two people seeking to use their influence against cigarettes. The groups included the WCTU, City Federation of Missionary Societies, Christian Endeavour, Society of the Christian Church, Presbyterian Congregation, Methodist S. S., Troop 2 Boy Scouts of America, Official Boards of the M. and E. and Christian Churches, and the Alethan Class of the Methodist Church.109 Ames, the location of Iowa State College of Agricultural and Mechanic Arts, offers another example. The density of WCTU membership in Story county (74) was far above average as was its electoral opposition to alcohol in 1917 and 1933. Yet, apparently without any opposition, the Ames city council granted eight cigarette permits as early as June 20, although at the same session the WCTU presented a petition with upward of 1,600 signatures requesting an ordinance prohibiting the showing of movies on Sunday.110

Finally, to be distinguished from towns in which formal resistance to selling cigarettes took place were those in which the market, so to speak, knew better: perceiving no profitable demand, potential sellers did not bother to apply for a permit. For example, in the small north-central town of Burt (pop. 626),111 by the time the law went into effect no one had applied for a permit, prompting the local Republican weekly to comment: “People who must have them will have to go to the neighboring towns for their supply of ‘pills.’” But the paper then added: “We doubt if very many care if the sale of cigarets in this burg was dispensed with entirely.”112 That, however, someone cared about sales even in tiny Burt was manifested in the very same issue (July 6) of the town’s only newspaper, which was the first in which cigarette advertising became lawful: the back page displayed an ad for Lucky Strike,113 as it did throughout July and until the last week in August when it was replaced by a larger one for Chesterfield. Whether American Tobacco Company and Liggett & Myers were seeking to stimulate

110“New Pavement Project Starts by August 1st,” ADT, June 21, 1921 (1:7); “Official Proceedings,” ADT, June 27, 1921 (5:4-6) (minutes of council meeting of June 20). This newspaper began publishing (large) cigarette advertisements as soon as it became lawful to do so. Id. July 5, 1921 (3:5-7) (Camel).
112“No Cigarets for Burt,” Burt Monitor, July 6, 1921 (1:1). It is assumed here that, unlike the situation, described below, in Lamoni, potential applicants in Burt were not deterred by the knowledge or perception that the city council would not approve a permit.
113Burt Monitor, July 6, 1921 (n.p. [8]:1).
cigarette smokers in Burt to travel to the nearest town where cigarettes could be bought\textsuperscript{114} or to build up a market in Burt itself so that demand would justify paying for a permit is unclear, but after ATC had, for an extended period in 1922, published ads for its new brand, 111, on August 9 a motion carried in the city council to authorize the clerk to issue a permit to Francis Pratt,\textsuperscript{115} a 32-year-old retail druggist,\textsuperscript{116} whose sales continued to be supported by ATC: the same issue of the newspaper that published the council minutes also ran an ad for 111, and soon Lucky Strike again appeared on the back page.\textsuperscript{117}

\textit{Albia}

The minimal resistance in Albia appears to have been carried on by one person—Mayor Pabst—who engaged in a limited holding action, which the local newspaper called a “rather unusual and to some extent embarrassing condition....” Although the new statute did not expressly confer any power on mayors to deal with issuing permits, mayors in neighboring towns called special city council meetings to act on it, but councils could also meet on their own. In Albia, the mayor had “taken it upon himself to handle the matter...to suit his own interpretation of the law and as a result of his action no permits will be issued in Albia until after” the next regular meeting on the evening of July 4. Because the rush on stamps at the state treasurer’s office was causing delays of three days to three weeks in securing them, the seven or eight dealers in Albia who had applied for permits and paid the $75 mulct tax would not be permitted to sell cigarettes (even if their applications were approved). The \textit{Albia Republican}, which consequently headlined its account, “No Cigarettes for July Fourth,” was unable to explain the mayor’s usurpation of all authority and control over the permits.\textsuperscript{118} In fact, the council did meet at 8:00 o’clock on July 4 and authorized the city

\begin{footnotesize}
\textsuperscript{114}In Algona (pop. 3,724), the county seat of Kossuth County, which was 10 miles away, the city council immediately issued permits to five sellers (including three pool halls). “Five Are Given Permits to Sell Cigarettes in Algona,” \textit{Kossuth County Advance}, July 7, 1921 (8:2). But even Titonka (pop. 418), which was even smaller than Burt and almost as close, issued two permits. “Council Proceedings,” \textit{Burt Monitor}, Aug. 9, 1922 (1:3).

\textsuperscript{115}“Council Proceedings,” \textit{Burt Monitor}, Aug. 9, 1922 (1:3).

\textsuperscript{116}1920 Census of Population (HeritageQuest).

\textsuperscript{117}\textit{Burt Monitor}, Sept. 6, 1922 ([8]).

\textsuperscript{118}“No Cigarettes for July Fourth,” \textit{Albia Republican}, June 30, 1921 (1:1).
\end{footnotesize}
clerk to issue permits to eight applicants.\footnote{119}

\textbf{Cedar Falls}

With a population of 6,316 in 1920, Cedar Falls was the location of Iowa State Teachers College, whose enrollment was 1,402.\footnote{120} The local WCTU’s innovative anti-smoking campaign in 1913 underscored the movement’s size, influence, and vibrancy.\footnote{121} By the last week in June 1921 it was publicly known that at least six dealers would definitely and another three probably apply for cigarette permits, but the city council had not considered the matter before its meeting on June 27.\footnote{122} At that session three applications were on the agenda, while three others were not discussed because they were not accompanied by bonds. Five different and liberally signed petitions, submitted by three WCTU organizations in Cedar Falls and two church groups, were read urging the council not to issue any permits. One council member, Robert Waters, a 57-year-old livestock buyer, voted against each petition because he was opposed to granting any licenses as provided by the new law. The majority, however, voted to issue permits to a drug store, cafe, and cigar store/billiard hall because they regarded cigarette sales “licensed under strict regulations” as “preferable to a ‘closed town’ with the constant temptation to ‘bootleg’” cigarettes.\footnote{123}

\textbf{Cumberland}

The council of this small town called a special meeting on June 27, 1921, whose sole object was to consider the matter of granting permits for the sale of cigarettes. After an informal discussion Councilman H. Glenn Liston, a 32-year-old undertaker, offered a resolution authorizing the clerk to issue cigarette sales permits “to any party whose application is accompanied by the town treasurer’s

\footnote{119}{“The City Clerk Issues Permits,” \textit{Albia Republican}, July 7, 1921 (1:6).}

\footnote{120}{http://www.uni.edu. It later became the University of Northern Iowa.}

\footnote{121}{See above ch. 14.}

\footnote{122}{“Cedar Falls,” \textit{WT-T}, June 26, 1921 (6:5) (NewspaperArchive).}

City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

receipt for $50 and good and sufficient bond in the sum of $1,000 to comply with the law governing the sale of cigarettes.” The council then defeated the motion to adopt the resolution by a vote of 4 to 1. In voting against his own resolution, Liston was joined by Councilmen William Burton Denham (a 31-year-old veterinarian operating his own veterinary hospital), H. Lee Breckenmaker (a 34-year-old meat market merchant/butcher), and Whitney (either 33 year-old Floyd, an undertaker, or his 36-year-old brother Orville G., a general store merchant and Baptist association activist); the sole Nay was cast by Lattimer (either 67-year-old George H., or his 38-year-old son John M., both of whom were carpenters).124 The press did not adequately describe the generalized and programmatic character of the council’s action when it reported that the council had merely “refused to grant a license to cigarette vendors....”125

The council did not discuss the cigarette question at its monthly meetings on July 7 or August 2,126 but did return to it on September 12 in connection with the permit applications of C. Mott Pigsley (a 41-year-old produce buyer), and C. F. Lassen. Councilman Breckenmaker’s motion to reconsider the resolution that had been defeated 11 weeks earlier was seconded by Lattimer and carried by a vote of 4 to 1. Breckenmaker’s motion to adopt Liston’s resolution, again seconded by Lattimer, passed this time by a vote of 3 to 2, Whitney and Denham adhering to their earlier Nays. The clerk was then authorized to grant permits when applications were accompanied by proper bonds and the treasurer’s receipt of $50 for the license,127 thus ending Cumberland’s brief resistance against cigarette sales.


125“Neighborhood News,” Adams County Free Press, July 16, 1921 (1:1).

126Telephone interview with Rebeka Gerlock, Cumberland Town Clerk (Feb. 5, 2021).

127Minutes of Cumberland Town Council, Regular Meeting (Sept. 12, 1921), Book [1] (1911-1927) at 259 (read aloud by town clerk Rebeka Gerlock to author, Feb. 5, 2008). There was no C. F. Lassen at the 1920 census in Cumberland, but a Fred Lassen (an own account garage bookkeeper) appeared in the 1930 census.
Earlham

Founded by Quakers, the small town of Earlham was by 1927 the place of publication of the WCTU Champion, and as late as 1933 its exquisite ideological dryness was on display in its 80 percent electoral majority against repeal of national liquor Prohibition in the teeth of a 60 percent statewide vote for repeal. In mid-1921 the Madison County WCTU was “making a determined effort to make the [county?] solidly prohibitory of cigarette smoking. They believe they have the campaign against the pill well in hand in all of the smaller towns as well as in Winterset,” the county seat. The intensity of feeling in Earlham on the question was reflected in the extraordinary procedure used by the community to form and measure public opinion. On Sunday June 26 a vote was taken in every church to determine the congregations’ sentiment regarding cigarette sales permits: “There proved to be slight division of opinion expressed. Aside from a few who failed to register their vote, the sentiment was almost unanimously against the licensing of local dealers to sell the ‘pill.’” To be sure, the Earlham Echo hardly expected to see a majority casting a vote in church for licensing cigarettes, “especially in a community where the cigarette smoker is in the minority as he is in Earlham.” But it was nevertheless clear that licensing was “unpopular.” On the other hand, the cigarette smoker was allegedly “not deeply concerned one way or the other. He figures if he can’t buy ‘em one place he can buy them another.” During the run-up to the council vote the press was aware that the members were split, some opining that “licensed sale was not worse an evil than unlimited bootlegging” because a licensed dealer would be “the surest safeguard against misuse of cigarettes through his efforts to curb the illicit trade in them.” How and why such dealers would perform that service the Echo did not disclose, but since it believed that the new law’s “principal purpose” was to “withhold the pestiferous alkaloid laden things from the minor” so that enforcement would “unequivocably reduce the amount of cigarette smoking within a decade by curtailing the formation of the habit,” it is odd that the paper began publishing cigarette advertising on the first day it became lawful.

At a special meeting of the Earlham town council on July 8 to consider a dealer’s application a committee of representatives of local churches, including

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129“Repealists Are Victors Tuesday,” EE, June 22, 1933 (1:1).
130“Cigarette License Unpopular Here,” EE, June 30, 1921 (1:5-6). The word “county” inserted in square brackets may be the word that appears to have been mistakenly omitted in the newspaper.
131EE, July 7, 1921 (8:4-6) (Chesterfield).
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the Friends, Methodist, Christian, and Presbyterian, “registered a strong protest against” cigarette sales permits. The council then defeated the application for a permit by a vote of 4 to 1.\textsuperscript{132}

The council during the next three years appears never to have dealt with the question of cigarette permits at any of its mid-year meetings with the exception of June 1924, when Edward G. Tough, a cafe owner, asked for one, but the “Council failed to take action thereon.”\textsuperscript{133} Likewise, from 1925 through 1929 the council minutes again did not mention cigarettes.\textsuperscript{134} That the refusal to issue permits really meant that cigarettes were not sold in Earlham was confirmed by a lifelong resident (born in 1916), one of whose earliest childhood memories was of his older brother’s having to go to the even smaller town of Dexter, six miles away, to buy them sometime during the 1920s.\textsuperscript{135} Although during these years the \textit{Earlham Echo} did publish a long, two-column front-page article quoting various prominent opponents of youth smoking,\textsuperscript{136} it was an unoriginal piece that was probably placed in the paper by the WCTU, the printing of whose \textit{Champion} had become a major component of the \textit{Echo}’s business.\textsuperscript{137} More interesting, perhaps, is that the WCTU entrusted the work to a newspaper that regularly published

\begin{footnotes}

\item[133]“Council Proceedings,” \textit{EE}, June 5, 1924 (4:4). Unfortunately, the minutes as published in the newspaper often omitted the date of the meeting and did so on this occasion; since it was a regular meeting, which was held Mondays, the date was probably June 2. The biographical information on Tough is taken from the 1930 Census of Population, T626, Roll 666, Page 174 (HeritageQuest), and http://iagenweb.org/boards/madison/obituaries/index.cgi?read=92844 (accessed Feb. 7, 2008).


\item[135]Telephone interview with Frank Inman, Earlham (Feb. 14, 2008). When Inman’s father found out, he was angry that his son was wasting his time instead of working.

\item[136]“Tobacco Traffic Menaces Youth,” \textit{EE}, June 14, 1928 (1:3-4).

\item[137]“To Echo Patrons,” \textit{EE}, June 2, 1928 (1:3-4).
\end{footnotes}
cigarette advertising.\textsuperscript{138}

In 1930 Tough once again applied for a permit as did John E. Bechtel, another cafe owner. At the June meeting the council voted 3 to 2 to deny the request to accept their cigarette bonds and in July denied another request by Bechtel alone by the same vote. The five members were all businessmen, who were returned at the 1930 Census of Population as engaged in the following occupations: John H. Junkin (coal dealer), Charles E. Deets (grain elevator manager, farmer in 1920), Sanford J. Golightly (farmer), Robert J. Lewis (general store owner), and Edward A. Anderson (implement store owner), the first two voting Aye and the last three Nay.\textsuperscript{139} Undeterred, on October 6, 1930, Deets introduced the following resolution:

\begin{quote}
WHEREAS, there are no cigarettes now being sold in the Town of Earlham, Iowa and [sic] are being sold in all neighboring towns and in justice to tobacco dealers in Earlham, Iowa and in view of increasing the funds of the Town of Earlham, Iowa

Now therefore be it resolved by the Town Council of Town of Earlham, Iowa that the Town Clerk be instructed to issue to E G Tough and J E Bechtel a cigarette [sic] permit....\textsuperscript{140}
\end{quote}

Manifestly, the worsening impact of the Great Depression on Earlham’s financial solidity prompted it at last to abandon the decade-old legal expression of the townspeople’s aversion to cigarettes, but it is nevertheless noteworthy that instead of justifying the facilitation of cigarette sales on the grounds that the policy was not working because residents were going to other towns to buy them anyway, the council chose to focus on—to use today’s ubiquitously deployed rhetoric to justify market-driven legislative decisions—‘creating a level playing field’ for Earlham merchants who were already selling other tobacco commodities, which did not require a permit. When Anderson, who had cast one of the three Nays in June and July, seconded the motion to adopt the resolution, the die was cast: on roll call he shifted to Aye, thus producing a 3 to 2 majority, and bringing Earlham’s ban to an end.\textsuperscript{141}

\textsuperscript{138}E.g., \textit{EE}, Sept. 15, 1927 (7:4-6) (Camel).

\textsuperscript{139}Email from Kathy Timmerman, Earlham Town Clerk, to Marc Linder (Feb. 19 and 20, 2008); 1920 and 1930 Census of Population (HeritageQuest). Unfortunately, no issues of the \textit{Earlham Echo}—which published the council minutes—from 1930 appear to be extant.

\textsuperscript{140}Earlham, Iowa Town Council Minutes, Oct. 6, 1930, at 173 (copy furnished by Town Clerk Kathy Timmerman).

\textsuperscript{141}The loss of the \textit{Echo} for 1930 eliminates what would otherwise be the most accessible source of gauging public reaction to the reversal in policy.
By the next year the same members achieved unanimity: at its meeting on July 6, after passing a motion to accept the cigarette bonds of Tough and Bechtel, the council unanimously passed a resolution “that since cigaret [sic] permits were in effect in Earlham, Iowa, and also that the town is badly in need of funds,...the Town Council...grant a cigarette permit to E. L. Scar....” Remarkably, Elmer Scar, a drug store owner, was the town clerk. The following year the council again accepted Scar’s and Tough’s bonds, but the motion to accept Bechtel’s lost. Then at the bottom of the Depression in 1933, the council unanimously passed a resolution that since cigarettes were being sold in Earlham, a permit be issued to Bechtel.

**Grinnell**

A college town located in a rich farming community about halfway between Iowa City and Des Moines, Grinnell was the most prominent example of secular-political municipal action against cigarette sales that was not led by the WCTU or churches. (It is unclear that there was a rift between the WCTU and the city government, but in 1922 in connection with a legal dispute over an ordinance banning movies on Sundays, the mayor strongly objected to an impression created by the WCTU that “this worthy organization” had been the campaign’s main force; in fact, the WCTU, he charged, had neither lent the movement any active cooperation nor been in any way identified with it.)

Grinnell also most clearly embodied that part of Governor Kendall’s declaration of legislative intent at the time of signing the Dodd-Clark bill advising anti-cigarette Iowans to elect like-minded citizens to their city council if they wished.

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142“Council Proceedings,” *EE*, July 23, 1931 (2:3-4) (July 6, 1931).
144“Council Proceedings,” *EE*, July 13, 1933 (4:4-6) (July 3, 1933). Because the newspaper was apparently bound very tightly, the last several letters of the lines in the right-most column of the article were in the gutter and not captured by the microfilming; consequently, some of the words had to be guessed at.
145According to Grinnell College, its enrollment in 1921-22 was 880 students, while faculty members numbered 79. Email from Chris Jones (Grinnell College Special Collections and Archives) to Marc Linder (Jan. 5, 2011). According to *State of Iowa: 1923-24: Official Register* 623 (13th No.), enrollment that year was 794.
146*Polk’s Iowa State Gazetteer and Business Directory: 1922-1923*, at 565 (Vol. 20, 43rd Year, 1922).
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to retain their communities’ ban on the sale of cigarettes. The town’s interest in tobacco control antedated 1921: among its revised ordinances of 1917 was a section prohibiting and making a misdemeanor of the distribution of sample packages of tobacco (or any drug, medicine, nostrum, or soap) by leaving them on “any porch, steps, sidewalks, or by throwing the same in any doorway or yard....”

The city council that met on June 20, 1921, to decide whether to permit the sale of cigarettes had been elected on March 28, when the Citizens ticket, headed by mayoral candidate James L. McIlrath (1871-1955), gained five of the six seats, largely by wide margins, leaving only one seat to the People’s Ticket. Just 10 years old when his dying father charged him with caring for his mother and five younger siblings, by the age of 14 McIlrath was in full control of the family’s 80-acre farm not far from Grinnell. At some point, with “[n]o money, no schooling, or any qualification upon which I could build a career,” he took up auctioneering. By 1921 the 49-year-old own-account auctioneer was well-known in Iowa with a reputation of being a strong leader with strong opinions. McIlrath was a relatively high earner: he reported to the Iowa state census enumerator that his total earnings from his occupation as auctioneer was $3,500 in 1914—when the average annual money earnings of employed wage earners in all industries in the United States was only $580. The value of his farm or

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148See above ch. 15.
149Grinnell Revised Ordinances of Nineteen Hundred Seventeen, sect. 74 at 18 (S. Crosby ed. 1917). The “actual delivery of such sample to any adult person” was not covered by the provision.
151“City Election Is Over,” GH, Mar. 29, 1921 (1:3); 1900, 1910, 1920 Census of Population (HeritageQuest); A Reader, “The People’s Ticket,” GH, Feb. 25, 1921 (4:3) (letter to editor). For a list of the People’s and Citizens tickets and Independent candidates, see [Untitled], GH, Mar. 25, 1921 (4:1).
152“J. L. McIlrath Tells of His Life in County,” Montezuma Republican, Jan. 1, 1952, at 1 (clipping provided by James L. McIlrath). Unfortunately and oddly, this very lengthy autobiographical account, which 81-year-old McIlrath wrote while recovering from a broken hip, consists largely of isolated details about auctions and does not even mention his having been mayor or state legislator.
153Telephone interview with James McIlrath, auctioneer, Grinnell (Mar. 16, 2008) (a relative, but non-direct descendant, of McIlrath, who is custodian of his papers).
154Iowa Census 1915, Poweshiek County, Grinnell, Card No. [A]835.
155Paul Douglas, Real Wages in the United States 1890-1926, tab. 84 at 230 (1930). In 1914 the earnings of John H. Patton, a leading lawyer in Grinnell and Poweshiek
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home was also considerable at $35,800.  

The five victorious Citizen ticket candidates were: 65-year-old James Harpster, a merchant and Methodist Episcopalian at the 1915 Iowa census, who was also a director (and about to become president) of the Mutual Home Loan and Savings Association, and was otherwise “a power always” in “various business organization”; 64-year-old Horace S. Lowrey, who was returned as a retired farmer and Methodist Episcopalian at the 1915 Iowa census; 50-year-old Charles Cratty, a mechanic employed in a garage; 59-year-old William Simmons, a farmer; and 62-year-old David McBlain, who had been returned as a waterworks engineer in 1910. (The Citizens ticket’s only defeated city council candidate was Herbert Brock, a dentist.) The only successful People’s ticket council candidate was Bernard Carney, the 28-year-old vice president of the Grinnell Savings Bank. A capitalist class bias in the composition of the People’s ticket seemed to emerge from the fact that, in addition, McIlrath’s opponent on the People’s ticket, Jesse Fellows, was the director/manager of Grinnell Washing Machine Company, and Cratty’s, Charles Snyder, was a furniture business employer, but other unsuccessful People’s candidates for city council were a washing machine company foreman (Cedric Barnes), telephone company lineman...
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(James C. Martin), railroad freight agent (John Foster), and carriage factory receiving clerk (Michael J. Garrigan, the only incumbent).

As in other Iowa towns of the period, the Grinnell ticket platforms were suffused with such commonplaces that it was difficult to tell them apart. McIlrath himself, responding to a letter to the Grinnell Herald seeking information about the various platforms, declared that “the city of Grinnell is not in ‘Politics’” and the campaign’s “real goal” would be “lost if our city should be divided into factions drawn up along lines representing factional platforms which did not represent the interests of all the People.” Drawing out this harmonized supra-faction, -class, and -gender ideal, he insisted that “Grinnell is a city of homes, churches and educational institutions, business enterprises, factories, etc., wage earners, business men, professional men and women, and retired citizens, all of whom represent the high type of character which has placed Grinnell in a high class by herself as a model home town.” Anticipating Coolidge’s “the business of America is business,” McIlrath’s secular manifesto declared that Grinnell “is looking for executives and not politicians. Men who have business ability to manage the business affairs of the town in the interests of economy as well as good business expansion, men who have the courage to stand for the enforcement of the ordinances of the town and thereby maintain the moral character and ideals of the city.” Projecting—on the very day that Warren Harding became president—an apolitical normalcy, “refus[ing] to develop or discuss any factional issue in this campaign,” and “vouch[ing] for every candidate on the ‘Citizens’ ticket,” he assured the public that a “‘Radical’ has no place in such a position any more than a ‘Liberal’....”

Even voters’ complaints that candidates had been “very vague in regard to what they stood for” were unable to tempt McIlrath to violate his self-imposed promise not to campaign on “factional issues,” but just three days before the election “a few mis-statements relative to my position on certain questions pertaining to the blue laws” did finally prompt McIlrath to speak out. In particular, he objected to allegations that “I would go as far as to interfere with the personal habits and practices of individuals that did not conform to my own of thinking.” After noting the obvious point that no mayor was authorized to enforce restrictions not provided for by ordinances or statutes, he allowed as that he stood for “a clean Grinnell or a standard of public morals that will be

161“J. C. Martin Was Buried Tuesday,” Grinnell Herald-Register, July 1, 1943, on http://www.grinnell.lib.ia.us/Obit/M/MartinJC.pdf
wholesome for the great aggregation of young people that make up the whole life as well as the school life of our city." Without explanation McIlrath also revealed that he had developed a position on the completely unrelated matter of utility rates, which, he owned, were "little short of burdensome, but any candidate would...show a great lack of judgment who takes a rap at such utilities until he had made a thorough and impartial investigation of such rates by competent authorities"; judiciously he would then "feel in duty bound to use my influence to bring about such action that would secure justice to producer and consumer alike." And to make sure that the electorate had not forgotten his program of subordinating "the administration of city affairs [to] the highest kind of business efficiency obtainable," McIlrath promised that as mayor he would "give to the municipal affairs the same active interest, hard work and careful attention to details which heretofore I have given to my own private business."164

Despite McIlrath’s reluctance to be pinned down on specific policies, he was well known as an opponent of smoking. (Although a member of the Congregational church from the time he moved to Grinnell in 1909, McIlrath for almost 25 years taught an adult Sunday School at the First Methodist church; whether this engagement had any connection to his position on cigarette sales is unknown.)165 The author of a purportedly humorous letter to the editor observed several weeks before the election that “sum say if Mac is elected, he wunt let ennyboddy smoke on Sunday nor Thanksgiving day, but if Jess [Peoples ticket candidate Jesse Fellows] is Mayr they can smoke every day and nites to, after they have gon to bed even if they do set the howse on fire....” Moreover, incumbent mayor and Independent candidate Dan White “don’t care a dam who smokes or goze to church and he wunt interfeer with no smoker nor no drinker if he donte drink nuthing hotter than Wawter or Cowfee.166

Despite his earnestness and zeal on the subject, McIlrath also displayed a sense of humor on cigarette law enforcement in his newspaper column just a week after he had been sworn in. After a mayor in Iowa had recently been “elected on an anti-cigarette and law and order platform,” the city council appointed a young

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164“Our Forum: From J. L. McIrath [sic],” GH, Mar. 25, 1921 (4:3-4 at 4).
165“J. L. McIrath, Former Mayor Dies Monday,” Grinnell Herald-Register, Nov. 24, 1955, on http://www.grinnell.lib.ia.us/Obit/Mc/McIrathJames.pdf. He was returned as belonging to the Congregational church in 1915. Iowa Census 1915, Poweshieek County, Grinnell, Card No. [A]835. McIrath’s wife was for many years an active member of the Daughters of the American Revolution, but it is not otherwise known whether she had any ties to anti-smoking groups. “They Were Married at Marengo Parsonage a Half Century Ago,” June 1942 (unsourced newspaper clipping furnished by James L. McIlrath).
166“Our Forum,” GH, Mar. 1, 1921 (4:3) (Petrolum V Nesby, letter to editor).
lawyer as city solicitor “who was some what [sic] of a cigarette smoker. On being sworn into office he thanked the council for the honor bestowed on him and addressing the Mayor assured him every cooperation in enforcing the law and making a clean city. ‘All right,’ replied the Mayor. ‘Just tell me where you are buying your cigarettes?’”

McIlrath’s ability to take a joke on the subject was (presumably) on display a few months later when he wrote in his column: “The Mayor has just received a package of twenty-four books of cigarette papers from the American Tobacco Co., of Durham, N.C. The merchant who placed the order for for [sic] use [sic; should be “us”?] forgot to include the tobacco otherwise the papers are worthless to us. However if he will call at our office we will gladly remit for them.” Since the sale of cigarette papers was as unlawful as the sale of cigarettes without a permit, and since no one in Grinnell (thanks to McIlrath) had a permit, this transaction was unlawful (at least as mediated by a merchant, though a consumer could lawfully have directly bought cigarettes for his own use from an out-of-state seller). But even if it had been lawful, McIlrath’s making and smoking his own cigarettes while spearheading the city’s drive against (manufactured) cigarette sales would have been so bizarre as surely to have prompted his opponents to accuse him of hypocrisy. Since McIlrath’s platform clearly stated that he did not smoke, perhaps the order placed in his name had been an anonymous hoax and McIlrath was jocularly acknowledging and trying to smoke out the hoaxster. (That McIlrath was a lifelong nonsmoker was consistent with his ability in 1951 to blow out all 80 candles on his 80th birthday, “indicating that he has lost none of his lung power which he had developed during his 50 years...as a livestock auctioneer.”)

At the special council meeting on June 20, 1921, Cratty of the Citizens ticket moved—seconded by Carney, the sole People’s ticket member—a framework resolution putting the city in principle on record in favor of licensure. After citing the new cigarette law as making it optional with city councils to grant permits and as “rigidly” safeguarding minors’ interests, the proposed resolution focused primarily on the public and private financial advantages accruing from a sales regime:

WHEREAS, Refusal to grant permits under said law will deprive the city of revenue and dealers of profits that will go to other municipalities and will not insure protection to

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167 [J. L. McIlrath,] “Mayor’s Corner,” GH, Apr. 12, 1921 (4:5-6).
169 See below.
170 “J. L. McIlrath Was Honored on 80th Birthday Saturday,” Montezuma Republican, Sept. 27, 1951 (SHSI IC, biography clippings file).
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minors.

THEREFORE BE IT RESOLVED, that it is the sense of this Council that upon proper applications being made and strict compliance with the said law relative to applications for and the granting of said permits, that [sic] permits will be granted by the City Council of the City of Grinnell, Iowa.¹⁷¹

No member having joined the mover and the second, the motion was defeated 2 to 4,¹⁷² and Grinnell became one of the first cities in Iowa programmatically to oppose licensure, although strictly speaking the form of the defeated resolution did not necessarily mean that the majority had committed itself to denying all individual requests.

Unfortunately, the press failed to shed any light on the arguments deployed at the meeting, but Mayor McIlrath in his regular column in the Grinnell Herald—which at least through September published no cigarette advertisements¹⁷³—offered a sparse account of “[o]ne of the most spirited council meetings yet held under the present administration,” the cigarette permit question being “[t]he principal bone of contention....” After the aforementioned resolution had been presented by the owner of the Rex Cigar store, 25-year-old¹⁷⁴ E. J. Sullivan¹⁷⁵—previously engaged in the bank business in Canada, Chicago, Davenport, and Los Angeles, Sullivan had just bought the store in February¹⁷⁶—a 90-minute discussion ensued, resulting in its defeat, which the mayor “heartily endorse[d]..., believing it to be the sentiment of the majority of the voters of Grinnell.”¹⁷⁷ A month later, the Poweshiek county board of supervisors reinforced the council’s action by refusing to grant a permit to an applicant: “If Grinnell wants cigarettes sold in the city or just outside, the Board thinks the council is abundantly able to handle the matter.”¹⁷⁸

¹⁷¹“Cigarettes Lose Out,” GH, June 21, 1921 (1:1) (minutes).
¹⁷²“Cigarettes Lose Out,” GH, June 21, 1921 (1:1) (minutes).
¹⁷³However, both before and after cigarette ads became lawful on July 4, 1921, the Herald did publish some pipe tobacco ads. E.g., GH, July 29, 1921 (7:4-6). In contrast, the Register early on published ads for Lucky Strike and Chesterfield. GR, July 7, 1921 (2:7, 3:5-7).
¹⁷⁴1925 Population Census Schedule—Iowa, Roll No. 344, Poweshiek County, Grinnell, 2d Ward.
¹⁷⁵“Mayor’s Corner,” GH, June 21, 1921 (2:4).
¹⁷⁷“Mayor’s Corner,” GH, June 21, 1921 (2:4).
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Despite these setbacks, would-be cigarette sellers did not abandon their efforts to undo the council’s action. At the council meeting on August 1, 1921, which lasted four and a half hours but dealt with other matters as well, such as utilities and the city dump, the American Legion, represented by John Horn, a 26-year-old bank bookkeeper who had unsuccessfully run for city treasurer against the People’s ticket candidate, asked the council to reconsider its refusal to permit cigarette sales. In a remarkable role reversal for a churchman, one Rev. Mr. Roberts—who, interestingly, had to be imported from Sheffield, 80 miles away—“spoke in behalf of the Legion and the change of sentiment that had come over the country in its attitude toward this habit.” However, as the mayor ironically reported in his column: “Further discussion soon revealed the fact that this so-called change of sentiment had not taken possession of the council as yet and the matter was not brought to a vote.”

On April 3, 1922, the day before the first anniversary of the new council’s swearing in, Emery Boren and Carl Phelps, two restaurant owners, joined Sullivan in presenting petitions requesting permits. Mayor McIlrath broke the tie-vote by voting No and thus preserved the ban.

In explaining the basis for his vote to Grinnell’s citizens three days later, Mayor McIlrath revealed an elaborated, deeply held, and historically shaped view of cigarette sales. His motivation for disclosing these beliefs was, once again, rooted in what he regarded as critics’ misstatements of his actions: “As mayor I have been frequently accused of trying to force my personal opinion upon the people of this community by those who have been opposed to the policies of the present administration.” In the not unrelated area of banning the public showing of movies on Sundays, he had experienced vindication in the form of an Iowa Supreme Court decision, issued the day after the council vote, that he took as “proving that I was clearly within my rights on one of these questions where religious intolerance was charged and [I] was simply carrying out the policies of the community as outlined in the laws and ordinances of the city that were handed to me at the beginning of this administration.”

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179 “Mayor’s Corner,” GH, Aug. 2, 1921 (4:1).
180 “Carl Phelps Has Gone,” undated clipping, on http://www.grinnell.lib.ia.us/Obit/P/PhelpsC.pdf. At the 1925 census Phelps was returned as a cafe owner with no religion.
182 “Mayor’s Corner—For You and Me,” GR, Apr. 6, 1922 (3:1-5 at 1-2). The case was G. W. Mart & Son v Grinnell, 194 Iowa 499 (1922).
concerned, whatever his “personal opinion” may have been regarding the “cigarette habit,” it was without weight in this discussion. Segueing to the history of the law, the mayor adopted what may well have been, at least for a secularist, an unprecedentedly broad, publicly articulated view of the taint with which the Iowa legislature intended to imbue cigarette sales even while empowering local governments to issue permits. McIlrath reminded his fellow citizens, who had been aware of his stance at the election, that for some period of time until July 1921, cigarette sales had been “absolutely abolished”:

A strong effort was made to appeal the law and legalize the traffic within the state but they [i.e., the legislature] refused to do so. Why? They must have had some reason other than their own personal opinion. The law making body of the state of Iowa has given the traffic in cigarettes whatever [sic] questionable flavor it may have and not the mayor of this or any other city. A license measure was enacted however which resembled the old mulct law governing the liquor traffic except that the option of granting a license was left with the town councils...instead of a county referendum. On this point as mayor I positively refused to cast the vote that would commit Grinnell to a license policy on this or any other traffic which has been considered questionable in the eyes of the state law or the local sentiment of my constituents and as I stated to the members of the council last Monday under these circumstances I would owe my resignation to this council if I would commit Grinnell to such a license law before the community had expressed themselves otherwise by a referendum vote. I do not believe that the voters of Grinnell elected me to license the cigarette traffic or any other traffic not having the moral freedom of the laws of the state. If the cigarette traffic is to be legalized within the state and given its full moral freedom, I believe the state of Iowa should so enact, but until such time I shall refuse to commit Grinnell to any license policy unless I have a different expression from the one given at the last city election.183

Finally, McIlrath hypothetically set forth one criterion that he would use for deciding whether to vote to grant a permit and at the same time distinguished himself from those (presumably the WCTU and various church organizations) that would interfere with smoking—as opposed to buying—cigarettes:

If I were ever to cast my vote for such a license I certainly would exercise my personal privilege of refusing to vote to issue such a license to any person whose court records showed had been wilful violators of the law governing such as I would have no reason to believe that the rights of the community would be safely guarded when such licenses were issued to such applicants. In this position we are dealing only with this question as a traffic and not in any way antagonizing those who may wish to indulge in the use of cigarettes as

183“Mayor’s Corner—For You and Me,” GR, Apr. 6, 1922 (3:1-5 at 3-5).
a habit. That is their own personal business and not the mayor’s. 184

The WCTU of Poweshiek county—whose local unit in Grinnell in March 1922 urged members to study conditions relating to “cigarette-using” and announced that Anti-Cigarette Sunday would take place April 23185—reported to the state convention in October 1922 that in “cooperation with others” it had “prevented licensing the cigarette in the County.”186 What activities it had engaged in to achieve that objective it did not reveal.

In spite of the ongoing ban on the sale of cigarettes in Grinnell, unlawful selling was nevertheless not unknown. For example, at the end of October and beginning of November 1922, state officers, who traveled all over Iowa, were in Grinnell investigating; in addition to finding a minor smoking a cigarette and identifying the boy who had given away cigarette papers to him (leading to judicial imposition of a fine), they “filed an information against George West, colored, an employee of a local cigar store, for selling cigarettes to minors.” A representative appeared before Superior Court Judge James Robison on November 3 to “plead guilty for the offender,” but no sentence had been passed by the time the local press lost interest in the case.187 What is remarkable about this account is that the Grinnell Herald omitted any mention whatsoever of the fact that this sale, regardless of whether it was to a minor or an adult, had violated the state law because neither that store nor any other store in Grinnell had been issued a permit by the city council. Yet the article said nothing about the owner’s failure to pay the mulct tax, imposition of a penalty for that failure, or any effort to seek an injunction to abate the nuisance that the owner was carrying on. Likewise, although the store owner had presumably sold the cigarettes without having paid the sales tax, neither a prosecution nor confiscation of the cigarettes in his possession was mentioned. Whether cigarette prosecutions were impeded by “the ‘silent’ sympathy of the well meaning public” is unknown, but McIlrath denounced “this class of citizen” whose failure to cooperate actively hampered liquor law prosecutions.188

184“Mayor’s Corner—For You and Me,” GR, Apr. 6, 1922 (3:1-5 at 5).
186Woman’s Christian Temperance Union of Iowa, Forty-Ninth Annual Convention 40 (1922).
187“For Selling Cigarettes,” GH, Nov. 3, 1922 (1:4). 32-year-old Missouri-born George West had been living in Des Moines in 1920 as a teamster for an ice and fruit company. At the time of the census only eight blacks live in Grinnell. 1920 Census of Population (HeritageQuest).
188“Mayor Puts It Before Public,” GR, Jan. 22, 1923 (1:1).
The paper may have ignored the city’s ban on cigarette sales, but not another dimension of the cause in which many residents continued to take an intense interest. For example, on January 3 and 4, 1923, a “fair-sized crowd” attended a program of entertainers and speakers under the auspices of the Anti-Cigarette League presented at the Friends church and Christian church. The Herald observed that “[i]n addition to speaking on the evils of the cigarette habit, its spread and reforms,” Messrs Filmore and Huddleston had been “great entertainers,” who “kept the audience in good humor throughout the program” and would, if their appearance had been better advertised, have faced a “much larger crowd.”

By February 1923 Grinnell was gearing up for the biennial city election. The tickets’ fluid and/or nonbinding character was reflected even in their name changes: this time round McIlrath’s group called themselves Progressives, while their opponents nominated candidates “under the party name of ‘Citizens’ the idea being to make the...candidates a group to be voted for on one ticket.” Initially the Citizens’ mayoral nomination was James Harpster, who had been elected to the city council in 1921 on McIlrath’s Citizenship ticket. In the wake of McIlrath’s intimation on March 1 of the possibility of being a candidate for reelection—“while I feel that I cannot really afford to give the city two more years of my time, there are some things I can afford better than others”—the Citizens ticket, which had already undergone changes in composition, now was headed by former mayor Daniel White, a founder and for many years director of the Mutual Home Loan & Savings Association. The six Progressive candidates for city council—every one of whom McIlrath heartily endorsed as owning his own home or place of business and as a taxpayer and thus “in a position to understand the problem of the taxpayers, and carefully guard their interests”—were: James Corrough (farmer), Norman Pilgrim (retired farmer), Horace S. Lowrey (none), Fred Dee (director of Grinnell State Bank and

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189“Against Cigarettes,” GH, Jan. 5, 1923 (1:1).
190“Name Ticket for Election March 26th,” GR, Feb. 22, 1923 (1:1).
191“McIlrath Says He May Be Candidate,” GR, Mar. 1, 1923 (2:6).
193“One Ticket for Election March 26th,” GR, Mar. 1, 1923 (1:1).
194“Mayor McIlrath Gives His Platform,” GR, Mar. 19, 1923 (1:3-5 at 5).
195On all the candidates of both tickets, see “White to Head the ‘Citizens’” and “New Ticket Now in Field Headed by Mac,” GR, Mar. 8, 1923 (1:1); 1920 Census of Population (HeritageQuest); [Untitled], GH, May 23, 1924 (4:2).

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Methodist Episcopal church Sunday School superintendent), 196 John Will Ent (owner of Grinnell Laundry Company), 197 and David McBlain (engineer), 198 Lowrey and McBlain being incumbents. The five Citizens candidates (none of whom was an incumbent or a candidate in the Third Ward) included Gilbert Hatcher (own-account automobile dealer), 199 Howard Triplett (planing mill owner), 200 Morris Bidwell (electric utility engineer), Albert Dickerson (garage owner), 201 and John Jantzen (pop corn elevator laborer). 202

During the run-up to the election the two mayoral candidates explained in some detail their tickets’ platforms, of which cigarette sales and Sunday movies were virtually the only matters set forth with sufficient specificity to put the voters on notice as to what they might expect from either administration. To be sure, White’s statement left readers awash in platitudes such as “[t]he greatest good to the greatest number is always a safe and sane policy” and “I am committed to a city policy that will, as nearly as possible, meet with the reasonable and lawful desires of all our citizens....” Arguably no less trite was his belief in administering the city so as to increase business and engender “a spirit of cordial invitation to people to come to our city to live and transact business,” but the public might have understood his promise to “endeavor, by lawful means, to bring back and hold patronage that has been lost to us through ignoring and violating such a policy” to encompass the McIlrath council’s outlawing of the cigarette trade, which prompted addicted residents to patronize out-of-town stores. So, too, might voters have detected a reference to the refusal to grant

197 At the 1915 Iowa census Ent was a traveling salesman without a religion; at the 1925 census he was a Baptist. Iowa Census 1915, Poweshiek County, Card No. A911; 1925 Population Census Schedule—Iowa, Roll No. 344, Poweshiek County, Grinnell, 3d Ward.
201 In 1915 Dickerson was returned as a Baptist. Iowa Census 1915, Poweshiek County, Grinnell, Card No. B-153.
202 At the 1925 census, Jantzen was returned a shipping clerk and a Methodist/Baptist. 1925 Population Census Schedule—Iowa, Roll No. 344, Poweshiek County, Grinnell, 4th Ward.
permits in White’s declaration that “I am unalterably opposed to imposing upon the many the peculiar wishes and dogmatic demands of any clique or faction.” But there was no need to speculate on opaque references to cigarettes: after all, White devoted more space to the question than any other in his platform statement:

There is a good deal of talk about permits to sell cigarettes. The Iowa law authorizes the sale of cigarettes, but gives the city council power to grant or refuse permits to sell them. I do not smoke cigarettes. If the council grants permits to sell them, dealers will be protected in their rights. If the council refuses to grant permits to sell them, violators of the law will be prosecuted. My personal attitude, if called upon to express it officially, will be governed by the will of the majority, as I may be able to determine it. I do not feel called upon to commit myself to a policy which may prove to be the policy of an inconsiderable minority. This would not be fair to the people generally.

Since White “believe[d] in indiscriminate enforcement of all laws,” his promise to apply his unconditional enforcement policy to whatever stance the council took shed as little light on his own position as did his plan to divine the townspeople’s views in case he was required to cast a tie-breaking vote. Nevertheless, since his ticket was viewed as hostile to McIlrath’s administration and as favoring licensure, voters could be presumed to interpret “inconsiderable minority” to refer to the antis.

McIlrath’s platform, presented a week later, was more forthcoming than that of White, whom he challenged to prove his assumption “that any legitimate business has been driven away from Grinnell or that we have as a town incurred the hate of any one [sic] on the outside unless it is a few disgruntled bootleggers and booze-fighters who have been obliged to leave town and are anxiously awaiting the return of the old regime that they may return to Grinnell and carry on their business unmolested.” After having thrown down the gauntlet to White, the incumbent confusingly asserted that “we coincide with him exactly and have no quarrel with him” regarding cigarettes and Sunday movies:

He says he does smoke cigarettes. Neither do we nor do we have any quarrel with those who do so long as they procure them in the manner prescribed by law. If the council votes to

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203 “Dan White States His Platform,” GR, Mar. 12, 1923 (1:3-5 at 3).
204 “Dan White States His Platform,” GR, Mar. 12, 1923 (1:3-5, at 1-2). White made parallel opaque comments on Sunday movies.
license the sale of cigarettes we bow to their decision but if obliged to cast a deciding vote we still refuse to vote to license a traffic which the state law will not give the moral right of way.\footnote{207}

Since White had never stated that he would break a tie by voting against granting permits, it is unclear why McIlrath glossed over their sharp difference, but precisely what goal he was pursuing with the suppression of cigarette sales absent any objection to smoking them he did not explain. Instead, he emphasized that movies and cigarettes were "only incidents in the process of law enforcement," while the taxpayers were "vitally interested" in other questions as well. Concrete where White had been silent, McIlrath specified certain aspects of the city disposal plant, police, superior court, and streets as interesting taxpayers more than "imaginary things" developed by "anti-administrationists...purely for campaign purposes."\footnote{208}

In its large newspaper advertisement several days before the election, the Citizens ticket emphasized that if it were elected, "individual dictation" would yield to government by majority rule and legislation by the council. Taking yet further aim at McIlrath and his "vilifying screed" of a platform, the Citizens defended farmers who had ceased trading in Grinnell as "neither bootleggers nor booze fighters."\footnote{209}

Gauging "how moral" each party was in the upcoming "moral election" was easy for one self-appointed town humorist: "Jim McIlrath don’t smoke cigarettes and so don’t Dan, of who it may be said he is strictly moral. But Jim McIlrath don’t even chew gum so if Jim wins maybe it’s going to be a ex-Spearment after all."\footnote{210} Less amused by McIlrath’s moral leadership was the dean of the city’s (and county’s) bar, John H. Patton, a one-time city solicitor and mayor,\footnote{211} whose animus against McIlrath was presumably in part shaped by his unsuccessful representation of the plaintiff in the aforementioned case testing the city ordinance against Sunday movies.\footnote{212} Four days before the election Patton warned voters that if McIlrath were reelected, "with three pliable echoes [on the city council], as he has had the past two years, his personal notions and ambition are
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likely to be very expensive.” Mocking McIlrath’s declaration that movies and cigarettes were “only incidents” as capable of fooling no one, Patton charged that the mayor had “said the same thing in the press two years ago. After he was elected he insisted that he was elected on the Sunday movie issue” and then spent $3,000 of “taxpayers’ money” on the litigation. Patton concluded that McIlrath “seems to be more concerned about making people live according to his pattern,” which was none of the mayor’s business.213

At the election on March 26, which generated more interest than any in years and the largest turn-out in Grinnell’s history,214 McIlrath secured 58 percent of the votes. His Progressive ticket won four of the six council seats, including the two at-large races, by virtually the same margin as the mayor’s. Lowrey, the only successful incumbent, won 72 percent of the vote in the First Ward, but Ent gained only 47 percent of the vote against two independent candidates in the Third Ward, where the Citizens fielded none, although it was the only ward in which White outpolled McIlrath. Dickerson won in the Second Ward by a bare majority of 50.7 percent, while Jantzen with 55 percent turned out the incumbent McBlain.215

Patton may have been depressed that the “cohorts of darkness and retrogression prevailed,” but he took hope from the “protest” vote for the Citizens ticket, which he regarded as “almost a majority....” Insisting that—without explaining why—only the vote for individual ward councilmen (as opposed to at-large councilmen or mayor) could be “considered in determining the wishes of the voters as to administrative policy,” he concluded that if, as many believed, voters treated cigarette permits and Sunday movies as an issue, it was “very clear” that a majority of Second, Third, and Fourth ward voters had voted for permits and movies. Rather than analyzing the underlying substantive issues, Patton merely left readers with the trivial arithmetical question as to whether the fewer than three-fourths majority of the First ward should determine the city administration’s policy. In any event, without on-site cigarette sales (and Sunday movies), Grinnell would not be “restored to its former favorable estimate by the traveling public and the people in the surrounding country....”216

Following its first meeting two weeks earlier,217 all six members of the new

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214“Biggest Vote in History of Grinnell,” GR, Mar. 29, 1923 (1:1).
215Calculated according to “McIlrath Winner,” GH, Mar. 27, 1923 (1:1); “How the Vote Was Cast,” GR, Mar. 29, 1923 (1:6-7).

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city council met in special session on April 16 to deal with the payment of interest on water bonds and other matters. Not a single No was cast on any motion except that moved and seconded by the two Citizens representatives Dickerson and Jantzen to grant Sullivan’s newest application for a cigarette permit at the Rex Cigar Store. Because councilman Ent broke ranks with his No-voting Progressive colleagues to vote Aye, the council was tied 3 to 3, causing Mayor McIlrath, unsurprisingly, to cast the deciding vote against violating his own principles, his sense of the town majority’s stance, and granting the city’s first permit ever. Ent’s apostasy may not have been unforeseen: Patton’s post-mortem election analysis observed that it had been “well known to the promoters of the Citizens ticket that either [sic] of the three candidates in the Third ward would be satisfactory, hence no candidate for councilman from the Third ward was placed upon the Citizens ballot.” To be sure, the fact that the Citizens ticket in its advertising urged Third Ward voters to place an X in the square opposite the name of “a Third Ward candidate for councilman...no matter where you find it,” still left unexplained why the Progressives included Ent on their ticket.

In its piece the next day on the council’s action, the Herald provided some background on how cigarettes had taken “the ropes in the first round.” In addition to the tactical criticism voiced by some proponents of licensing of Sullivan’s “starting something” at an inopportune time (meaning, presumably, while McIlrath was still in a position to break deadlocks) and speculation that certain tobacco dealers in Grinnell would probably be unable to obtain permits even if the council decided to grant them to others, the newspaper focused on several fundamental dimensions of the conflict:

Councilman Dickerson says that he has tried to inform himself as to the desires of the people, and so canvassed the business houses finding an overwhelming majority in favor of licensing the sale. This, he thinks, indicates the feeling of the public. Those of course favoring the license say it will outlaw bootlegging of cigarettes, and make it much harder for minors to get them, and also that it is costing the people of Grinnell too much in gasoline to drive to adjoining towns to buy their coffin nails.

Those opposing the license stand on the proposition that the young public needs an education on the injurious effects of cigarettes and that outlawing cigarettes is the best

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218“Minutes of Council Meeting,” GH, Apr. 17, 1923 (5:1-2) (Apr. 16); “Proceedings of the City Council,” GR, Apr. 19, 1923 (3:3-4). At this time the Register was publishing cigarette ads regularly. E.g., GR, Apr. 16, 1923 (2:5) and Apr. 23, 1923 (2:7) (Lucky Strike).


221“Our Cigarette Corner,” GH, Apr. 17, 1923 (1:3).
That Dickerson, himself a businessman, surveyed only other business owners, was hardly surprising, but the report that the anti-smoking movement was sophisticated enough to understand the ban as an educational measure designed to delegitimate cigarettes among young people confirms the view of Grinnell as the leading example of a non-religiously motivated refusal to grant permits; the leakage represented by the (inconvenient and expensive) out-of-town cigarette-buying trips may even have reinforced rather than under undermined the denormalization efforts.

Enforcement of the state law also contributed to cigarettes’ image as contraband. In addition, “the best argument yet made against that license,” as the editor of the Herald noted, was that “so many of the dealers who wish to have them licensed have been guilty of selling them illegally.” If Grinnell ever licensed them, he urged the council to grant the privilege only to law-abiding tobacco dealers “and not those who have been caught red-handed in the act of violating the law.” (The editorialist went on, with impeccable logic, to ask rhetorically why, when a cigarette manufacturer or wholesaler “sends a salesman into a town where there is no license to secure customers,” it should not be treated as a “bootlegger within the meaning of the law as much as the lesser man who hocks them in the alley?”)

The pro-licensing group’s strategy of biding its time until McIlrath, the driving force behind city government’s steadfast refusal to permit cigarette sales, left the mayor’s office, finally came to fruition on January 21, 1924, when he confirmed rumors that he would resign no later than April 7. Although he would give up his position in any event in order to take up work that would no longer permit him the time required by the mayoralty, he also admitted that he might become a candidate for state legislative representative in the Republican primary in June. The Grinnell Register editorially took up the cudgels for McIlrath as representative, praising his knowledge of agriculture and the contribution he could make in the legislature to the “relief of the farm interests.” The breathtaking praise that the prominent Republican editor and owner, Charles Needham, bestowed on Vladimir Ilyich Lenin—“If we try to judge him by the effete standards of a smoothly working society, his greatness becomes doubtful.
But Lenin worked under conditions which few Americans can ever understand. ... Russia has advanced amazingly under his influence.... He was a Communist, but Communism is better than imperialism"\textsuperscript{226}—who died the same day that McIlrath announced his resignation, manifestly did not taint McIlrath, who was elected in November 1924 and became a Republican House member for one term.\textsuperscript{227}

Once McIlrath had officially tendered his resignation to the city council on February 4,\textsuperscript{228} a long battle erupted over electing his successor. At its meeting on April 7—the day McIlrath’s resignation went into effect—a “sudden and unexpected upheaval in the smooth running machinery of the city administration...re-opened several old arguments that were supposed to have been dead for lo these many months.”\textsuperscript{225} With Lowrey, the council president, presiding instead of McIlrath, the council undertook several unsuccessful efforts to elect a new mayor. The two Citizens members, Dickerson and Jantzen, moved and seconded the election of the Progressive Corrough to McIlrath’s unexpired term,\textsuperscript{229} but the council deadlocked at 3 to 3 (the nominee presumably voting for himself and all his ticket mates against him). Dickerson raised the point of order that since, according to an 1888 rule “the presiding officer...shall have the casting vote on all questions upon which the council is equally divided but otherwise not,” Lowrey was not entitled to vote on an otherwise non-tie vote, but Lowrey, arguing that the rule was not law and that the consequence of Dickerson’s interpretation would be the First Ward’s disenfranchisement, declared the motion lost and Corrough was not elected.\textsuperscript{230} Then Corrough moved and his ticket-mate Pilgrim seconded that Ross V. Coutts, a bookkeeper for a building materials firm, be elected mayor, but this motion also lost. Making a more concerted effort at 9:30 that evening, the council met in special session to elect a mayor. Dickerson moved and Pilgrim seconded that the council vote by ballot to fill the mayoral vacancy. However, another impasse arose when Corrough again received three votes and Frank Knight, an auto salesman who


\textsuperscript{227}\textit{State of Iowa: 1925-26: Official Register} 289.

\textsuperscript{228}“Proceedings of the City Council,” \textit{GR}, Feb. 7, 1924 (5:3-5 at 5) (Feb. 4).

\textsuperscript{229}“Grinnell Is Mayorless As Days Pass By,” \textit{GR}, Apr. 10, 1924 (1:6).


\textsuperscript{231}“Grinnell Is Mayorless As Days Pass By,” \textit{GR}, Apr. 10, 1924 (1:6).
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was an employer at a garage, received the same number.\textsuperscript{232}

The stalemate, as the out-of-town press observed, was rooted in the council’s even split on the McIlrath administration’s ban on cigarette sales (and Sunday movies): “Now the opposition swear they will control the election [of the next mayor] and repeal the ordinance [sic].”\textsuperscript{233} In the event, even before a new mayor was elected, the opposition, more by crook than by hook, achieved its objective. “In the absence of two of the up-holders of the blue laws,”\textsuperscript{234} Progressive-ticket anti-cigarette members, Lowrey and Pilgrim, at the special council meeting on May 19, 1924, Dickerson was elected chairman. After the council had voted to buy two flags and requisition two copies of the Iowa Code, Jantzen, seconded by Ent, moved that Sullivan be granted a permit for the Rex Cigar store.\textsuperscript{235} With Dickerson joining the pro-permit faction, only Corrough voted No.\textsuperscript{236} Thus, after a three-year struggle, the free commerce forces won by an anti-climactic 3 to 1 vote, and for the first time in 28 years one store could lawfully sell cigarettes, at least to adults.

Whether the WCTU had been caught off guard is not clear, but the next day at the Grinnell local branch’s monthly meeting—which was held at the home of member Mrs. John Mincer, whose non-drinking, -smoking, or -chewing husband, astonishingly, owned a pool hall, which “he endeavored to maintain...along strictly business lines”\textsuperscript{237}—after the president had opened the session for the 42 attendees with a song, “The World Is Going Dry,” and scripture had been read, “Miss Buck, Lincoln and Richards were appointed to give attention to the city

\textsuperscript{232}“Proceedings of the City Council,” \textit{GR}, Apr. 10, 1924 (5:1-3) (Apr. 7). The biographical information is taken from the 1920 Census of Population (HeritageQuest), the name index to which misread “Coutts” on the handwritten schedule as “Cants.”

\textsuperscript{233}“Grinnell Having Sunday Fight, Is Without a Mayor,” \textit{DD&L}, Apr. 10, 1924 (7:1). See also “Grinnell Still Sans Mayor as Council Fights,” \textit{ICP-C}, Apr. 11, 1924 (1:6); “Grinnell Is Without a Mayor,” \textit{Oelwein Register}, Apr. 10, 1924 (2:5). The out-of-town press reference to an ordinance against cigarettes was erroneous: the council had merely refused to grant permits.

\textsuperscript{234}“Council Grants Cigarette Permit,” \textit{Grinnell Scarlet and Black}, May 21, 1924 (1:2).

\textsuperscript{235}“Proceedings of the City Council,” \textit{GR}, May 22, 1924 (2:3); “Minutes of City Council, \textit{GH}, May 23, 1924 (3:4) (May 19).

\textsuperscript{236}“Given Permit to Sell Cigarettes,” \textit{GH}, May 20, 1924 (1:6).

councils [sic] action toward the selling of cigarettes[.].” If they in fact hastened to perform their mission, it went unreported and failed: three days after its precedent-setting vote, the council, meeting again in special session, this time called by three councilmen for the purpose of approving cigarette bonds, granted, by the same voting configuration, a permit to restaurateur Phelps. The only implicit analysis of this turn of events that the Register offered was a nod to an editorial in a Des Moines paper that prompted the conclusion that cigarettes had become “the great national smoke” and “the ideal smoke” because, unlike cigars, they were short and cheap. Even less analytically, the Grinnell College student newspaper was elated that Mr. Sullivan had traveled to Des Moines several times to buy “the necessary supplies” and downright proud that he was going to announce their arrival in a “Scarlet and Black advertisement.” And that pride swelled the collegiate editorial breast much sooner than the ten-day wait Sullivan had predicted: on May 24, one day after the Rex Cigar Store had run a large ad in the Herald—adjoining a piece on, of all things, the aforementioned WCTU meeting—announcing its “complete line of Turkish and Domestic Blends” and adding at the bottom, “Positively No Cigarettes to Minors,” the Grinnell Scarlet and Black published one more than twice as large, shouting that “The CAMELS Are Here. Arrived at THE REX CIGAR STORE This Morning.” After listing 10 brands he carried, Sullivan dropped the “Positively,” simply stating in the smallest unbolded font: “No Cigarettes Sold to Minors.” Since a solid majority of Grinnell students were presumably under the legal age of 21 for buying or being sold or given cigarettes, the advertisement itself represented precisely the kind of bad-faith temptation of minors that all

238[Minutes of May 20, 1924], Record of Woman’s Christian Temperance Union, Grinnell, Iowa, Book V [1913-1928] at 157, in WCTU of Iowa, Unprocessed, Local Branches, Grinnell, Iowa Women’s Archive. University of Iowa. For a much abbreviated account of the meeting that failed to describe the “regular business,” see “Entertain W.C.T.U.,” GH, May 23, 1924 (4:4-5). Buck was presumably 65-year-old Harriet Buck, a school teacher, who for many years was treasurer of the local WCTU. “Miss Harriet C. Buck Is Dead,” [unsourced newspaper clipping], Aug. 20, 1926, on http://www.grinnell.lib.ia.us/Obit/B/BuckHarrietC.pdf

239“Council Votes Cigaret Permits to Both,” GR, May 22, 1924 (1:2); Proceedings of the City Council, GR, May 22, 1924 (2:3-4); “Grant C. C. Phelps Cigarette Permit,” GH, May 23, 1924 (1:2); “Minutes of City Council,” GH, May 23, 1924 (3:4) (May 22).


241“Council Grants Cigarette Permit,” Grinnell Scarlet and Black, May 21, 1924 (1:2).

242GH, May 23, 1924 (4:5-6).

243Grinnell Scarlet and Black, May 24, 1924 (2:4-6).
elements of the anti-cigarette movement had all along feared and suspected would accompany legalization and licensure. This reckless commercialism was of a piece with the fact that Sullivan had already been convicted twice of violating the cigarette law\textsuperscript{244} and cast the three-member council majority into further disrepute.

Grinnell’s antis had, to be sure, lost the battle against the suppression of cigarette sales, but they could not resist launching an afterclap to underscore the underhanded manner in which the commerce über alles forces had secured their triumph. The day after the rump council had granted the second permit, councilman at large Pilgrim\textsuperscript{245} announced on May 22 that he was resigning in protest. On returning on May 20 from an out-of-state trip that could not be put off, Pilgrim was informed that a special meeting had been called (on May 19) during his absence at which a permit was granted. He explained why he regarded the scheduling as devious:

As this was one of the clean-cut issues during the last campaign and while both sides had their ardent devotees, the result of the election gave forth no uncertain sound as to where the large majority stood on the question. So I have felt in honor bound to carry out the desires of my constituency on this question and hence it struck me as a little cowardly or at least an unmanly act on the part of some members of the council to take advantage of the absence of some of the members of the council who have consistently stood for the platform upon which they were elected.\textsuperscript{246}

He had nevertheless been willing to let the whole incident pass without protest, “[b]ut the straw that broke the camel’s back” had been the appearance of two police officers on the morning of May 22 calling him out of bed and demanding his presence at the city office. Having assured the city clerk that he would attend the meeting as soon as he received notice of it and never having been in police custody before, Pilgrim took such umbrage at this “drastic” step\textsuperscript{247} that he apparently resigned rather than attend the meeting at which the second permit was granted.

Surprisingly, the circumstances surrounding his encounter with the police were even more bizarre than Pilgrim himself had let on. As a backgrounder in the \textit{Herald} disclosed, the police had rung his bell around five o’clock in the morning

\textsuperscript{244}See below this ch.

\textsuperscript{245}Pilgrim was returned as a Baptist in 1915 and a Methodist in 1925. Iowa Census 1915, Poweshiek County, Grinnell, Card No. A19; 1925 Population Census Schedule—Iowa, Roll No. 344, Poweshiek County, Grinnell, 4th Ward.

\textsuperscript{246}“Councilman N. O. Pilgrim Resigns,” \textit{GH}, May 23, 1924 (1:1).

\textsuperscript{247}“Councilman N. O. Pilgrim Resigns,” \textit{GH}, May 23, 1924 (1:1).
to present him with a summons to appear at the council meeting at eight. Members of the council admitted to the *Herald* that Pilgrim had been “the victim of a misunderstanding” and that one policeman appearing somewhat later would have sufficed. Although it is unclear why the council members who had pushed through the permit on May 19 would have wanted to insure Pilgrim’s presence on May 22 when the second one would be debated, ironically, had Pilgrim attended the meeting, he might have been able to mobilize greater resistance. However, without Lowrey—whose absence went unexplained and whose presence the other council members apparently did not seek to compel—he would presumably nevertheless have been unable to forge the tie to deny Phelps a permit.

Former Mayor McIlrath could barely contain his wrath. In a letter to the *Register* four days after Pilgrim’s resignation, he handed down a damning judgment on the political processes, remarking:

> That the game played in putting over this piece of legislation would not stand the ruling of a referee.
> That for the first time in the history of the city, Grinnell is committed to a license law...permitting a traffic which the state law will not give the moral right of way.
> That if getting the money is the chief argument there are many other things which would be equally...productive of revenue. Why not [l]icense them all and “get the money.”
> That accepting a place on a ticket representing a certain platform has no bearing with certain councilmen as to how they will vote on these questions when elected.
> That the cigarette license may have come to stay but the tactics of its promoters will not be forgotten in the next spring election so why not forget it for the time being.
> ...
> That the cigarette license seems to have been so important to the business interests of Grinnell in the minds of these three Councilmen, that it was necessary to deprive the entire First ward of their representation by taking advantage of the temporary absence of their Councilman [Lowrey].
> That there might have been some ground for sincerity in the purpose of these councilmen were it not for the fact that the first permit granted was to an applicant who had been twice convicted for violation of the Cigarette laws.249

Unfortunately, McIlrath failed to flesh out the details of the connections between and among the city’s “business interests,” cigarettes, and Councilmen Dickerson, Jantzen, and (the Progressive renegade) Ent. Had he analyzed these links,

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248[Untitled], *GH*, May 23, 1924 (4:2).
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perhaps he would have explained his belief in the inevitability of the future permanence of cigarette sales in Grinnell and explored whether and/or why his three-year successful resistance had been merely conjunctural, serendipitous, and ultimately subject to certain defeat, and what the anti-cigarette movement might have done to build a more solid base to overcome the businessmen’s profit über alles drive for licensure.

As a counterpoint to Pilgrim’s and McIlrath’s complaints and criticisms, the Herald also published a defense of the council by someone who professed not to be a member, but lacked the courage to self-identify. Taking exception to the impression created by opponents that a few members “had craftily waited until other members were out of town,” the anonymous letter writer insisted that the meeting, which “was perfectly legal in every respect,” had been called by (Progressive and No-voting) Corrough as well as by Ent and Dickerson. However, the gravamen of the riposte was the Schadenfreude at the sight of tables’ allegedly being turned:

If it is true that three of the councilmen were elected to oppose cigaret legislation, it is equally true that three others were elected to favor it. The same logic that applies to one applies to the other as well. On previous occasions attempts to grant cigaret permits were blocked by three members of the council and there was no outcry from the other three. Now, when the worm turns and the three under dogs are in the saddle temporarily, there is great indignation from some quarters, by people who forget that for more than a year a city with half its council favoring cigarets has been forced to bow to the will of the other half.

It still makes a difference whose ox is gored.250

What the author conveniently failed to deal with was that Grinnell had elected Progressives to four of the six council seats, thus affording them, especially with McIlrath as the tie-breaker, an insuperable majority. Regardless of whether the rump council had arranged the May 19 meeting as a surprise attack or not, given the overriding significance of the matter and intensity of convictions, making the outcome hinge on the fortuity of one-third of the membership’s absence was manifestly not an act of quintessentially democratic self-governance.

Undaunted by this brief postlude, the council, having earlier elected the editor of the Herald mayor and the owner of an implements business to replace Pilgrim,251 doubled the number of outstanding permits on June 16, 1924, by

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251“Ray Is Mayor,” *GH*, June 6, 1924 (1:5); “Minutes of City Council,” *GH*, June 6, 1924 (3:3-4) (June 3, W. G. Ray and Harry Sanders).
granting four more to a hotel, smoke house, news depot, and billiard parlor.\textsuperscript{252} Two years later, when five of the six permittees applied for new permits, the council accommodated all of them with two-year permits.\textsuperscript{253}

\textit{Indianola}

Located only 17 miles from Des Moines in an agricultural area in south-central Iowa, Indianola, the 59th largest city with a population of 3,488 in 1930, refused to issue any cigarette sales permits for the longest period among all 110 first- and second-class cities in Iowa: not until 1933, after 12 years, did the city council grant the first permits. Although the density of WCTU membership (1 in 75) in Warren county, of which Indianola was the seat, was one of the highest in the state, even more important for the longevity of prohibitionist practices in Indianola was the influence of the Methodist church and its educational institution, Simpson College, on whose campus smoking was prohibited.\textsuperscript{254}

The sentiment against cigarettes was so widespread and deeply ingrained in Indianola at the time the new cigarette law went into effect in mid-1921, that: “Not a single application for licenses to sell cigarettes was made here by business men. The feeling of the council on the subject was too well known for anyone to give them a chance to express it.”\textsuperscript{255} The WCTU in Indianola and Warren county actively combated cigarettes there, reporting to the 1923 state convention that it had “protested against renewal of cigarette license.”\textsuperscript{256}

That the town’s attitude toward cigarettes was still forcefully negative in 1927, when Indianola had already become the only first- or second-class city to continue the ban on cigarette sales, was visibly on display in connection with an expose by the Simpson College student newspaper of a plan by the American Tobacco Company to mail a sample package of cigarettes to every male student at the college and to sample the town as well in an effort to “stampede Indianola with the sale of cigarets....” As part of this plan a farmer named John Piffer had

\textsuperscript{252}“Proceedings of the City Council,” \textit{GR}, June 19, 1924 (5:4) (June 16); “Others Licensed to Sell Cigaretts,” \textit{GH}, June 17, 1924 (1:3); “Cigaret Licenses Granted to Four,” \textit{GR}, June 19, 1924 (4:2).

\textsuperscript{253}“Proceedings of the City Council,” \textit{GR}, June 7, 1926 (3:2-3) (June 3).


\textsuperscript{255}ICP-C, July 9, 1921 (3:4) (untitled).

\textsuperscript{256}Woman’s Christian Temperance Union of Iowa, \textit{Fiftieth Annual Convention} 46 (1923).
applied to the Warren County Board of Supervisors for a cigarette permit to set up a stand beyond the city limits on the north and south sides of town, which would net $300 a month. Although Piffer claimed that he would “advise anybody against” cigarettes, since he believed that they were being bootlegged anyway in Indianola, “he thought he might as well have the profits to use in paying for his farm....” However, after the board at its meetings in September and October had postponed action on his application, at its meeting on November 14 the board had refused the application, interestingly, on the grounds that issuance would both be contrary to the college’s interests and circumvent the city council’s regulations. However, ATC apparently had its own method for creating demand for cigarettes among students and townspeople (based on a modern understanding of early onset nicotine addiction): it was focusing on students “on the theory...that if the young man starts the habit early, he will be a regular customer of the tobacco industry for life.” To this end the company intended to send the male students several brands so that the light smoker might choose the one that suited him best, thus “making him a constant smoker.” If its readers had not intuited the point, the student newspaper added that “[c]ommercial reasons are back of the plans of the syndicate.”

The editor, Wendell Tutt, hastened to add that “it is not that we are opposed to cigarettes. They have their place....” Although the tobacco syndicate’s plan to “circumvent” the city council’s ban on cigarette selling was “not unlawful,” it was “underhanded and crooked.” The only illegality the editor could discern was sampling the entire male student body because more than half of it consisted of minors. Pushed by a letter to the editor arguing that since minors in Indianola who wanted cigarettes could and did buy them in Des Moines, thus profiting dealers there, “the dealers of Indianola should be allowed to use the profits of cigarette sales which are inevitable,” the editor returned to “The Fag Question” the next week. Sharpening the critique of the original article, whose purpose he now admitted was “to cripple, if possible,” the cigarette manufacturer’s...
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campaign, the editor observed that the company’s plan was to sample the college’s men, 75 percent of whom were under 21, “in order that they might develop the ‘habit’ and become regular customers in later life.” Turning bolder this time round, he now substituted “illegal” for “underhanded.” As for the suggestion that the Indianola dealers might as well receive the profits, he agreed that such a redistribution would be “a fine thing,” but asked whether “profits and material gain” were “the only goal in life....”

The cooperation between Warren county and Indianola was not a one-time phenomenon. (Similar coordination took place between the Poweshiek County board of supervisors and Grinnell.) Although the county board of supervisors did issue some cigarette permits in the 1920s, it steadfastly refused to grant permits to sell in locations it deemed too close to Indianola. Evansville, six miles away, was the closest place it had permitted sales; in 1928, it denied a permit to the owner of a filling station under a mile from Indianola. Unlike Piffer, who had twice unsuccessfully sought a permit at the same station, as had two other operators, J. E. Hackley, an applicant in 1932, did not simply abandon his quest for cigarette profits. On March 26 he applied for a permit to sell from a business combining a gasoline and oil filling station with a restaurant selling soft drinks, candy, and lunch—he had taken over the aforementioned gas station on March 1—located less than one mile north of Indianola, arguing that the board had no

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264In 1922 the supervisors refused to permit cigarette sales at a dance pavilion just outside of the city limits because they “did not care to issue license [sic] close to Grinnell when the city authorities refused to issue license [sic] inside the corporate limits.” “Local News,” Pella Chronicle, May 4, 1922 (4:1).

265According to the Warren County Auditor, the board granted the first permit in 1923. Supervisors’ Minute Book, No. 11, Warren County, Iowa, at 14-15 (Dec. 3, 1923) (to John C. Duncan) (copy furnished by Warren County Auditor); email from Mary Lynn Keene to Marc Linder (Feb. 4, 2008). See also Supervisors’ Minute Book, No. 11, Warren County, Iowa, at 126 (July 6, 1925) (to W. B. Evans); “County Board Proceedings,” Indianola Herald, Sept. 1, 1927 (7:6) (at July 5 meeting permit of sellers who gave up business cancelled and auditor directed to issue permit to seller in Beech); “Board Proceedings,” Indianola Herald, July 9, 1931 (7:1) (application for permit renewal granted at June 1 meeting).

266“Refuse Hackley Permission to Sell Cigarettes,” Indianola Herald, Apr. 7, 1932 (1:8).

267“Hackley Denied Permit to Sell Cigarettes Here,” Indianola Record, Apr. 7, 1932 (1:1).

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right to deny such an application. The board, which had consistently denied all permits within a five-mile radius of Indianola in deference to the city’s ban on cigarette sales within its limits, took the position that it did have the right to deny permits to everyone within that area, treating all alike. WCTU representatives, the Simpson College president, and the Indianola mayor attended the supervisors’ meeting on April 4, asking that the application be denied or postponed until the case’s legal aspects could be further studied. The board appeared to be proceeding in that direction anyway, since it was awaiting a report from Joseph Watson, Jr., the county attorney, who had already informed it that, since “legal precedent in such cases is conflicting,” he wanted more time to study the facts in the local case before submitting his report.269 The next day Watson delivered his report, which very cautiously stated that, based on the consistent precedent of denying all permits to persons operating at locations within a five- or six-mile radius of Indianola, the board was justified in denying one to Hackley. He added his (unexplicated) belief that the Iowa Supreme Court decision in *Ford Hopkins Co. v City of Iowa City*, which had been decided just two months earlier and had been called to his attention, was “‘not controlling in this matter.’” Unfazed, Hackley immediately insisted that “I don’t know just how soon but we are going to have cigarettes here.” His optimism derived from his having retained Des Moines lawyer Howard L. Bump, who planned straightaway to file an action seeking a writ of mandamus forcing the board to issue the permit.270

At its meeting on April 5 the board of supervisors offered a surprisingly detailed and concrete explanation of the reasons for its action, which proceeded from its (and its predecessors’) consistent denial of permits within a five-mile radius of Indianola, which it justified on the grounds that:

This board feels that since the City of Indianola has seen fit to deny applications for cigarette [sic] permits...and since the reason for said denial has been the presence...of Simpson College and the various public schools, this board should aid in the curbing of smoking and sale of cigarettes in said City, and feels that by denying the issuance of cigarette permits where the place of business is within a radius of five miles...it will be cooperating with the City of Indianola in preventing the smoking of cigarettes by the students in the various schools.... 271

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269 “No Action Yet on License to Sell Cigarettes,” *IT*, Apr. 5, 1932 (1:1). It is unclear that the Indianola city council had in fact passed an ordinance (as opposed to having refused to grant permits).


271 Supervisors’ Minute Book, No. 12, Warren County, Iowa, at 71 (Apr. 5, 1932) (copy supplied by Warren County Auditor). The minutes were published in “Board
Considerably less transparent was the constitutional basis for the board’s open declaration of assistance to a church school’s implementation of what was in part a religious tenet: “This board further feels that since Simpson College is a sectarian school and is attempting to prevent its students from smoking cigarettes, by denying permits within the above radius it will be aiding the college in its program.”

Hackley’s response to the board’s contention that it could not have discriminated against him because it had already denied applications for permits at the same filling station four or five times was that once the supervisors granted a permit in any part of the county outside of the incorporated towns, denying his application constituted unfair discrimination—even though the eight county permits then outstanding were all for locations more than five miles distant from Indianola.

On April 7, two days after being rebuffed by the council, Hackley filed his petition for a writ of mandamus in Warren County District Court, claiming that the board had “arbitrarily, and without legal excuse or reason,” refused to grant him a permit, thus unjustly, unfairly, and illegally discriminating against him. That very same day, District Judge Norman Hays, a Harvard Law School graduate who later became an Iowa Supreme Court justice (1946 to 1965), assigned April 27 as the trial date. A week after Hackley had filed, the board answered, denying that it had discriminated against him since it had “repeatedly refused” permits to others to sell cigarettes within a five-mile radius of Indianola because of its “desire to cooperate with...Indianola...in preventing the smoking of cigarettes” there. Consequently, granting Hackley a permit would constitute discrimination—in his favor. The supervisors also stressed their desire to cooperate with the officials of Simpson College and Indianola’s public schools who had requested the city council to refuse to grant permits, pointing out that permitting cigarette sales within five miles of the city would “nullify” Indianola’s...
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ban. Finally, and in the present context most importantly, the Warren County Board of Supervisors argued that the act of granting or denying a cigarette permit to Hackley was “a matter within this board’s discretion,” which was not subject to compulsion pursuant to a mandamus action.277

At trial, in an effort to undermine the logic of the board’s argument, his lawyer, Bump, elicited testimony from the defendant board members that some of the county’s eight permit holders were located closer to consolidated schools than Hackley’s business was to Indianola schools. In refutation, county attorney Watson elicited from his clients the differentiating datum that no one had protested against the issuance of any of those permits. In his summation he explained that the board’s denial of a permit to Hackley had been actuated by the fear that granting his would then force it to grant one to the operator of an oil station just outside of Indianola’s southern limit (if he should ever apply), with the ultimate consequence that the board “‘would virtually nullify’” Indianola’s ordinance.278 As expeditiously as Hays heard argument on the case, it took him an entire year—during which the board of supervisors continued to renew cigarette permits279—to issue a very brief decree on April 22, 1933, denying Hackley’s request for a writ of mandamus on the opaque grounds that the board of supervisors had acted “by a vote duly recorded by the secretary” and that their “denial was for good cause...and was within their sound discretion.” Hays also ordered that the supervisors recover $14.10 in costs from Hackley.280 By the time the judge issued his decision interest in the outcome had diminished considerably, not least of all on the part of Hackley, who in November 1932 had left the filling station to farm in another county.281

277Hackley v. Powers, Answer at 2-3 (No. 8653, Warren County Dist. Ct., Apr. 13, 1932) (copy archived at Warren County Historical Society, Indianola). The defendants alleged that Hackley’s place of business was located two miles north of Indianola.

278“Hays Ponders on Cigarette Mandamus Case,” Indianola Herald, Apr. 28, 1932 (1:8). See also “Hays Considers Petition Asking Cigaret Permit,” IR, Apr. 28, 1932 (1:8, 3:7-8) (copy supplied by Indianola Public Library).

279E.g., “Board Proceedings,” Indianola Herald, July 14, 1932 (8:2) (June 6).


281“Hackley’s ‘Fag’ Permit Decided; But He’s Gone,” Indianola Herald, Apr. 20, 1933 (1:5-6). This article had appeared before the written decision was issued because Hays had “recently...made an oral ruling to” the county attorney. Id.
The regular city council meeting on May 15, 1933 (the same day on which the Iowa Supreme Court announced its decision upholding the power of the Iowa City city council to limit the number of cigarette permits) was a harbinger of the anti-prohibitionist finale. On March 22, 1933—between the time in February when Congress voted to submit the repeal of the Prohibition Amendment to the states and its ratification by the requisite number of states in December—Congress passed a bill amending the National Prohibition Act so as to exempt 3.2 percent beer from its scope. On April 15 the governor approved the bill passed by the Iowa legislature to give cities the power to issue retail permits to sell such beer. Interestingly, the legislature required cities to determine—as they were not with regard to cigarette permit applicants—that applicants were of “good character.” On the other hand, if applicants met this requirement and several objective requirements, the beer permit statute, unlike the cigarette permit statute, provided that permits “shall be issued,” leaving cities with no discretion as to whether any permits would be issued at all or as between individual applicants.

On April 17, with “the whole town on the qui vive over the return visit of Old John Barleycorn,” the Indianola city council “was all set...to issue the required licenses to sell... but ‘nary’ an application was filed.” This failure to file “opened up the beer question for discussion,” prompting members who had heard that some local dealers were planning to apply to “admit[ ] that there was no other way out in case the applicants to sell squared with the new beer bill.” On the other hand, other local merchants—pointing to a risk that did not appear to factor into the profit-and-loss calculation of would-be cigarette permittees—had informed the council that “75 per cent of their trade is made up of minors and even if their transient customers demanded beer they could not afford to sell it on account of the continual trouble that would arise over the legal age limit.” Council members nevertheless expected that local people would apply for permits a little later.

In Indianola, pursuant to an announcement at a special session on May 11 that the council would vote on the issuance of beer permits, 14 organizations in Indianola presented signed petitions requesting the council not to issue beer permits. The groups included the WCTU of Indianola and of Warren county, the Baptist and United Presbyterian Sunday schools, the Friends church, the ladies...
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Aid and Woman’s Home Missionary societies of the Methodist Episcopal church, a parent-teachers association, two bible classes, the Ministers’ Wives association of Indianola, and the Simpson College faculty. During the almost hour-long discussion on May 15, four opponents addressed the council, including Dr. Ruth Van Clark, a physician who was the president of the Warren county WCTU, John L. Hillman, the president of Simpson College, Rev. W. C. Smith, and Florence Conrey, the 73-year-old wife of a clergyman. President Hillman’s wife, former Warren county WCTU president and physician Rose Butterfield, and three other women also appeared before the council. One claim that drys such as Van Clark and Hillman pressed on the council members was that they would be violating their oath of office by voting to implement the unconstitutional beer law. Smith even went so far as to warn the councilmen that by granting beer permits they would “‘violate God’s law. It would be against your own conscience. ... You are facing a question of righteousness or sin. You will violate the vows to your church if you vote for the license. Don’t listen to the Iowa law when the constitution of the United States says the sale of beer is illegal.’” But such admonitions merely provoked the members to reply that, on the contrary, refusing to obey the state law and to grant the permits might, as the city attorney had advised, make them personally liable in ensuing litigation. Hillman, who assured the council that he spoke for the students’ parents as well in pleading with it to refuse the permits, astonishingly descended from the religio-moral plane to engage in commercial competition by intimating that Simpson College brought more cash to Indianola than beer ever would when he declared that: “‘We are standing for an institution that brings more money to the town than any other institution in the town. The welfare of the college depends to a very great degree upon the moral condition of the town. We will be able to make less of an appeal to our constituents for students if beer is allowed to be sold here.’”

Some of the prohibitionists fancied themselves legal experts as well. When Hillman opined that “‘I doubt if a court could compel you to grant these permits,’” city attorney Berkeley Wilson presented a sharply differing legal opinion, explaining that “the only question involved is the ministerial power to issue permits. The only judicial or discretionary matter is a consideration of the

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287“City Council Votes 3.2 Beer for Indianola,” *Indianola Herald*, May 18, 1933 (1:8).

288“Council Grants Permits; Beer Goes on Sale,” *IT*, May 16, 1933 (1:7). The drys argued that it was unconstitutional for Congress to define 3.2 beer as not comprehended within the scope of the proscribed “intoxicating liquors” because some courts had ruled that even 1 percent beer was intoxicating. *Id.* at 8:1.

289“Council Grants Permits; Beer Goes on Sale,” *IT*, May 16, 1933 (1:7, 8:1-3 at 1-2).

290“Council Grants Permits; Beer Goes on Sale,” *IT*, May 16, 1933 (1:7, 8:1-3 at 1).
applicants’ character.”

Growing impatient with the drys’ opposition, councilman and building contractor William Fears argued that the only result of refusing the permits would be the appearance of bootleggers on every corner. Pleading for identical treatment of the two commodities, he offered a basis for changing the council’s course: “‘The beer situation would be similar to the cigarette situation here.... Everyone knows that any boy can go five miles and buy cigarettes. We might as well bring beer and cigarettes out in the open.’”

Despite the concerted urging by the venerable town leadership of the temperance/prohibitionist movement, the councilmen voted 5 to 1 to issue 3.2 beer permits to three applicants (two of whom would soon be applying for cigarette permits as well). The only No vote was cast by 74-year-old James McGranahan, who had retired in 1928 as a retail grocery merchant. One of the city’s “most highly esteemed citizens,” McGranahan was a long-time Presbyterian church elder. He disagreed with his colleagues regarding the law’s constitutionality, taking the prohibitionists’ position that because other states had declared beer unconstitutional and other towns had refused permits, Indianola could too.

During their beer debate the other council members manifestly were acutely aware that, unlike the cigarette permit law, that providing for beer permits conferred no discretion on them not to issue them for reasons other than those expressly set forth by the legislature. As Mayor N. D. Gordon, who believed that all beer was intoxicating and knew that “‘saloons were the worst curse of prohibition days,’” put it, “‘Iowa law makes it mandatory on the council to grant the permits....’” Consequently, the day after the council had voted to issue beer permits, “[b]eer trucks rolled into Indianola,” where beer began to be sold legally for the first time in more than half a century. Whether cigarette sales would follow suit, despite the undisputed discretion that the Indianola city council had been exercising for a dozen years and was indisputably empowered to continue
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exercising not to issue any permits to sell them, would be decided next.

The key role played by the Simpson College Methodist hierarchy sheds light on the moralistic underpinnings of the anti-cigarette movement in Warren county. At the same time that President Hillman and others were agitating against beer, a battle was raging at the college over dancing: in April 1933 the board of trustees had “agreed that something must be done to meet the growing unrest on the campus due to a continuation of the ban against dancing.” In exchange for students’ compliance with the ban until June, the trustees agreed to take some action favoring the students’ requests. After the students had lived up to their side of the bargain, the student council declared that if the trustees did not live up to theirs, the council refused to accept responsibility for the student body’s action. The upshot was that in June the trustees, without granting specific permission to dance, decided to leave the decision up to individual conscience as prescribed by Methodist Episcopal church doctrine. To be sure, dancing continued to be prohibited in college buildings and campus social programs had to be “kept free from dancing so that our college be not responsible for that activity [against] which our church warns,” and whatever dancing did take place had to be supervised by administration-approved people. Smoking, drinking, and dancing hardly exhausted the universe of proscribed activities on the Methodist index. Cause for grave concern was given by all manner of amusements including “attending upon immoral, questional [sic] and misleading theatrical or motion picture performances” as well as games of chance, which had been “found to be antagonistic to vital piety” and “productive of worldliness,” thus “dulling the spiritual life....” 298

Ironically, one activity in which the college administration permitted its charges to indulge at the nadir of the Great Depression was listening to socialists proclaim that capitalism, a doomed “epileptic” system, was due to be replaced by a cooperative commonwealth. 299

No business appears to have applied for cigarette permits from the city council in 1932. 300 Yet the decision to end the prohibition on cigarette sales in Indianola which, under the statewide law (1896-1921) and as a result of the non-issuance of any permits since 1921, had lasted continuously for 37 years, 301 was

298“Students May Dance But Not on the Campus,” IT, June 6, 1933 (1:7, 5:7).
300“Council Proceedings,” Indianola Herald, July 21, 1932 (7:3-5) (no mention of cigarette permit applications at June 20 or July 5, 1932 meetings).
301The account in a local newspaper turned history on its head by stating that: “Cigarettes will be legally sold for the first time since the passage of the state license law. Prior to that time no licenses were required.” “City Council Permits Sale of Cigarettes,” IT, June 20, 1933 (1:8). In fact, from 1896 to 1921 no licenses were issued because selling
made, seemingly, not even with a whimper, at a city council meeting on June 19, 1933. In contrast to the deliberations on beer permits five weeks earlier, the front-page articles in the Indianola Tribune and the Indianola Herald mentioned no protest petitions or appearances by the WCTU, Simpson College officials, or church groups. Instead, the resolution to authorize the city clerk to issue cigarette permits (effective on July 1) to five applicants was voted on “without discussion.” This apparent silence was all the more remarkable since the very next day, June 20, Iowans voted in record numbers (in a special election) to repeal the national Prohibition Amendment. Whereas 60 percent of voters statewide supported repeal, southern Iowa alone showed any unified opposition; in Warren county as a whole the drys “won a smashing victory,” 70 percent of voters opposing repeal. To be sure, even this high proportion masked the fact that 66 percent of voters outside of Indianola voted against repeal, while in Indianola itself that shared reached 80 percent. Whether the temperance movement was too preoccupied with that vote to be able to devote adequate attention to the council vote seems improbable, but is unclear. Without any doubt, however, the anti-alcohol campaign took precedence: the Warren County Emergency Prohibition group insured that for more than two weeks before the vote and “[r]ight up to the hour when the flap in the voting booths closes on the last voter” a “fighting campaign all over Warren county” was waged that included numerous meetings and rallies, at which Simpson College President Hillman and other college administrators and professors were featured speakers. The relative neglect of the city council’s action on cigarettes was, ironically, symbolized by the fact that the council’s first vote on June 19 dealt with a petition concerning a water pipe submitted on behalf of a relative by attorney A. V. Proudfoot, who as a state senator in 1909 had, at the WCTU’s behest, been the chief legislative advocate of the bill banning public smoking by minors.

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302 “City Council Permits Sale of Cigarettes,” IT, June 20, 1933 (1:8); “City Council Votes Permits for Cigarettes,” Indianola Herald, June 22, 1933 (1:8).
303 The Indianola Record (of June 22, 1933) did not even report the issuance.
306 Calculated according to “Unofficial Results in Warren County Wet-Dry Vote Tuesday,” Indianola Herald, June 22, 1933 (1:3-6).
307 “Dry Meetings Are Schedule Up to June 18,” IR, June 8, 1933 (1, 8) (copy furnished by Indianola Public Library).
308 See above ch. 6.
Although Proudfoot did not address the council on cigarette sales, he was the main speaker at one of the big anti-liquor prohibition repeal rallies. In any event, the resolution to grant permits to five applicants, including two drug stores, two cafes, and the A & P—despite the fact that other cities much less hostile to cigarettes had denied permits to chain stores selling them and the Iowa Supreme Court had upheld their discretion in doing so—was passed by a vote of 4 to 2. Interestingly, in spite of the absence of any discussion, councilman McGranahan was joined this time by another dissenter—Lester D. Weeks, a dentist, who this time did not have to vote against his conscience as he had on the beer permit vote. The four-member majority included building contractor William F. Fears, barber shop owner Bruce Rowe, local bank president William Buxton, Jr., and Robert Ernest Hansell (automobile or farm implement dealer). Two weeks later, by a vote of 3 to 2, with, once again, McGranahan and Weeks voting Nay, the council granted a cigarette permit to the first person to whom it had granted a beer permit in May.

Indianola was the only city in Iowa that collected no cigarette permit taxes in 1932-33. The next year, the first in which all 110 first- and second-class cities recorded such receipts, Indianola’s receipts totaled $525 (the equivalent of seven permits), than which only 17 cities received less. By October 1934, when a druggist applied for a cigarette permit, Weeks deserted McGranahan, leaving the

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309 Indianola City Council Minutes at 327 (June 19, 1933) (copy furnished by city clerk’s office); on Proudfoot’s legislative activity, see above ch. 13.
310 “Dry Meetings Are Schedule Up to June 18,” IR, June 8, 1933 (1) (copy furnished by Indianola Public Library).
311 See below ch. 21.
312 Indianola City Council Minutes at 327-28 (June 19, 1933) (copy furnished by city clerk’s office); “City Council Permits Sale of Cigarettes,” IT, June 20, 1933 (1:8); “City Council Votes Permits for Cigarettes,” Indianola Herald, June 22, 1933 (1:8); “Council Proceedings,” Indianola Herald, Sept. 21, 1933 (6:5) (June 19). The biographical information, which was needed in part to determine the kinds of businesses to which the permits were issued, is taken from the 1920 and 1930 population censuses (HeritageQuest), and “R. E. Hansell Rites Friday,” Indianola Record Herald, Aug. 31, 1967 (copy furnished by Indianola Public Library).
313 Indianola City Council Minutes at 330 (July 3, 1933) (copy furnished by city clerk’s office); “Del Comito Given Cigarette Licence [sic],” Indianola Herald, July 6, 1933 (1:2).
315 State of Iowa: 1934: Report on Municipal Finances for the Year Ending March 31, 1934, tab. 1A, at 8-11. All but one of those cities was smaller; many cities were tied with Indianola.
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latter as the only No vote, a pattern that was replicated in 1936 when the council composed of the same members granted four permits. Finally, in June 1937, when McGranahan was no longer a member but Weeks was, the council granted permits without any No votes, this time to the A & P and seven other applicants, including three of the other original four permit holders. This pattern of no Nays persisted through at least 1945 with the exception of one session on June 21, 1943, when, after granting two permits unanimously (including one to A & P), the council voted 4 to 2 to deny a permit to a cafe that had been one of the original permit holders from 1933, although it then by a vote of 6 to 0 granted one to the same person for a lunch room. Two other permits were also granted 6 to 0, but when the council tied 3 to 3 on a cigarette permit to the first beer permittee and one of the first cigarette permittees from 1933, the mayor broke the tie in the applicant’s favor; one of the persistent Nay-voters also cast a lone vote against a permit for a cigar store. The reasons for these No votes are unknown.

The end of World War II also marked the end of Indianola’s unique position in another way. When nicotine-addicted soldiers returned to Simpson College, they at first complied with its campuswide smoking ban by standing across the street to smoke. But after a while the veterans chafed under what they perceived as an “infringement on their personal rights,” a criticism that the student newspaper reinforced by arguing that because this “national habit” was not a “social evil,” the college’s tradition had to give way to “the dictates of modern society.” In order to persuade the administration to yield, one day dozens of young male students confronted professors as they were leaving the administration to walk to weekly chapel at the Methodist Church: flanking both

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316 Indianola City Council Minutes at 464 (Oct. 15, 1934). These and all later minutes were identified by the city clerk’s office, which found some council items dealing with cigarette permits from 1933 to 1946. Email from Jennifer Baughman to Marc Linder (July 7, 2006).

317 Indianola City Council Minutes (June 15, 1936) (page number missing from copy).

318 Indianola City Council Minutes at 195 (June 21, 1937).


320 Indianola City Council Minutes at 148 (June 21, 1943). The only councilman to cast three Nay votes was John L. Main, who served on the council from 1939 to 1949; in addition to having been a custodian at Simpson College and an operator at the municipal light plant, he had also been in the restaurant and real estate businesses. “Services Held Wednesday for John L. Main,” Indianola Record Herald and Tribune, Dec. 28, 1967 (1:2) (copy furnished by Indianola Public Library).
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sides of the walk, “each one silently, confidently, even jauntily holding a lighted cigarette, their ranks formed a smoky gauntlet through which the astonished faculty was forced to pass. Not a word was said by anyone. And afterwards, no notice was taken of their act of defiance. No rules were changed. But from that day forward smoking on the campus—not in the buildings, to be sure—was commonplace, at least among the men.”

Nevertheless, that even these rebels dared not violate the ban on indoor smoking while college students elsewhere were smoking even in classrooms suggests that the college, if no longer the


322In the late nineteenth and early twentieth century many colleges prohibited students from smoking on campus. For example, in 1887 when the college faculty of the University of Pennsylvania forbade students to smoke within the building, the tobacco trade press wondered whether the university would also side with Pope Gregory that the sun moved around the Earth and require students not to hold to Galileo’s theory. “A Ukase Against Smoking,” USTJ, vol. 24, Nov. 19, 1887 (3:4). Columbia College in New York City had prohibited smoking anywhere on campus until 1889, relaxing the ban that year to cover only inside buildings. “Cigarettes and Classics,” USTJ, vol. 27, Apr. 6, 1889 (4:2). By 1897 the press spoke of the beginnings of a “crusade against the use of tobacco” at universities, mentioning Boston and Ohio Wesleyan University. “Should Students Use Tobacco?” WNC, Feb. 17, 1897 (2:7). In 1911 the University of Notre Dame began penalizing students who smoked cigarettes on campus, in the streets, or in residence halls with suspension. “College Bars Cigarettes,” NYT, Sept. 28, 1911 (1). On the ban at the University of Minnesota in the first decades of the twentieth century culminating in the year-long suspension of the future New York Times reporter Harrison Salisbury, see vol. 2. In 1921, John Hibben, the cigarette-smoking president of Princeton University, objected to the “war on cigaret smoking” declared by Chancellor Day of Syracuse University, who had been “shocked to see” male students who “insolently blew smoke in girls’ faces.” “Hibben Smokes ’Em; Fags Safe at Princeton,” NYT, Jan. 30, 1921 (2). But 40 years later Princeton barred smoking in lecture halls and classrooms—purportedly “merely match[ing] rules long in force at Yale and Harvard”—in an effort “not to stop smoking ‘as a moral evil,’” but to save $16,700 annual cleaning, sanding, and refinishing costs. “Princeton Bans Butts,” Crimson (Harvard), Oct. 13, 1960, on http://www.thecrimson.article.aspx?ref=248723 (visited May 9, 2006). The same year the president of Barnard College asked students to observe a longstanding rule against smoking in classrooms, but added that there would be no penalties for violations. “No Smoking, Positively,” NYT, Oct. 25, 1960 (41). In fact, in 1952 Yale prohibited smoking (along with “putting feet on other seats”) in classrooms, but continued to allow it in seminars with a limited enrollment. “Yale Smoking and Slouching Prohibited by Dean’s Office,” Crimson (Harvard), Feb. 27, 1952, on http://www.thecrimson.article.aspx?ref=482513 (visited May 9, 2006). In 1927 Harvard University for the first time permitted smoking in any college library when it allowed it in the reading room of the new business school library.
town, remained decades ahead of its time.

_Ladora_

A very small town located about 25 miles east of Grinnell, Ladora appears to have devoted much of the early twentieth century to burning down. The town’s active WCTU organization presumably contributed to banning the sale of cigarettes into the mid-1920s. Because no copy of the _Ladora News_ from 1921 is still extant, the events surrounding the introduction of prohibition there are unknown, but renewed struggles in 1924 (“Ladora Delivers Blow to Cigarettes”) shed some light on the origins. At the town election on March 31, 1924, considerable interest focused on the question of issuing cigarette permits. Indeed, the “Citizen’s ticket” ran on a platform which proposed the issuance of cigarette licenses.” Because “the old council, which had in past years declined to issue licenses, refused to make the race...only one ticket was printed on the ballot.” Nevertheless, “the opponents of cigarettes rallied in force and wrote in the names of their candidates in sufficient numbers to elect a mayor and three of 


323See generally, _History of Iowa County Iowa and Its People_ 1:250-51 (1915).


five councilmen.” Although there was “some talk of a contest,” no one appears to have been conducted. Unfortunately, even the press account that revealed cigarette sales permits to have been the central issue of the election failed to mention which of the newly (re-)elected councilmen belonged to the anti-cigarette group.

### Lamoni

Lamoni, located in south-central Iowa a few miles from the Missouri border, was founded as a religious colony and became the headquarters of the Reorganized Church of Jesus Christ of Latter Day Saints, a Mormon split-off. In 1921, prominent townspeople, including the mayor, had opposed the Dodd bill

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327 “Much Interest in Ladora Town Election,” *Victor Record*, Apr. 3, 1924 (1:2). Part of this article was republished as “Ladora Delivers Blow to Cigarettes,” *GH*, Apr. 4, 1924 (4:4).

328 The *Ladora News* did not report on a contest or cigarette sales permits during the following weeks.

329 “Ira Wyant Re-Elected Town Mayor,” *Ladora News*, Apr. 4, 1924 (1:6), the main article on the election did not even mention the cigarette or any other issue. Clearly Mayor Wyant, who was a farmer, belonged to the anti-cigarette group. Of the five councilmen, three (Oliver Davis, George Morse, and Elwyn Madison [not Matteson, as reported in the newspapers]) were farmers; one (Lawrence Shedenhelm) was a 23-year-old machinist working at a battery service station); and one, Jasper L. Augustine, was a physician-surgeon and director of the local bank, lumber company, and gas company, and member of the Ladora Improvement Company (and father of the future first Nancy Drew ghost writer, Mildred Augustine Wirt Benson aka Carolyn Keene). On Dr. Augustine, see *History of Iowa County Iowa and Its People* 2:38-39 (1915); “Well Known Iowa County Physician Dies,” *Williamsburg Journal-Tribune*, Nov. 4, 1937 (1:2); *The First 100 Years: Being a Historical Outline of the First Century of Ladora, Iowa* n.p. [5] (C. Morgan, Edith Shaul, and Margaret Daniels eds. Aug. 17, 1968); Melanie Rehak, *Girl Sleuth: Nancy Drew and the Women Who Created Her* 33-34 (2005). The occupational data are taken from the 1920 population census. The newspapers stated that H. W. Smith was elected, but he received only 59 votes compared to Morse’s 61. The current town clerk’s lack of cooperation in finding the council minutes made it impossible to determine when the council first issued permits.

and urged Governor Kendall to veto it.\textsuperscript{331} The church’s position on smoking is reflected in the fact that its college, Graceland University in Lamoni, has always prohibited smoking on the entire campus, indoors and outdoors, to the present day.\textsuperscript{332}

The local newspaper, the Lamoni Chronicle, which published no cigarette advertisements in July-August 1921, also did not mention that the town council had received any applications for cigarette permits or taken any action on them.\textsuperscript{333} That the council minutes for 1921-30 also contain no references to cigarette permits,\textsuperscript{334} in combination with the church’s influence on the town at that time, strongly suggests that sentiment against cigarettes was so strong that no one applied for a permit. At its April 1931 meeting Howard M. Silver, a 40-year-old cafe manager\textsuperscript{335} who had no church affiliation, but whose mother, an LDS member, owned the cafe,\textsuperscript{336} asked the council to consider an application from him for a cigarette permit, but it took no action at the meeting.\textsuperscript{337} Silver appeared again at the May meeting, asking the council to consider and act on his

\textsuperscript{331}See above ch. 15.

\textsuperscript{332}Telephone interview with Alma Blair, former history professor at Graceland, who began teaching there in 1955, Lamoni (Dec. 21, 2007). In contrast, the church’s influence on the town has waned considerably. Emblematic of this diminution (as well as of the persistent opposition to smoking) is the current city clerk’s statement that since two council members are adamantly opposed to issuing alcohol and cigarette permits, whenever the council meets on these matters, they have to make sure that none of the three other members is absent—otherwise they would be unable to issue permits. Telephone interview with Deanna Ballantyne, city clerk, Lamoni (Dec. 19, 2007).

\textsuperscript{333}“Town Council Meeting July 5, 1921,” LC, July 28, 1921 (1:2). The paper did not publish the minutes for the June council meeting.

\textsuperscript{334}Telephone interview with Deanna Ballantyne, city clerk, Lamoni (Dec. 21, 2007). In September 1921 the council did pass an ordinance on cigarette sales to minors. \textit{Id}. The city clerk examined the minutes through July 1923. The minutes for June and July 1924 as published in the local newspaper also included no mention of cigarette permits. “Council Proceedings: July 7, 1924,” LC, July 10, 1924 (5:2).

\textsuperscript{335}1930 Census of Population (HeritageQuest).

\textsuperscript{336}Silver did not appear in the 1925 Iowa state census, but in 1915 he was returned with no church affiliation and garage work as his occupation; his mother Flora was a member of LDS, while his father Joseph Silver was returned as a restaurant proprietor who had been born in Utah and was also without a church affiliation. Iowa Census 1915, Decatur County, Card No. A500, A499, and A498. At the 1920 population census Joseph Silver was again returned as a restaurant owner; in 1930, he no longer appeared, but his wife was returned as a cafe owner.

\textsuperscript{337}“Council Proceedings,” LC, Apr. 23, 1931 (6:3) (Apr. 6).
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application, but the minutes do not include any response.\textsuperscript{338} Through 1934 cigarette permits were not mentioned in any council minutes for the months of June or July, in which they would typically have been granted/have had to have been renewed.\textsuperscript{339}

That change had come to Lamoni, however, heralded by the fact that although less than a year earlier 80 percent of the town’s voters had opposed repeal of the national Prohibition amendment,\textsuperscript{340} remarkably, on June 5, 1934, the council unanimously granted a beer license to William Hollands,\textsuperscript{341} who at the 1930 population census had been an electric utility manager in Lamoni, but by the middle of the Great Depression was operating the Coffee Shoppe. A year later, on July 1, 1935, the council—whose five members were all businessmen, and four of whom were also members of the Reorganized Latter Day Saints Church\textsuperscript{342}—unanimously approved the cigarette permit applications of Silver,

\textsuperscript{338}“Council Proceedings,” \textit{LC}, May 21, 1931 (6:3) (May 4). The same issue of the newspaper that published the minutes included a large advertisement for Lucky Strike that claimed that it protected the larynx from “certain harsh irritants,” which were expelled and “sold to manufacturers of chemical compounds.” \textit{LC}, May 21, 1931 (2:3-6). A different version of the same advertisement appeared in \textit{LC}, July 2, 1931 (2:3-6).


\textsuperscript{340}“Decatur County Polls Dry Majority,” \textit{LC} June 22, 1933 (1:2); “President Briggs Opposes Locating Liquor Store Here,” \textit{LC}, May 23, 1935 (1:2).

\textsuperscript{341}“Council Proceedings,” \textit{LC}, July 5, 1934 (6:4-5) (June 5, 1934). The council at the same time unanimously rejected two other beer permit application applications pending from the May 7 meeting.

\textsuperscript{342}The 1930 population census returned the council members as Everett W. Bell (Ford dealer), Albert W. Fleet (department store merchant), Edward Stoll (creamery manager), David Vredenburg (general store merchant), and George H. Derry (garage manager). All but Bell (who belonged to the United Brethren) were RLDS members as was Mayor Joseph C. Danielson. 1925 Iowa Population Census Schedules (listing all but Stoll). According to Alma Blair, a former professor at Graceland College and historian of the
Hollands, and cafe owner Thomas S. Williams\textsuperscript{343} (a high-ranking official of the RLDS who had been “released” in 1932, opened a cafe to support himself during the Depression, and later was mayor for many years)\textsuperscript{344} as well as a new beer permit for Hollands and Lewis Cafe.\textsuperscript{345} Although the council minutes do not reveal any earlier issuance of permits\textsuperscript{346} and the Lamoni Chronicle did not publish any article commenting on the issuance of the first permits in the town, it did state on July 4, 1935, that since “all licenses to sell beer and cigarettes were cancelled the first of the month, necessitating renewals being made,” the three aforementioned “new” cigarette permits had been issued on July 1.\textsuperscript{347} A year later the council unanimously issued yet another cigarette permit\textsuperscript{348} to someone to whom it had issued a beer permit the month before.\textsuperscript{349}

Why a town government so heavily influenced by a church opposed to alcohol and tobacco—though not quite so rigidly and categorically as the Mormons\textsuperscript{350}—did an about-face and issued permits for beer and cigarettes in the mid-1930s is not quite so puzzling as on first sight.\textsuperscript{351} After all, from the town’s church and Lamoni, Stoll was also a member. Telephone interview with Alma Blair, Lamoni (Feb. 14, 2008).


\textsuperscript{344}Williams, a coal miner in southern Iowa from 1900 to 1920, had held the position of stake president (the equivalent of bishop), supervising about 20 congregations. The loss of his employment embittered him toward the church, which, in turn, was probably alienated by his selling cigarettes. Telephone interview with Prof. William Russell, History Dept. Graceland University and nephew of Thomas S. Williams, Lamoni (Feb. 17, 2008); telephone interview with Alma Blair, Lamoni (Feb. 14, 2008).


\textsuperscript{347}“Beer Permits Renewed,” \textit{LC}, July 4, 1935 (1:2).

\textsuperscript{348}“Council Proceedings,” \textit{LC}, July 9, 1936 (2:4-5) (July 6, to Ralph King).

\textsuperscript{349}“Council Proceedings,” \textit{LC}, June 25, 1936 (2:4-5) (June 3, to Ralph King).

\textsuperscript{350}Both groups adhered to the prohibition of tobacco in the Word of Wisdom section 89(9).

\textsuperscript{351}Church and town historian Prof. Alma Blair found the turn of events, with which he had not been familiar, surprising. Telephone interview with Alma Blair, Lamoni (Feb. 14, 2008). The nephew of Howard Silver, the first recipient of a cigarette permit, when asked when and why the prejudice against cigarettes had disappeared in Lamoni,
inception a large number of people in Lamoni, including RLDS members (but not its prominent leaders), smoked. The RLDS’s somewhat more “flexible” attitude meant that it would not even have been out of character for a member to run a cafe and permit smoking, though many in that church would have frowned on it and him, but expulsion from the church would not have followed. That Lamoni, despite its refusal to issue cigarette sales permits for so many years, was nevertheless no fanatical anti-tobacco fortress, is strongly suggested by the following large advertisement, which appeared at the top center of the front page of the Lamoni Chronicle in 1919:

Do you know the Fern cafe is the only one in the West that is not selling tobacco in any form? Do you still want a Nice, Clean place in your city like the Fern, where your mother, daughter and respectable friends can go and not endure the perfume of tobacco?

Of course we all know that cigars are a good drawing card for any Cafe, and if you want a good cigar that is your own affair and you can find them in other Cafes. But the question is—Do you still want a place like the Fern in your city? 

The fact that the Fern’s owner, at a time when cigarette sales were unlawful in Iowa, apparently felt constrained to plead with the public to patronize a smoke-free and tobacco sales-free cafe, constitutes rather impressive evidence that even in Lamoni many smoked and others put up with exposure to smoke even while eating.

The businessmen-city council members who, in the view of church and Lamoni town historian Alma Blair, were good but not especially pious RLDS members, “would not have been excessively strict in their religious beliefs when applying them to the civic situation.” And Graceland University history professor William Russell, Thomas Williams’ own nephew, explained the council’s decision to issue permits as an example of businessmen’s commercial sense and mentality overcoming their church mores.

Ironically, one of these members in 1935, David Vredenburg, a general store merchant—in 1923 representatives of the RLDS had approached him to take over the church-sponsored General Supply Store in Lamoni—was the co-founder of

responded: “There was a prejudice against everything.” Telephone interview with Maurice Silver, Lamoni (Feb. 14, 2008).

352 Email from Alma Blair to Marc Linder (Feb. 15, 2008).

353 LC, Aug. 28, 1919 (1) (copy furnished by Alma Blair).

354 Email from Alma Blair to Marc Linder (Feb. 15, 2008).


what became a major midwestern supermarket chain (Hy-Vee), the largest private employer in Iowa and by the late twentieth and early twenty-first century one of its largest cigarette sellers. Even in the 1930s as a member of the RLDS and co-owner of an expanding grocery chain, Vredenburg sold pipes and smoking tobacco, although this commerce “didn’t mean that smokers or chewers were welcome in the store.” Neither he nor his partner “used tobacco in any form but neither one ever came right out and said ‘Don’t smoke.’” His partner, Charles Hyde, “had his own way of getting his message across. If a salesman came in with a pipe full of tobacco and smoking a cigarette or cigar, Charlie came running with a broom and dustpan...ready to sweep up any ashes that might happen to fall on the floor.” Vredenburg did not like his employees to smoke, especially in his presence, and at least on one occasion in the 1930s decided not to hire a 21-year-old applicant as a store manager because he was not a member of the LDS church and had smoked a cigarette during his job interview. The key to the disconnect between Vredenburg’s and Hyde’s business practices and their RLDS-inspired religious beliefs was that: “They took their church membership seriously but they were wise enough to realize that a particular religious affiliation did not guarantee success.” Nevertheless, as late as 1951, two years after Vredenburg’s death, the Hy-Vee in Lamoni still did not sell cigarettes. Indeed, at that time the only place in town to buy them was a pool hall owned by the aforementioned Thomas Williams, who despite being the mayor, sold them to

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357 With 26,113 employees in Iowa Hy-Vee purports to be the state’s largest private employer. Email from Marilyn Gahm, customer service coordinator, Hy-Vee, to Marc Linder (Feb. 19, 2008). See also http://www.fundinguniverse.com/company-histories/HyVee-Inc-Company-History.html;http://www.hy-vee.com/about/about.asp. Vredenburg remained with the company, which his son presided over, until 1949. E. Mae Fritz, The Family of Hy-Vee 89 (1989). Although by 1935 Vredenburg and Hyde owned eight stores, which should have been subject to the chain store tax that the Iowa legislature passed that year, their relatively small size might have meant that they were not perceived as chains, especially since they were owned by varying combinations of owners. E. Mae Fritz, The Family of Hy-Vee 28-29 (1989).


362 Vredenburg, who had been born in 1884, died on Sept. 24, 1949. “Chain Grocer Dies,” Cedar Rapids Gazette, Sept. 26, 1949 (17:5); email from Marilyn Gahm, customer service coordinator, Hy-Vee, to Marc Linder (Feb. 18, 2008).
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minors, at least one of whom was expelled from Graceland for smoking.\textsuperscript{363}

In the event, by 1939, selling cigarettes had become so much a part of second nature even in Lamoni,\textsuperscript{364} possibly Iowa’s last hold-out, that when, in the wake of a newly effective law cracking down on cigarette smuggling to avoid taxes,\textsuperscript{365} state officials were stopping trucks daily for inspection in the area, the tenor and content of the Lamoni Chronicle’s front-page lecture to its readers would have been unimaginable just a few years earlier:

The cigarette tax is beneficial to every community in the state and everyone receives some good from the funds thus derived.

Another reason why persons here should cooperate in keeping the law is because of the fact that each purveyor of cigarettes in Lamoni will reap a benefit. So, besides being a good citizen of the state, those observing and carrying out the law will also be helping their neighbors here.\textsuperscript{366}

Newton

By 1921 Newton, situated about 35 miles east of Des Moines, was a midsize

\textsuperscript{363}Telephone interview with Paul Edwards, Independence, MO (Feb. 18, 2008). Despite having been expelled, Edwards became vice president of the college. Although Silver still operated a cafe and gas station in 1950-51, he no longer sold cigarettes. Edwards—who returned to Lamoni in 1960 and lived there until 1982—noted that his son, who worked at the Hy-Vee as a bagger, reported that the store did sell cigarettes. Hy-Vee’s senior vice president for corporate procurement and logistics, when asked whether the company had made a central decision to begin selling cigarettes and when that might have been, at first replied that: “We cannot even try to surmise what total view our founders had toward the sales of cigarettes, but I can tell you that we have had tobacco products in our stores well before 1951. They may not have had them in Lamoni, but there were other areas that did sell the.” Email from Ron Taylor to Marc Linder (Feb. 19, 2008). When asked whether there was some way to obtain this information from the company archives, he admitted that: “My comment that we had them before 1951 is based on several veteran people who have around 40 years of service. These particular people would actually have no way of knowing exactly either, it was simply their memories that we carried product back to the early days of our company.” Ron Taylor to Marc Linder (Feb. 20, 2008).

\textsuperscript{364}Again in 1937 without any Nays the council instructed the clerk to issue beer and cigarette permits to Joe Dwyer. “Council Proceedings,” LC, July 15, 1937 (2:5-6) (July 7).

\textsuperscript{365}See above ch. 19.

\textsuperscript{366}“Search Trucks; No Cigarettes,” LC, Aug. 3, 1939 (1:4).
manufacturing town owing to the location there of numerous industries, including a foundry, flour mills, manufacture of agricultural implements and gasoline engines, but especially of the Maytag Company, which was on the verge of becoming the world’s leading producer of washing machines and turning Newton into a company town. Even before the company achieved its ascendancy, its owner, Fred Maytag, had been elected to the town council twice in the late 1880s and early 1890s, to the state senate from 1902 to 1912, and mayor of Newton from 1919 to 1921.

Auspiciously, at the city council meeting on May 31, 1921, at which Alderman William Brock, a 62-year-old former farmer (whose wife was treasurer of the WCTU Newton local union), initiated discussion of the cigarette question, those in the audience chamber saw a new sign on display: “No cigarette smoking allowed in this office.” In response to Brock’s request that city solicitor George Campbell report on the question of permits, astonishingly—in light of the unambiguous legislative history of that year’s Dodd-Clark bill—the lawyer remarked that “the question as to whether the granting of licenses was optional was one that he had been unable to determine.” Equally startling was the source of Campbell’s uncertainty: “there was some doubt as to whether” the “may” in the provision that councils “may” issue permits “would be construed as ‘may’ or ‘shall.’” After the solicitor had explained that he had unsuccessfully tried to get in touch with the attorney general, Brock did not object to a motion to postpone the discussion for a week until an opinion had been secured from Attorney General Ben Gibson. The apparently commercially minded mayor found no fault with the motion except that “some of the dealers were anxious to get an early decision,” and the council voted unanimously for postponement. By the very next day the Newton Daily News succeeded where Campbell had failed: Gibson told the newspaper that “at this time he did not care to hand down any ruling. He went on to say that the question was really a big one” and that therefore before issuing an opinion he wanted to study the situation carefully that week.

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367 Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 697 (Vol. 20, 43rd Year, 1922).
369 Woman’s Christian Temperance Union of Iowa Forty-Ninth Annual Convention 156 (1922).
370 See above ch. 9.
371 “Council Holds Question Over,” NDN, June 1, 1921 (1:3).
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Since the Daily News had scooped the issue, presumably it would have reported any opinion that the attorney general issued, yet it ran no such report.\(^{372}\) Moreover, the attorney general published no such opinion, which, given its universal applicability and centrality for the administration of the cigarette law, would surely have been published and not merely communicated quasi-privately to city solicitor Campbell.\(^{373}\) And, finally, the fact that the Newton city council on June 20 did decide not to issue any permits strongly suggests that Gibson must have informed the city council that it did indeed have the discretion to do so.

In anticipation of the discussion at the council meeting on June 6, 1921, many people interested in the issue on both sides planned to attend, but since, as of noon, the Daily News reported, the attorney general had not yet been heard from, it was unclear whether the council, which wanted to know “whether the word ‘may’ is to be construed as ‘must,’” would take up the question. The intense interest in the semantic question stemmed from the opposition of some members to issuing any permits “unless the law is to be construed as meaning that they ‘must.’”\(^{374}\) At that session Brock informed the city council that he had prepared a resolution on the question of cigarettes,\(^{375}\) but the absence of one member prompted the body to table the discussion until the next meeting or until all members were present.\(^{376}\) By June 18 the Daily News reported that three council members were known to oppose issuing permits, while two favored it; how the sixth member would vote was unknown, but if he voted Yes, the mayor would have to break the tie.\(^{377}\)

All members were present at the next meeting on June 20, at which “[l]adies

\(^{372}\)On June 14 the Daily News, like many other Iowa papers, did run a summary of the new law that Attorney General Gibson had released, but it did not touch on Newton’s question. “Gibson Prepares Summary of New Cigarette Law,” NDN, June 14, 1921 (4:6).

\(^{373}\)According to the Iowa State Archives, no letter to or from Campbell (or the Newton city council) is contained in its eight boxes of Requests for Opinions and Advice from the attorney general file for 1921. Email from Meaghan McCarthy to Marc Linder (Jan. 16-17, 2008).

\(^{374}\)“Cigarettes Uo [sic] Tonight,” NDN, June 6, 1921 (1:2).

\(^{375}\)“No Action on Cigarettes Yet,” NDN, June 7, 1921 (1:5); “Council Postpones Action on Cigarettes,” NR, June 10, 1921 (1:7) (identical article). At the 1920 census Brock, who had been a farmer in 1910, was returned as having no occupation.

\(^{376}\)City of Newton Council Proceedings, Regular Meeting at 75 (Sheet No. 888) (June 6, 1921) (copy furnished by Jayme Ewing, adm. asst., City of Newton, Adm. Dept.). The absent member was Harvey. “No Action on Cigarettes Yet,” NDN June 7, 1921 (1:5), stated that Sayre was also absent.

\(^{377}\)“Cigarette Question to Be Up to Council Next Monday Night,” NDN, June 18, 1921 (1:3).
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representing the WCTU were present and took part in the discussion of the CIGARETTE question.” Brock submitted the question: “Shall the City of Newton, Iowa, issue licenses or permits for the Sale of Cigarettes?” After Brock had explained why cigarettes should not be sold in Newton, Minnie Grimes (whose husband was a farmer) spoke on behalf of the local WCTU, of which she was the president. She urged the need to protect Newton’s girls during a period of proliferating cigarette smoking among girls, while Brock took up the need to defend boys. With no other comments forthcoming, the council then voted 4 to 2 against issuing any cigarette permits. The four no votes were cast by Brock, Robert Sayre (a banker), Bert Beatty (a 49-year-old who had no occupation), and William Elliott (a factory pattern maker); the two votes in favor of issuing permits were cast by George Warner, a real estate agent, and John H. Harvey, a woodworker at the washer factory. Since the public was generally aware of how the members would vote, the result was no surprise. Had the vote been a tie, a rumor had been circulating that Mayor John McLaughlin would have voted against permits, though he denied its truth and refused to divulge his stance. That same night the Grinnell city council rejected cigarette sales by the same margin.

It was doubtless people like Brock and Grimes whom the weekly Newton Record—which inaugurated cigarette advertising in its first issue after legalization—had in mind when, back in April, it editorially excoriated the “anti-tobacco people”:

There is, of course, no such case to be made against tobacco as could be made against alcoholic liquor, but enough of a case can be made against the weed to appeal with force

378 City of Newton Council Proceedings, Regular Meeting at [82] (Sheet No. 895) (June 20, 1921) (copy furnished by Jayme Ewing, adm. asst., City of Newton, Adm. Dept.).

379 “Cigarettes Not to Be Licensed After July 4,” NDN, June 21, 1921 (1:7); “Council Refuses to License Cigarette Dealers,” NR, June 24, 1921 (3:5-7) (same article); Woman’s Christian Temperance Union of Iowa Forty-Ninth Annual Convention 156 (1922).

380 City of Newton Council Proceedings, Regular Meeting at [82] (Sheet No. 895) (June 20, 1921) (copy furnished by Jayme Ewing, adm. asst., City of Newton, Adm. Dept.); “Cigarettes Not to Be Licensed After July 4,” NDN, June 21, 1921 (1:7); “Council Refuses to License Cigarette Dealers,” NR, June 24, 1921 (3:5-7). See also “Newton Refuses,” GH, June 21, 1921 (4:3). The occupational information is taken from the 1920 population census; because the newspaper did not mention the aldermen’s first names, it is unclear whether John H. Harvey or his brother Will Harvey was the alderman, but both were returned with the same occupation and John H. had already been alderman in 1916 (information provided by Newton Public Library, Dec. 31, 2007).

381 NR, July 8, 1921 (6:5-7) (Chesterfield).
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to that class which enjoys compelling other people to be as good as the class thinks itself to be. There are many people in this class and they have frequently dominated the affairs of this nation and others. They never wither under silent contempt and they never die of ridicule. The only weapon that is useful against them is sound reason...

As in several other towns, on July 5, two weeks after the first vote, the council, at a meeting adjourned from July 4, on a motion by Warner and seconded by Sayre, voted 4 to 2 (Brock and Beatty) to reconsider its action denying permits. Before the vote was taken, Alderman Elliott explained that he had in the meantime concluded that the council had made a mistake: though a church member, he was able to find only one “big point” in the law—keeping cigarettes away from minors—which he believed licensing would facilitate. After Brock had again explained the basis of his opposition, the council, by the same 4 to 2 vote, Brock and Beatty voting Nay, voted both to issue permits and to issue one to the sole applicant, a confectioner. Following this defeat, Brock announced that at the next meeting he would propose an amendment to the city ordinances requiring that moving picture shows (as well as skating rinks, merry-go-rounds, and other entertainments) be closed Sundays. A week later the council defeated Brock’s motion to amend the ordinance, only Beatty joining him. After Brock had left to catch a train, the council issued three more permits (to another confectioner, a cigar store, and the Dreamland) by a vote of 4 to 1, this time Sayre casting the lone Nay, as Beatty changed sides. At the next meeting, no one joined Brock in opposing the issuance of a fifth cigarette permit to a pool hall manager.

383 City of Newton Council Proceedings, Regular Meeting at [85] (Sheet No. 898) (July 5, 1921) (copy furnished by Jayme Ewing, adm. asst., City of Newton, Adm. Dept.).
384 “Council Backs Up on Question of Cigarettes,” NDN, July 6, 1921 (1:7); “City Council Gives License for Cigarettes,” NR, July 8, 1921 (7:6) (identical article).
385 City of Newton Council Proceedings, Regular Meeting at [85] (Sheet No. 898) (July 5, 1921) (copy furnished by Jayme Ewing, adm. asst., City of Newton, Adm. Dept.). The confectioner was Clyde Roswell.
386 “Council Backs Up on Question of Cigarettes,” NDN, July 6, 1921 (1:7); “City Council Gives License for Cigarettes,” NR, July 8, 1921 (7:6).
388 “Council Hunts for Big Game,” NDN, July 19, 1921 (1:2). Frank McCarl’s occupation is taken from the 1920 population census.
Oskaloosa

The state’s nineteenth largest city with a population of nearly 10,000, Oskaloosa in south-central Iowa was both the most populous and industrialized city to ban cigarette sales in 1921. The town’s industrial base included flour and feed mills, iron and brass foundries, garment, cigar, hardware, and washing machine factories, extensive brick and tile works, and surrounding coal mines employing 3,000 miners.389 At its meeting on July 5, the day after the statewide law had gone into effect, the Oskaloosa city council considered a resolution offered by councilman David Eckenbom, the president of a wholesale drug business, to issue cigarette sales permits to 17 applicants, including six pool halls, three candy stores, two drugstores, two restaurants, a cigar store, a wholesale grocery, and an Eagles Lodge. The council voted 4 to 2 against the resolution, Eckenbom, and Charles Gunnar, a longtime railroad yard foreman—the former a second generation and the latter a first-generation Swede—voting Aye. The occupations of the members casting No votes were lawyer, commercial salesman, garage owner, and (perhaps) farmer or farm laborer.390 Two weeks later the council “stood pat on its refusal to grant permission to dealers to sell cigarettes in Oskaloosa” by voting unanimously to refund to a dealer the money accompanying his application and then to each of the 17 applicants. For its action refusing licensure the council received commendatory letters and special resolutions from the WCTU, citizens, St. James Episcopal church, the Christian church.391

The press in Iowa indulged its taste for mockery of the anti-cigarette

389Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 720 (Vol. 20, 43rd Year, 1922); N. W. Ayer and Son’s American Newspaper Annual and Directory 310 (1920).

390City of Oskaloosa, Iowa, Council Proceedings at 185-86 (July 5, 1921) (copy furnished by Marilyn Miller, city clerk, Oskaloosa); “No Cigarettes for Oskaloosa,” ODH, July 6, 1921 (1:1). The kinds of businesses were identified either directly in these sources or indirectly through the population census, and, in one case, Phil Hoffmann, Oskaloosa: or the First One Hundred Years in a Mid-West Town 141 (1942) (H. L. Spencer Wholesale Grocer Co.). The likely business of one applicant, whom the census returned as a livestock shipper, could not be identified. The occupations of the council members (LeRoy Corlett, Alonzo Drinkle, James Lewis, and C. E. Stockham) were identified thought the population censuses and the first names mentioned in Revised Ordinances of the City of Oskaloosa Iowa 18 (1936). No such Stockham was returned as living in Iowa in 1920, but it was conjectured that the Charles E. Stockham in nearby Davis county in 1900 and 1910 was the councilman.

movement by analogizing the action in Oskaloosa to the sumptuary rules in Zion City near Chicago, a bizarre planned religio-utopian community that banned, in addition to alcohol and tobacco, gambling, theaters, circuses, pork, dancing, swearing, doctors, politicians, oysters, and tan-colored shoes. At the election of 1911, the “overseer” of Zion City, Wilbur Glenn Voliva (the successor to its founder, John Alexander Dowie), had declared that if he regained power, he “would appoint a vigilance committee of prominent citizens to horsewhip on sight any user of tobacco” and “refuse to admit any industries unless it is positively guaranteed that no users of tobacco are hired.”

Over the next two years bloody physical battles erupted over efforts by disciples to prevent employees of an electrical company from smoking. Eventually, in 1914, the Illinois Supreme Court, reversing the county circuit court, invalidated as regulation and control of “the habits and practices of the citizen without any reasonable basis” and as an “unreasonable interference with the private rights of the citizen” the Zion City ordinance outlawing the smoking of tobacco “‘in any form... in or upon any street, alley, avenue, boulevard, park, parkway, public passageway, depot, depot platform, depot grounds, hospice, hotel, store, post-office, or other public building or public place.’”

The article that numerous Iowa newspapers published declared:

Though naughty Manhattan would not listen to Voliva’s agents from Zion City nor forsake its “wicked” ways, Voliva’s blue edicts have found their way into the hands of Oskaloosa’s guardians of public behavior and as a result cigarettes have been outlawed and bare dimpled knees are taboo.

City fathers of this none too wild community have decreed that “fags” are not to be smoked in the best of families, and permission to sell “coffin nails” has been denied seventeen applicants. License fees today were returned to seventeen surprised tobacco merchants by City Clerk Tom Carlin in compliance with the council’s decision.

Mail order business in cigarettes went forward with a bound today when it was found that cigarettes were no longer on the market and a new type of bootlegger has put in his appearance. He’s puttin’ out smokes on the q. t.

And that “ain’ t” all.

Rolled down stockings and abbreviated skirts displaying a bit of feminine daintiness do not have the sanction of the city dads.

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393 “To Whip Tobacco Users,” NYT, Jan. 31, 1911 (7).
394 “Zionist Rioting over Smoking,” NYT, Apr. 23, 1912 (7); “Riot in Zion City,” NYT, Apr. 30, 1912 (1); “Workmen Attack Volivites,” NYT, Mar. 21, 1913 (2).
395 City of Zion v. Behrens, 262 Ill. 510, 513, 510-11 (1914).

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No siree.

Policewoman Nellie Howe has her hands full telling the more daring of the dashing young flappers that the long ones must be worn up according to Hoyle and that that bit of nothingness labeled skirt must reach the knees at least. ... 396

To be sure, since the city council minutes directly before, at, and after this time include no reference to such dress codes, 397 the story may have been a joke or a hoax, 398 just as the assertion that the Oskaloosa city council had in any way limited smoking (as opposed to buying) cigarettes was a canard. Nevertheless, entrepreneurs did immediately seek out profitable methods for satisfying pent-up demand. Three days after the council’s denial of the permits local tobacco merchants were considering opening cigarette sales stores “just outside” the city’s corporate limits, and one had already begun setting up a roadside shop. 399

Exactly how long the city council continued to prohibit cigarette sales in Oskaloosa is unclear, 400 but the ban ended no later than 1922, since for the year ending March 31, 1923, the city collected $1,350 in cigarette permit taxes, 401 which was the amount corresponding to 18 permits. On July 1, 1923, the city collected a further $1,275 for 17 permits for the year 1923-24. 402 Signaling its definitive retreat from its one-time anti-cigarette stance, the council on October

396 "Bare Knees and Cigarettes Taboo in Oskaloosa,” CFDR, July 8, 1921 (1:2). See also “Cigarettes and Bare Knees to Be Taboo, City Council Rules,” MCG-G, July 8, 1921 (9:5); “Iowa News,” Oxford Mirror, July 28, 1921 (7:4). Though the meaning of “Voliva’s angels” is unclear, in 1903 Dowie had descended on New York City with thousands of his followers, but failed to achieve his goal of prophecy and salvation. E.g., “Dowie and His Host Mass in the Garden,” NYT, Oct. 17, 1903 (1); “Hostile Audience Howls at Dowie,” NYT, Oct. 20, 1903 (1).

397 Email from Marilyn Miller, City Clerk, Oskaloosa, to Marc Linder (Jan. 3, 2008).

398 Since the original version of this article appears to have run in the Oskaloosa local paper, it would have been a joke rather than a hoax; whether the out-of-town papers understood in the same way is unclear. “Must Cover ’Em Up,” ODH, July 7, 1921 (6:4), did not mention cigarettes at all; instead, it stated that “[s]trict enforcement” of dress reform prevailed in Oskaloosa.

399 “An Out of Town Station,” ODH, July 9, 1921 (7:1).

400 Oskaloosa city clerk Marilyn Miller was unable to identify the first time the council issued a permit.


402 “Cigaret Licenses,” ODH, July 6, 1923 (5:7). Since at the same time the council approved the 17 permits it revoked the permit of a holder who had failed to pay the fee for 1923-24, the council must have issued permits for 1922-23.

2045
15, 1923, passed a boiler-plate ordinance regulating the sale of cigarettes, which presumably meant that it had decided to issue permits. The same ordinance was still in force in 1936, but a decade later the council sequentially capped the number of permits in force at any one time at 55, 59, and 61, before repealing this limitation in 1947 and thus apparently putting an end to Oskaloosa special regulatory approach to cigarette sales.

**Rockford**

Little is known about the action taken by the small northcentral farming town of Rockford because the local weekly paper, the *Rockford Register*, in a very brief notice, merely reported that on June 7 the council “took up this important matter, and after an animated discussion as to the merits and demerits of the licensing plan decided by a vote of three to two not to grant any cigaret licenses to retailers in Rockford.” According to the 1920 Census of Population, two of the three Nays were cast by the council’s only farmers, the third by a garage manager; the Ayes were cast by a carpenter and either a hardware dealer or a salesman. How the Cedar Rapids *Evening Gazette* uncovered this motivation is unknown, but seven weeks after the event it reported that this refusal to grant permits “was taken because the three members of the council disapprove of the use of cigarettes and in the belief that Rockford might set an example to other towns.” Whatever the reason, the result was that a “fag can not be purchased in

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403 Ordinance No. 287, City of Oskaloosa, Iowa, Ordinance Record No. 4, at 28-29 (Oct. 15, 1923) (copy furnished by Oskaloosa city clerk Marilyn Miller); “Ordinance No. 287,” *ODH*, Oct. 17, 1923 (5:7).
404 *Revised Ordinances of the City of Oskaloosa Iowa* ch. 46 at 52-53 (1936).
406 For a very brief anecdotal history of the town, see *Past Harvests: A History of Floyd County to 1996*, at 237-59 (Cameron Hanson and Heather Hill eds. 1996). See also http://www.netins.net/ricweb/community/rockford/rockford.htm.
408 The Nays were cast by farmers (Wallace) Talbot and (Elmer) Webster and garage manager (Charles) Elliott; the Ayes by carpenter (Samuel) Lohr and either hardware dealer (Albert) Koerner or salesman (William) Koerner. Since the newspaper did not mention the members’ first names, these identifications presume that the census did not omit other residents with the same last names.
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Rockford, but must be smuggled in.\footnote{Cigarets Are Banned by Rockford Council, “EG, July 26, 1921 (3:4). The use of “smuggled” was misleading since the refusal to permit sales did not set any limits on buying cigarettes elsewhere and bringing them to Rockford. A small piece in a Waterloo paper was even less informative. “Cigarets Not Legalized in Rockford, Ia,” WEC, June 30, 1921 (3:2).} Exactly how long the ban was in place is also unknown, but since no permits were applied for, granted or rejected in 1926, but on July 5, 1927 the council, on the motion of two members, issued two permits, at least one of them to the manager of a billiards room, it seems likely that the ban was in effect until 1927.\footnote{Telephone interview with Pam, Deputy City Clerk, Rockford (Dec. 20, 2007). The mention in the minutes consisted of a newspaper clipping: “Council Proceedings,” Rockford Register, July 6, 1927 (1:5). According to the deputy clerk, the city council minutes are missing from 1921 through 1925, but the minutes for June and July 1926 contain no reference to cigarette permits. Telephone interview with Pam, Deputy City Clerk, Rockford (Jan. 14, 2008). Oddly, the council proceedings that the Rockford Register published for July 5, 1927 were the only ones it published from 1922 to 1927. One of the permittees, George Dawson, had been returned as the billiards room manager at the 1920 population census. The council also approved the bonds of two other applicants.}

Rockwell

As reported in the press elsewhere in the state\footnote{The Rockwell Tribune for 1921 appears no longer to be extant.}, at a special July 4 meeting of the town council of Rockwell—an even smaller town than neighboring Rockford, but a trading center for an extensive farming and animal stock raising district in north-central Iowa\footnote{Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 777 (Vol. 20, 43rd Year, 1922).}—called to decide whether to issue permits, the councilmen (including a telegraph operator, a general store owner, and a 54-year-old German without an occupation, who had been a farmer) voted unanimously not to issue any.\footnote{“Rockwell City Council Forbids Cigaret Sale,” EG, July 5, 1921 (15:5); “No Cigarettes Sold at Rockwell, IA,” Albia Republican, July 7, 1921 (1:5). The occupational information about Sam J. Rankin, Walter L. Williams, and Gerhart A. Block is taken from the 1920 population census; the occupation of one of the other two councilmen, J. H. [F.?] Hillis, who was a business owner, was illegible, while no one corresponding to A. M. Geer was listed. Oddly, according to the Rockwell city clerk, there is no record of a council
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Shannon City

The “boom” that the railroad brought Shannon City in 1887 lasted until the 1920s, though the southwestern Iowa town’s population peaked at 380 in 1900. At the council’s evening meeting on July 8, 1921, 25-year-old Rev. Clare H. Maple presented a petition signed by an astonishing 109 voters in a town whose population was only 333. The councillors, according to a brief account published directly above a Lucky Strike advertisement in a neighboring town’s weekly, “at once took action,” voting to “sustain the petition so that until a new council is elected next spring, cigarettes cannot be legally sold in this town.”

Shenandoah

Located in the southwestern corner of the state, about 12 miles from the Missouri border, 20 miles from the Missouri River border with Nebraska, and 60 miles from Council Bluffs, Shenandoah, with a population in excess of 5,000, had an industrial base consisting of foundries and machine shops, flour mills, and large brick and tile works, as well as the largest seed house in the West and two of the largest flower and tree nurseries in the United States. On March 19, 1921, while the legislature was debating repeal or retention of the statewide anti-cigarette law and during the run-up to the city elections in Shenandoah, an information was filed in Shenandoah Superior Court charging “William Manos, the Greek,” with illegally selling cigarettes. The 35-year-old Manos, who had emigrated in 1906 and not yet become a U.S. citizen, owned
Manos Cafe and Candy Kitchen. The prosecuting witness was 26-year-old James Way, a 26-year-old Kansas-born married laborer with three children. The Tri-Weekly Sentinel-Post, which charged that the law was “generally a dead letter over the state,” predicted that if Manos was convicted, it was “likely that a great many other arrests will follow,” adding sarcastically that “extra jail room” would have to be hired if all violators were arrested. Presumably seeing no way to overcome the prosecuting county attorney’s evidence, Manos immediately pleaded guilty and Judge Frederick Fischer imposed the $25 minimum fine plus costs.

In its next issue, the Republican Sentinel-Post, which had not shied away from intrusively injecting its editorial position into the original report, returned to the subject in a formal editorial. The orthographically shaky editor urged on his readers that the Manos prosecution brought “Shenandoah people face to face with the anamolous [sic] condition of a state law generally a dead letter over the state”—as witnessed by “flagrant[ ]” cigarette smoking by young boys and even “some girls” in Shenandoah and “every other town.” After getting off his chest what by this time had become a cliche about the “travesty” of arresting and fining someone for selling cigarettes to “the boys who acquired the habit under the quasi sanction of the great religious and humanitarian organizations of the country” during World War I, the editor shifted to an innovative criticism of dead-letter laws as giving people the chance to “‘get even’” with enemies by “‘get[ting] the goods’” on them for violating a law that “most everybody else does” too without legal consequences. Without explicitly stating that Manos had fallen victim to such personally selective denunciation, the editor sought to assimilate the target of prosecution for illegal cigarette sales to America’s preeminent racist and ethnic discrimination by declaring that civilized law “will not pick out the Greek in Shenandoah, the Negro in Mississippi and the Japanese in California for punishment for the same things that ten million Americans two three generations from England or Ireland or Sweden are permitted to do.”

The mayor and city council that would have to decide whether to permit cigarette sales in Shenandoah was voted into office at the election on March 28, 1921, which was contested by the Citizens, People’s, and Independent tickets (of

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418 1920 Census of Population, Ser. T625, Roll 506, Page 74 (HeritageQuest); SW, Sept. 6, 1921 (7:5-7) (advertisement).


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which the latter gained no seats), “[t]he main issue” being enforcement of Sunday closing laws. The People’s candidate for mayor, incumbent Fred Hackett, took the position that “when you try to compel [sic] people to follow a strict observation of the Sabbath day, and to take pleasures from them in which they, in their own minds, can see no harm, you are pouring oil on the flames of dissatisfied creation.” As far as he was concerned, “it would be far better to permit Sunday Ball Games and clean picture shows to exist than to drive our people to highways and byways and perhaps to other cities where they could find the amusements best suited to their tastes. My way would be to keep them at home with clean amusements, so that they would be fit for their daily tasks when Monday morning came.” That the People’s ticket was not a citadel of secular libertarianism was underscored by Hackett’s support for the “good work” performed by the “Gospel Team” and others “converting these souls to our Master.” Nevertheless, by analogy Hackett could be imagined as opposed to forcing Shenandoahans to travel to other cities to buy cigarettes as well. The Citizens ticket candidate for mayor, George B. Warner, promised to “strive to keep the city as clean and moral as possible” and to “use his best efforts to keep the amusement places clean and free from vice, so that they may be a necessary adjunct to the business life of the city and not a menace....” Though Warner’s rhetoric made the differences among the tickets on this issue difficult to discern, the Citizens ticket could be interpreted as leaning more toward a regulatory than a laissez-faire stance.

The Citizens candidates secured the mayor’s office (Warner, a farmer) and two council seats (J. W. McMichael, president of a farmers supply company, and H[allie]. A. Rawlings, a carpenter), while the People’s ticket gained three of the

422 “Two More Tickets Enter Field for Coming Election,” SW, Mar. 15, 1921 (1:3). See also “Peoples [sic] Preference Vote Lost in Council,” SW, Mar. 15, 1921 (1:2); “City Council Has Real Busy Session Discussing Topics,” SW, Mar. 15, 1921 (1:6, 8:2-3); “Club Asks Council that People Vote on Sunday Closing,” SW, Mar. 15, 1921 (1:7, 6:4).

423 “Two Candidates for Mayor Tell Where They Stand,” SW, Mar. 22, 1921 (1:3-4).

424 “Not Mayor of Set or Party, But of All City,’ Says Warner,” SW, Apr. 5, 1921 (1:7).

425 The unsuccessful Independent ticket candidate for mayor, H. J. Higinbotham, appeared to tilt a tad closer to the laissez-faire position in owning that he could see “no harm” in Sunday picture shows and ball games “as long as they are conducted in a decent and orderly manner and do not disturb the peace.” Yet even he promised that he would see to it that the pictures shown were “the best” on Sunday and all other days. “Two Candidates for Mayor Tell Where They Stand,” SW, Mar. 22, 1921 (1:3-4); “J. A. Higinbotham States Views on Various Questions,” T-WS-P, Mar. 21, 1921 (1:3).
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five council seats (Harry Shurtz, a poultry man, Clarence Welch, a nursery man, and Oscar Rutledge). One newspaper characterized the impact of this outcome on “Sunday Amusements” as “about an even break,” with three councilmen favorable to an open Sunday and two advocating a closed Sunday. Nevertheless, the Tri-Weekly Sentinel-Post argued that since the question had been “magnified out of all proportion to its importance in the campaign,” it was unlikely that any member of the new council would “take extreme positions” on it.

The city council—which, as the Sentinel-Post understood, was empowered to “license or reject the plan of licensing” began discussing cigarette permits at its meeting on June 13, but deferred action until all members were present. One local newspaper noted that it was believed that the council would adopt the local licensing option “as it is in the majority of the cities the size of Shenandoah,” while another reported the consensus of opinion that the council would issue about four permits. The Democratic Shenandoah World—which published its first cigarette advertisement on July 8—reported that the council had decided on June 17 to license cigarette sales, but this confused and skimpy account may have been erroneous, as revealed by its next report that the council might decide the issue on June 24. In fact, a previous “conference among members” had “left the matter in doubt,” with three favoring permits for a limited

426 “City Election Will Be Held on Monday on Three Tickets,” SW, Mar. 25, 1921 (1:1, at 2:5-7); “Warner Has Majority over Hackett of 16,” SW, Mar. 29, 1921 (1:6-7). The occupational information is taken from the population census; no Oscar Rutledge appeared in Iowa in 1920, but in 1910 a 25-year-old by that name was an assistant farm manager in another county. Use of the 1920 census was complicated by a curious error that apparently listed everyone living in Shenandoah as living in the much smaller town of Shambaugh in Page county. The same ticket names were used in the local elections in Grinnell, Mayor McIlrath of the Citizens ticket leading the cause against permits. What the press meant by the statement that “the election resulted in a one-sided ticket having the majority of the members on the city council” is unclear. “Council Learns Shenandoah’s Debt Is Now $308,500,” SW, Apr. 8, 1921 (1:3).


429 “City Council Meets,” SW, June 14, 1921 (6:4). By June 13 it is very unlikely that most same-sized cities had made any decision, let alone that this newspaper would have known whether they had in fact.

430 “Council Has Taken No Action,” T-WS-P, June 15, 1921 (1:5).

431 SW, July 8, 1921 (8:1-3) (Chesterfield).

432 “Council Selects New Fire Chief,” SW, June 21, 1921 (1:4). Not only did the article fail to disclose the vote, but it conflated the state law and the council’s purported action.
number of merchants and two "disfavoring the idea." Unsurprisingly, several of Shenandoah’s "leading merchants" requested that they be among the chosen few in case this proposal were limited, their reputations lending credence to their law-abidingness. The council’s failure to issue any licenses, the World commented, would “result in thousands of dollars each year being sent out of the city to procure smokes” by residents. Presumably in order to take advantage of such failure, Council Bluffs, Omaha, and other cities were reportedly monitoring the council’s decision. The council did formally, albeit tentatively, act on June 24, in the presence of a local WCTU delegation, which presented a petition signed by an impressive 480 voters requesting that no permits be issued in Shenandoah. In the WCTU’s immediate presence, following lengthy discussion, the council by a 3 (McMichael, Welch, and Rawlings) to 2 (Rutledge and Shurtz) vote rejected the only application that had been submitted. To be sure, the vote appears not to have been a principled decision since the press observed that the council would probably have further opportunities to act on other applications. Whether Welch would continue to vote with the Citizens ticket against his People’s ticket colleagues remained to be seen.

The possibility that smoking residents of Shenandoah would have to leave town to buy cigarettes triggered diametrically opposed value judgments in the press. A weekly in neighboring Adams county observed that “if the Shenandoah users want to make a ‘stink’ in that town and color their fingers a creamy yellow, they will have to get the ‘paint’ some place else.” The editorial writer of the Times-Republican, published in Bedford, the county seat of neighboring Taylor county, viewed the council members as having “laid down the bars for their young men to either send their money to neighboring towns or burn up $5.00 worth of gasoline making trips to Missouri or to towns who are permitted to sell the ‘coffin nails.’” Committed to a narrow economic framework, the perplexed paper asked: “What will Shenandoah profit by closing the door on the sale of cigarettes when almost every town surrounding it will be permitted to sell?” As far as it was concerned, “[t]he best way to handle the ‘weed’” was licensure.

433“Council May Decide on License Issue,” SW, June 24, 1921 (1:3). See also “No Cigarettes in Shenandoah,” Boyden Reporter, July 7, 1921 (8:4). “Divided on Cigarette Sales,” T-WS-P, June 17, 1921 (1:2), had reported earlier that the council was “divided on the propriety of issuing” cigarette permits.

434“City Council Says No Cigaret Sales Will Be Licensed,” T-WS-P, June 27, 1921 (1:1); “To Discuss Oil and Cigarette Cases,” SW, June 28, 1921 (1:2); “Shenandoah Bars Cigarette Sales,” CBN, June 28, 1921 (10:3).

435“Neighboring News,” Adams County Free Press, July 16, 1921 (1:1).
combined with the appointment of enforcers “who are not users...” Though the latter point was meritorious as far as it went, it nevertheless failed to deal with the ever-present issue of ubiquitous role-modeling for emulation by minors.

For reasons that the press did not explain, the council’s 3 to 2 vote against permits shifted to favoring them, as Welch switched sides (realigning himself with the other People’s ticket members) at the meeting on July 1, when the council voted to grant permits to six applicants, including owners of two candy stores (one of whom was none other than Manos, the confessed transgressor under the old law), two cafes, a cigar store, and the Elks lodge. However, the shift was trumped when Mayor George Warner vetoed the resolution. With four votes required to pass the resolution over the veto, the press speculatively concluded that unless another opponent of cigarette sales changed his vote, they would be unlawful in Shenandoah. When the applicants’ lawyer declared that he would secure a court order compelling the council to issue the permits, the Sentinel-Post (which two days later inaugurated publication of cigarette advertising), playing legal expert, incorrectly characterized the law as “specifying] that the council shall pass separately upon each applicant for a permit and may grant or reject the same.” The paper then proceeded to conjecture that: “The theory of the law probably is that the discretion of the council is simply as to the general qualifications or fitness of the applicant and does not contemplate the rejection of permits in toto.” However, the article understood that even this restrictive approach could bring about the latter outcome anyway because “the council may reject all applications one by one as they are presented...” And although it significantly overestimated the urgency (“very soon”) of judicial intervention, the Sentinel-Post did correctly predict that the question would probably be tested in the courts because Shenandoah’s dispute would doubtless be replicated in other cities and towns. In the meantime, the likelihood that for some time cigarettes could not be sold lawfully in Shenandoah prompted a cafe in Essex, a smaller town six miles away, to take out a large ad in the Sentinel-Post calling attention to the cigarette brands that it was selling.

At the meeting on July 13, with “[t]he cigarette question still occup[y]ing the leading place in city activities,” after the six applications that had been

436“No Cigarettes,” Times-Republican (Bedford), July 7, 1921 (4:3) (edit.).
439T-WS-P, July 6, 1921 (3:4-6) (Camel).
441T-WS-P, July 8, 1921 (4:1-3) (Model Cafe).
442“Mayor Again Vetoes Permits to Dealers to Sell Cigaretts,” T-WS-P, July 15, 1921
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presented at the previous meeting were again presented to the council, the members once again voted 3 to 2 in favor of granting permits, and the mayor again vetoed each such motion. To be sure, lawyers in Shenandoah were uncertain as to the veto’s legality and the city government awaited an opinion from the state attorney general.443 The local press framed the question in terms of whether mayors could veto cigarette permit actions of city councils which, according Governor Kendall, had “discretionary power” over the matter.444 In the meantime, as the out-of-town press reported under the headline, “Shenandoah Has Battle over Fags,” one of the lawyers for the would-be cigarette sellers notified the city clerk that unless he issued the permits by a certain hour, the attorney would “start mandamus proceedings against him personally on the theory that the city clerk is a creature of the council and must obey the wish of the council.” The clerk, however, decided not to act until an opinion was issued by the attorney general,445 who announced that he had received similar questions from other towns, on all of which he would probably provide an opinion at the same time.446

In any event, the Shenandoah Superior Court would not decide the applicants’ mandamus action and therefore no lawful cigarette sales could take place until the court’s next term began on August 3.447 In turn, the council majority that voted to issue permits was rumored to have decided not to fund the clerk’s legal defense, though an alternative source of funding was also said to be available.448

On August 2, Attorney General Gibson responded to the question posed by the Page County Attorney as to whether the mayor of Shenandoah had a right to veto the motion passed by a 3 to 2 city council majority to grant cigarette sales permits. Noting that the new cigarette sales statute did not prescribe any procedure for city councils to follow, Gibson pointed out that in fact councils had been using three methods: ordinances, resolutions, or motions duly recorded. Whereas the last mentioned did not, by judicial precedent, require any mayoral approval, the Iowa Code required councils to pass ordinances and resolutions

(1:6).

443“Vote on Cigarettes,” SW, July 15, 1921 (1:2).
444“Cigaret Hearing Tomorrow,” T-WS-P, July 18, 1921 (8:3).
445“Shenandoah Has Battle over Fags,” EG, July 19, 1921 (7:2). The same article also ran under a different title: “Shenandoah Has Hot Cigaret Fight,” WEC, July 18, 1921 (7:6-7).
446“Cigaret Hearing Tomorrow,” T-WS-P, July 18, 1921 (8:3).
447“Cigarette Sales in City Will Not be Decided Until August 3,” T-WS-P, July 20, 1921 (1:2).
448“Council May Refuse Attorney Fees to Fight ‘Cig’ Case,” SW, Aug. 2, 1921 (1:1).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

over vetoes by at least a two-thirds majority. Since the mayor had vetoed a resolution, his action was valid, but in the meantime the judge held a hearing in the case against the city clerk. As the local press observed, however, Judge Frederick Fischer’s decision would “have but little bearing upon the final outcome, for if the three councilmen favoring the applicants for permits pass a simple motion to grant the permits the mayor can not veto the action and it would appear that the applicants will therefore win their claim if the three councilmen stick to their former position.” Judge Fischer finally issued his decision on August 26, upholding the mayor’s veto and denying the writ of mandamus without explanation.

In the wake of the ruling vindicating the council in sustaining the executive veto of the permits, the lid was “clamped down” on sales. The next phase in “Shenandoah’s ‘cigaret war’” opened a week later, on September 3, when the deputy sheriff raided several confectionary stores, securing a large number of cigarettes from the businesses of two applicants, the recidivist William Manos and Tom Atherton (the owner of Candyland), which they had allegedly been selling without permits. Superior Court Judge Fisher was also to be in charge of their trial on charges of unlawful selling. It is unclear whether the Sentinel-Post’s editor was now satisfied that the authorities had unambiguously plumped for enforcement.

With two competitors facing charges, the prohibitory regime’s longevity appeared solid enough that on September 6 Zurmeuhlin & Gunnoude Smoke House in Council Bluffs (about 60 miles away) published a large advertisement in the Shenandoah World with the following text:

**CIGARETTES**

You needn’t be without them.

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450 “Cigarette Veto by Mayor Valid,” SW, Aug. 9, 1921 (1:2).


453 “Cigaret Stocks of Two Dealers Now at City Hall,” Shenandoah Tri-Weekly Sentinel-Post, Sept. 5, 1921 (1:1). The version of this article that appeared as “Officers Raid Alleged ‘Pill’ Bootleggers,” WT-T, Sept. 9, 1921 (1:1), confusingly got the date of the raid wrong.

2055
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

We have them in any quantity you want. We will send them by mail to you. Just enclose a money order for the quantity you want, send your name and address, and the brand you want, and you’ll have them in a jiffy.

**KEEP YOUR MONEY IN IOWA EVEN THOUGH IT MUST LEAVE SHENANDOAH**

Remember, just an order, and you can smoke.\(^{454}\)

This solicitation (by Louis Zurmuehlen, the mayor of Council Bluffs, who two years later was investigated by a grand jury for selling cigarettes without stamps)\(^{455}\) not only presupposed the continuing existence of the prohibition on cigarette sales in Shenandoah, but also hinged on the hope that townspeople’s Iowa commercial pride would deter them from driving a dozen miles to the Missouri border to stock up. And although this outcome was presumably not intended by the Council Bluffs merchants, at a special meeting the very next day, September 7, the city council granted permits to three of the original six applicants (Edwards Brothers, Oviatt & Son, and the Elks Club), the three People’s councilmen, Rutledge, Shurtz, and Welch, voting for and Citizens ticket councilmen McMichael and Rawlings against each application. Although Mayor Warner gave notice that he would veto the council’s actions, under the attorney general’s opinion the veto power did not extend to the procedural vehicle of a “simple motion,”\(^ {456}\) which, not requiring the mayor’s approval, was thus immune to his veto.\(^ {457}\) Despite this defeat the mayor nevertheless gained the praise of the local WCTU for his stand.\(^ {458}\) On September 22 the council then granted permits

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\(^{454}\)SW, Sept. 6, 1921 (7:5-7)


\(^{456}\)“Cigaret Dealers at Last Granted Selling Permits,” T-WS-P, Sept. 9, 1921 (1:1). “Council Grants Cigaret Licenses,” SW, Sept. 9, 1921 (1:6), did not even reveal the vote.

\(^{457}\)“Mayor’s Hands Tied Is Ruling in Cigaret War at Shenandoah,” EG, Sept. 13, 1921 (3:7); “Shenandoah Loses Big Cigaret Fight,” CRR, Sept. 14, 1921 (10:5). For still later and more abbreviated accounts in weeklies, see “Iowa News” in Humeston New Era, Sept. 21, 1921 (5:5); Lytton Star, Sept. 22, 1921 (6:1); Oxford Mirror, Sept. 29, 1921 (9:7). After the legislature in 1924 had prescribed “resolution” as the sole procedure for issuing permits, the dispute as it had unfolded in Shenandoah could no longer be replicated. Iowa Code § 1557 (1924).

\(^{458}\)“Commends Mayor’s Stand,” T-WS-P, Sept. 12, 1921 (1:5).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

to Atherton and one cigar store, while voting on, but not granting a permit to a cigar maker, because Rutledge deserted his co-People's ticket colleagues to join Rawlings and McMichael, who had voted "steadily against all permits." Although, or perhaps precisely because, the anti-cigarette movement had lost the selling war in Shenandoah and greater availability was anticipated, a few days later the school superintendent announced that any pupil found with any form of tobacco on his person would be suspended for three days and for a second offense "expelled...for good." Thus ended the "Cigaret War at Shenandoah."  

Winterset

The county seat of Madison county—which may have had the state's highest per capita WCTU membership, which had vigorously and concertedly opposed the Dodd bill—Winterset was surrounded by extensive farming and livestock-raising operations. A few months later it engaged in a see-saw struggle over permits, for which by June 29 only three applicants (two drugstores and a restaurant) had applied. At its crucial meeting on the night of July 5, the city council received petitions protesting licensure from the WCTU, the Methodist, Presbyterian, United Presbyterian, and Baptist churches, and Church of Christ, the YMCA, and the ministerial association. With the council vote split 2 to 2, the mayor cast the deciding vote against issuing permits to any of the four applicants. However, at the next council meeting held two days later, more

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459 "Candyland Granted Cigarette License," SW, Sept. 23, 1921 (1:6). Atherton, the owner of Candyland, the next day published a large advertisement touting its home-made candies and sanitary candy kitchen without mentioning the commodity it was newly authorized to sell. SW, Sept. 23, 1921 (6:5-7). Why Atherton's application was approved but not Manos's is unclear as is the outcome of the charges against them for selling without a permit.
460 "Grant Two More Licenses," T-WS-P, Sept. 23, 1921 (1:4). The rejected applicant was William Tomlin.
461 "Put a Ban on Smoking," SW, Sept. 30, 1921 (1:1).
463 See above ch. 15.
466 "Cigaretts Turned Down," WM, July 6, 1921 (1:1).
City Councils that Perpetuated Cigarette Sales Bans in the 1920s and 1930s

petitions were presented, this time also by those favoring licensure, who secured theirs “after the petitions signed at the close of Sunday church service” had been submitted at the previous session. The press failed to identify the backgrounds of those urging licensure, merely noting that many who disapproved of the use of cigarettes and acknowledged their injuriousness nevertheless doubted that prohibiting any form of tobacco to adults would be successful. In the event, one of the two council members who had voted Nay—Charles Christensen, a 42-year-old plumber with his own shop who had emigrated from Denmark as a child—for reasons unexplained in news accounts, changed his vote to Aye, thus producing a 3 to 1 vote for issuing permits and ending Winterset’s two-day old ban. 467

467“The Council Reverses on Cigarettes,” WM, July 13, 1921 (1:5). The Nay-voting councilman who did not change his vote, 46-year-old Earnest Hiatt, was county engineer. The two consistent Aye-voters were Albert Rees, a 53-year-old blacksmith, and (apparently) Edward or Will Davis, both of whom were laborers. The occupational information is taken from the 1920 population census. There is a confusion of dates in the two newspaper articles: the first article, which appeared on Wednesday July 6, spoke of the first meeting as having taken place “last night” (Tuesday July 5), whereas the second article, which appeared on Wednesday July 13, referred to the first meeting as having taken place the previous Wednesday (July 6) and the second meeting the previous Thursday (July 7). If the dates mentioned in the second article are correct, then the ban had lasted only one day. A blurb in an out-of-town weekly stated that the first meeting had taken place on Tuesday. “Neighborhood News,” Adams County Free Press (Corning), July 16, 1921 (1:1).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales: The Anti-Chain Store (and Especially Anti-Great Atlantic & Pacific Tea Company) Battle

With cigarettes being sold by chain grocery stores at a price which it is impossible for the merchants handling only tobacco products to meet...¹

MR. JONES: Does your state compel the municipality to issue the license?

MR. HAWSE: It does not.²

The resistance in the later 1920s and 1930s to permitting the Great Atlantic & Pacific Tea Company to sell cigarettes in various Iowa cities such as Perry, Waterloo, and Iowa City was part and parcel of a nationwide struggle between small independent retail tobacco dealers and the “world’s largest retail organization,”³ the number of whose stores, already at 14,000 in 1925, increased by 1933 to 16,000,⁴ and whose sales for the fiscal year ending February 28, 1930, exceeded a billion dollars.⁵ That A & P was the flash point for disputes over cigarette permits was hardly fortuitous: by the early 1930s it had for several years been selling not only one-tenth of all the food sold at retail in the United States, but also tens of billions of cigarettes. These facts together with the company’s 90,000 employees prompted Fortune to launch this extravagant praise: “If a communistic government, aided and abetted by the toplوغiest ‘planned economists’ alive, should set out to devise the most efficient food distribution

¹Chas D. Barney & Co., The Tobacco Industry: Annual Review for 1928, at 23.
²Report of Proceedings: Fourth Annual Conference of Administrators of Tobacco Tax Laws: November 19-20, 1930, at 64. H. M. Jones was a field agent of the Alabama Tobacco Tax Department; W. E. Hawse was the superintendent of the Iowa Cigarette Revenue Department in Iowa.
⁵“A. & P. Company Sales for Year $1,053,692,882,” WDC, Apr. 18, 1930 (2:8).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

system and should produce anything half so effective as the Great A & P, the Supreme Food Dictator would command the headlines of the world. In all Soviet Russia there is no division of production or distribution which even in the crude matter of size can compare with the Great A & P.\(^6\) Regardless of the Stalinist Soviet Union’s alleged envy, A & P stood at the center of the anti-chain store movement’s protest against the concentration of capital and its impact on economic democracy.\(^7\)

A study conducted by the Federal Trade Commission during the last week in December 1928 revealed that cigarettes were the commodity on which grocery store and drug store chains showed the greatest losses in terms of selling prices below their total costs (14.0 percent and 26.2 percent, respectively).\(^8\) The dispute in Iowa City reflected in part a larger, indeed nationwide, cigarette war between chain grocery stores (preeminently A & P) and chain tobacco retail organizations (primarily the United Cigar Stores Corporation, of which the Duke interests were co-owners, and the second largest firm, Schulte Retail Stores Corporation),\(^9\) which local independent dealers feared would destroy them. The latter complained that chain stores were using cigarettes as loss leaders,\(^10\) selling them below cost, as the head of the Independent Retail Tobacconists of America put it in New York in 1929, “as a means of bringing people into their stores in order to sell them profitable lines of other goods.” With the list price of cigarettes at 12 cents a pack for small dealers, who were expected to sell them at two for 25 cents, the economic ruin of 400,000 cigar dealers loomed since they were unable to withstand the “unfair competition” of the chains, which could sustain selling

\(^6\)“Biggest Family Business,” Fortune 7(3):52-55, 128-32 at 53 (Mar. 1933). Although Fortune referred to tens of billions of cigarettes, that estimate appears to be excessive for a single year. See below this ch.


\(^8\)Federal Trade Commission, Chain Stores: Chain Store Leaders and Loss Leaders tab. 22 at 44, and tab. 25 at 47 (Sen. Doc. No. 51, 72d Cong., 1st Sess. 1932). The FTC reported that “loss leader” included commodities sold below net invoice cost, net purchasing cost, net manufacturing cost, or even the usual mark-up. Id. at viii.

\(^9\)Recent Economic Changes in the United States: Report of the Committee on Recent Economic Changes, of the President’s Conference on Unemployment 1:366 (1929); “Retailers Aroused by Cigarette War,” NYT, May 21, 1929 (30). On earlier (unsuccessful) efforts to merge the two chains, see “United Cigar Plans to Buy Schulte Co.,” NYT, Oct. 27, 1921 (1).

below cost, whereas small stores found even the 4 percent profit rate unsustainable. These periodic price reductions were in part designed by the cigarette manufacturing oligopolies to undermine competition from manufacturers of cheap 10-cent cigarettes, whose share of total cigarette sales skyrocketed from 0.26 percent in January to 22.78 percent by November 1932, but dropped back down to 6.43 percent by May 1933 in the wake of A & P’s reduction of its selling price to 10 cents. A & P’s large and widespread impact on retail price structures enabled the cigarette oligopolists to use it as “a price-cutting instrumentality,” in connection with which from 1930 to 1933 the oligopolists paid the chain more than $2.5 million for window and counter displays and sales cooperation. In view of A & P’s central role in the oligopolies’ pricing strategy, Iowa municipalities’ denial of permits to the chain stores under their jurisdiction was tantamount to a counterattack by small local sellers on the giant manufacturers.

Remarkably, the city councils of the four cities forced into litigation over the question of their power to deny cigarette sales permit had put up no resistance to issuing them at the outset of licensure in 1921.

**Perry (1928)**

The power to grant permits for the sale of cigarettes is a matter of public interest. The public interest is against the sale and use of cigarettes and therefore opposed to the granting of such permits. Construing the word “may” as favorable to the public interest, it must be construed as permissive and discretionary in application.

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15. American Tobacco Co. v United States, 147 F.2d 93, 106 (6th Cir. 1944).
17. Appellant’s Brief and Argument at 8-9, Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

On July 11, 1921, a week after the new cigarette law had gone into effect, the city council of Perry, the state’s thirty-first largest town, with a population in 1920 of 5,600, located near Des Moines, and the center of an important agricultural district with some farm-related industries in addition to cigar and washing machine factories, passed a boilerplate cigarette ordinance. The ordinance had been passed at the previous meeting, but Mayor Adrian Cross, for reasons that he had stated, but that neither the city clerk in her Certificate of Passage of Ordinance over Refusal of Mayor to Sign Same nor the Perry Daily Chief revealed, vetoed it.

Cross (1868-1924) had been publisher and editor of various newspapers before becoming Perry city clerk in 1904, a post that he held until 1923 except for the year and a half he was mayor. Throughout his career he was also extensively involved in various charities and was a long-time Presbyterian Sunday school teacher and superintendent.

Cross’s veto message (“Mayor’s Objections”) of July 5, which he filed with the clerk and is attached to the council minutes, was read by the clerk to the council on its instruction at the July 11 meeting. A unique document in the 1921 post-repeal permit process, it deserves full quotation:

I cannot sign the cigarette ordinance for the following reasons:

First. Because there is no good reason for the use of cigarettes, and furthermore they are exceedingly offensive to the person who does not smoke.

Second. The smoking of cigarettes in restaurants and hotels and other public places, where ladies are present, is being permitted to the extent of becoming a very serious nuisance.

Third. Not only is the cigarette habit very pronounced among young men and boys, but is reaching out to women and girls which is a most deplorable fact.

Fourth. I can see no good reason why cigarette permits should be issued promiscuously to everyone who makes application, merely as a revenue producing proposition. The number of permits should be limited (since the Council have the matter in hand), and the sales confined to the proper places and under the more favorable conditions.

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18 On the businesses and industries in Perry, see Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 746 (Vol. 20, 43rd Year, 1922); Eugene Hastie, History of Perry, Iowa 155-68, 187-97 (n.d. [1962]).

19 Ordinance No. 140, in PDC, July 13, 1921 (3:4-5).

20 Certificate of Passage of Ordinance over Refusal of Mayor to Sign Same, in PDC July 13, 1921 (3:5).

21 “Death Takes Adrian Cross This Morning,” PDC, June 7, 1924 (1:1); “Last Services for Adrian Cross,” PDC, June 10, 1924 (1) (copies furnished by Katie Edmondson, Perry genealogist); Eugene Hastie, History of Perry, Iowa 134-35 (n.d. [1962]).
conditions.

Fifth. The new cigarette law delegates all the powers to the City Council, so that the Mayor has no voice in the matter, up to the point of signing the Ordinance. I cannot therefore consistently sign my name to an Ordinance that would legalize the sale of cigarettes in Perry.\textsuperscript{22}

Interestingly, the first reason that Cross, who was not a member of a church that programmatically or doctrinally banned smoking,\textsuperscript{23} offered for objecting to the issuance of permits was the extreme offense that cigarette smoking caused nonsmokers in general. In second place he listed the nuisance it caused women. Then shifting focus, he drew attention to the increase in smoking by females that increased availability of cigarettes would bring about. Finally, taking a reformist tack, he proposed that, instead of quasi-automatically issuing permits to everyone who met the minimal formal statutory requirements merely in order to raise revenue for the city, the council cap the number of permits and formulate criteria for identifying the sales locations (and presumably sellers) that would give rise to less destructive consequences.

After the mayor’s objections were read, the council—which consisted of an eye doctor, grain elevator manager, feed store merchant, grocery store clerk, and auto salesman—\textsuperscript{24}—passed it over the mayor’s veto by a vote of 4 to 0\textsuperscript{25} “without discussion or argument.”\textsuperscript{26} By the same vote the council then issued permits to 13 applicants,\textsuperscript{27} including the owners of two restaurants, a cigar store, two drug stores, and a billiard hall.\textsuperscript{28} From 1922-23 to 1928-29 Perry issued between 14

\textsuperscript{22}Adjourned Regular Meeting of the City Council at 170 (July 11, 1921) (copy furnished by Perry City Clerk Jeanette Peddicord).

\textsuperscript{23}Cross listed himself as a Presbyterian for the state census. Iowa Census 1915: Dallas County, Card No. B136.

\textsuperscript{24}The members were B. Roy Emms, Charles A. Etnire, David Hall, Leo Dignan, and E. J. Haupert. Eugene Hastie, \textit{History of Perry, Iowa} 135 (n.d. [1962]). Edward J. Haupert was not listed in the 1920 population census, but did appear in the 1915 Iowa census, Dallas County, Card No. 71. Etnire’s occupation is illegible, but his occupation from 1910 is used here. Dignan operated the grocery store after his father’s death in 1926. Eugene Hastie, \textit{History of Perry, Iowa} 144-45 (n.d. [1962]).

\textsuperscript{25}Adjourned Regular Meeting of the City Council at 171 (July 11, 1921) (copy furnished by Perry City Clerk Jeanette Peddicord). Dignan was absent and did not vote.

\textsuperscript{26c}Council Issues Permits to Sell Cigarettes,” \textit{PDC}, July 12, 1921 (1:1).

\textsuperscript{27}Adjourned Regular Meeting of the City Council at 172 (July 11, 1921) (copy furnished by Perry City Clerk Jeanette Peddicord).

\textsuperscript{28c}Council Issues Permits to Sell Cigarettes,” \textit{PDC}, July 12, 1921 (1:1). See also “Perry Licenses Sale of Cigarets,” \textit{Des Moines Sunday Capital}, July 17, 1921 (12:7).
and 17 permits annually.  

Judicially cognizable problems developed in February 1928, when the Great Atlantic & Pacific Tea Company applied for a permit for its grocery store in Perry, which its manager was “in a hurry” to obtain, presumably because the store had not been in a position to sell cigarettes lawfully since its opening in January 1927.  A & P’s involvement in this test litigation was hardly fortuitous: after all, the company was “[t]he largest purchaser of cigarettes in the United States.” By 1934, A & P’s purchases accounted for 5.04 percent of all cigarettes produced in the United States—more than 50 percent more than the next five grocery chains combined. A & P’s share also exceeded the 4.6 percent accounted for by the three largest drug and tobacco chains (United Cigar Stores, Schulte Retail Stores Corporation, and United Drug Company, which operated Louis K. Liggett & Company stores).

After the manager had paid the requisite mulct tax and posted the proper bond, the city clerk interviewed all but one of the city council members, and, forming the belief that they were “favorable,” issued the permit. Since the council had never acted on the application, let alone issued the permit by the statutorily prescribed procedure of a resolution, the clerk lacked authority to issue it and her action was without legal effect, although A & P suffered no harm, since it actually was able to sell cigarettes pursuant to the permit during the entire term

Unfortunately, the 1920 population census did not permit unambiguous identification of the other permit holders.

29Calculated by dividing the permit tax revenue by the $75 fee. See the various issues of Report on Municipal Finances cited above ch. 19.


31Eugene Hastie, History of Perry, Iowa 154 (n.d [1962]).


33Report of the Federal Trade Commission on Agricultural Income Inquiry, Part III: Supplementary Report tab. 27 and 28 at 143, 145 (1938). Although it did not reveal absolute dollar amounts, according to an internal cigarette company document on A & P sales from 1930 to 1932, Camel cigarettes accounted for between 24 and 44 percent of the chain’s cigarette sales, while Lucky Strike and Chesterfield accounted for between 36 and 40 percent and 20 and 25 percent, respectively. Sales of Cigarettes in A and P Stores (Feb. 20, 1933), Bates No. 502407226

Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

of its alleged validity.35

In June 1928, as the permit period was approaching its expiration, the manager apparently realized that A & P would need a valid permit and therefore filed an application together with the required bond and tax. But while denying A & P’s application, the council granted “most, if not all, the other applications,”36 prompting A & P, on August 24, 1928, to file a mandamus action against the City of Perry, the mayor, the five council members,37 and the city clerk in Dallas county district court,38 alleging that the council had acted arbitrarily in denying the company a permit and seeking a writ directing the defendants to grant the plaintiff the permit. A & P’s principal claim was that since it had not violated the law before filing its application, “the council had no discretion, but was under legal obligation to issue the permit.”39
It is unclear whether the parties or the court was aware of the fact that on December 5, 1927, the treasurer of state had requested an opinion from the Iowa attorney general regarding these two questions:

“1. Can a Board of Supervisors or a City or Town Council, where they have granted permits to some persons, refuse to grant a cigarette permit to others?

“2. In refusing to grant a cigarette permit, can the Board of Supervisors, City, or Town Council, be compelled to furnish or give a reason why said permit was refused?”

The attorney general, who replied four days later, did not reveal (and perhaps was himself not familiar with) the context in which the questions had arisen—not even as to whether the treasurer was himself reacting to an inquiry or merely hypothetically raising the issue on his own. The attorney general’s brief, one-sentence, opinion was based on section 1557 of the Iowa Code, which, in pertinent part, merely provided that a “permit may be granted by resolution of the council of any city or town...and when so granted, may be issued by the clerk of such city or town.” Without engaging in jurisprudential exegesis or offering any explanation as to how he had arrived at his conclusions, the attorney general simply asserted that: “In view of the language used in the above section we are of the opinion that the granting of a cigarette permit by either a board or city council is absolutely discretionary, and they may refuse to grant a permit and are not compelled to give any reason therefor.”

Regardless of what District Judge W. S. Cooper may have known of similar disputes elsewhere in Iowa, he conceded that “all laws and ordinances must operate with equality”; he was even willing to acknowledge that “probably it is true that the discretion vested in the council is not an arbitrary discretion, but rather a legal discretion, but he nevertheless found that “the record does not sustain the contention of plaintiff’s council [sic] that the council was coerced by other cigarette dealers into refusing this permit.” Rather, the evidence showed that after discussing the matter the council decided to grant no permits to grocery stores to sell

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41Iowa Code § 1557 (1927).
cigarettes. It seems to me that this was a matter within its discretion. At one time the sale of cigarettes was prohibited; then it was allowed under the restriction that none should be sold until after a permit to do so had been granted by the council. If the council has no discretion in the latter, then the Chapter in relation to this amounts to little.\footnote{Great Atlantic & Pacific Tea Company v. City of Perry, Iowa (No. 11,777, Dallas Cty Dist. Ct., Nov. 2, 1928).}

Since statutes prohibiting the sale of liquor in certain places such as grocery stores or hotels had been upheld by courts, Judge Cooper reasoned that at the very least “[s]urely some discretion rests with the council as to the places where cigarettes may be sold.” On the other hand, the most that he would concede (counterfactually and speculatively) to A & P was that if its “place of business had been singled out for a denial, such denial might possibly not be upheld unless there was some particular reason therefor, but when the denial of the right extends to all engaged in similar business then no abuse of discretion is shown for that reason alone.”\footnote{Great Atlantic & Pacific Tea Company v. City of Perry, Iowa at 2 (No. 11,777, Dallas Cty Dist. Ct., Nov. 2, 1928).} Without deciding what obligation the council may have had to explain its reasons, the judge guessed at some plausible ones, some of which, significantly, might also have applied to adults:

Children patronize grocery stores more than other places of business; grocery stores as a rule do more credit business than drug stores, grocery stores deliver goods, more freedom is usually allowed in going about the merchandise in grocery stores than in other stores. All of these reasons and perhaps others might have been in the minds of the council. In the absence of some showing of wrongful motive, the discretion of the council should not be interfered with by the Court.\footnote{Great Atlantic & Pacific Tea Company v. City of Perry, Iowa at 2 (No. 11,777, Dallas Cty Dist. Ct., Nov. 2, 1928).}

Even more remarkable than Judge Cooper’s failure to cite any judicial precedents for the conclusions in his brief and typo-studded ruling\footnote{The local paper’s assertion that the “three page ruling...was a long one” was curious: it was about 55 lines. “Verdict for City in License Case,” PDC, Nov. 5, 1928 (1:5).} was the lack of any concrete rootedness in the cigarette sales statute: not only did he not seek to parse the meaning and scope of the legislature’s grant of discretion to local governments, but he appeared to be ignorant of the direct connection, relevance and significance of the legislative history for the question of the extent of city councils’ home rule powers. Although A & P excepted to the ruling,\footnote{Great Atlantic & Pacific Tea Company v. City of Perry, Iowa at 2 (No. 11,777,} it does not
appears to have filed an appeal; in any event, the Iowa Supreme Court did not rule on it. But when that Court finally did resolve the same question three times in 1932-33, the statute and legislative history played a central role.

The Iowa Attorney General, apparently during the final two months of 1928, appended a footnote to his aforementioned opinion to the Treasurer of State: “So held in Great A. & P. Tea Co. vs. City of Perry, Dallas Co. Dist. Court, 1928.”49 Although the assertion that Judge Cooper had held that the city council had the absolute discretion to grant or deny a permit (that the Attorney General had read the statute as conferring) was an exaggeration, the Supreme Court’s superseding decisions soon created or confirmed precisely such a power.

In the meantime, predictably—in view of A & P’s central importance for cigarette sales and vice versa—A & P did not abandon its efforts to sell cigarettes in Perry. On July 7, 1930, the chain once again presented a request for a permit to the city council, which discussed the question, which had become “touchy” since the previous litigation, for more than half an hour, as two A & P representatives from Des Moines were afforded time to state the company’s reasons for the request. In the course of the discussion “[i]t was intimated that the number of permits in the city was already too high numbering 18 which is more than the number allowed in several Iowa towns of this size or larger. Because of the unusually large number already issued it was not considered that more were needed.” These grounds replicated the “opposition to the promiscuous granting of permits...organized by certain organizations” in some other towns. Acutely aware, especially since the district court’s ruling two years earlier, that the state law conferred on the council “full authority in the issuance of permits,” which made the members “privileged to grant or refuse permits as they desire,” they unanimously passed a motion to table the application (along with one by another grocery, Snowball Market), which “constituted a refusal to grant the license....”50 Although the city of Perry collected cigarette mulct taxes amounting to $1,462 in 1930-31, 1931-32, and 1932-33, and then $1,106 in 1933-34,51 suggesting (at $75

Dallas Cty Dist. Ct., Nov. 2, 1928).

49Seventeenth Biennial Report of the Attorney General for the Biennial Period Ending December 31, 1928, at 273. Since the Attorney General’s opinion was dated Dec. 9, 1927, it could not possibly have relied on the A & P case, which did not even arise until mid-1928.

50“Council Refuses Grocery Stores Cigaret Permits,” PDC, July 8, 1930 (1:8).

Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

Waterloo (1930)

“May” Means “Must”\(^{53}\)

Despite its defeat in Perry, by no means did A & P acquiesce in efforts by city councils to deny it the privilege of selling cigarettes. In Waterloo, the state’s seventh largest city with a population just shy of 46,000, though the total number of cigarette permits outstanding was plentiful, the taxes they generated for the fiscal year ending March 31, 1930, nevertheless accounted for only $10,300 of the city’s total receipts of more than $1.6 million.\(^{54}\) The A & P stores there did have permits in 1928 and 1929\(^{55}\) but “allowed them to lapse.”\(^{56}\) A & P applied for permits in February 1928 and the council granted all five;\(^{57}\) in April the council, without objection, received A & P’s application for renewal of cigarette permits and placed them on file,\(^{58}\) and two months later, at its mid-year session, approved five permits for the same store locations.\(^{59}\) At its mid-year session in 1929, the Waterloo city council approved all of the almost hundred applications for permits with “but one exception”—A & P’s, which were tabled.\(^{60}\) The parties’ later


\(^{55}\)A & P appears not to have been issued permits in 1927: it was not listed among the applicants whose applications were granted at the mid-year session on June 27, 1927. “Council Proceedings,” \textit{WEC}, July 4, 1927 (9:6-8 at 6-7) (June 27). Nor was A & P listed as having been granted a permit in the minutes of any other council meeting in 1927 published by the \textit{Courier}, at some of which permits were granted.


\(^{60}\)“City Speed Code Changed in Line with State Law,” \textit{WEC}, June 25, 1930 (4:1-3 at
stipulation revealed what happened at this point without explaining why A& P, “[i]nstead of paying the mulct tax due and payable on each of said permits, on July 1, 1929,...filed new applications for permits” at each location, attaching new bonds and proper mulct tax fees. As a result, “by reason of filing for new permits, instead of paying the mulct tax, under the old permits, then in force, the same [sic] expired.” The council not having acted on the applications or bonds, A & P withdrew them, but filed the five applications again in December 1929, which, however, the lawyer who would was about to represent it in litigation against the city again withdrew.\footnote{Great Atlantic & Pacific Tea Company v City of Waterloo, Petition at 2 (Black Hawk County Dist. Ct. Feb. 1930).} 

Presumably of causal relevance to the battle that would be fought out in 1930 was the cigarette price war that erupted in Waterloo in mid-April 1929, when a store in the United Cigar chain (the country’s largest retail tobacco company) reduced the per package price on “standard brands” from 18 to 15 cents, thus meeting the price that A & P stores were charging. Local cigarette dealers did not support this price war, which was a local manifestation of an impending national price war, because they claimed that their profit was already narrow as it was on the higher price. In addition, from the two-cent profit on the 15-cent package they had to pay the $100 mulct tax.\footnote{After the company had filed five applications for cigarette permits for five stores on January 13, 1930,\footnote{Atlantic & Pacific Tea Co. v City of Waterloo, Petition at 1 (Black Hawk County Dist. Ct. Feb. 1930); Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 1 (Black Hawk County Dist. Ct. Case No. 27875 Chancery, n.d.).} which the city council did not grant,\footnote{The answer and stipulation agreed that the council denied the permits on May 12, Great Atlantic & Pacific Tea Company v City of Waterloo, Answer at 2 (Black Hawk County Dist. Ct., #27875 Chancery, June 27, 1930); Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 2 (Black Hawk County Dist. Ct. Case No. 27875 Chancery, n.d.).} A & P filed

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\footnote{Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 3 (Black Hawk County Dist. Ct., Case No. 27875 Chancery, n.d.).}

\footnote{Cigaret Price War Opens Here,” \textit{WEC}, Apr. 18, 1929 (22:5-7). The annual permit fee was thus the equivalent of the profit on 5,000 15-cent packages or 2,000 18-cent packages. A report in the local press three weeks later that a truce in the destructive national price war was impending turned out to be premature. “Cigaret Price War Truce Is Predicted.” \textit{WEC}, May 10, 1929 (24:3-4).}

\footnote{Great Atlantic & Pacific Tea Company v City of Waterloo, Petition at 1 (Black Hawk County Dist. Ct. Feb. 1930); Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 1 (Black Hawk County Dist. Ct. Case No. 27875 Chancery, n.d.).}

\footnote{The answer and stipulation agreed that the council denied the permits on May 12, Great Atlantic & Pacific Tea Company v City of Waterloo, Answer at 2 (Black Hawk County Dist. Ct., #27875 Chancery, June 27, 1930); Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 2 (Black Hawk County Dist. Ct. Case No. 27875 Chancery, n.d.). Yet the petition, which was filed in February, asserted that already by then the defendants had “failed and refused and still fail and refuse to grant and issue” the permits. Great Atlantic & Pacific Tea Company v City of Waterloo, Petition at 2 (Black Hawk County Dist. Ct. Feb. 1930). Apparently, in January 1930 the council referred the applications to its committee of the whole, whose failure to report prompted the company to file its...}
a mandamus action in Black Hawk County District Court requesting an order requiring the defendant city, mayor, clerk, and council members, who had granted and issued permits to “all others who have heretofore filed applications... including many who are engaged in the same or similar businesses” as A & P, to issue the permits to A & P because the defendants had acted in a “capricious, arbitrary, unreasonable and discriminatory” manner in denying them. 65 By the end of February the council instructed the city attorney to defend against the action. 66 The city’s defense rested on the claim that section 1557 of the Iowa Code conferred on it discretion in granting or refusing permits and that the council had exercised its “sound discretion” in refusing permits to A & P. 67 At the city council meeting on May 12, 1930, the applications for the permits met a “deniance,” 68 the motion carrying by a vote of 4 to 2, but no reason being announced. 69 Unfortunately, the failure to take a roll-call vote makes it impossible to identify the Ayes and Nays among the six councilmen, who were predominantly, but not entirely, businessmen, 70 and who were the same members

65Great Atlantic & Pacific Tea Company v City of Waterloo, Petition at 2-3 (Black Hawk County Dist. Ct. Feb. 1930). The parties later that year stipulated that the city council records did not reveal that the council had refused any cigarette permit applications during the previous three years, although there were some applications that the applicants withdrew after the council had neither refused nor granted them. Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 2-3 (Black Hawk County Dist. Ct., Case No. 27875 Chancery, n.d.).

66“Council Proceedings,” WDC, Mar. 5, 1930 (17:6) (Feb. 24). The notice that A & P’s petition asking for the writ would be filed on or before February 21 was served on the defendants on February 19. Great Atlantic & Pacific Tea Company v City of Waterloo, Original Notice (Black Hawk County Dist. Ct., Feb. 19, 1930).

67Great Atlantic & Pacific Tea Company v City of Waterloo, Answer at 2 (Black Hawk County Dist. Ct., #27875 Chancery, June 27, 1930). It is unclear why the city did not file its answer until the day of the hearing more than four months after the filing of the petition.

68Atlantic & Pacific Tea Co. v City of Waterloo, Stipulation at 2 (Black Hawk County Dist. Ct. Case No. 27875 Chancery, n.d.) (“deniance”); “Council Proceedings,” WDC, May 17, 1930 (18:5-7), and May 19, 1930 (26:5-8 at 8). The Courier’s article on the session did not mention the permits. “Andrew G. Reid Will Take Office As City Attorney,” WDC, May 13, 1930 (9:1).


70Kenneth L. Bragdon was an assistant manager of a poultry medicine company (having been a bank cashier in 1920); John A. Hartleip was the manager of Hartleip
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who had tabled A & P’s applications in June 1929.\textsuperscript{71}

At a court hearing on June 27, A & P argued that since it had complied with all legal requirements, the city was required to issue the permits. In contrast, the city contended that because granting permits was discretionary with the city council, the court lacked jurisdiction over its action.\textsuperscript{72} Republican\textsuperscript{73} Judge Alva B. Lovejoy ruled in A & P’s favor on July 16, ordering the city council and clerk to issue the five permits.\textsuperscript{74} The judge proceeded from an analysis of the defendants’ claim that the city council had discretion to deny or grant permits and that this discretion derived principally from the use of the word “may” in section 1557 of the Iowa Code in the sentence: “Such permit may be granted by resolution of the council...”.\textsuperscript{75} Certain that the statute itself contained “conclusive evidence that the word ‘may’ was not here used in merely a permissive sense,” Lovejoy immediately pounced on the city’s argument, pointing out that the code also provided that after the permit had been granted, it “may be issued by the clerk of the city.” Irrefutably he observed that: “No one would seriously contend that the word ‘may’ in the last sentence implied there was a discretion on the part of the clerk whether he would issue the permit after the council had by resolution granted it. Yet the language in form is not mandatory upon the city clerk any more than it is made mandatory on the city council to grant the permit....” Lovejoy went on to point out that, in contrast, the procedure established for unincorporated areas provided that permits “may be granted by the county board of supervisors, and when so granted ‘shall be issued’ by the auditor.” Rhetorically, the judge asked whether it could be successfully argued that the city

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Electric Co.; Frank A. Lawson worked at a manufacturer of toilet articles (having been a barber in 1920); Edward A. McFarlane was manager of McFarlane Coal Co.; James A. Robinson was a shipping clerk at a foundry; Joel Steely had no occupation in 1930 or 1920, but in 1910 had been a pharmacist with his own store). Mayor Edward E. Peek was vice president of Waterloo Building & Loan Assoc. McCoy’s Waterloo and Black Hawk County Directory: 1930, at 16, 47, 138, 189, 204, 270, 304 (1930); 1910, 1920, and 1930 Census of Population (HeritageQuest).

\textsuperscript{71} They had taken office on Apr. 2, 1928; three members of the new council had also been on the old council.

\textsuperscript{72} A. & P. Stores Try to Force Council on Cigarette Permit,” \textit{WDC}, June 27, 1930 (2:4).

\textsuperscript{73} Three Judges Nominated for Election Again,” \textit{WT}, July 20, 1930 (3:1).

\textsuperscript{74} Great Atlantic & Pacific Tea Company v City of Waterloo, Peremptory Writ of Mandamus (Black Hawk County Dist. Ct., No. 27875 Ch., July 16, 1930).

\textsuperscript{75} Great Atlantic & Pacific Tea Company v City of Waterloo, Decision at 1 (Black Hawk County Dist. Ct., No. 27,875 Equity, July 16, 1930). Unfortunately, since the case file archived at the Black Hawk County courthouse includes no briefs, the parties’ legal arguments are known only as filtered through the judge’s remarks.

\textsuperscript{2073}
clerk had discretion and the county auditor none “simply by virtue of the use of the word ‘shall.’” This seemingly unassailable abstract linguistic analysis led him to opine that “the permissive word ‘may’ was used loosely in this statute and that it cannot be successfully maintained that by its use a discretion was vested in the city council.” From this intermediate conclusion Lovejoy then leaped to the far-reaching opinion that “the only discretion” that the legislature conferred on the council was “to determine whether the applicant has complied with all of the requirements of the law preliminary to the issuance of a permit.” If so, then “the council has no discretion, but is required to issue the permit.” In other words, the court, as the press pointed out, held that “‘May’ Means ‘Must.’”

While denying that the city council had any discretion—after all, the statute did not even require applicants to be of good moral character—Judge Lovejoy queried whether, if it did have discretion, the council would be empowered to “grant permits to a favored few and refuse all others” and thus to “to create a monopoly in a business not prohibited by law and which under the statutes of Iowa does not come within the police power,” although he acknowledged that some 30 grocery stores already had permits. After suppressing the elaborate history of the legislature’s subjection of cigarettes to the police power, the judge asserted that, if the council could grant a permit to one applicant and deny it to another without giving a reason or stating the underlying facts, such an exercise of power would be arbitrary, but the court was “unable to extract from the statute that such was the legislative intent.”

In order to understand how these semantic difficulties forming the core of the legal dispute arose, it is necessary to review the historical sequence of legislative events. The original statute of 1921 provided that the “permit may be granted and issued by the council of any city or town....” In 1924 the General Assembly changed the wording to read: “Such permit may be granted by resolution of the council of any city or town...and when so granted, may be issued by the clerk of such city or town.” This change was prompted by the code commissioners’ argument that: “No permits are ever ‘issued’ by a city or town council, which would imply that each councilman must attach his signature to it.” The second

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76Great Atlantic & Pacific Tea Company v City of Waterloo, Decision at 1-2 (Black Hawk County Dist. Ct., No. 27,875 Equity, July 16, 1930).
78Great Atlantic & Pacific Tea Company v City of Waterloo, Decision at 3-4 (Black Hawk County Dist. Ct., No. 27,875 Equity, July 16, 1930).
791921 Iowa Laws ch. 203, § 3, at 213, 214.
80Iowa Code § 1557 (1924).
81Brief of Code Commissioners’ Bill No. 257, prepared by J. C. Mabry, in Briefs of
use of “may” in the code was odd and ambiguous: if the use of “may” as applied to the council is interpreted as signaling and, indeed, constituting the legislature’s grant of discretion, it would be more than implausible to interpret the second use as also conferring discretion on the clerk to issue or not to issue the permit that the council had granted. On the contrary, the clerk’s action would be a prototypical example of a non-discretionary ministerial act. Interpretation is complicated by the fact that the code commissioners’ report had provided that a “permit may be granted by resolution of the council...and when so granted may be issued by the mayor of such city or town.” The commissioners explained their own modification as providing “for granting ‘by resolution’ of the city or town council and issued by the chief executive officer.” Although it is conceivable that the commissioners actually meant to confer a veto power on the mayor to nullify the council’s action, it seems implausible that they would have chosen such a subtle and indirect way of creating this power, especially since they did not provide for any override of a veto by the council. To be sure, further ambiguity arose because in the very next sentence, dealing with the corresponding procedure to be used in unincorporated areas, the code commissioners proposed and the legislature approved diametrically opposite language: “If issued to a person for use outside of a city or town such permit may be granted by resolution of the board of supervisors and when so granted shall be issued by the auditor of the county.” Despite substituting “shall” for “may,” the commissioners appear to have believed that they were providing for the same procedure: “The language which applies to a city or town council as to granting and issuing permits, likewise applies to the board of supervisors, hence the change that the board grant the permit by resolution and the auditor issue it.” Although the county auditor,
Like the mayor, was elected (whereas the city clerk was appointed by the council), the auditor did function as clerk to the board of supervisors, and it was therefore logical not to confer any discretion on the auditor not to issue permits that the board had granted.87

In any event, the code commissioners’ bill with the word “mayor” and the aforementioned explanatory note (“issued by the chief executive office”) was the bill that the legislature considered (as Senate File No. 257) in 1924.88 After the Senate had passed the bill without any amendments to this section, Representative John Rankin, a Republican lawyer from Keokuk who chaired the subcommittee on H.F. 257 of the House Committee on Police Regulation, proposed that “clerk” be substituted for “mayor”; the committee adopted the proposed change, unfortunately without any discussion recorded in the minutes.89 The committee then reported out the bill with the recommendation that it pass with this amendment.90 Two days later the House adopted the amendment without a recorded vote and then passed the bill by a vote of 74 to 7.91 Whether the committee and/or the House would have changed “may” to “shall” had it reflected on the meaning of the substitution of a ministerial subaltern for the chief executive officer is unknown. These incongruities came to an end in 1939 when the legislature amended the code to remove all references to individual officials’ roles and powers so that thenceforward “[c]ities and towns may issue retail permits to dealers” and “[c]ounty boards of supervisors may issue retail permits to dealers....”92

The Waterloo city government did not immediately decide whether to appeal the adverse ruling; it would have had to post an appeal bond, but during the pendency of the appeal permits would be withheld.93 At its meeting on July 28 the council decided, for reasons that neither the minutes nor Waterloo’s major newspapers reported, not to appeal; instead, A & P paid the $500 mulct tax and

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87 Iowa Code §§ 520, 5141, 5633, 5640 (1924).
88 Code Commissioners’ Bill No. 257 § 6, in File of Code Revision Bills (1923), 1923-24 Special Session.
92 1939 Iowa Laws ch. 72, § 9, at 102, 107; Iowa Code § 1556.08.2 (1939).
93 A. & P. Stores Win Decision on Cigarette Permit,” WT, July 17, 1930 (5:1).
the council ordered the five permits issued.\textsuperscript{94} Despite the fact that by mid-1933 the Iowa Supreme Court’s decision in (the Iowa City case) \textit{Ford Hopkins II}\textsuperscript{95} would have justified not renewing A & P’s permit, the Waterloo city council did grant all five permits again at the end of June.\textsuperscript{99} Moreover, five days before Ford Hopkins opened its first store in Waterloo on September 23, 1933, the city council met in special session to vote on an application for a cigarette permit submitted by Ford Hopkins’ district manager. That the council unanimously ordered the permit issued\textsuperscript{97} might have been part of an appreciative city government’s quid for the chain’s $10,000 investment in Waterloo and employment of 20 Waterloo construction workers for four to six weeks and of 37 Waterloo residents in the store\textsuperscript{98} at the very nadir of the Great Depression. Or perhaps the council members had drawn their conclusions from the Realpolitik practiced by their counterparts in Iowa City, news of whose agreement to issue Ford Hopkins a permit despite their victory before the state supreme court had appeared in the Waterloo press.\textsuperscript{99} In any event, press coverage of the permit’s timely issuance\textsuperscript{100} may have motivated some of the 19,462 people who visited the store on its opening sale day.\textsuperscript{101}

Although the district court opinion was—like all trial court decisions in Iowa—unreported, it is nevertheless noteworthy that neither plaintiff from Iowa


\textsuperscript{95}See below this ch.


\textsuperscript{100}“One Dance Hall and Two Cigaret Permits Issued,” \textit{WDC}, Sept. 19, 1933 (8:2).

\textsuperscript{101}\textit{WDC}, Sept. 25, 1933 (12:4-8) (Ford Hopkins advertisement). Nevertheless, the firm’s full-page advertisement two days before the opening included cigars and pipe and chewing tobacco, but no cigarettes. \textit{WDC}, Sept. 21, 1933 (16).
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City and Marshalltown in the ensuing Iowa Supreme Court litigation ever alluded to the favorable ruling.

Marshalltown (1930-33)

Sales of cigarettes are still criminal except to those who have obtained an immunity from proper authority. ...

The granting of such immunity is placed by statute upon and delegated to the policy forming and deliberative bodies of local authority. Before them every applicant must come. Every applicant in effect...must say “Here is my application for an immunity. Kindly give it your deliberative judgment and if approved authorize the issuance of the privilege I am seeking.”

The state’s fourteenth largest city and smallest first-class city, with a population of 15,731 in 1920, centrally located Marshalltown boasted a large packing house and numerous manufacturing plants. In mid-June 1921 the city council expected at least eight applications for cigarette permits, but by the end of the month it had already approved 16, including those of at least one cafe and one drug store. By fiscal year 1929-30—when Marshalltown was the thirteenth largest city with a population in excess of 17,000—cigarette permit fees had risen to $3,575, the equivalent of about 36 permits, from $2,700, the equivalent of 27 permits, in 1922-23. Despite the alacrity with which the council had handed out permits, by 1930 it decided to draw a line.

On December 8, 1930, one A. H. Bernstein filed an application for a permit to sell cigarettes at his wholesale/retail newspaper and magazine business, which the Marshalltown city council rejected at its meeting that same day.

102 Appellant’s Brief and Argument at 11, Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933).
103 Polk’s Iowa State Gazetteer and Business Directory: 1922-1923, at 634 (Vol. 20, 43rd Year, 1922).
104 “Bond for Cigaret Dealers Is $1,000,” ET-R, June 18, 1921 (7:1-2).
108 “Action Deferred on Scott’s Bills,” Marshalltown Times-Republican, Dec. 9, 1930 (8:4); Appellant’s Abstract of Record at 10-11, Bernstein v. City of Marshalltown, 215
Indiscriminately the plaintiff’s name was spelled “Bernstein” and “Burnstein” in various court papers in the case; the Marshalltown city directory in the 1930s spelled it “Burnstein,” supplying Albert as his first name. According to the 1930 Census of Population, however, which returned him as Abraham H. Burnstein living in Marshalltown, he was a 28-year-old merchant in magazines and newspapers, who had been born in Poland to parents also born there, whose mother tongue was “Jewish,” and who had immigrated to the United States in 1914; his wife Minnie, who also spoke “Jewish,” had emigrated from Russia in 1905. In Fort Dodge, where he had also been a news dealer before moving to Marshalltown, the city directory had also listed him as Albert Burnstein one year and Abraham H. Burnstein the next. The plaintiff’s various names and spellings and his background might be relevant as perhaps suggesting that the WASPish council members’ resistance to his application may have been rooted in anti-semitism. Bernstein’s lawyer aggressively raised this possibility in his brief before the Iowa Supreme Court: “Perhaps the fact that the appellee is a Jew, with red hair and blue eyes[,] had its effect upon the minds of some of the council. Such would be just as reasonable as the excuses given by some of them as to why they voted to reject his application.” The plausibility of such a discriminatory motive would have to explain why back in 1921, when the city council had first issued permits, one of the first applicants granted a permit had been Martin Greenstein, a grocery store owner who had been born in Russia and

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111 Polk’s Fort Dodge City Directory 1928, at 78 (1928); Polk’s Fort Dodge City Directory 1928, at 70 (1929). He was not listed in the Fort Dodge directory before 1928.
112 The members in 1931 were Clifford C. Jennings (owner of Jennings Greenhouses), William Jennings (locomotive engineer), Claude Leaf (coffee roaster, Western Grocery Mills), Earl H. Nice (assistant cashier, Fidelity Savings Bank), W. Herbert Nicholson (real estate owner-agent), Earl N. Peak (president and general manager, Marshalltown Electric Co.), W. O. Rutherford (manager, Woolworth), Albert M. Treat (insurance company agent). Polk’s Marshalltown (Iowa) City Directory, Vol. III: 1932, at 153, 171, 205, 208, 214, 266 (1931); Polk’s Marshalltown (Iowa) City Directory, Vol. II: 1934, at 210 (1933). Alternatively, there was also a Willard O. Rutherford who was a railroad track supervisor. Polk’s Marshalltown City Directory 1930, at 209 (1930).
113 Appellee’s Reply, Brief and Argument at 8, Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933).
whose mother tongue was also “Jewish.”  

On January 12, 1931, Bernstein, according to the pleadings in the case, filed a second application, and, not having received a response, five days later filed a petition in Marshall county district court seeking a writ of mandamus compelling the city to issue the permit. On January 26 the council rejected that application as well. To be sure, the contemporaneous press accounts differed somewhat. The Marshalltown Times-Republican reported that already on January 12 the council had rejected Bernstein’s third application, while it granted one to (Greek-born) Nick Patakotis. An attorney, Albert B. Hoover (who would later represent Bernstein before the Iowa Supreme Court) appeared at the council meeting to explain that the charges that had been filed against Bernstein when he was arrested for selling obscene literature had in the meantime been dismissed because his brother Herman (whose name was Hyman), the guilty one, had been punished by fine and an order to leave Marshalltown and “stay out.” As for the council’s meeting on January 26, the Times-Republican called the cigarette permit and gas station ordinance on the agenda that night “[t]hose two ‘niggers’ in the city governmental wood pile....” The council did grant cigarette permits to one A & P—whose application had been rejected twice before—and a lunch room, but it voted down Bernstein’s, which had been held over from the previous meeting when the mayor had fruitlessly asked for a motion. This time councilman Clifford Jennings, owner of Jennings Greenhouses, “settled all doubts by the emphatic tone of his voice in moving that the application be rejected.”

In 1931 33 cigarette sales permits were outstanding in Marshalltown, issued to grocery, drug, confectionery, and cigar stores, restaurants, and one news stand. In addition to Bernstein’s, the council had rejected only one application—A & P’s; in fact, A & P’s application for another store had been either rejected or

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114“More Cigaret Permits,” Marshalltown Times-Republican, July 1, 1921 (9:3). The 40-year-old Greenstein had immigrated in 1893 and been naturalized in 1912. Fourteenth Census of Population (1920). His hair/eye color is unknown.

115Appellant’s Abstract of Record at 2, 6, Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933).

116“Bernstein Again Refused Permit,” MT-R, Jan. 13, 1931 (9:3). The biographical information on Patakotis is taken from the 1920 census. The 21-year-old Hyman Burnstein was returned at the 1930 census as living with his brother, like whom he spoke “Jewish” and had immigrated from Poland in 1914.

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tabled but was finally approved and issued.\textsuperscript{118} One reason for the council’s denial of the A & P application was that, according to the testimony of councilman Albert M. Treat, “there were about twelve people who were handling cigarettes came up there who said that they couldn’t sell cigarettes for what these people were willing to sell them at. That if we were willing to take one hundred dollars from A. & P. and they drop out, and lose twelve hundred dollars, all right. I considered it a matter of revenue for the city. The A. & P. permit was later granted for the west end. I voted for it, as some citizens prevailed upon me as other grocery stores had them.”\textsuperscript{119}

The ostensible reason for the council’s denial of Bernstein’s application was that the police had raided his place of business on the basis of complaints—one of which had been made by a councilman who was also a school board member—\textsuperscript{120} that obscene literature, cow itch powder, and “iron mechanical dogs which would perform vulgar and foul tricks” were kept in the store, which young people frequented.\textsuperscript{121} Although the charges were eventually dropped, the council members did not view the dismissal as proof that Bernstein was “of good moral character and worthy of a permit to sell cigarettes in Marshalltown.”\textsuperscript{122} The “moral reason”\textsuperscript{123} undergirding the council’s conclusion that “it wasn’t a good thing to have a cigarette permit in a questionable place” which “young boys and girls” entered\textsuperscript{124} was the feeling that Bernstein “might sell cigarettes to minors if granted a permit.”\textsuperscript{125}

In April 1931 trial Judge Bertram O. Tankersley found that Bernstein was entitled to a writ of mandamus ordering the city to issue the permit to him.\textsuperscript{126} The

\textsuperscript{118} Appellant’s Abstract of Record at 7, 10-11, Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933).

\textsuperscript{119} Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 24-25.

\textsuperscript{120} Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 32 (C. C. Jennings).

\textsuperscript{121} Bernstein v. City of Marshalltown, 215 Iowa 1168, 1175 (1933).

\textsuperscript{122} Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 28 (A. M. Treat). See also id. at 29-30 (W. H. Nicholson).

\textsuperscript{123} Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 33 (C. C. Jennings).

\textsuperscript{124} Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 31 (E. N. Peak).

\textsuperscript{125} Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 33 (C. C. Jennings).

\textsuperscript{126} Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 7, 10-11.
judge characterized the city’s defense as based wholly on the argument that Code section 1557 conferred discretion on the council to grant or deny permits, which the council and its individual members had properly exercised in denying Bernstein a permit. Tankersley, who allowed as the aforementioned items in Bernstein’s store were, in his opinion, not “particularly offensive, but are...well known to be on display and for sale in other reputable places of business in Marshalltown and other cities,” detected “decided hostility” toward Bernstein by some councilmen-witnesses, which was based solely on their knowledge of the search and arrest. Since they had failed to investigate the real facts and disregarded the dismissal of the charges, the judge found that even if the council had the right to exercise its discretion, it had done so arbitrarily and without valid reasons.

Judge Tankersley next identified the same semantic problem in the code provision regulating the issuance of permits on which Judge Lovejoy had dwelt in Waterloo in 1930. Whereas section 1557 provided that permits “may be granted by resolution of the council” and when so granted “may be issued by the Clerk,” the corresponding provision for boards of supervisors and county auditors used “may” and “shall,” respectively. Refuting Tankersley’s argument that “[c]ertainly it can not be contended that the use of the word ‘may’...would give the City Clerk the power and discretion to nullify the action of the City Council” would be onerous. Considerably less persuasive was his conclusion that “it may well be questioned whether the words ‘may’ and ‘shall’ have been used in Section 1557 with such care as to be of value in determining the meaning when considering this Section alone.” The failure of the City of Marshalltown’s lawyers and, much more significantly, of any member of the Iowa Supreme Court to engage Tankersley’s opinion on this important issue was not a sign of intellectual integrity; in particular the Supreme Court was remiss in failing to bring to the legislature’s attention the need, at the very least, to reconsider whether the seemingly discordant and incongruous uses of “may” and “shall”

Record at 38, Order and Decree (Apr. 4, 1931).

127 Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 40, Order and Decree (Apr. 4, 1931).

128 Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 41-42, Order and Decree (Apr. 4, 1931).

129 Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 42, Order and Decree (Apr. 4, 1931).

130 Bernstein’s lawyer did repeat Tankersley’s argument without attribution or enlargement. Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellee’s Reply, Brief and Argument at 5.
were the product of sloppy drafting or actually (but implausibly) designed to express some legislative intent.

To be sure, Tankersley’s critique was hardly the final word. Astonishingly neither he nor any of the litigants or judges involved in any of the three cases appeared to be aware of the legislative history in 1921 that indisputably forged the compromise that paired licensure with local power to continue prohibition.131 Thus, regardless of the ambiguous or careless word usage, that the legislature had empowered local governments to decide whether cigarettes would be sold in their communities constituted, as shown above, the universal and monolithic discourse of the debates surrounding the initial issuance of permits in 1921. There is no evidence that anyone, even where councils approved applications, ever disputed the existence of the power to deny them. After all, even the Afton Star-Enterprise, a weekly published in a town of 926, knew enough to report that cigarettes might be sold in another town “provided that the city council says so. Such is the meat of the local option provision of the committee bill passed as a substitute for the Dodd bill.... The granting of permits to sell is purely optional with the council.”132 Second, none of the judges or litigants appeared to realize that the semantic inconsistencies that Tankersley pointed out did not arise until 1924, when the legislature, pursuant to the code commissioners’ proposed amendments, changed the wording without debate or consideration of the possible real-world consequences. It is inconceivable that either the legislature would have intentionally undermined the historic compromise without any debate or municipalities or anti-smoking groups such as the WCTU would have failed to challenge the changes; rather, it is virtually certain that the General Assembly in 1924 was simply ignorant of the ambiguities it was creating.

In 1933, during the pendency of Bernstein’s case before the Supreme Court, at the lowest point of the Depression, an attempt was made in the legislature to make the case and the issue moot by amending the permit provision of the cigarette statute. As filed by Democrat William Sheridan, a lawyer and American Legion member from Keokuk,133 House File No. 406 read in pertinent part:

No person shall sell cigarettes...without first having obtained a permit therefor in the manner provided by this chapter. The council of any city or town...may in its sole and unqualified discretion either grant such permit, or, likewise, in its sole and unqualified discretion, may refuse to grant such permit. The grant of or refusal to grant, [sic] shall be by formal resolution, and when so granted such permit shall be issued by the Clerk of such

131See above ch. 15.
133State of Iowa: 1933-1934: Official Register 102 (Lester Drennen ed., 35th No.).
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city or town. Such city or town council may grant a permit to one applicant and refuse a permit to another. Likewise, such a permit for use outside a city or town shall be either granted or refused by a resolution of the Board of Supervisors and when so granted shall be issued by the Auditor of the County.\(^{134}\)

Sheridan’s bill thus unambiguously conferred absolute and unfettered discretion on local governments both to deny all permits and to pick and choose among applicants. And by substituting “shall” for “may,” it also eliminated the anomaly created by the Code amendments of 1924 (seemingly) giving discretion to the city clerk to issue or not to issue permits approved by the council.

When the House took up H.F. 406 on March 31, 1933, Republican Blake Willis of Perry, another American Legionaire and long-time city and Dallas county attorney,\(^ {135}\) moved to amend by striking the sentence containing the grant of “sole and unqualified discretion” and inserting at the end of the passage quoted above the following proviso:

> Provided, however, that there shall be no discrimination between applicants for licenses unless said applicants have previously been convicted of violating any law of this State; and no application for a license shall be refused on the ground that the applicant has refused to join in any combination to fix the price of cigarettes and cigarette paper.\(^ {136}\)

Willis’s amendment, both of whose wings A & P—which, as the country largest cigarette buyer, was getting discounts and manufacturer rebates\(^ {137}\)—would presumably have found quite congenial, would have gutted the bill by eliminating councils’ and boards’ discretion to devise their own criteria for determining on which applicants to bestow immunity from prosecution for what would otherwise have been the crime of selling cigarettes, though it would not have affected their discretion to deny all permits and prohibit all cigarette sales. Given the decision in the Perry A & P case and especially the Supreme Court’s decision in the Iowa City case, the amendment would have left local governments with less discretion than they had under existing law. In a House with a 77 to 31 Democratic majority\(^ {138}\)—the Republican party had never before been in the minority in the

\(^{134}\)H.F. No. 406 (Feb. 24, 1933, by William Sheridan).

\(^{135}\)State of Iowa: 1933-1934: Official Register 106 (Lester Drennen ed., 35th No.).


\(^{138}\)State of Iowa: 1933-1934: Official Register 73-75 (Lester Drennen ed., 35th No.).
House since its founding\textsuperscript{139}—Willis’s amendment was adopted by a vote of 55 to 39, but while 35 Democrats and 20 Republicans voted for it, 32 Democrats and only 7 Republicans opposed it. That the amendment’s point was to kill the bill was clearly on display on the final vote, which overwhelmingly defeated the bill 6 to 88.\textsuperscript{140}

Rather than examine any of these legislative developments, Judge Tankersley, in apparent ignorance of history, turned the statute on its head by asserting that it merely created a state revenue raising system: by means of section 1557 and others the legislature “simply set up part of the machinery by which the revenue law and the regulations of cigarette sales are to be put in operation.”\textsuperscript{141} Having excised the entire struggle over cigarettes, even to the extent both of omitting all reference to the purpose of insuring that minors had no access to them—which, together with controlling the cigarette business, Attorney General Ben Gibson in 1921 had stressed as the purpose of the law\textsuperscript{142}—and of seeking to draw meaning from the lack of a requirement that applicants be of “good moral character,” Tankersley subordinated all elements of the law to the maximization of state revenue. He then leaped to the breathtakingly unmediated and ahistorically counterintuitive conclusion that “it was not the intention of the State Legislature to vest in the City Council any discretion, but that a ministerial duty is prescribed for the City Council as an agency for aiding and assisting the putting in force and operation of a state law designed for the purpose of raising revenue.” Because the council thus had no discretion, it instead “had a legal duty to issue the permit to the plaintiff....”\textsuperscript{143}

\textsuperscript{139}Democrats had not controlled the House since 1852, when the Whigs were in the minority. Frank Stork and Cynthia Clingan, \textit{The Iowa General Assembly: Our Legislative Heritage 1846-1980}, at 5 (1980).

\textsuperscript{140}\textit{State of Iowa: 1933: Journal of the House of the Forty-Fifth General Assembly: Regular Session 1117-19} (Mar. 31).

\textsuperscript{141}Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 43, Order and Decree (Apr. 4, 1931).

\textsuperscript{142}“Attorney General Gives Details of New Cigaret Law,” \textit{EG}, June 15, 1921 (3:2).

\textsuperscript{143}Bernstein v. City of Marshalltown, 215 Iowa 1168 (1933), Appellant’s Abstract of Record at 44, Order and Decree (Apr. 4, 1931). The only opposing view Tankersley cited was a recent student note in the \textit{Iowa Law Review}, which he did not even bother to refute. Unfortunately, the note, which tantalizingly referred to unnamed city councils that had interpreted the statute as giving them full discretion to refuse permits, provided absolutely no facts and did not even make any reference to any cases involving A & P. While concluding that councils did have some discretion, the note, making as little use of specific legislative history as Tankersley, interpreted the limits of that discretion much more restrictively than the Iowa Supreme Court would in 1932-33. “Power of Local Authorities
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Before the parties had filed all their appeal submissions with the Iowa Supreme Court, it had issued its decision in *Ford Hopkins Company v City of Iowa City* on February 9, 1932. Thus by the time the court handed down its decision in *Bernstein v City of Marshalltown* on April 4, 1933, an outcome upholding the city council’s action would have been foreclosed if the same justices had ruled and voted the way as they had a year earlier. Indeed, given the extraordinary constraints that the majority in the Iowa City case had imposed on city councils once they decided in principle to issue a permit to anyone, the same result would have been such a foregone conclusion in the Marshalltown case that it would have seemed improbable that the Supreme Court would, without more, have chosen to devote further resources to the question. In fact, considerable turnover on the Court and (now) Chief Justice Kindig’s apparent insight that he should have joined the dissenters (who then would have become the majority) instead of allowing his agreement on a subordinate factual issue to enable three justices to stand the cigarette law on its head generated an almost diametrically opposed result.

Whereas no Democrat sat on the *Ford Hopkins* Court, by the time it handed down *Bernstein* a year later, the Court was composed of five Democrats and four Republicans. Of the three Republican majority justices in *Ford Hopkins*, only the author, Albert, was still on the court, whereas Grimm and De Graff had left. Of the two justices who had specially concurred, Morling (who had no party affiliation), had died, whereas Kindig was now chief justice. Of the four Republican dissenters, Evans and Stevens remained, while Faville and Wagner had left. Thus, overall, only four justices remained on the court—two dissenters, the majority opinion author, and one concurring justice. All five of the new justices were Democrats—John Anderson, Maurice Donegan, Richard Mitchell, Hubert Utterback, and John Kintzinger—elected in November 1932 as part of the unprecedented Democratic victory in Iowa.

The majority opinion that Chief Justice Kindig wrote and Evans, Stevens, Anderson, Donegan, and Mitchell concurred in reversed District Court Judge Tankersley based in large part on a verbatim adoption of the dissent in *Ford Hopkins*. Similarly, the dissent by Utterback, concurred in by Kintzinger and

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to Deny Cigarette Permits to Chain Stores,” *Iowa Law Review* 16(1):81-85 (Dec. 1930). Although some ambiguity inhered in it, the Muscatine city council passed a cigarette ordinance in 1921 that appeared to deprive it of discretion: “The city council shall...proceed to the consideration of said application and bond and if it finds the same proper and sufficient, shall by resolution approve said bond and grant the permit applied for.” City of Muscatine Cigarette Ordinance § 4 (June 16, 1921), in *Muscatine Journal*, “Official Proceedings of City Council,” June 20, 1921 (5:3-6 at 6).
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Albert, was taken in large part from the latter’s majority opinion in the same case. Curiously, however, despite the fact that the Marshalltown decision merely inverted the majority and dissenting opinions of the first Iowa City case, nowhere was that case cited.

Kindig proceeded from the conclusion that the “whole history, theory, and purpose of the statute indicates that each individual application is to be considered on its merits.” By granting a permit, local government was entrusting to the holder an immunity from prosecution for what would otherwise be an offense. Because the legislature’s use of the police power to declare the sale of cigarettes “objectionable and against the public policy of this state” was (in spite of the repeal of the absolute prohibition in 1921) “still in effect,” the permit provision imposed on local governments “the duty...to determine who may be thus rendered immune from criminal prosecution.” The use of “may” undoubtedly connoted permissiveness and discretion, whereas nothing in the statutory purpose or context suggested that the legislature meant to impart to the word the unusual meaning of “shall” or “must.” This conclusion was hardened by the consideration that the measure constituted a police regulation of cigarettes, whose sale the legislatively declared public policy deemed “illegal and dangerous to the public health and morals.” Consequently, when Bernstein applied for a permit, “he was not demanding an absolute right, but rather asking for a privilege as a matter of grace.” Conversely, in being charged with administration of the permit system, local governments were “burdened with a great responsibility...of granting immunity to persons who otherwise would be guilty of a public offense,” which required the exercise of discretion. Moreover, this need for discretion was inconsistent with Bernstein’s contention that once a city council decided to grant a cigarette permit, that council and all its successors were legally bound to grant every application regardless of the applicant’s fitness. Indeed, future councils—in the final link in Kindig’s ad absurdum argument—“would be helpless to limit the number of permits or to refuse permits already issued, even though such future council unanimously felt that there should be no permits in the municipality.”

To Bernstein’s other argument that the foregoing general rule concerning discretion did not apply when a city council discriminated in a purely arbitrary and capricious manner the City of Marshalltown offered the counterargument that such exceptions covered only useful occupations as distinct from ones recognized as not being useful and therefore prohibited by the police power and “merely tolerated only to a limited extent.” The majority found it unnecessary to resolve

144 Bernstein v City of Marshalltown, 215 Iowa 1168, 1170-72 (1933).
145 Bernstein v City of Marshalltown, 215 Iowa 1168, 1173-74 (1933).
this dispute and thus to determine whether the city council had “an absolute right to discriminate or act arbitrarily” with respect to denying Bernstein’s application because under the facts of the case the council had “acted clearly within a legal discretion....” What the Iowa Supreme Court had in mind was the evidence before the council that he had “conducted an immoral place”; and even though the charge of “keeping, exhibiting, and selling obscene and lewd magazines” on which he had been arrested was dropped, the fact that the police had also found in Bernstein’s business “‘foul trinkets’...and ‘cow itch or itch powders’”—the latter of which school boys frequenting the premises bought and “caused the boys who took physical exercise in the gymnasiums of the public schools annoyance and physical discomfort”—sufficed to demonstrate that the council had “acted within a sound legal discretion” in denying a permit to an applicant who had surrounded the many young people who visited his store to make purchases with “immoral conditions.”

The three dissenters did not go beyond Albert’s majority opinion in Ford Hopkins I in asserting that: “It would seem that the only discretion conferred by the legislature on the city council is the power to determine in the first instance whether cigarettes may or may not be sold within the boundaries of the city.” Consequently, the dissent agreed that the question was not whether the council was empowered to “prohibit the sale of cigarettes entirely, but whether it can grant permits to some and refuse permits to others similarly situated” when, in this case, Bernstein had complied with the sole statutorily required formality of owning or operating the business where the cigarettes sales were to take place. That the statute did not expressly include any requirements as to applicants’ moral character or business operations was interpreted by the dissenters as proof that taking such factors into consideration was tantamount to an illicit exercise of discretion. Utterback realized that a city council might, pursuant to his statutory interpretation, “some time be required to grant a permit to a person who [sic] on moral grounds it would prefer to refuse,” but such an outcome was not “a wrong that the court can remedy. For protection against such situations, the people must resort to the polls and the legislature, and not to the court[ ],” whose majority opinion was “the equivalent of a legislative amendment to the statute.”

The Iowa Supreme Court in Bernstein v City of Marshalltown thus vindicated local governments’ power both to ban all cigarette sales and to use considerable discretion to discriminate among applicants for permits. Whether city councils also had an absolute right to discriminate arbitrarily was a question that the Court

146 Bernstein v City of Marshalltown, 215 Iowa 1168, 1174-76 (1933).
147 Bernstein v City of Marshalltown, 215 Iowa 1168, 1182 (1933).
148 Bernstein v City of Marshalltown, 215 Iowa 1168, 1183 (1933).
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left open.

Iowa City (1930-33)

There is no provision in the laws and statutes of the State of Iowa which delegates to the City Council the duty of forcing its views on the subject of tobacco on an unwilling public.\(^\text{149}\)

This Court recently decided the case of *Ford Hopkins Co. vs. Iowa City*. The opinion reveals the inner turmoil of this honorable Court. This appellant...most respectfully observes that the majority opinion seems a strange and ingenious construction of what was the legislative intent and purpose in the cigarette statute.\(^\text{150}\)

*Initial Laissez-Faire*

The city council of Iowa City, the state’s premier college town and eighteenth largest city with a population of 11,267, displayed no reluctance whatsoever in 1921 to begin issuing cigarette sales permits. On the contrary, the council, composed of businesspeople,\(^\text{151}\) approved them freely. During the run-up to the city elections in March 1921, the Democrats advertised themselves as “A Ticket of Business Men” who “promise a clean, business administration.” The party’s advertising included the business affiliation of all seven of their council candidates except that of Charles Chansky,\(^\text{152}\) whose soft drink and billiard parlor was in the process of being shut down as a nuisance for having sold alcohol—\(^\text{153}\)—the result, ironically, of a raid by the irrepressible John B. Hammond,

\(^{149}\) *Ford Hopkins Company v City of Iowa City*, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 35.

\(^{150}\) *Bernstein v. City of Marshalltown*, 215 Iowa 1168 (1933), Appellant’s Brief and Argument at 11-12.

\(^{151}\) James J. Carroll (butcher); Charles Chansky (soft drink and billiard hall owner); Curtis Dey (civil engineer); Emma Harvat (women’s clothing store owner); William F. McRoberts (treasurer, River Products Co.); Martin O. Roland (manager, Masterphone Co [advertising]); Owen R. Williams (hog dealer). *Smith’s Directory of Iowa City and Johnson County, Iowa: For 1918*, at 103 (Vol. 6, 1918); *1920 Census of Population*; *Smith’s Directory of Iowa City and Johnson County, Iowa: For 1922*, at 66, 86, 184, 237, 297 (Vol. 8, 1922).

\(^{152}\) *ICP-C*, Mar. 26, 1921 (10:1-2).

state peace officer of Des Moines, who had played such a major role in state cigarette legislation—but who refused to withdraw from the race. Since no one, presumably, doubted the Republican Party’s business bona fides, its city ticket advertising did not need to mention its candidates’ occupation or include a pro-business slogan, though its mayoral candidate’s political advertisement promised “every effort and endeavor to give you a Clean, Businesslike Administration.” On March 28, while the labor movement succeeded in electing a socialist mayor in Mason City, Iowa City’s electorate gave Republican businesspeople (including the city’s first councilwoman) a 4 to 3 majority over Democratic businesspeople.

By mid-June the city clerk was animating would-be permit holders to make sure that they missed no deadlines so that they could start selling on July 4: “‘Thus it behooves every dealer to get busy right away, and to get his bond and application filed with me by next Monday.’” On June 20 the city council met and accepted the bonds of all 14 applicants, directing the city clerk to issue them permits. The first four went to Fred Racine, who owned in the downtown central business district four cigar stores (in several of which he also operated soda fountains and pool halls); the others were issued to a cigar and news merchant, owners of two cafes, two drug stores, two pool/billiard halls, a candy store, a fruit store, and a grocery store. At its meeting on July 1, the council directed the clerk to issue seven more permits, this time to owners of two

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157ICP-C, Mar. 26, 1921 (3:3).
159“Mason City Elects a Socialist Mayor,” ICP-C, Mar. 29, 1921 (1:2).
160“G.O.P. Controls Council” and “Mayor Swisher Elected Again Defeats Paine,” ICP-C, Mar. 29, 1921 (1:2, 8).
161“Cigarette Law Looms,” ICP-C, June 16, 1921 (2:3).
162Minutes of an Adjourned Meeting of June 20, 1921 of the Iowa City City Council 16:509-10; “Proceedings of the City Council,” ICP-C, July 22, 1921 (6:3-4) (June 20). The types of businesses were derived from the occupational data in the 1920 Census of Population, and Smith’s Directory of Iowa City and Johnson County, Iowa: For 1919-20, at 173, 203, 224 (Vol. 7, 1919).
163Irving Weber, Historical Stories About Iowa City 3:135-38 (1985). The first permit went to Store No. 1 at 132 E. Washington St, on the northwest corner of E. Washington and S. Dubuque St. No. 2 and No. 4 were located across the street at 131 E. Washington and the Jefferson Hotel; No. 3 was located around the corner at 24 S. Clinton St.
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restaurants, two billiard parlors, a hotel, a cafe, and a candy store. What actuated the council is unknown, but several weeks later it solemnified the process by passing a resolution that “ratified, confirmed and approved” the 21 permits “in order to remove any doubt as to the[ir] legality or effect....” The council had, as the Press-Citizen put it, declared all cigarette dealers whose bonds had been filed “bona fide salesmen of the ‘coffin nails’....” Eighteen of these first 21 permitted dealers were densely packed in the central downtown business district adjacent to the State University of Iowa campus. Indeed, a decade later, the city, in defending against an action for failure to issue a permit, stated that several of these stores “were located close to the campus and close to the buildings of the University, which certainly would be contrary to the spirit if not to the letter of the statute which prohibits the advertisement of cigarettes within four hundred feet of a school.”

The leading local paper was presumably reflecting the council’s position when, under the heading, “Cigarettes Enrich Community,” it jauntily reported two days before the new law went into effect that:

Once more local merchants proved that the cigaret is a great little medium for enriching the community’s treasury. Seven applicants for licenses filed $1,000 surety bonds, and were granted permits making a total of 21 stores in Iowa City, now authorized, or soon to be authorized, to sell the aromatic little “coffin nail.” That means, at $75 per

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164Minutes of a Regular Meeting of July 1, 1921 of the Iowa City City Council 16:524-25; “Proceedings of the City Council,” ICP-C, Aug. 29, 1921 (5:5-6). The types of businesses were derived from the occupational data in the 1920 Census of Population; Smith’s Directory of Iowa City and Johnson County, Iowa: For 1919-20, at 91, 94, 171, 173, 206, 247 (Vol. 7, 1919); Smith’s Directory of Iowa City and Johnson County, Iowa: For 1922, at 275 (Vol. 8, 1922).

165Minutes of an Adjourned Meeting of July 28, 1921 of the Iowa City City Council 16:540.


167The area was bounded by S. Clinton St., E. College St., S. Linn St., and Iowa Ave, and included S. Dubuque St. For business listings by street, see Smith’s Directory of Iowa City and Johnson County, Iowa: For 1922, at 317-22, 331-32, 349, 364-66 (Vol. 8). In 1995 and 2005, when the total number of permits outstanding in Iowa City was 94 and 70, respectively, 14 businesses in this same central business district had cigarette permits. Calculated according to [Iowa City] City Clerk, Cigarette Permits (Apr. 20, 1995); [Iowa City] City Clerk, Cigarette Licenses (Feb. 9, 2006).

168Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 79.
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license, $1,575 paid into the city’s strong box, made stronger by cigaret smoke.\(^{169}\)

In fact, however, that cigaret mulct tax amounted only to about 0.5 percent of the city’s total receipts or expenditures.\(^{170}\) By 1929-30, when the city had become the state’s fifteenth largest, Iowa City’s mulct tax collections had risen to $4,025—higher than those of the two next biggest cities and much higher than the smaller ones below it.\(^{171}\)

From the outset of the permit issuance process in June 1921 until 1928 not only did the city council never deny any permit, no council member was ever recorded as having cast a Nay.\(^{172}\) To be sure, this uninterrupted stream of approvals did not mean that permit holders were all complying with the law. For example, in 1922, four permittees—three owned pool or billiards halls and one a cafe—were charged with selling to a college freshman, who was a minor.\(^{173}\)

**Finally the Council Rebuffs A & P**

The permitting process itself ran into a first obstacle on May 4, 1928, when the council, controlled by Republicans with a 5 to 2 majority,\(^{174}\) defeated a motion

\(^{169}\)“Cigaretts Enrich Community,”* ICP-C*, July 2, 1921 (7:6).


\(^{172}\)A number of votes were recorded only as “motion carried,” which could possibly have included split votes, but no recorded or roll call votes included any Nays. Not even the notes in the city clerk files on which the minutes were based contain any roll calls for such votes. That no permits were denied during these years was stipulated to by the parties to the litigation discussed below; the city clerk also testified to this fact. Ford Hopkins Co. v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Abstract of Record at 14-17. Even the defendant-councilmen themselves apparently did not recall how they voted on these unrecorded or non-roll call votes since their attorney, city attorney Will Hayek, who presumably himself attended at least some of these council meetings, felt compelled to assume for purposes of litigation that “all members who were present at the meeting voted in favor of the particular motion if it was carried, or against it if it was lost.” Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 4.


\(^{174}\)Party affiliations are taken from “Democrats Leading in Election,”* DI*, Mar. 29,
to grant the Great Atlantic & Pacific Tea Company’s application for a permit by a vote of 2 to 4. The two councilmen who supported A & P were Democrat Leo Kohl (a publishing company press room foreman) and Republican Edward Greer (a retired grocery store manager), while the opponents were all Republicans—William McRoberts (treasurer of River Products Co.), Lou Kaufmann and Lou Kaufmann (a meat market owner), carpenter Charles Paine, and farmer Clark C. Roup. Coming in the midst of the similar disputes in Perry and Waterloo, the battle over issuing cigarette sales permits to A & P in Iowa City microcosmically reflected the national competition between the giant retailer and small independent retail tobacco dealers.

Fortunately, the Iowa City newspaper revealed more of the background to the dispute than did Perry’s. A & P’s application for a permit for its newly opened store “brought the first public opposition to chain stores in Iowa City. As readers of newspapers may have noted, two or three small towns in eastern Iowa have refused to license the A. & P. Company as cigaret dealers because of the objections of their local competitors.” The store was not A & P’s first in Iowa City: in 1924 and 1925 it had opened two others in the downtown area. Oddly, as recently as February 7, 1928, the council had granted A & P’s application for permits for these two stores. In light of the controversy to which A & P’s

1927 (1:7-8); “Republicans Snatch Majority of City Offices,” DI, Mar. 30, 1927 (8:1).

175 His name was spelled in bewildering permutations in various official and semi-official documents as Kaufmann, Kauffman, Kaufman, and Kauffmann.

176 Minutes of a Regular Meeting of May 4, 1928 of the Iowa City City Council, 19:595; Smith’s Directory of Iowa City and Johnson County, Iowa: For 1928, at 178, 187 (Vol. 11, 1928); Smith’s Directory of Iowa City and Johnson County, Iowa: For 1930, at 171, 222 (Vol. 12, 1930); 1910 and 1920 Census of Population (HeritageQuest). In some instances the councilmen may have retired and no longer been active in those occupations.

177 “Council Asks Inquiry of Rates on Fire Insurance; Hope to Get Lower Figure,” ICP-C, May 5, 1928 (2:4-5). See also “Council, Merchants Delay Parking Row,” DI, May 5, 1928 (8:1).

178 One store first appeared in the 1924 city directory in 1924; the second, which was very close by, was opened in 1925. Smith’s Directory of Iowa City and Johnson County, Iowa: For 1924, at 444 (Vol. 9, 1924) (125 S. Clinton St.); ICP-C, Oct. 9, 1925 (12:5-7) (A & P ad for 2d store at 112 S. Linn St.); Smith’s Directory of Iowa City and Johnson County, Iowa: For 1926, at 455 (Vol. 10, 1925).

179 Iowa City City Council, Minutes of a Special Meeting of February 7, 1928, 19:450. See also “Council Asks Inquiry of Rates on Fire Insurance; Hope to Get Lower Figure,” ICP-C, May 5, 1928 (2:4-5) (“The A. and P. Company has permits for its other two stores”). An examination of the minutes of all city council meetings from 1924 to 1928 identified no earlier approval/granting of an application by A & P. Even if the council had
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applications for cigarette permits had given rise elsewhere, why its competitors had not objected to the issuance of permits for these first two stores is unclear. The Press-Citizen’s report of the meeting on February 7 had even characterized the granting of the permit to A & P as one of “several minor matters” to which the council had attended, which apparently paled in significance compared to its approval of the purchase of a used Buick for $350 for the fire department to use to respond to small alarms. In any event, after A & P had applied for a permit for the third store, Joseph (Gus) Pusateri, a 51-year-old, Italian-born retail fruit merchant, who had been among the very first permittees in 1921, appeared before the council on May 4 as the representative of nine local retailers objecting to A & P’s permit. To lend weight to their objection, Pusateri threatened that if the council granted the chain store a permit, his group would not renew theirs when they came up for renewal in July. At $100 a


182It was located at 110 E. College St., which was virtually across the street from the first store. Minutes of an Adjourned Meeting of June 29, 1928 of the Iowa City City Council 19:648.
184Minutes of an Adjourned Meeting of June 20, 1921 of the Iowa City City Council 16:510. His business address of 130 S. Clinton put him across the street from the site of the first A & P, which had opened in 1924.
185“Council Asks Inquiry of Rates on Fire Insurance; Hope to Get Lower Figure,” ICP-C, May 5, 1928 (2:4-5). In light of such a public statement to the council, its defendant-members were at best disingenuous in later quibbling with the Iowa Supreme Court’s finding that local businessmen had told the council that if it issued a permit to Ford Hopkins, their permits would become worthless by virtue of their being undersold. Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 26-27.
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After its population surpassed 15,000 at the 1925 state census, Iowa City became a first-class city and the mulct tax on its cigarette permits rose from $75 to $100.


“A. and P. Loses Cigaret Fight,” ICP-C, June 30, 1928 (2:3). The student newspaper merely stated that no reason had been given for denying the permit. “City Council Buys 2 Traffic Signals; Renews Licenses,” DI, June 30, 1928 (1:3).


permit, the lapse of 10 permits would cost the city $1,000 in tax revenue—compared to $300 generated by A & P’s.

Eight weeks later, at the council’s last meeting before the cigarette permits’ annual expiration date, 24 motions were presented for “renewal” of cigarette bonds and voted on separately: 23 carried, whereas the motion for renewal of A & P’s for its two older stores lost. The council voted the company “out with a whoop, not one of the aldermen voting in favor of the renewals.” For good measure the council then voted not to grant the company’s application for a new permit for its third store, although all other applicants for new permits were successful. “[U]n- fair competition” in the form of A & P’s selling prices below the “prevailing rates” was the basis for dealers’ complaints that they had been injured. Preceding Pusateri’s renewed advocacy on their behalf, A & P’s assistant superintendent, W. L. Caley of Des Moines, had requested the council to renew/grant the three permits. While conceding that the company might be underselling other dealers, he insisted—presumably seeking to anticipate claims that A & P was using cigarettes as loss leaders—that it nevertheless made a “satisfactory profit” and that as an Iowa City taxpayer it was as entitled to the council’s consideration as any other business. Doubtless seeking to parry the small dealers’ threat to deprive the city of their mulct taxes, Caley recited the sums that A & P paid in Iowa City in street light assessments and general taxes. No councilman expressed any opinion on the matter or explained his vote, but the “chorus of ‘noes’ made it quite clear that the plaint of the local dealers had registered with” the council, whose de facto “right to regulate prices,” in the Press-Citizen’s view, “seemed unquestioned.”

Although A & P “consistently undersold the tobacco stores on cigarettes,” the majority of permit holders in Iowa City were not tobacco stores at all, but
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rather cafés, restaurants, lunch diners, pool halls and billiard parlors, candy stores, as well as independent local grocery and drug stores, just as the vast majority of businesses selling cigarettes nationally were not tobacco stores, but grocery stores, eating and drinking establishments, drug stores, and candy stores. This very structure may have underlain the question that councilman and acting mayor Will Hayek (who would later represent the city in litigation over the issuance of permits) raised at a council meeting in 1924 as to “whether small dealers really made any money on cigarettes. It was decided that they really didn’t make any money.” Ironically, the council members concluded that even they were treating cigarettes as loss leaders: “Some of them actually lose money on the ‘coffin nails.’ However they help to bring people into stores and visitors are always potential customers.” Such an account matched up remarkably well with later analysis by the Federal Trade Commission, which concluded that the hundreds of thousands of retailers for which cigarettes (and tobacco products generally) formed a small part of their total business but a large proportion of the manufacturers’ output had become “accustomed to selling these fast moving tobacco products at a lower mark-up than that customarily received by strictly tobacco distributors....” Indeed, despite regarding the profit margin on the oligopolists’ cigarettes as “inadequate,” their customers’ demand “practically force[d]” such retailers to sell them, even against their will at cut-rate prices lest “important sales volume...be lost on other products if they do not meet competitive prices.”

192 Although for the period in question there were no comprehensive data on the proportion of all cigarettes sold by various types of retailers or the proportion of total sales of each type of retailer accounted for by cigarettes, it was known that cigar stores/stands constituted a minuscule and diminishing proportion of all cigarette retailers (which, excluding vending machines, numbered between 850,000 and 900,000 by the end of the 1930s) and accounted for an absolutely declining dollar amount of tobacco product sales between 1929 and 1935. In 1934 there were only about 15,000 cigar stores, whereas 355,000 grocery stores, 251,000 drinking and eating establishments, 57,000 drug stores, and 55,000 candy stores, in addition to untabulated gas stations and recreation centers, constituted “potential” retail sellers. Report of Federal Trade Commission on Resale Price Maintenance 447-48, 450-51 (1945).


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Ford Hopkins Company Wants to Sell Cigarettes Too

A year after the city council had stripped A & P of its permits, a much smaller chain applied for a permit. Ford Hopkins Company, a Chicago-based Midwest drug store chain, was established in 1928 by Lewis J. Ruskin, a Yiddish-speaking child of Russian parents, who was born in London in 1903 and emigrated to the United States in 1905. It opened its first store in Illinois in 1928 and by the time Ford Hopkins first appeared in the Directory of Chain Drug Stores in 1932, it included 16 stores, five of which were located in Iowa (three in the Mississippi River towns of Clinton, Fort Madison, and Keokuk, as well as in Iowa City and Ottumwa in eastern and southeastern Iowa), three in Wisconsin, and eight in Illinois, all eleven being smaller towns. The next year it expanded to 23 stores ranging from Mason City and Sheboygan, Wisconsin in the north to Ottumwa in the southwest. At trial in October 1930, its officials characterized the company as “creating a national chain of drug stores in small cities, confining their operations only to rural communities,” though at the time

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196 Ironically, a quarter-century later, D. A. Schulte Inc., a tobacco store chain, arranged to buy Ford Hopkins “to signalize the emergence of Schulte ‘beyond the tobacco shop...into a vigorous new enterprise in the chain drug field.’” “Chain to Expand, Change Its Name,” NYT, Jan. 14, 1954 (39, 43:5).


199 American Druggist, Directory of Chain Drug Stores 18 (1932). The threshold for inclusion was four stores.


201 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 37 (testimony of Lewis Ruskin).
the chain encompassed only eight stores. In anticipation of opening a store in Iowa City, the company at the council meeting on May 24, 1929, filed a petition for permission to hang out a sign, but when the council—which was now controlled by a 5 to 2 Democratic majority—found that it measured nine feet by five feet and weighed 1,300 pounds, the body referred the request to the Sidewalk Committee and city engineer. More consequentially, at the same meeting the motion by Democrat Charles Sample (dairyman and city milk inspector), seconded by Republican Lou Kaufmann, to refuse the company’s application for a cigarette permit carried. Although “the action was taken without comment,” the Press-Citizen surmised that “the reason is probably the same as actuated the council a few months ago in denying permits to the Atlantic and Pacific Tea Company, which had aroused the antagonism of other dealers by selling cigarettes at less than the current price.” (If Ford Hopkins in fact intended to use cigarettes as loss leaders, that motivation distinguished it from late twentieth and early twenty-first century chain pharmacies, which sell cigarettes as profit leaders, that is, very profitable commodities that also allegedly bring in “traffic.” In contrast, Ford Hopkins’ health ethics did not differ from that of latter-day chains, which continued to sell huge numbers of cigarettes despite the fact that in 1970 the House of Delegates of the American

202 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 29 (testimony of C. Paul Johnson, dist. mgr).
203 “Democrats Sweep City Election,” DI, Mar. 26, 1929 (1:8).
204 Iowa City Finance, Council Proceedings, May 4, 1928-June 1929, Roll No. 19 (Iowa City Clerk’s Office); Minutes of an Adjourned Meeting of May 24, 1929 of the Iowa City Council 20:212; “Council Votes $42,419 Paving Progress; Hearing June 12,” DI, May 25, 1929 (8:1).
205 Smith’s Directory of Iowa City and Johnson County, Iowa: For 1922, at 241 (Vol. 8, 1922); “Of Interest to Every Voter,” DI, Mar. 24, 1929 (10:5-8) (Democratic City Central Committee political advertisement); Smith’s Directory of Iowa City and Johnson County, Iowa: For 1930, at 250 (Vol. 12, 1930).
206 Minutes of an Adjourned Meeting of May 24, 1929 of the Iowa City Council 20:212. Unfortunately the council minutes did not record the vote and the Iowa City Press-Citizen did not disclose the vote.
207 “Benda Wants ‘Black Maria,’” ICP-C, May 25, 1929 (2:4). The article incorrectly stated that Bywater (rather than Kaufmann) had made the motion together with Sample.
Pharmaceutical Association adopted the position that “mass display of cigarettes in pharmacies is in direct contradiction to the role of the pharmacy as a public health facility” and in 1971 that the same body approved a resolution recommending that tobacco products not be sold in pharmacies.\footnote{209}

At its meeting on July 1, the council had before it a resolution to direct the city clerk to issue permits to 35 applicants (most of whom were seeking renewals). Republican Councilman Jacob Van der Zee (1884-1960), a Dutch-born political science professor at the State University of Iowa with legal training\footnote{210} who had been a Rhodes Scholar and an assistant to the Iowa Code Commission,\footnote{211} moved (and Democrat William L. Bywater, a physician who had practiced in Iowa City for three decades and been a member of the school board,\footnote{212} seconded the motion) to amend by striking from the list The Academy

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  \item “Candidates Seeking Municipal Office,” \textit{DI}, Mar. 28, 1931 (1:3-6, at 3:2-4 at 3).
  \item “Of Interest to Every Voter,” \textit{DI}, Mar. 24, 1929 (10:5-8) (Democratic City Central Committee political advertisement).
\end{itemize}}
Cigar Store and Pool Hall (which also maintained a soda fountain, served food,\textsuperscript{213} and frequently advertised in the student newspaper, the \textit{Daily Iowan}, offering free delivery of cigarettes on orders of 50 cents or more).\textsuperscript{214} Van der Zee’s animus was directed against its owner, who had “been thumbing his nose at the city administration and doesn’t deserve any favors from the council,” because he had pleaded not guilty to charges of keeping a gambling house, which had been filed the previous week after a raid on slot machines, whereas seven other local men had pleaded guilty. The WCTU’s executive committee may have conveyed its congratulations on the raid,\textsuperscript{215} but none of Van der Zee and Bywater’s colleagues having shared their outrage, the motion lost by a vote of 2 to 4; in turn, Van der Zee and Bywater opposed adoption of the original resolution, which was passed by a vote of 4 to 2.\textsuperscript{216} In the next few months the council granted the additional applications without opposition by Van der Zee, Bywater, or any other members.\textsuperscript{217} The customary unopposed mass approvals for 1930 took place at two meetings at the end of June and beginning of July, generating a total of 36 permits.\textsuperscript{218}

On Saturday July 20, 1929, Ford Hopkins finally opened its store in the busiest part of downtown Iowa City across the street from one of the A & P stores.\textsuperscript{219} Two days earlier the \textit{Press-Citizen} had opened its columns to a public


\textsuperscript{214}\textit{DI}, Mar. 28, 1931 (3:5). For an example of an earlier tobacco-related ad, see \textit{DI}, Jan. 3, 1928 (6:5-8).

\textsuperscript{215}“Horrabin Company Gets $27,600 Paving Contract for Seven Local Streets,” \textit{ICP-C}, July 2, 1929 (3:1-4 at 1-2). The Academy was called “‘poor sports,’” who “‘would not take their medicine.’” “Council Lets Paving Contracts to Horrabin Company,” \textit{Daily Iowan} (Iowa City), July 2, 1929 (8:1).

\textsuperscript{216}Minutes of an Adjourned Meeting of July 1, 1929 of the Iowa City City Council 20:257.

\textsuperscript{217}Iowa City City Council, Minutes of a Regular Meeting of July 5, 1929, 20:262; Iowa City City Council, Minutes of a Special Meeting of Sept. 27, 1929, 20:358; Iowa City City Council, Minutes of an Adjourned Meeting of Apr. 25, 1930, 20:512; Iowa City City Council, Minutes of a Regular Meeting of May 2, 1930, 20:521.

\textsuperscript{218}Iowa City City Council, Minutes of an Adjourned Meeting of June 27, 1930, 20:564; Iowa City City Council, Minutes of an Adjourned Meeting of July 3, 1930, 20:569.

\textsuperscript{219}“Ford Hopkins Store Ready,” \textit{ICP-C}, July 18, 1929 (15:1-2); \textit{id.} (6-7) (full page ads for opening). The store at 108 S. Clinton St. was not listed in the 1928 city directory, but was listed in 1930. \textit{Smith’s Directory of Iowa City and Johnson County, Iowa: For 1928}, at 365 (Vol. 11, 1928); \textit{Smith’s Directory of Iowa City and Johnson County, Iowa: For 1930}, at 330 (Vol. 12, 1930).
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relations article that was presumably a quid pro quo for the two-page advertising spread that highlighted the “Cozy Luncheon Room where 80 people may dine in [an] environment of Art, Beauty and AMERICAN SANITATION” eating food, such as “home baked” pies and cakes, “prepared by trained cooks,” as well as reduced prices for Kotex, antiseptic douche solution, and vaginal douche syringes. The soda fountain’s ice cream sodas and “triple rich chocolate malted milk” and “elaborate candy department” were hardly designed to repel minors.\footnote{2101}{ICP-C, July 18, 1929 (6-7).}

The PR piece quoted an unnamed company official as confiding that Ford Hopkins had entered into a long-term lease because it believed that Iowa City was “‘destined to become a large and important city. We make a complete study of a city before deciding whether it can support so large a store as ours. We carefully analyze its resources, its location, and its people.’”\footnote{220}{“Ford Hopkins Store Ready,” ICP-C, July 18, 1929 (15:1-2).} Whether that market analysis included the local demand for cigarettes, especially among the students who formed such a large proportion of the city’s population and whose campus was just across the street from the store, the article failed to reveal. (In fact, as early as 1915 the cigarette industry was very attentive to college students as consumers: that year, when the city council of Columbia, Missouri, where the University of Missouri was located, made cigarette smoking in public, allegedly “for the first time in history,” a “statutory offense,” the United States Tobacco Journal called the city Missouri’s third best cigarette town, its desirability as a market stemming from the large number of college students, who made up one-fifth of the population.)\footnote{222}{“Cigarette Smoking Statutory Offense,” USTJ, vol. 84, Nov. 11, 1915 (1:4).} The previous week the council had raised the license tax from $10 to $250, prompting a violent protest; in retaliation the council “decided to throw cigarettes out of town altogether.” The Journal cited “local opinion” to the effect that the action reflected “a hysteria that any small-town public is likely to contract, and consequently cannot be cried down too quickly or severely.” Purportedly dealers were in the process of finding a lawyer to secure quick repeal an allegedly flagrantly unconstitutional measure.

In particular, “the walls were designed by John Greco, a famous painter who
decorated two Raphael-loggias in the Vatican for the late Pope Leo.”223

A few days after the grand opening, to which many were doubtless lured by the offer of a box of free miniature toiletry gifts, the company published a large advertisement in the Press-Citizen both thanking and apologizing to the public:

For surely never before had so many people come to any store in Iowa City in one day—9,687 people—(by door count) passed through Ford Hopkins last Saturday!

To the many thousands who could not get near the counters to be waited on—for the items which were completely sold out—

We Sincerely Apologise.

We had prepared a complete stock—far larger than even Chicago or New York stores carry. We had trained 10 Iowa City men and women—BUT NO QUANTITY OF DRUGS and DOUBLE THE SALESFORCE WOULD HAVE BEEN ENOUGH, so far beyond our expectations was Iowa City’s appreciation of this BEAUTIFUL STORE, THE FRESH MERCHANDISE and the LOW PRICES.

We wish to thank the many Iowa City business men, the university, the banks, the Press-Citizen, the Daily Iowan, and many others for their floral tributes and active cooperation.224

The gala was marred only by what no store in New York or Chicago lacked—the cigarettes and the accompanying profits that the denial of a permit put out of legal reach. Until Ford Hopkins managed to obtain one that would enable it to supply the “FRESH DRUGS” in that particular commodity, “graduate and registered pharmacists” would be confined to advising customers on a variety of other drugs that would defeat deafness, make “rheumatics wild with joy,” or make it possible for them to eat pickles, lobster, and pie without gas or bloating.225

By May 1930 the Cedar Rapids city council had been receiving complaints for months from local dealers that chain stores were selling cigarettes below cost as a way of attracting customers. After the assistant city solicitor had reported that chain stores had not fought Marshalltown’s denial of cigarette permits to them and read aloud a state attorney general opinion that councils were empowered to deny permits without giving reasons, the Cedar Rapids city council unanimously passed a resolution denying permits to chain stores once their existing ones expired in June. Making explicit the pressure that dealers had exerted in Iowa City two years earlier, councilman (and former mayor) Louis

224ICP-C, July 25, 1929 (3:4-7).
225ICP-C, July 25, 1929 (3:4-7).
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Roth remarked that he “could see no reason why the council should allow five or six stores to jeopardize the legitimate business of some 110 others who pay $100 each into the city treasury annually for permission to sell cigarettes” (meaning that it would be irrational to sacrifice $11,000 in tax revenue to retain $600). The chain stores, which were selling two packages of cigarettes for 25 cents plus tax, announced, according to The New York Times, that they “would appeal the case to the highest Federal court, if necessary, on the grounds that the City Council had no right to seek to fix the price of a commodity.” The threat appears to have been mere braggadocio: no decision in such a case was ever published.

In Iowa City the dispute with the chains came to a head at the session of August 1, 1930, when the council by a vote of 4 to 2 initially passed a resolution directing the clerk to issue a permit to Ford Hopkins after all. This time Bywater and Van der Zee supported approval, joining Democrats Leo Kohl (the press room foreman) and Charles Regan (nursery owner), while Democrat LeRoy Mercer (vice president of his family’s Economy Advertising Company, one of the city’s largest and oldest manufacturing industries) and Republican Lou Kaufmann (a meat market owner) opposed issuance. Then the council, faced with yet another application from A & P (this time for two permits), split 3 to 3 after Bywater had switched to the anti-group, necessitating a tie-breaking vote by Democratic Mayor Carroll, whose Nay caused the motion to fail. Apparently sensing which way the majority sentiment had now drifted, Bywater, seconded by Kaufmann, moved to reconsider the vote on the Ford Hopkins permit; against only Van der Zee’s opposition, the council voted 5 to 1 to reconsider, and then by a vote of 2 to 4 (only Van der Zee and Kohl from the original majority continuing to vote Aye) defeated the resolution to grant the permit. Immediately thereafter Bywater’s motion that the Ordinance Committee “bring in an ordinance limiting the number of cigarette permits to the number of permits now issued” carried.

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226“City to Bar Chains from Cigaret Sales,” EG, May 1, 1930 (25:1). Interestingly, when asked why the council did not merely refuse to renew the permits without explanation, Roth replied that such action would be “‘arbitrary.’” Id.


228Iowa City City Council, Minutes of a Regular Meeting of Aug. 1, 1930, 20:600. The occupational data are taken from: “Of Interest to Every Voter,” DI, Mar. 24, 1929 (10:5-8) (Democratic City Central Committee political advertisement); Smith’s Directory of Iowa City and Johnson County. Iowa: For 1930, at 171, 199, 238; “Life Sketches of Five Office Seekers Told,” DI, Mar. 29, 1931 (1:1-2). Regan had taken the seat held by Democrat Charles Sample in early 1930.

229Iowa City City Council, Minutes of a Regular Meeting of Aug. 1, 1930, 20:600.

230Iowa City City Council, Minutes of a Regular Meeting of Aug. 1, 1930, 20:601.
The *Press-Citizen*, which made the invasion by “aldermanic rigmarole” responsible for the twofold refusals, offered two reasons for the council’s action, which may not have been consistent with each other: “there are enough cigarettes sold in Iowa City at the present time” and “no more retailers of cigarettes were needed in Iowa City....” It is unclear whether inserting a low-price chain-store seller into an already physically crowded market would have widened the market or merely reduced the prices and profits of local merchants. To be sure, those resulting lower prices might have increased sales.

In spite of these actions, on August 8 the council voted unanimously to place Ford Hopkins’ application on file for further consideration, but, as the *Press-Citizen* noted, “Ford Hopkins is a chain store and heretofore such stores have been refused licenses.” The council treated A & P’s two applications the same way two weeks later, Van der Zee alone voting Nay because he opposed “‘the delay’....” A Ford Hopkins representative appeared before the council on September 19 to make “an urgent appeal” for a permit. He sought to convince the members that its “local store was a public servant, that they received many calls for cigarettes and that cigarettes belong to a drug store. He said further that...Iowa City was the only city that had denied the company’s stores a cigarette license,” and cited, not so subtly, instances in other cities in which court action had forced the city councils to issue permits. Prefiguring the litigation strategy that Ford Hopkins would soon pursue, the company’s agent—as the State University of Iowa student newspaper, which was following the dispute carefully, reported—argued that “independent merchants” in Iowa City were “charging illegitimate prices,” whereas “a chain store selling at lesser amounts would save persons thousands of dollars annually.” The council, after hearing a “lengthy discussion,” during which the representative quoted the (aforementioned) attorney

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232Iowa City City Council, Minutes of a Regular Meeting of Aug. 8, 1930, 20:604.
234Iowa City City Council, Minutes of a Regular Meeting of Aug. 19, 1930, 20:613. With the same voting configuration the council also placed on file the application of Mrs. Alice Goza. For the motion and roll call, see Iowa City Finance, Council Proceedings, Aug. 5, 1929-Oct. 1930, Roll. No. I 10 (Iowa City Clerk’s Office).
general opinion, voted 4 to 3 to postpone action on Ford Hopkins’ application to its next meeting.

On September 23, Owen Elliott, a partner in the Cedar Rapids corporate law firm of Wheeler, Elliott & Shuttleworth, wrote Democratic city solicitor Will Hayek that it had been retained by Ford Hopkins Company, which had authorized the lawyers to file suit against the city if it did not issue the cigarette permit. However, since Elliott understood that there was a possibility that the permit would be granted at the council meeting on September 26, the firm would refrain from filing the action until after the meeting, unless Hayek informed him that the council had “definitely determined not to issue the permit....” Although a score of local merchants with cigarette permits and wholesalers, along with Ford Hopkins representatives, attended the meeting on September 26, none addressed the council. Faced with pending applications from Ford Hopkins and Quality Lunch, the council, “[t]aking a definite stand and defying threatened legal action,” passed a resolution to deny both of them on the grounds that “there are already large numbers of permit holders in Iowa City and each permit granted places an additional burden on the City to enforce a law relative to the sale of cigarettes to minors.” The 4 to 2 vote found Van der Zee and Kohl in the minority. As important as this motive may have been and as sincerely as the majority may have meant it, the council failed to reconcile this objective with the fact that as early as 1924 it had granted a permit to sell cigarettes at the city’s own Recreation Center. On the other hand, the plausibility of the council’s

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239Iowa City City Council, Minutes of a Regular Meeting of Sept. 19, 1930, 20:636 (Bywater, Mercer, Piper, and Kohl voting Aye, Van der Zee, Kohl, and Kaufmann Nay). The erroneous recording of Kohl as having voted both Aye and Nay should presumably be corrected by substituting Regan, who had made the motion, for him as having voted Aye.
243“Iowa City Council Takes Stand and Defies Legal Action; Denied Cigarette Permits,” ICP-C, Sept. 27, 1930 (3:1).
244Iowa City Finance, Council Proceedings, Aug. 5, 1929-Oct. 1930, Roll No. I 10 (Sept. 26, 1930) (Iowa City Clerk’s Office).
245Iowa City City Council, Minutes of a Regular Meeting of Sept. 26, 1930, 21:13 (Mercer, Piper, Kaufmann, and Regan voted Aye, while Bywater was absent).
246Iowa City City Council, Minutes of an Adjourned Meeting of Oct. 17, 1924, 18:171.
trepidations about facilitating minors’ access to cigarettes was underscored by Ford Hopkins’ conscious efforts to attract children to its stores. In opening a store elsewhere in 1932, an “important executive official” of the company candidly told the press that “‘when we decide to establish a Ford Hopkins drug store in a city, we try to get the very best location, one which is easily reached and accessible to the farmers, to every city resident and above all, to school children.’”

Ford Hopkins Unsuccessfully Requests the District Court to Order the City Council to Issue a Permit

On October 2 Ford Hopkins, as a seven-column banner headline blared across the front page of the university’s student newspaper, filed an action in equity in Johnson County District Court against the City of Iowa City, the mayor, the council members, and the city clerk, complaining that the defendants had violated their statutory “duty” to issue the company a cigarette permit by arbitrarily refusing to issue it, and seeking a writ of mandamus ordering the defendants to grant and issue the plaintiff a cigarette permit. The company alleged that the city had granted many permits to others retail drugs stores, whose cigarette sales were “lucrative and profitable,” whereas Ford Hopkins was unable to sell cigarettes to customers who asked for them and then left the store without buying anything. The only reason that the city had ever given for denying the permit, according to the petition, was that increasing the number of permits beyond the large number already outstanding would impose a greater enforcement expense on the city. In fact, Ford Hopkins claimed, this reason was a “sham, false and made for the sole purpose of masking the motive which actuated” the city—namely, the company’s being a “so-called ‘chain store.’” Presumably in order to reinforce the allegation of arbitrariness, the plaintiff pointed out that the city had issued permits to two or more drug and/or cigar stores owned by the

249 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 2, 3, 9, 10.
250 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 4.
251 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 5.
same person, thus arbitrarily discriminating even among chain stores, although Ford Hopkins’ hands were clean in the sense that it had never violated the cigarette law or encouraged minors or anyone else to violate any Iowa laws; moreover, its place of business was “not a place where loafers and lawless people congregate.”

The defendants’ purpose in discriminating against Ford Hopkins was rooted in their “attempt[ ] to create a monopoly for the sale of cigarettes...by compelling the people of Iowa City...to purchase cigarettes from those dealers upon which the...defendants are pleased to capriciously bestow their favor....” Without explaining how limiting sales to 51 dealers (rather than 52) could create or sustain a monopoly, the company alleged that the “great loss and damage” that it incurred by being “deprived of profits” was also a deprivation of property without due process.

The defendants’ answer was substantive and set the terms for the resolution of the dispute. The city stressed that the refusal to grant a permit to Ford Hopkins was rooted in its “good faith effort to limit the number of places” where cigarettes could be sold to 51 and thus to “control the traffic in cigarettes” in a city in the “peculiar position” of having an “unusual proportion of minors”: of a total population of 15,000, more than 3,000 university students were under age in addition to a thousand in high schools and junior high schools. The city was acting in the youth’s interest because “the law recognizes the detrimental effect upon minors of the use of cigarettes” as witnessed by the ban on advertising them within 400 feet of any school. Since the law authorized the city council to determine “what permits” to grant and provided for declaring places selling cigarettes without such permits to be enjoinderable and abatable nuisances, “compel[ling] the City Council to issue permits to all applicants in unlimited numbers violates both the spirit and letter of the law.” In refutation of the plaintiff’s allegation that the city’s denial of the permit was based on Ford Hopkins’ being a chain store it referred to its simultaneous denial to Mrs. Alice Goza; and to refute the charge of attempted monopolization the city pointed out that among the 51 sellers were five within a block of the plaintiff. Finally, the

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252 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 6. The stores were Whetstone’s three drug stores and Racine’s four cigar stores.

253 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 9.

254 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Petition in Equity, in Appellant’s Abstract of Record at 8.

255 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Answer, in Appellant’s Abstract of Record at 11-12.
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defendants denied that Ford Hopkins had any “legal right to demand a permit” because if it did, then any applicants would too and the “City Council would...be compelled to sanction and encourage the unlimited extension of traffic in cigarettes recognized as detrimental to the health and”—introducing the specter of a threat theretofore absent from public policy discussions—“subversive of the habit of thrift in the youth.” Why the city council gauged 51 permits as the effective limit of enforcement city attorney Hayek explained no more than what the city had been doing to protect minors’ health and thrift before Ford Hopkins’ advent in 1929.

Johnson County District Judge R. G. Popham set the hearing on issuance of the writ for October 13. That first day numerous witnesses testified including councilmen, the mayor, and city clerk, as well as Ford Hopkins’ district manager, C. Paul Johnson, the local store manager, J. C. Gussmann, and Ruskin himself. The plaintiff’s “star witness”—whom city attorney Hayek alternatively characterized as the company’s “pet witness”—was, by a wide margin, councilman and professor Jacob Van der Zee, the only council member who testified on the company’s behalf. He recalled for Popham’s benefit that when Ford Hopkins applied for a permit in May 1929 “it was well understood” among the council members “that a permit should not be granted because the Ford Hopkins store was a chain store.” In particular, several (unnamed) members had stated before the vote that “the Iowa City dealers were opposed to a chain store getting a cigarette permit, that the chain store would undersell...the local dealers.” Moreover, no member offered any other reason, such as limiting the total number of permits, for denying the permit. A year later, around August 1, 1930...

256Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Answer, in Appellant’s Abstract of Record at 12-14.
257Popham was eighth judicial district judge from 1917 to 1933. Iowa Press Association, Who’s Who in Iowa 658 (1940); “Former Judge R. G. Popham Dies in Sioux City at 93,” ICP-C, Feb. 6, 1965 (2:1). See also History of Iowa County Iowa and Its People 2:112, 115 (1915). Both in the earliest census in which he was returned as a nine-year-old child and on his tombstone his first and middle names appeared only as initials. 1880 Census of Population (HeritageQuest); http://iowagravestones.org/gs_view.php?id=34830.
260Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 78.
261Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 11.
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when the company again applied for a permit, no local merchant tried to “get” him to vote against granting it, but about ten days later, Whetstone, whose three drug stores were all permitted to sell, did speak to him; without trying to influence Van der Zee, he told the councilman what cigarettes cost him wholesale and “that in order to continue to sell cigarettes, he should be allowed to sell them at the present prices.” As for the August 1 meeting, at which the council at first voted to grant Ford Hopkins’ application, Van der Zee testified that right after that vote a councilman predicted that A & P would be in to get its permits (which prediction immediately came true). Prompted by the company’s lawyer, Van der Zee compliantly explained that after the fact Hayek had advised the council that it would be empowered to deny permits on moral grounds or to limit their number. Incredibly, although Hayek had already objected to numerous questions, he said nothing at all when Ford Hopkins’ lawyer asked the professor whether Hayek had offered that opinion in response the council’s request as to “what excuse” it could give for refusing to issue the permit to the company. After giving his unequivocal Yes, Van der Zee testified that despite the council’s instruction to the Ordinance Committee—which he chaired—to present an ordinance, it never did, just as it also never tried to enforce the cigarette law or assigned the police to inspect cigarette sellers.262

Johnson (who by 1932 was the company vice president)263 stated that in the course of conversations with all the city council members about the permit application, he was told by John Piper, who was engaged in the wholesale and retail coffee business, that “personally he had no objections but for business reasons, if he voted for the chain store for cigarettes, he would lose a number of business accounts.” Similarly, LeRoy Mercer, who was involved in a soda bottling business that supplied several dealers, had told him that “he would be liable to lose a number of customers” if he voted to grant a chain store a permit.264 Johnson and Gussmann complained that the lack of a cigarette permit had a negative impact on Ford Hopkins’ ability to compete with six nearby drug stores (including three Whetstone branches)265 because customers—who demanded cigarettes every day—wanted to buy cigarettes in order to be able to make all

262Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 22-27.
263American Druggist, Directory of Chain Drug Stores 18 (1932).
264Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 28-29. Gussmann, who had been present, corroborated Johnson’s testimony about Piper. Id. at 30-31.
265Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 32-33.
their purchases in one place. More generally, Johnson’s experience was that it was a benefit to a retail drug store’s general business to sell cigarettes.266

Perhaps the most intriguing testimony was offered by Ruskin (modestly self-styled company general manager although he was also president),267 who, after boasting that “[w]e do not permit people to loaf or congregate around our store in Iowa City, particularly young people”—and just to make sure, “[w]e also maintain a system of...store sharpers...[who] lay traps, so to speak, which would immediately detect any let down in the morale or the carrying out of the company’s orders and policies”—testified about an “experiment” that Ford Hopkins had performed in its store in Clinton, Iowa, which it opened after the council in Iowa City had refused to issue a permit in May 1929. Once the city council in Clinton had made it clear that it did not object to granting a permit, “we decided that for some months we would run our store without selling cigarettes and get the volume of business we did, comparing it with the time of the year, and then apply for the cigarette license.... As I recall we permitted that store to operate without cigarettes through the holiday season, to give it the benefit of the best time of the year, or at least rather close to it; then we applied and received our permits [sic] and started the sale of cigarettes, and we noticed a perceptible increase in business, and a great many comments by customers, stating that it made it much easier for them to purchase their drugs where they purchased their cigarettes, and there was a definite increase in business from almost the first week, and now the increase is very considerable.”268 In light of this remarkable controlled experiment, which was self-serving but also self-inflicted short-term financial loss, it is puzzling that Ruskin, who presumably had initiated the plan in contemplation of precisely this litigation, failed to offer any quantitative estimate whatsoever of the loss of sales/profits caused by the lack of a permit.

Ruskin did provide quantitatively precise data on prices and apparently stylized (but perhaps real) data on turnover and planned/realized profit rates designed to project Ford Hopkins’ image as smokers’ benefactor, which did not prompt city attorney Hayek to ask whether lower prices might attract more underage smokers. After stating that the general wholesale per package price was 11.6 cents (minus 2 percent for cash discount) and the prevailing retail price in Iowa City was 18 cents (though he himself had also bought them there for as much as 20 cents), Ruskin purported to reveal this much about the firm’s profit-

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266Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 30.
267American Druggist, Directory of Chain Drug Stores 18 (1932).
268Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 34-35, 36.
price matrix:

We require that every dollar invested in merchandise return a certain profit; let us say..., just entirely for example, that that profit be 50 per cent. Now if that article of merchandise sells once a year, and it cost a dollar, then necessarily that sells at $1.50, that would be the fifty per cent profit. If the article had a turnover of ten times per year, we would only require five cents profit, or a profit of $1.05 to get our fifty percent profit back at the end of the year, the fixed overhead remaining the same throughout the year. It necessarily follows that with an item like cigarettes, a daily turnover of stock,...it is not at all necessary for us to have a full margin of profit to [sic] get on our slow moving article, to realize the same return on our investment over a year’s period.

The general public gets the benefit of the increased turnover. 269

Defendants’ witnesses featured four named defendant councilmen and the mayor, all of whom swore that their votes against Ford Hopkins and/or A & P had absolutely nothing to with their being chains. 270 Indeed, Councilman Kaufmann testified that he was unable to remember why he had voted to refuse to renew A & P’s permit or to grant one to Ford Hopkins 271 (though he did insist that he had first begun “thinking there were enough cigarette permits in Iowa City when about thirty-five had been issued”). 272 The most persuasive testimony, such as it was, came from Dr. Bywater, who did not smoke cigarettes, “[a]s a medical man...know whether or not a cigarette is harmful to a minor,” and did “not believe in young girls smoking cigarettes.”273 Insisting that Ford Hopkins’ status as a chain store played no part in his vote against granting it a permit on August 1, 1930, Bywater testified that the only reason for his vote was that:

I think we have enough licenses in Iowa City, in fact I think we got too many as it is. We have all these young boys and girls here to look after and to protect, and the Ford Hopkins people have a store right in a prominent part of town where young people are passing all the time, they have got an attractive front that is more attractive than any store in Iowa

269 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 36.
270 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 49 (Charles Regan), 52-53 (L. H. Kauffman [sic]).
271 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 54-55.
272 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Second Amendment to Abstract at 9.
273 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 46.
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City, it has a tendency to bring boys and girls into that store, and when they get in there why they can—in a position to buy their cigarettes. I think that the little store outside, in much more out of the way place, just to settle, the locality, is much more desirable than a store in a prominent place like Ford Hopkins, and I think we have too many places now.274

On cross-examination, Ford Hopkins’ lawyer, Owen Elliott, elicited from Bywater the admission that the plaintiff’s store was hardly the central commercial magnet of students:

The intersection of Clinton Street and Washington Street and the northeast corner thereof is probably passed by more students than any other corner in Iowa City. The student traffic is greater there than any other place in Iowa City. The corner is occupied by the Whetstone Drug Company which has a large business with the young trade. The Whetstone Drug Company makes a special effort to attract the student trade. It has a subpostoffice station and cashes students’ checks. The store is frequented largely by students and has a cigarette permit. It is a very attractive store inside and out. It has many times over the amount of student trade that the Ford Hopkins store has.275

Why, given their alleged solicitude for students’ well-being, neither Bywater nor any of his colleagues ever voted to deny a permit to Whetstone, which also had permits at two other stores in the downtown business district, the physician did not reveal. Nevertheless, the city council had no compunctions about annually renewing the permits of Whetstone Drug Company, locally owned but operating three stores each with a cigarette permit, despite the fact that the aforementioned branch was “a busy student center with post office boxes for fraternities and sororities” and famous for its sherbets, malted milks, and soda fountain.276 The council apparently perceived no contradiction between Whetstone’s perpetual and ubiquitous sale of cigarettes and the company’s boast on one of its anniversaries277 of “55 years of serving the public health.”278

274Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 41-42.
275Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 44.
277“Three Whetstone Stores Observe 55th Anniversary,” *ICP-C*, July 9, 1929 (2:5-6).
278*ICP-C*, July 9, 1929 (12) (full-page ad). The next year the store advertised to
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That Bywater had never visited any of Racine’s four stores or a pool hall to “see whether it was a fit place to be granted a permit” and “never made any attempt to find out where these minors purchased these cigarettes” suggests that his devotion to “safeguarding the morals of the youth” was as staunch as his conviction that increasing the number of permits from 51 to 52 “would be a tremendous detriment to the youth of Iowa City”—especially since he admitted that he and the other councilmen had, despite their alleged insight as far back as 1929 that there were enough outstanding permits, nevertheless “added some.”279 And, to judge by the attention that the cigarette manufacturing oligopolists were paying to them, well might Bywater and his fellow councilmen have been concerned about the university students. The student newspaper, the Daily Iowan, which as early as the outset of 1924 had begun publishing small advertisements for Lucky Strike,280 soon was printing many large ads for the cigarette trust successors almost daily.281 By 1930, Liggett & Myers was hawking Chesterfield to SUI students, in a large advertisement featuring a football player motif, as so mild that “You don’t have to learn to like them.”282 Indeed, two days after Bywater had testified university students read that: “You can bet your bottom dollar—They Satisfy.”283 This print immersion was not confined to cigarettes or national manufacturers. Racine’s, which in tamer days had advertised its malted milks,284 now urged students (in the same issue of the paper detailing Ford Hopkins’ efforts to persuade the city counsel to issue it a permit) to take “A Pipe Course” at its four stores.285

Elliott, aided by one witness’s apparent ineptitude, effectively undermined the defendants’ monolithic narrative. On cross-examination, Elliott asked Le Roy Mercer, who had just testified that he had never even given any thought to Ford Hopkins’ chain-store status,286 why suddenly, after having voted to grant 51

students that whatever they wanted from a drug store Whetstone would send over. DI, Nov. 25, 1930 (6:4-5).

279Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 44-47.

280DI, Jan. 8, 1924 (3:5).

281E.g., DI, May 2, 1926 (7:1-3), Mar. 25, 1927 (7:2-5) (Lucky Strike), Feb. 7, 1928 (8:5-8) (Camel), May 24, 1928 (8:5-8) (Old Gold).

282DI, Oct. 19, 1930 (10:5-8).

283DI, Oct. 15, 1930 (6:3-5).

284DI, July 19, 1921 (4:2-3).

285DI, Sept. 20, 1930 (6:4-5).

286Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 57.
permits, he concluded that there were already enough permits in Iowa City:

A. Well, you are always getting new thoughts and they have to come to you at one
time or the other.
Q. And this thought broke in on you that night?
A. Yes, it came right then.
Q. The thought just snapped into your mind then?
A. Just popped right out.
Q. How did it happen that the same thought came to—you know it there, five of them, right that one night of Aug. 1, 1930?
A. Mental telepathy, I imagine. 287

Hayek did not even bother to try to rehabilitate his witness on redirect. 288

The defendants’ final witness was James Carroll, Democratic mayor since
1925 and owner of a meat market, 289 who, at least in the version of the testimony
that Ford Hopkins printed for the record presented to the Iowa Supreme Court,
allegedly testified on direct examination that he had broken the tie vote on and
opposed A & P’s application on August 1, 1930, “because it was a chain store.” 290
In reality, as the city pointed out in its Denial of Appellant’s Abstract of Record
and Amendment to Abstract, Carroll had expressly denied that he had voted
against granting the permit on the grounds that A & P was a chain. His precise
motivation, however, remained unclear. When Hayek asked him directly what his
reasons had been for voting no, the mayor, after Elliott had objected to the
question’s irrelevance, replied that it had been his first opportunity to vote No on
a cigarette permit. Instead of continuing and stating his reasons, Carroll was
interrupted by Hayek, who asked: “Do you believe in the issuance of a great
number of permits in...Iowa City...?” Neither his denial nor his reasons—“Morals

287 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 58.
288 Pursuing a serendipity defense, in an appeals brief the city insisted that the trial
date “clearly and plainly was convinced” that the “City Council seemed to believe that
the sales of cigarettes must be limited and they must put a stop somewhere and sometime,
and the only arguments appellant has is imputing bad faith because the stop happened to
be made upon the application of the Ford Hopkins Company....” Ford Hopkins Company
v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on
Resubmission at 66.
289 1920 Census of Population (HeritageQuest).
290 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 58-59.
and welfare of the young people” —were more plausible than the councilmen’s, but, unlike them, the mayor was able, without fear of refutation, to suggest that the fact that his first (No) vote was directed at A & P was purely coincidental. (Ford Hopkins’ lawyers’ excuse for the falsified record testimony—“the apparent misquotation was due solely to a mistake or inadvertence of the printer”—was about as credible as the councilmen’s denial that they had voted against granting the permits because the stores were chains.) He also stated that there was “quite a bit of smoking among minors in Iowa City,” which the police had “made an attempt to curb....” On cross-examination he added that although the police chief had tried to find out where minors got cigarettes, he personally had not, confining his own investigative activities to “find[ing] out where students...are loafing.” I find that they are loafing in pool halls that have been granted permits to sell cigarettes by the City Council....” The mayor had seen them loafing in drug stores, including Whetstone and Ford Hopkins.

The lawyers’ arguments occupied the session on October 14. City solicitor Will Hayek argued that the council’s “sincere effort to restrict the sale of cigarettes” on behalf of the large number of minors “should be praised....” The company’s lawyers contended that it was impermissible for cities to discriminate arbitrarily among persons engaged in the same business.

On December 5, 1930, Judge Popham—who after leaving the bench became law partners with Will Hayek, the Iowa City city solicitor who had litigated the case before him—issued his judgment, which had been awaited with “great anticipation” in Iowa City and “over the state,” that “the equities are with the defendants,” dismissing the petition without any substantive opinion.

291 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Denial of Appellant’s Abstract of Record and Amendment to Abstract at 3.
292 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument at 3.
293 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Plaintiff’s Evidence, at 59-60.
296 “Court Upholds City in Cigarette License Case,” ICP-C, Dec. 5, 1930 (2:1).
297 Ford Hopkins Company v. City of Iowa City, Iowa, Judgment and Decree (Johnson County Dist. Ct., Cause No. 24417, Dec. 5, 1930) (archived at Johnson County Courthouse).
The Republican Iowa Supreme Court Reverses the Trial Court

Ford Hopkins quickly filed a notice of appeal to the Iowa Supreme Court, which ruled that the case would be heard in March 1931. In its brief the company failed to formulate precisely what question(s) it was submitting for the Court’s resolution, but it seemed to be requesting: (1) a fact finding that the city council’s declared reason for denying the permit (namely, that it was limiting the total number of permits to 51) was a “subterfuge,” whereas the real reason was that Ford Hopkins was a chain store; and (2) a legal finding that this latter reason was impermissible because the council had admitted the plaintiff’s “equality...with others to whom permits had been granted” without giving Ford Hopkins “an equal opportunity to compete for permits.” The plaintiff charged that the council, in an attempt to legitimate its discrimination against chain stores and in favor of local merchants, “began a systematic course of conduct solely for the purposes of anticipated litigation consisting of numerous self-serving acts and declarations and manifested an intense interest in the morals and welfare of the youth of Iowa City..., an interest which had lain dormant for many years, but was suddenly inflamed by the necessity of finding an excuse for denying a cigarette permit to a so-called chain store.” Although Ford Hopkins made the aforementioned point that the use of “may” in the statute created the “absurd result” that city clerks had discretion not to issue the permits that city councils had granted, whereas county auditors lacked such discretion vis-a-vis county boards of supervisors, its attempt to salvage some meaning for the word by claiming that it was “merely used to indicate” whether an applicant was to apply to a council or board was implausible. As an alternative or fallback position,
the plaintiff, admitting for the sake of argument that by the use of “may” the legislature had conferred some discretion on city councils, conceded that the word “might very logically be held to confer” on the city council the discretion “to determine whether or not cigarettes would be sold within the city limits”\textsuperscript{304} in the sense of a binary local option. Mockingly, Ford Hopkins suggested that the council should indeed have exercised that option and prevented the sale of cigarettes if it had really been “so desirous of protecting the numerous minors within the city...”\textsuperscript{306} But once the council had decided to grant some permits, it lost any further discretion because—as the company, without any textual support and in complete disregard of the legislature’s clearly expressed intent to retain features of a police power even after licensure—the law, and in particular the mulct tax, was designed “solely for the purpose of revenue”\textsuperscript{307} and thus deprived the council of any discretion because under such a revenue law “every one [sic] who complies with the conditions expressed as to filing bond and paying the mulct tax is entitled to a permit.”\textsuperscript{308} As a final public policy argument, which would ring perversely today, but even in 1931, given the lingering concern for smoking initiation among minors, presumably drew whatever resonance it may have engendered from the lower incomes of the Great Depression, Ford Hopkins attacked the council’s purported capping of the number of permits (so as to exclude the chains) as logically resulting in allow[ing] those having permits to exploit the public and to maintain an artificial price level. ... The fear of the present permit holders who are so anxious to have a permit denied to this plaintiff is that if a permit is granted the present permit holders will not be able to maintain the artificial and unwarranted price of cigarettes which now prevails in...Iowa

\textsuperscript{304}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 31.
\textsuperscript{305}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 49.
\textsuperscript{306}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 32.
\textsuperscript{307}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 15.
\textsuperscript{308}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 48. In fact, Ford Hopkins implicitly conceded that the council did retain some discretion by stating that the council could not refuse it a permit “when it brings itself in [sic] the same situation and class as those to whom the City Council has granted cigarette permits.” Id. at 32. Without explaining what those terms meant, the plaintiff was presumably conceding that the council could lawfully distinguish between and among applicants in different situations and classes.
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City... It is the duty of the members of the City Council...to do those acts which will enable the people of Iowa City...to secure the benefits of free competition among merchants.

It is difficult to see how the defendants can profess to serve the great mass of the people who elect them and can exercise the powers “held by them in trust for the people of this municipality, and for the public generally,” when they vote to maintain an artificial price level on a commonly used article of commerce, particularly when the result of the artificial price level is to increase the wealth of a limited number at the expense of the majority.309

The city’s brief, filed in February 1931, was much more concise and focused. In contrast to the multiple and diffuse factual issues that Ford Hopkins presented to the court as the questions for resolution, the defendants articulated one question—whether a city council had “legal discretion to limit the number of...permits it will issue when in its judgment a greater number would be inimical to the safety, health, and morals of the inhabitants of the municipality and especially of its youth....”310 Although the medical and lay opinion that cigarettes were harmful for minors might not be universal, “where there are conflicting scientific beliefs...it is for the city council to determine upon which theory it will base its regulations....”311 The city rebutted the plaintiff’s suggestion that the city council lacked authority to limit the number of permits because it was not specifically granted by arguing that it was comprehended within the authority to refuse all permits.312 Hayek’s most transparently untenable argument was directed at refuting the plaintiff’s critique of the statutory meaning of “may.” His assertion that the statutory language confirmed the construction of the city council’s power as discretionary and “not merely ministerial” was nonsensically based on the further assertion that although the statute did use “‘may’ with regard to the council’s granting the permit and the clerk’s issuing it, the law also

309 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument at 48.

310 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument, at 2.

311 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument, at 16. Bizarrely, Hayek injected his “personal opinion...that the youth should be confronted less frequently with the appealing cigarette.” The sole basis for this opinion was his equally bizarre reference to a finding in a series of tests by “Miss Frey, former research worker in Iowa City,...that cigarette-smoking coeds fell 13.3 per cent. below non-smokers in physical efficiency.” Id. at 13.

312 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument, at 13.
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went on to use “‘may’” for the county board of supervisors and “‘shall’” for the county auditor. It is difficult to imagine that Hayek had failed to understand that these disparate, irreconcilable, and ultimately incoherent uses of “‘may,’” could, when subjected to a purely abstract semantic interpretation, devoid of analysis of the legislative history (including the sloppily drafted, but ultimately meaningless, word changes) and purpose, not ground city councils’ discretionary powers.\footnote{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument, at 16-17. Hayek revamped his analysis in the defendants’ petition for rehearing, but it remained absurd. He asserted that the legislature used “‘may’” because cities had “‘various agencies for performing ministerial duties such as Mayors, City Clerks, City Auditors, Collectors, and others,’” thus implying that the council “‘might designate this ministerial duty to others of its agents,’” whereas “‘shall’” reflected the uniform designation of auditors as the ministerial officer in the counties. Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 31.}

Finally, the defendants, while staunchly denying that they had denied Ford Hopkins a permit because it was a chain store, remarkably conceded that “[w]e do not contend that appellant may be discriminated against because it is a chain store.” Their much more modest contention was simply that the plaintiff had not carried and could not carry its burden of proving that the council’s decision to limit the number of permits in order to enforce the ban on selling to minors more effectively—the real reason for denying Ford Hopkins a permit—was capricious and arbitrary.\footnote{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Reply Brief and Argument at 7.}

The plaintiff’s reply brief of March 1931 was even testier and more sarcastic than its previous submission. Although skepticism regarding council members’ asseverations that their votes against A & P and Ford Hopkins had not been motivated by anti-chain store sentiments was hardly out of place—surprisingly, nowhere did the plaintiff seek to buttress its claim of discrimination by pointing to similar litigation in Perry and Waterloo and the city council’s action in Cedar Rapids, where Ford Hopkins’ law firm was located—the plaintiff went far beyond challenging the city council’s “good faith” and its being in cahoots with “Mr. Whetstone and other local merchants [who] didn’t want their profiteering monopoly interfered with”\footnote{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument, at 22 (quote), 13.} by charging bias on Judge Popham’s part: “Even the trial court, anxious as he [sic] was to find in favor of the City Council, would not go to the extent of declaring the action of the City Council was in good faith.”\footnote{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument at 7.}
The only further concession that the company appeared willing to make at this late stage of the litigation again pertained to the statutory term “may”: assuming, for the sake of argument, that the word indicated a legislative intent to confer some discretion on city councils, the plaintiff now acknowledged that such discretion was “of necessity limited to” (but in any event included) “a determination of the question whether the applicant for a license is a fit person qualified to have a license....”

However, the most significant break with its previous approach that Ford Hopkins made in its reply brief was its plea to the Iowa Supreme Court to turn a new jurisprudential page by getting in sync with the age of normalcy’s acceptance of the sale and use of cigarettes as perfectly legitimate and normal commercial and social activities that had in fact become the norm:

At one time considerable sentiment opposing the sale of cigarettes was prevalent in some of the United States. Laws forbidding the sale of cigarettes were enacted. These laws were sustained by the Supreme Court of the United States solely upon the ground that the legislature could declare the public policy of the particular state. The prejudice against the use of cigarettes has disappeared, and the use thereof has become almost universal. The change of sentiment has been reflected in the various state legislatures which have repealed the legislation forbidding the sale of cigarettes. The legislature of the State of Iowa, at the 39th General Assembly, repealed previous anti-cigarette legislation and legalized the sale of cigarettes in Iowa. This act of the legislature was clearly a recognition of the change in public sentiment and was a recognition that the sale of cigarettes was a legitimate business.

As plausible as some of these empirical claims were, the far-reaching distorted interpretation of legislative history and intent that the company’s lawyers sought to hitch to them was mere assertion based on no reference whatsoever to the slightest shred of evidence:

There is nothing in the act authorizing the sale of cigarettes in Iowa which in any way indicates an intention on the part of the legislature to authorize local authorities to prohibit the sale of cigarettes by a particular individual or to limit the number of permits. Such construction is inconsistent with the legislative pronouncement.

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Reply Brief and Argument at 9.

[^317]: Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument at 15.

[^318]: Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument at 26.

[^319]: Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s
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In the interim before the Iowa Supreme Court issued its decision on the appeal, the city council at its mid-year session in 1931, immediately after having directed the clerk to issue permits to 34 applicants, unanimously voted to adopt a resolution that stopped short of imposing a ceiling on the number of outstanding permits at any one time, although the Press-Citizen regarded the council as having “stood firm...on its previous decision about new cigaret licenses...”320

WHEREAS, it is the desire of the City Council that the number of licenses to sell cigarettes and cigarette papers be limited and that permits be granted only to such persons, firms, and corporations as will comply with the law relative to the sale of cigarettes and cigarette papers, and before any permits are granted, except in cases where the City Council has knowledge of the record of the applicant as to the observance of the law, investigation shall be made, therefore,

BE IT RESOLVED, that permits be granted to such persons, firms, and corporations only as have previously been granted permits, and that all other applications be filed and action thereon deferred pending investigation as to the question of the qualifications of the applicants and the general limitation of the number of permits to be granted.321

In a fractured opinion issued in February 1932, the Iowa Supreme Court—none of whose members was a Democrat322—reversed Judge Popham’s denial of mandamus, ruling instead that the city council should have granted Ford Hopkins Company a permit. Written by Republican Justice Elma Albert (1925-36), the opinion was concurred in by Republican Justices Lawrence De Graff (1921-32) and John Grimm (1929-32), who, remarkably, had, until his appointment to the Court, been a name partner in the Cedar Rapids corporate law firm that represented Ford Hopkins in the case he decided and that he rejoined immediately after resigning from the Court in 1932.323 It became the majority opinion of the nine-member Court because Justices Edgar Morling (1925-32) and James Kindig (Republican, 1927-34) specially concurred in it.

Albert framed the case as dominated by two interlocking questions: Did the city council have “any discretion whatever” in acting on plaintiff’s permit application? And if so, what limits were placed on the exercise of that discretion?

Reply Brief and Argument at 26.

321Iowa City City Council, Minutes of a Regular Meeting of July 3, 1931, 21:204.
322All were Republicans except Edgar Morling, whose various biographical sketches mentioned no party affiliation. State of Iowa: 1929-30: Official Register 201 (33d No.); State of Iowa: 1931-32: Official Register 213-14 (34th No.); State of Iowa: 1933-1934: Official Register 54-56 (35th No.).
323Martindale’s American Law Directory 273 (1929); http://www.judicial.state.ia.us
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Albert concluded that although factually the record did “not show the reasons for the refusal of this permit,” there was no doubt that the council had discriminated against Ford Hopkins, even vis-a-vis other chain stores. The council, however, took the position that it had “a broad and unqualified discretion to grant or refuse a permit for any reason deemed by it, in good faith, to be sufficient.” This “absolute discretion” derived, according to the defendants, from the legislature’s use of “may” in authorizing councils to grant permits. 324

Albert rejected this absolutist, but good faith-constrained, interpretation because:

A review of the past legislation touching this subject shows that until the adoption of the present law, the sale of cigarettes and cigarette papers was absolutely prohibited under the statutes of this state. Their sale is still prohibited unless a permit for the sale is procured in the manner provided by law. It is apparent, after reviewing the past and taking into consideration the present legislation on this subject, that the purpose of the Legislature in passing the present law was to give each municipality designated in the statute the right to say whether or not cigarettes should be sold within its boundaries. In other words, it was the “local option” statute pure and simple, and the use of the word “may” in the above statute shows that was the intent of the Legislature, and thereunder each municipality might determine for itself whether or not cigarettes should be sold within its boundaries. 325

To this analysis explaining that the legislature had empowered local governments to prohibit the sale of cigarettes Albert then tacked on this non sequitur: “It necessarily follows from this that when the city council has determined that cigarettes shall be sold within its boundaries, every applicant for a permit who complies with the requirements of the statute is entitled to a permit.” 326 Albert failed to justify his interpretive leap that denied that a conceded legislative conferral of all-encompassing power to prohibit all cigarette sales excluded the authority to limit the number of permits in order to insure adequate enforcement consistent with the city’s budgetary resources. The only requirement or qualification that Albert found in the statute for being granted a permit was owning or operating the place where the sales were to be made. Thus

324 Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 687-88 (Iowa 1932).
325 Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 688 (Iowa 1932).
326 Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 688 (Iowa 1932). The defendants ironically characterized this discretion as dying “upon its being exercised”; alternatively, “as soon as the Council has...granted a permit to one person, then the word ‘may’ in the statute is,...by some subtle alchemy, turned into the word ‘must.’” Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 7, 8.
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once the council decided that cigarettes may be sold, and once it found that this “condition precedent” had been met, “there is nothing left for the city council to do except to grant such permit.” The majority’s lame exegesis of the word “may” was that it was designed to indicate that the council “‘may’ refuse to grant a permit” if the applicant did not own or operate the place where the cigarettes were to be sold.327 However, this interpretation was illogical and incoherent since the legislature conferred no discretion on councils to grant permits to applicants who lacked this qualification; on the contrary, it was, according to Albert, the only basis for denying a permit. Nevertheless, the majority, reversing the trial court, held that the council should have granted Ford Hopkins Company a permit.

The special concurrence was based on the asserted grounds that the evidence conclusively showed that the city council’s denial of a permit was unlawful because it was “discriminatory and purely arbitrary....” In other words, Morling and Kindig did not subscribe to the rest of Albert’s opinion, but merely agreed with the outcome because they took the position that no matter how much discretion the legislature conferred on councils, it could not have lawfully encompassed this kind.328

Despite the majority opinion’s narrow, if not crabbed, basis, it is crucial to observe that even the majority fully acknowledged that, without any doubt, the legislature had empowered local governments to perpetuate the prohibition on cigarette sales that had been initiated in 1896.

The dissent, written by Republican Justice Frederick Faville (1921-32) and concurred in by Republican Justices Henry Wagner (1927-32), Truman Stevens (1917-34), and William Evans (1908-34), criticized and refuted the entire basis of Albert’s approach. Although the dissenters did not deny that city councils were empowered to ban all cigarette sales if they so chose, they correctly pointed out that:

The statute does not contemplate any such thing as a general resolution of a city council as to whether permits to sell cigarettes shall or shall not be granted within the municipality. Section 1557 makes the granting or refusal of a permit a personal matter between the applicant and the city council in each and every separate and individual instance. ... There is not a hint in the statute as to any general resolution of the city council as to whether permits to sell cigarettes shall or shall not be allowed within the municipality. 329

327Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 688 (Iowa 1932).
328Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 688-89 (Iowa 1932). Since the two-sentence special concurrence failed to identify which evidence Morling and Kindig had in mind, it is impossible to reconstruct what kind of arbitrariness they meant.
329Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 689 (Iowa 1932).
Instead, Faville observed:

The whole history, theory, and purpose of the statute is to make the permit a trust granted by proper local authority which renders the holder immune from prosecution for that which, but for the permit, would be a crime. It is most distinctly and essentially a police regulation. By the very terms of the statute the duty is imposed upon the city council (or board of supervisors) to determine who may be thus rendered immune from criminal prosecution. The Legislature used the word “may” advisedly and intentionally. By express, direct, and unambiguous language it placed a discretion and a responsibility as well upon the local authorities.

In my judgment, it is a clear perversion, not only of the intent but of the very language of the statute, to hold that because the city council may grant a permit to one proper applicant, ipso facto it must grant a permit to each and every applicant, regardless of who or what such applicant may be, save only, as the majority say, the applicant “owns or operates the place from which sales are to be made.” Under such a holding the Y. M. C. A. and the notorious bootlegger stand on an absolute equality, and each must be clothed with the trust to do that which otherwise would be a crime.

The law does not so provide, and we should not enlarge it beyond its plain and explicit language.

It is the universal holding that in statutes of this character the word “may” is to be construed as permissive and not mandatory. The decisions are almost without number and can be found in Words and Phrases, First, Second, and Third Series, under the word “May.” The majority construe the word as mandatory instead of permissive. They make it the equivalent of “must,” which is directly contrary to every rule of construction as applied to statutes of this character. ... I think the city council has not only a right but a duty under this statute to properly exercise its discretion as to whether a permit shall be granted to any individual applicant, and that duty involves much more than merely ascertaining whether or not the applicant owns or operates the place where the sales are to be made.330

Turning to the facts, the dissenters noted that once the council had issued 51 permits, on August 1, 1930, it ordered its ordinance committee to draft an ordinance limiting the number of permits and granting none beyond that level. Shortly thereafter both Ford Hopkins and another applicant filed applications, both of which the council denied while adopting a resolution explaining that with the already large number of existing permit holders, granting additional permits burdened the city’s ability to enforce the law regarding the sale of cigarettes to minors. Following this denial, the dissenters found, the council had denied all applications. This self-limitation was simply an exercise of the legislatively conferred discretion, for which the Supreme Court was not authorized to

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330Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 690 (Iowa 1932).
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...substitute its own discretionary judgment as to whether the cap should be set at a higher number.\textsuperscript{331}

As far as the plaintiff’s claim was concerned that the council had acted arbitrarily because its denial of the permit was based on Ford Hopkins’ status as a chain store, the dissenters argued that the trial judge had correctly ruled that the plaintiff had failed to prove this point. However, even if the council had refused the permit on these grounds, the dissenters argued that such a judgment would still not have been so arbitrary as to justify issuance of a writ of mandamus: “Many good reasons could well be urged why a city council might hesitate to grant a permit to a foreign corporation, with only employees living within the city where the permit was granted, and with the possibility of frequent changes in such employees. The law contemplates a large degree of personal responsibility on the part of one to whom the permit is granted and we should not hold, as a matter of law, that the refusal of a permit to a foreign corporation operating as a chain store is such an arbitrary classification as to require the court to hold it to be void.”\textsuperscript{332}

\textit{The Democratic Iowa Supreme Court Reverses Itself}

Three days after the Iowa Supreme Court had handed down its decision, the press reported that the city council might seek a rehearing based on the ruling’s nature and closeness.\textsuperscript{333} A week later Ford Hopkins filed another application for a permit,\textsuperscript{334} which the council tabled pending the city attorney’s report on the advisability of petitioning for a rehearing, which the council then promptly decided to instruct Hayek to request.\textsuperscript{335}

In its petition for rehearing the council lashed its fate to the dissenting opinion so irretrievably that it ventured the sarcastic blast that the dissent was so “able, logical and...convincing” that “[t]he only reason that we can think of for” the majority’s not having adopted it was “that the majority did not read it.”\textsuperscript{336} The

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\textsuperscript{331}Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 691 (Iowa 1932).
\textsuperscript{332}Ford Hopkins Co. v. City of Iowa City, 248 NW 687, 691 (Iowa 1932).
\textsuperscript{333}“May Ask for Re-Hearing of Cigaret Case,” \textit{ICP-C}, Feb. 12, 1932 (2:4).
\textsuperscript{334}Application for a Cigarette Permit (Feb. 19, 1932) and Bond for Sale of Cigarettes (Feb. 19, 1932). Iowa City Finance, Council Proceedings, Nov. 1931-Apr. 1933, Roll No. I 12 (Iowa City Clerk’s Office).
\textsuperscript{335}Iowa City City Council, Minutes of an Adjourned Meeting of February 19, 1932 (21:313); “Council Asks Re-Hearing of Cigaret Case,” \textit{ICP-C}, Feb. 20, 1932 (2:8).
\textsuperscript{336}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 7.
\end{flushright}
city forcefully sought to extend the boundaries of its discretionary power to grant cigarette permits by contending that it “had the right to refuse to grant a license to the appellant solely on the ground that it was a ‘chain store’...and such a decision would not be arbitrary” because “granting...a license to carry on a detrimental and tolerated business contemplates a consideration of all the qualifications of the applicant as bearing on the probable manner in which the business will be conducted. [T]he difference between a store owned by a non-resident corporation, and operated entirely by hired servants, many of whom are not even permanent residents of the city, and a store owned and operated by a resident taxpayer, who is presumed to have the moral welfare of his city at heart, is such as to justify a distinction or discrimination in granting a permit....”

The city’s aggressiveness was also reflected in its belittling Ford Hopkins’ position of basing “its desire to sell cigarettes upon no other ground” than wanting to “make a little more money” rather than an “intention...to advance the morals, or improve the health or benefit in any way the citizens of Iowa City, whether young or old.” But the heart of the defendants’ petition was its very expansive, yet (largely) historically accurate, portrayal of the discretion that the legislature had conferred on local governments to suppress or promote cigarettes. Although akin to the dissenters’ approach, the city’s went even further in arguing that:

The Legislature did not intend when it prohibited the sale of cigarettes and then only allowed their sale under certain conditions and upon the granting of a license to so arrange it that every place of business in a town should be allowed to sell cigarettes. The Legislature evidently did not intend to make it extremely convenient for everyone to purchase cigarettes without going more than a block away from home; yet such situation may very readily develop if the Council of the City has no authority or power to limit the number of licenses.... Even entirely aside from moral grounds for such limitations or if not moral, at least, grounds which took into consideration an attempt to diminish the evil of the sale and use of cigarettes, particularly by minors, the Council had a right to take into consideration the financial situation or its effect upon the town and the revenues of the town. It had the right to say, “the more cigarette licenses were issued, the larger will be the revenue, and therefore, we will issue all the cigarette permits that are asked for and not only that, we will encourage people to ask for them.” On the other hand, they had the right to consider the overhead or expense that they would incur in any additional inspection or police control that might be required to see that the law as to selling cigarettes to minors

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337Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 6.
338Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 41.
was obeyed. They had a right to figure, for instance, that one additional policeman could perform all the additional work required to keep track of fifty places where they sold cigarettes, but that he could not take care of any more than that and therefore, the granting of one, two or a dozen more would create an expense greater than the revenue derived.... The council...had the right to consider that the more places...that were licensed to sell cigarettes, the more temptation there would be on the part of each place to sell cigarettes to minors, because the more competition there was in the sale of cigarettes, the more anxious the people selling them would be to increase their sales or at least prevent the decrease of their sales in order to be able to pay the license fee. There was therefore a direct danger here with regard to minors buying cigarettes or procuring cigarettes on account of the increase of the number of permits.\footnote{339}

Ironically, the defendants, while implying that Iowa City belonged in the group that had taken the legislature up on its offer to “diminish the evil of the sale and use of cigarettes,” had in fact been integral agents of a more than decade-long tradition of freely granting and issuing permits without giving any publicly expressed thought to the consequences for the general welfare as opposed to local businessmen’s profits. Indeed, the city council’s laissez-faire policy, which entailed flooding the central business district with permits that kept downtown awash in cigarettes, had implemented one dimension of the legislature’s intent (or at least acquiescence in a foreseeable result) that the defendants’ brief had self-contradictorily misrepresented—namely, making cigarettes extremely available, accessible, and convenient to buy if local communities and the government officials they elected desired such an outcome.

Much of Ford Hopkins’ submission resisting the city council’s petition for a rehearing filed in April 1932 was devoted to hurling invective at the councilmen and their monopoly-seeking mercantile “friends,”\footnote{340} some of it recycled from previous pleadings. Speaking “off the record,” the company’s lawyer taunted the defendants by asking why the council granted numerous permits to its “special friends” in July 1931, while the case was pending, especially if it really desired to protect the youth’s moral welfare and to limit the consumption of cigarettes: “The entire record presents a situation wherein it is preposterous and ridiculous to ask the Court to find that the appellees were acting in good faith.”\footnote{341} In particular, Whetstone, whose three stores were in “direct competition with” Ford

\footnote{339}{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Petition for Rehearing at 34-36.}
\footnote{340}{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 18.}
\footnote{341}{Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 4.}
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Hopkins, was scored as “one of the leaders in a movement to preserve for himself and other local merchants a virtual monopoly on the cigarette business in Iowa City...at exorbitant prices....” The sarcasm reached its peak when the company accused the city council of having suborned Alice Goza to apply for a permit: “‘poor Alice’ no doubt served her useful purpose in having her application denied, together with the application of the appellant, in order that an appearance of apparent fairness was given to the farce enacted by the appellees on September 26, 1930.”

Without explaining how 51 small stores could constitute a “monopoly,” Ford Hopkins did unburden itself of the precise source of the outrage that purportedly went to the absolute core of the commonwealth: “[I]t is difficult to imagine any result more foreign to American institutions and justice than the idea that a group of municipal officers could at their whim and fancy confer or withhold the right to sell cigarettes without any measure of judicial regulation or control.” In the event, the lawyers for the city council saw no constitutional dimension implicated in the absence of a “vested right to engage in the cigarette business” and the Iowa Supreme Court apparently failed to share the cigarette price-cutting chain drug store’s sense of political abomination: on June 24, 1932, it withdrew the original opinion and granted Iowa City’s petition for a rehearing.

The city council in its brief submitted to the Court on resubmission reinforced its aggressive stance, adopting the position that even though it had refused the permit on the grounds that “too many were engaging in the business for the well being of the town,” it could nevertheless be lawful to deny a permit because the applicant was a chain store:

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342 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 11.

343 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 16.

344 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 50.

345 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Reply to Resistance to Rehearing at 9.

346 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Brief and Argument on Resubmission at 3; “Petition for Rehearing in Cigaret Case,” ICP-C, June 20, 1932 (2:1); “City to Get Rehearing in Cigaret Case,” ICP-C, June 24, 1932 (2:1).

347 Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 76.
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[I]f the council did actually refuse to grant the permit on the ground that the applicant was a foreign corporation or was what is commonly known as a chain store, yet if the council really believed that there were disadvantages to the city in this class of business in allowing it to be carried on by a foreign corporation or a chain store, such a decision, if made in good faith, would not be arbitrary in such a sense as would justify the courts in interfering with it. 348

Whatever plausibility attached to the city’s arguments in the abstract concerning possible relevant differences between locally owned and national chain stores was dissipated by the self-contradictory assertion that a permanent resident engaged in the “detrimental business” of selling cigarettes was “presumed to have the moral welfare of the residents of his city at heart...” 349 Instead of explaining why such a moral businessman would be selling cigarettes at all, the defendants chose to dwell on the claim that it was “significant” that

the first chain store permits refused, and, in fact, the first permits refused at all...were permits refused to a chain store which were not original permits but renewals. In other words, they had tried out the particular chain stores, the Great Atlantic & Pacific Tea Company, and after a trial, we presume of two years,...they had decided not to issue them any more and they stuck to that position. And possibly their experience with this chain store had something to do with their refusal to issue a permit to another chain store, the plaintiff in this case.... 350

This sheer speculation not only stood in sharp contrast to the defendants’ alleged preference in this context for “concrete evidence,” 351 but verged on the surreal since the speculators were the defendant councilmen themselves and their lawyer, the city attorney, who had been free to put on whatever evidence they wished to shed light on their actual reasons for having refused to renew A & P’s permits. (This faux-schizophrenic approach was also on display in the claim that “[i]f the Council should be criticised [sic] at all it would seem to us that it might be criticized for issuing so many cigarette permits rather than for issuing so few. It would seem to us that they would be entitled to greater praise if they had begun

348Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 76-77.
349Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 77.
350Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 77.
351Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 77.
to limit the number when there were only thirty-five...”\textsuperscript{352} Yet, to the extent that they testified about A & P at all, none of them offered any substantive reason for the refusal, let alone any mention of alleged deleterious experiences with A & P.\textsuperscript{353} In light of the contemporaneous newspaper reporting about local retailers’ dissatisfaction with A & P’s lower cigarette prices, the defendants’ smokescreen speculation in their brief forfeited any claim to credibility. Apparently, although the lawyers were willing to argue to the Iowa Supreme Court that the city council was empowered to single out foreign chain stores for denials, they did not believe that they would enhance their chance of prevailing if they conceded that they had discriminated against them simply because they were outcompeting local retailers. It is unknown whether Iowa City’s counsel considered developing the argument that a city council was authorized to deny permits to chain stores on the grounds that their lower prices encouraged the consumption, especially by young people, of a “deleterious” commodity.

The same spirit of aggressive optimism about pushing the boundaries of permissible discretion also pervaded the city-defendants’ critique of Ford Hopkins’ contention that if the council were empowered to limit the number of permits, the end result might be the creation of a monopoly for a favored few. Again manifestly taking the position that cigarettes constituted a special category as a harmful commercial product, the city argued that “[w]hile we contend that in a business of this sort where the attempt is to regulate and discourage it the Council would even have a right to grant only one or two permits, yet it is not necessary that we should be right as to this in order to meet the situation in the present case” (because the existence of 51 sellers would preclude any concern about monopoly).\textsuperscript{354}

On rehearing the opinion was unanimous, but only six justices participated—the same six who had formed the majority in \textit{Bernstein v. City of Marshalltown} six weeks earlier. Hubert Utterback did not participate because his

\textsuperscript{352}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 79.

\textsuperscript{353}Elsewhere in the same brief the city asserted, without a shred of evidence, that the plaintiff had “los[t] sight of the fact that the refusal to renew three permits to the Great Atlantic & Pacific Tea Company...would indicate that there was something unsatisfactory about the way this chain store was handling the business, and that permits were refused on that ground.” Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 14. As the city well knew, the way A & P was pricing cigarettes was “unsatisfactory” to the other permit holders.

\textsuperscript{354}Ford Hopkins Company v. City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and Argument on Resubmission at 84.
term had come to an end on April 16 as a result of a judicial resolution of a dispute as to who was entitled to the seat vacated by Morling’s death. Why Kintzinger and Albert, who did vote in other cases decided the same day, did not participate is unclear; especially puzzling, given his investment in the majority opinion in Ford Hopkins I, is Albert’s failure to dissent.

Based on the same argument that the Court had deemed without merit in Bernstein v. City of Marshalltown, Justice Kindig quickly dismissed Ford Hopkins’ contention that the only discretion the city council had was to “decide the general policy of permitting or not permitting cigarette sales,” but that once it decided to permit sales, it was required to grant a permit to each applicant complying with the law. Proceeding to the plaintiff’s alternative argument that even if it had discretion, the council could not exercise it arbitrarily, Kindig found that, as in Bernstein, the facts in Ford Hopkins II made it unnecessary to determine whether the city council’s discretion to grant cigarette permits was absolute or limited. The principal fact—as represented by the preponderance of the testimony—that the Court had especially in mind was that the council had refused the permit not in order to discriminate against chain stores, but because it wanted to limit the total number outstanding at any time to 51 in order to police the holders better and protect minor school children in addition to 3,000 minors attending the State University of Iowa, many of whom passed the plaintiff’s attractive store front prominently located in the central downtown. That the council also denied permits to “many other stores” for the same reason also demonstrated it had “clearly acted within its discretion.”

Discussion of Ford Hopkins’ third and final contention that the council had violated its constitutional interstate commerce and due process rights prompted the Iowa Supreme Court to review its and the U.S. Supreme Court’s anti-cigarette cases going back to the 1890s (which were analyzed in detail above). The central conclusion that Kindig derived from these cases was that since it was “constitutional under the police power of the state to prohibit the sale of cigarettes entirely, it is likewise constitutional to regulate and limit the sale thereof.”

355 Brown v. Martin, 216 Iowa 1272 (May 15, 1933) (Kintzinger and Albert participated). In Anderson v. Droge, 216 Iowa 159 (May 15, 1933), and Ransom v. Mellor, 216 Iowa 197 (May 15, 1933) Albert participated as did George Claussen, who had ousted Utterback on April 16.

356 Ford Hopkins Co. v. City of Iowa City, 216 Iowa 1286, 1288 (1933), reh’g denied (1933).

357 Ford Hopkins Co. v. City of Iowa City, 216 Iowa 1286, 1289-91 (1933), reh’g denied (1933).

358 See above chs. 11-12.
Because the city council neither infringed on congressional power to regulate interstate commerce nor discriminated against cigarettes manufactured or sold in or imported into Iowa, the factually and legally substantial basis, grounded in the police power to protect minors’ health and morals, for setting a maximum number of permits was not arbitrary.\textsuperscript{359}

\textit{The City Council Reverses Itself and Snatches Defeat from Its Own Victorious Jaws}

Several weeks after the Iowa Supreme Court had issued its second decision in the case, Tyrrell M. Ingersoll, one of the lawyers from the Cedar Rapids firm (Wheeler, Elliott, Shuttleworth, & Ingersoll) that represented Ford Hopkins “wandered into the office” of the Des Moines firm (Clark, Byers, Hutchinson & Garber) that had co-represented the City of Iowa City.\textsuperscript{360} Charles Hutchinson, who had played such a prominent role in opposing the repeal of the cigarette ban in 1921,\textsuperscript{361} informed Iowa City’s city attorney, Will Hayek, that “Mr. Ingersoll...served a notice of intention to petition for rehearing in our famous cigarette case,” adding dryly: “I had supposed in view of the Marshalltown case and that the opinion in our case was on a rehearing that that would have satisfied the other fellows, but apparently it has not.”\textsuperscript{362} Hutchinson’s irony notwithstanding, on June 30, just six weeks after the Supreme Court decision—“in a case which attracted national attention in legal circles”\textsuperscript{363}—had vindicated the city council’s power to deny permits, the council made its peace with Ford Hopkins by approving the latter’s application for a permit by means of a blanket resolution encompassing 31 other applicants as well. To be sure, the action was contested, two of six members opposing the entire

\begin{footnotesize}
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  \item \textsuperscript{359}Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286, 1294-95 (1933), \textit{reh'g denied}\ (1933).
  \item \textsuperscript{360}Chas. Hutchinson to Will J. Hayek (June 8, 1933), in Iowa City Finance, Council Proceedings (Apr. 1933 - Apr. 19, 1935), Roll No. I 13 (Iowa City Clerk’s Office).
  \item \textsuperscript{361}See above ch. 15.
  \item \textsuperscript{362}Chas. Hutchinson to Will J. Hayek (June 8, 1933), in Iowa City Finance, Council Proceedings (Apr. 1933 - Apr. 19, 1935), Roll No. I 13 (Iowa City Clerk’s Office). The city council received and placed this letter on file. Iowa City City Council, Minutes of an Adjourned Meeting of June 16, 1933 (21:602).
  \item \textsuperscript{363}“Three Year Legal Battle over Cigaret License for Drug Store Brought to End,” \textit{ICP-C}, July 1, 1933 (3:3-4).
\end{itemize}
\end{footnotesize}
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Control of the council, on which Democrats had held a majority of 5 to 2 in 1929 and 6 to 1 in 1931, had passed to Republicans, who, having appropriated the slogan “New Deal” from President Roosevelt, in 1933 gained four of seven seats, but party composition does not appear to have generated the outcome, since, with one Republican not voting, two-thirds of members of both parties voted to grant the permit. Republican Roswell B. Ayers, a chamber of commerce member who owned a lumber yard, offered an amendment striking out Ford Hopkins from the list of applicants, but it lost because none of his colleagues would second it. Nevertheless, on the resolution itself Democrat Michael J. McGuan, a pharmacist who owned his own drug store, joined Ayers in voting Nay, while Republicans Van der Zee and James Stronks (manager of Standard Publications and one-time president of the chamber of commerce), and Democrats Edward Sybil (owner of a sheet metal works/stove store) and John P. Memler (retail grocery store owner) voted to adopt it. Sometime before the meeting Ford Hopkins had notified the council that—like the city in 1932—it would request a rehearing from the Supreme Court. On June 29, when the store’s manager, Thomas Meredith, had applied for a permit, he had appended a letter, stating through the firm’s lawyers, R. C. Davis and former Iowa City mayor Ingalls Swisher, that Ford Hopkins “would be willing to dismiss the case and pay all court costs if the council granted the company a cigaret permit.”

364 Iowa City City Council, Minutes of an Adjourned Meeting of June 30, 1933, 22:3.

365 The party affiliation for 1933 is taken from “Republicans Sweep City Election,” DI, Mar. 28, 1933 (1:5-8).

366 “Candidates Seeking Municipal Office,” DI, Mar. 28, 1931 (1:3-6, at 3:2-4 at 4); Polk’s Iowa City (Iowa) Directory: 1932, at 78 (1931) (F. E. Ayers Co.).

367 Iowa City Finance, Council Proceedings, Apr. 1933-Apr. 19, 1935, Roll No. I 13 (June 30, 1933) (Iowa City City Clerk’s Office).

368 1920 Census of Population (HeritageQuest).

369 Polk’s Iowa City (Iowa) Directory: 1932, at 348 (1931); “Republicans Sweep City Election,” Daily Iowan (Iowa City), Mar. 28, 1933 (1:5-8, at 8:5-7 at 6).


371 1920 Census of Population (HeritageQuest).


373 “Three Year Legal Battle over Cigaret License for Drug Store Brought to End,” ICP-C, July 1, 1933 (3:3-4).
threat/offer would have exerted any pressure on the city counsel is unclear: after all, the Supreme Court’s unanimous vote in *Ford Hopkins Company v. City of Iowa City* and the cumulative impact of that decision and *Bernstein v. City of Marshalltown* made it extraordinarily improbable that the Court would revisit the issue. Moreover, granting the permit would subvert the public policies underlying the decision to litigate in the first place. The city, in the view of the *Press-Citizen*, had permitted Ford Hopkins to deprive it of its freedom of action by dealing with its application at a time when only 33 other applications were on file or already granted: since the total of 34 fell below the limit over which the city had litigated, the council was precluded from refusing a permit on that basis. In the event, Ford Hopkins’ manager announced that the store would start selling cigarettes the following Monday.

Curiously, in spite of the deal, Ford Hopkins not only did not dismiss the case, but in July 1933 adopted a possibly even more sneering tone toward the council in its petition for rehearing than it had displayed in earlier submissions. In addition to accusing the councilmen of having had as their “real purpose...protect[ing] their political henchmen against competition in the sale of cigarettes,” the plaintiff hinted at bribery in connection with “creat[ing] a monopoly for the benefit of...friends with or without secret compensation.” The company undertook a special effort to enhance the credibility of its star witness, Van der Zee, whom in December 1932 it had praised for not being a “political trimmer,” by inferring from his being the “only University representative” on the council that he “was really interested in the welfare of the students.” Incredibly, the lawyers appeared to be oblivious of the self-refutation they were creating by praising him for having voted to grant Ford Hopkins a permit “because he opposed the existing profiteering by maintenance of high prices by those holding permits....” How to reconcile his support for lower

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374 “Three Year Legal Battle over Cigaret License for Drug Store Brought to End,” *ICP-C*, July 1, 1933 (3:3-4) (erroneously stating twice that the limit was 41 instead of 51). In addition to the 31 other applications granted on June 30, the council had earlier unanimously directed the clerk to issue two permits. *Iowa City City Council, Minutes of a Regular Meeting of June 2*, 1933 (21:598); *Iowa City City Council, Minutes of a Regular Meeting of June 16*, 1933 (21:601).


376 *Ford Hopkins Co. v City of Iowa City*, 216 Iowa 1286 (1933), Appellant’s Petition for Rehearing, Argument and Notice of Oral Argument at 2-3.

377 *Ford Hopkins Co. v City of Iowa City*, 216 Iowa 1286 (1933), Appellant’s Reply Brief and Argument on Resubmission at 3.

378 *Ford Hopkins Co. v City of Iowa City*, 216 Iowa 1286 (1933), Appellant’s Petition
cigarette prices, which would stimulate even greater consumption, with a concern
for students’ welfare Elliott and his fellow lawyers did not stop to explain. (The
city, which had earlier mockingly declared that it was “a little difficult to
understand why” a university professor like Van der Zee “should be so obsessed
with the idea that the sale of cigarettes in unlimited quantities would be a good
thing for the students,”379 submitted a one-page reply, which did not even bother
to hide its contempt for what it regarded as a baseless petition.)380 Moreover, the
company did not even submit its petition until after the city council had granted
the permit. Indeed, it called the Supreme Court’s attention to that action,
explaining that the council had mooted the issuance of the writ of mandamus.
Nevertheless, in addition to pointing out that the question of costs was still
involved, Ford Hopkins assured the justices that “more important is the fact that
the present opinion establishes a bad precedent and one wholly wrong in
principle. It will lead to serious abuses. In the interest of public justice and to
safeguard the rights of other applicants for permits of various kinds from city
councils, the opinion should not be permitted to stand.”381

That Lewis Ruskin was generously footing the legal bill on other firms’
behalf is so implausible—after all, Ford Hopkins was only a small chain
competing against national drugs chains with hundreds of stores382—that it raises
the possibility that he was seeking to prevent other cities in Iowa from frustrating
his profitable sale of cigarettes as he opened stores elsewhere. In fact, the store
that Ford Hopkins opened in Cedar Rapids in 1936 was its sixteenth in Iowa and

379Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Appellees’ Brief and
Argument on Resubmission at 78.

380Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Resistance to
Appellant’s Petition for Rehearing at 2. In particular, the defendants ridiculed the
appellant’s having quoted “the alleged funny column of the Register,” whose author would
be appropriate to quote if he were a member of the Supreme Court, but since “he has never
advanced in the law so far as even being a Justice of the Peace,” they failed to see the
relevance. Id. For the quotation, see Ford Hopkins Co. v City of Iowa City, 216 Iowa
1286 (1933), Appellant’s Petition for Rehearing, Argument and Notice of Oral Argument
at 7. The column’s charge was that “[s]ince there are more than a dozen places within
mashie shot of the campus where cigarettes are sold...[t]he ruling merely gives city councils
a chance to...haze an occasional merchant who isn’t in the good graces.” H. S. M., “Over
the Coffee,” DMR, May 16, 1933 (16:3).

381Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Petition
for Rehearing, Argument and Notice of Oral Argument at 7-8.

382Federal Trade Commission, Chain Stores: Growth and Development of Chain
Stores tab. 6 at 23 (Sen. Doc. No. 100, 72d Cong., 1st Sess., 1932).
Litigation over Cities’ Home-Rule Power to Prohibit Cigarette Sales

its thirtieth overall. And while advertising themselves as “the world’s finest...druggists,” who “cater to” their customers’ health, the stores did include in their advertisements in Iowa “fresh mild smokes.” Another, albeit completely speculative possibility, is that Ford Hopkins was fronting for A & P, which might have concluded that its seemingly inexorable expansion and consolidating status as a commercial giant largely owned and controlled by one immensely rich family during a period of proliferating state-level anti-chain-store legislation would not have redounded to its benefit in further litigation. This speculation is at the very least consistent with the fact that the Cedar Rapids Hopkins law firm representing Ford Hopkins was also counsel to A & P. To be sure, as soon as the Iowa legislature, joining the national trend, in 1935 enacted a Chain Store Tax Act, A & P challenged its constitutionality, securing a ruling from the U.S. Supreme Court that its graduated tax on gross receipts violated the equal protection clause of the Fourteenth Amendment. Defendant City of Iowa City, finally responding to plaintiff’s repeated taunts that the councilmen’s favored cigarette monopolizers were the real litigants footing the bill, counter-conjectured about how Ford Hopkins “alone could afford to carry on this ‘long and interminable course of litigation’ and still persist in it merely to obtain the

384 MCG-G, June 1, 1933 (12:1-3).
385 MCG-G, Feb. 21, 1935 (9:5-8).
387 Recent Social Trends in the United States: Report of the President’s Research Committee on Social Trends 1435 (1933).
389 1935 Iowa laws ch. 75, at 89. The law imposed both a per store tax rising from $5 to $155, depending on the number of stores in the chain, and a graduated gross receipts tax. Id. §§ 4(a) and (b) at 91-93.
390 Great Atlantic & Pacific Tea Co. v Valentine, 12 F.Supp. 760 (S.D. Iowa 1935), aff’d, 299 US 32 (1936). The two giant drug store chains, Walgreen Co. and Liggett Drug Co., were also plaintiffs and/or intervenors in this litigation. Justices Brandeis and Cardozo dissented on the basis of their dissent in Fox v Standard Oil Co., 294 US 87 (1935), which argued that gross receipts were a sufficiently reasonable surrogate for profits as an indicator of capacity to pay to sustain a graduated gross receipts tax as a surrogate for a graduated profit tax, which was constitutional. The Iowa Supreme Court, in separate litigation, upheld both the validity of the graduated tax on the number of stores and the exemption of certain kinds of stores from the statute. Tollen & Warfield Co. v Iowa State Board of Assessment and Review 222 Iowa 908 (1936).
391 Ford Hopkins Co. v City of Iowa City, 216 Iowa 1286 (1933), Appellant’s Resistance to Appellees’ Petition for Rehearing at 3.
privilege of selling a few cigarettes in the City of Iowa City. Either there is a tremendous profit in the cigarette business or the appellant is a great stickler for constitutional rights, or else there is some other reason, for their using 'every conceivable device' to get a decision from the Supreme Court to the effect that a city council has no discretion as to the issuance of cigarette permits after it has issued one permit."  

Whatever the strategy underlying the effort to secure a second rehearing, however, on December 14, 1933, the Iowa Supreme Court denied the request.  

In 1936 the city council reinstated its pre-1929 laissez-faire policy by unanimously granting two permits to A& P. The council’s quondam alleged solicitude for minors’ health was invisible in its unanimous decision that year to issue a permit to the University’s Iowa Memorial Union Dining Service. The council continued to grant permits unanimously to Ford Hopkins, which featured cigarettes in its large newspaper advertisements and remained in Iowa City until the early 1960s. The city’s post-Ford Hopkins actions gave the most
eloquent lie to its litigational claims that its denial of permits to two chains had been motivated by a concern for the evils of unchecked cigarette sales and smoking.

In the aftermath of the Supreme Court’s rulings in Bernstein and Ford Hopkins, the Iowa attorney general issued an opinion concluding that city councils and boards of supervisors had “discretionary power” regarding the issuance of cigarette permits. Although the Court had not “squarely” decided whether that discretion was absolute or limited, local governments, the attorney general opined, might “refuse to grant a permit where such refusal is substantiated by facts which establish that the granting of such permit may be inimicable [sic] to the health or morals of the community or where such granting may hinder law enforcement.”399 And into the twenty-first century the Iowa Revenue Department’s regulations, citing these 70-year-old cases, declared that the “power to grant retail permits is discretionary with the city council or board of supervisors” (adding inaccurately, that “uniform, nondiscriminatory limits may be placed on its issuance”).400 But the existence of this ongoing discretion was a matter of indifference to the city council of Iowa City, which, like the rest of the state’s municipalities, lost the nerve to take any steps that might dampen ringing cash registers.401

400Iowa Administrative Code § 82.1(7)a.(2).3. (2000 [2002]).
401See below ch. 28.
Iowa Repeals Its Unique Prohibition of Cigarette Vending Machines: 1939-63

“[I]t should be no concern of the state how cigarettes are sold.”1

Although the period from the 1930s to 1964 may realistically be regarded in Iowa, as elsewhere in the United States, as the high point of smoking laissez-faire, when few restrictions were placed on access to or the use of cigarettes, the Iowa legislature did in fact prohibit one significant form of access that it took the cigarette oligopolists a quarter-century to dismantle. By the early 1950s the prohibition on the sale of cigarettes through vending machines enacted by the General Assembly in 19392 left Iowa as the last and only state with such a ban still in place.3 The anti-regulation forces had to struggle from 1953 to 1963 before overcoming this last bulwark of prohibitionism, which was rooted partly in the fear that vending machines would expand minors’ access to cigarettes. Ironically, just as other states were considering imposing a total cigarette vending machine ban,4 Iowa repealed its.

As early as 1953 bills in the House and Senate would have conferred discretion on city and town councils and county boards of supervisors to issue retail permits authorizing cigarette vending machine sales in the same locations as their existing business, but they died in committee.5 Four years later opponents of the ban seemed to be on the verge of repealing it. First the Senate defeated its bill 23 to 24,6 but voted the next day to reconsider its action after a senator

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2See above ch. 19.
4These states included Maine (1963), Michigan (1964), Oregon (1951), Pennsylvania (1951), South Dakota (1961), and Utah (1963). Tobacco Merchants Association of the United States, “Restrictive Legislation Affecting Tobacco Introduced in State Legislature 1950-1963” (Oct. 1963), Bates No. 968196267/88/95/313/314/317/320. The claims that in 1961 Idaho killed in committee a bill calling for a complete ban on cigarette vending, while a similar ban was defeated by two votes in the North Dakota Assembly by Ben and Mike, “Reflections: Smoking & Health,” American Automatic Merchandiser, Dec. 1962, Bates No. 84410130/1, were not confirmed by the TMA publication.
5H.F. 425 (Mar. 9, 1953, by Nelson and Schroeder) and S.F. 286 (Mar. 9, 1953, by Nolan).
6State of Iowa: 1957: Journal of the Senate of the Fifty-Seventh General Assembly
declared that he had an amendment on file that would deal with objections that legalizing cigarette vending machines would open Iowa up to syndicates “controlled by ‘undesirable elements.’” The lengthy debate in the House, which culminated in passage by a vote of 63 to 41, did not focus on gangsters, but rather on “whether it would be easier for youths to obtain cigarettes illegally from the machine than in some other way. One contention was that merchants would be better able to determine the age of a cigarette purchaser than would a machine,” whereas the bill’s supporters claimed that supervised machines out in the open would make it harder for youths to get cigarettes. The Senate then followed suit by the much smaller margin of 26 to 23, but at this point Democratic Senator Joseph Coleman—newly embarked on the first of his record-breaking 34 years in the Senate—changed his mind: although he had been a cosponsor of the Senate bill, he moved to reconsider and to request that the bill be returned from the House, to which it had been sent for concurrence in an amendment. His motion carried by a vote of 26 to 23, and after the House, which had not yet acted, had complied with the request, the Senate renewed debate. Coleman, unconcerned that Iowa was the only state that banned cigarette vending machines, felt that it should set an example, and since in his area the only proponents were backers of pinball machines and other gambling machines, he urged the bill’s defeat. Republican William Tate, a real estate and insurance businessman, was unable to understand such worries: after all, this “‘simple bill...would only permit selling cigarettes the same way candy and peanuts are sold.” If, on the other hand, opponents’ real fear was that “‘youngsters will get cigarettes, they’re getting them anyway. Most youngsters don’t have to go any farther...than their mother’s purse.’” Consequently, opposition being no virtue, voting against the cigarette vending machine bill would not qualify for entry into

212-13 (Feb. 11) (S.F. 126).

7“Senate Revives Bill to Permit Cigarette Vendors,” MCG-G, Feb. 13, 1957 (1:7) (motion to reconsider carried by vote of 33 to 15).


11State of Iowa: 1957: Journal of the Senate of the Fifty-Seventh General Assembly 374-75 (Feb. 27).

12Iowa Official Register: 1957-1958, at 56 (47th No.).

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heaven. Ignoring Tate’s admonition, the Senate voted to reconsider its earlier vote to pass the bill and then tabled it, thus effectively ending the measure for that session. The economic pressure that was being brought to bear on Iowa legislators to accommodate commerce by the cigarette manufacturing industry, the stores (such as groceries and restaurants) that wanted to sell more cigarettes, and the vending machine industry was encapsulated in the fact that by 1958 nationally the number of packages of cigarettes being sold and bought weekly through 675,000 vending machines had risen to 60,750,000. The same year the Iowa attorney general opined that if a clerk had to perform some act enabling him to retain control of the machine’s dispensing process, then it was lawful to use it to sell cigarettes. The sea change that this opinion represented was conspicuous alongside an attorney general’s opinion from 1939, which stated that it would be illegal to use a machine for showing or displaying cigarettes even if an employee operated the mechanism. Nevertheless, in 1959, when repeal bills were once again filed, many Iowa legislators refused to yield, this time focusing on health issues as well. To be sure, the Senate did pass a measure by a vote of 37 to 13, and “[o]ne of the reasons given for passing the bill is that one of the largest manufacturers of vending machines is located in Des Moines but cannot sell the products in this state.” However, the two-hour debate revealed deep rifts. In addition to ongoing fears over (criminal) “syndicates,” legislators also echoed the apprehensions expressed by cities such as Dubuque and Muscatine that legalizing vending machines would reduce their revenues from permits as well as facilitate minors’ access to cigarettes. Senator Coleman, switching themes, voted against

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the bill because the ready availability would enable children to “get at cigarettes at an early age”\textsuperscript{22}—a remarkable insight from the man who would become the Senate’s heaviest smoker and its most strident and obdurate adversary of the victims of his and others’ secondhand smoke who demanded restrictions on smoking in the chamber.\textsuperscript{23} Republican Majority Leader, Jack Schroeder, a nonsmoker, pooh-poohed Coleman’s concern as yet another attempt to “legislate morals”: although he hoped that his children would not smoke, he also knew that: “‘You cannot take all temptations of life away from my children. They must learn through example and teaching.’”\textsuperscript{24} What children would learn from the majority of adults (including parents) who smoked in a society characterized by cigarettes’ ubiquitous availability and normalcy, Schroeder did not reveal. To those justifying the bill on the grounds that it would be naive to imagine that minors were not already getting cigarettes somewhere anyway one Republican senator offered the rhetorical question: “‘But aren’t we going to make cigarettes more accessible for them?’”\textsuperscript{25} While his point may have cut both ways in the context of the debate, Waterloo Democrat Melvin Wolf underscored the vitality of the home-rule foundations of Iowa’s cigarette sales law 38 years after Governor Kendall had made it the centerpiece of the great compromise of licensure in 1921: the vending machine law was “‘permissive legislation only.’ He said cities will still control the issuance of cigaret permits and ‘do not have to give one to anyone they don’t wish to.’”\textsuperscript{26}

That keeping youths away from cigarettes may not have been a high legislative priority after all was suggested by the filing the same day by five House Democrats of a bill that grafted a lowering of the minimum age from 21 to 18 for lawful purchases of cigarettes onto the governor’s request for an increase in the cigarette tax.\textsuperscript{27} (A bill filed by two Democrats in 1957 to lower the age to 18, which died in committee, was explained as proceeding from the recognition that 18-year-olds were already buying cigarettes if they wanted to do so; its purpose was to “remove the unrealistic age requirement of 21 years which is not publicly accepted and which creates an utter disregard for law

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\textsuperscript{26}“Approve Smokes Vendors,” \textit{MCG-G}, Feb. 5, 1959 (1:4).

enforcement."

The next day, the sponsor of the House companion vending machine bill (H.F. 87), Republican Clark McNeal, himself a businessman, called up the bill, terming it "a good businessman’s bill," and declaring: "It would appear that we have sanctioned the sale of cigarettes in Iowa. This measure simply provides another way in which a retailer may sell them." Two years later, in an equity action brought by cigarette vending machine manufacturers, distributors, and owners to enjoin state agencies from interfering with their use, the chief justice of the Iowa Supreme Court, disagreeing with the majority, who chipped away at the scope of the definition of an unlawful cigarette vending machine, shed light on McNeal’s distortion of the development of legislated restrictions on the sale, purchase, and availability of cigarettes in the state:

Plaintiffs concede the legislature could, within constitutional limits, prohibit sale of cigarettes to minors through an automatic vending machine. I think the legislature has the power to prevent sale of cigarettes to anyone by means of a vending machine.

... The legislature conceivably may have reasoned from evidence it deemed convincing that the use of cigarettes, especially excessive use, is harmful to the health of adults as well as minors; that the sale of cigarettes by means of vending machines would stimulate their sale and use; and it would promote the public health to prohibit this means of selling cigarettes.

Certainly anything the legislature honestly feels would be apt to promote the public health is a legitimate exercise of the police power. If the legislature, as it might have done, reasoned as above suggested, the statute is not to be held unconstitutional merely because we may think it acted unwise. But there is no showing such reasoning would even be unwise. On the contrary, its wisdom is attested by plaintiffs’ argument that one retailer converted his loss from the sale of cigarettes into a profit of $1500 per year by use of a

28H.F. 348 (Feb. 20, 1957, by Andrew Frommelt and Casey Loss). Frommelt was the former president of the Dubuque Trades and Labor Congress. State of Iowa, 1953: State of Iowa Official Register: 1953-1954, at 68 (45th No. Sherman Needham ed.). That Frommelt may have harbored a more extensive tobacco agenda was suggested by an amendment he filed (and withdrew) as a senator in 1959 that would have struck a provision from a bill reinstating mandatory revocation of a retailer’s cigarette sales permit even for the first violation of the ban on selling to minors. State of Iowa: 1959: Journal of the Senate of the Fifty-Eighth General Assembly 1262 (Apr. 30) (H.F. 266).


vending machine in question here, that they are attractive pieces of paraphernalia which add to the appearance of a place of business and “may even have some advertising value in calling attention to the availability of cigarettes on the premises.”

Following McNeal’s intervention the House engaged in “a lengthy debate over the desirability of preventing young people from purchasing cigarettes.” After one Republican representative had questioned “whether the public health is adequately safeguarded” by the bill, another, Lawrence Carstensen, a Methodist and lawyer, who had started smoking at the age of 15, administered the following lesson in cognitive dissonance to his colleagues:

“I’ve been smoking up a storm ever since. It’s ridiculous—a dirty, lousy, rotten, filthy habit—and I wish I didn’t do it. Maybe if my parents had instructed me about the evils of tobacco I wouldn’t do it, but unfortunately they weren’t alive to instruct me.

However, as long as I do it, I don’t see that it makes any difference whether I buy my cigarettes out of a machine or from some sweet little old lady behind a counter. I’m in favor of the bill.”

Tacking on a non sequitur for good measure, Carstensen confided to the world that his right to buy cigarettes had never even been questioned until he was 25, when a “nice elderly lady made me show her my driver’s license. I respect her more than any person I have ever known.”

In light of the prevailing disagreements over health and safety questions pertaining to young people, the House—at the behest of Iowa City Democrat Scott Swisher, who smoked a big black cigar during the debate—narrowly voted to send the bill back to committee for further study. When the bill finally returned to the floor six weeks later, the House defeated it by a vote of 41 to 65.

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32Continental Industries v. Erbe, 252 Iowa 690, 696-97 (1961) (Garfield, C.J., dissenting). Because the Supreme Court was divided four to four (with one judge not participating), the lower court decision in favor of the plaintiffs was affirmed.


Iowa Repeals Its Unique Prohibition of Cigarette Vending Machines: 1939-63

and then by an even larger margin refused to reconsider its vote. Not the least of the factors contributing to this outcome was, ironically, “pressure from cigarette companies producing the less popular brands which felt that their packages would not be offered for sale in machines.”

In tandem with action on the cigarette vending bill, the House demonstrated that privileging 18-to-20-year-olds to destroy their health and shorten their lives may have had more to do with expanding cigarette sales than young people’s civil rights: the same day that its Steering Committee advanced the measure lowering the minimum age for buying cigarettes from 21 to 18, its Constitutional Amendments Committee killed a proposed constitutional amendment to reduce the minimum voting age from 21 to 18. Despite this clear rebuff to the general entitlement of this cohort, supporters of the lower age for cigarettes trotted out a version of the same argument: If we believe that they’re old enough to kill those we deem our country’s enemies, they’re old enough to kill themselves. Democrat and bank president William Johannes—who felt that 18 was “realistic because ‘the evidence shows that young fellows under 21 are getting cigarettes somewhere anyhow’”—declared: “‘If they’re old enough to serve in the armed forces, they’re old enough to buy cigarettes and accept responsibility for handling them.’” Apparently convinced, the House then voted by an overwhelming 95 to 8 to lower the age to 18 after defeating a proposal to make it a misdemeanor for persons under 18 to possess cigarettes. Six weeks later the Senate followed suit by a vote of 32 to 13, thus establishing the new lower legal smoking age that endured.
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into the twenty-first century. Presumably for the sake of uniformity, the legislature’s massive support for a lower minimum age at which cigarettes could be lawfully bought foreshadowed its ultimate abandonment of the ban on vending machine sales.

The persistent strength of the opposition to cigarette vending machines was once again on display during the 1961 legislative session at the outset of which the Iowa Supreme Court ruled that the purpose of the legislature’s 22-year-old ban was merely to support the prohibition against sales to minors; consequently, since the machines in question were not fully automatic, but required the participation of the owner in operating a remote-control device, he therefore had the same opportunity and duty to determine the age of the would-be buyer as he would in a face to face sale and the machines thus did not fall within the law’s coverage. Despite this setback, opponents of vending machine sales succeeded again in thwarting repeal. To be sure, the Senate passed a bill by a hefty margin of 38 to 9, but it died in committee in the House. Senate supporters used the Supreme Court’s recent decision as a basis for legalizing all the machines and “end[ing] the hypocrisy.” In response to one Republican who argued that the bill would enable children to get cigarettes at any time, its chief sponsor, Democrat Peter Hansen (state vice-commander of the American Legion, bank board chairman, and, most relevantly, past state president of the Iowa Retail Food Dealers, Iowa Independent Businessmen, and Associated Retailers of Iowa), “cried out, ’It’s about time we legalize lots of things that are going on in our state. You can play bingo almost anyplace and get liquor-by-the-drink too.’”

In the interim between the 1961 and 1963 legislative sessions, the automatic merchandising industry, more than 40 percent of whose gross volume was accounted for by cigarette sales, had become alarmed by the problems that the “[r]apidly growing forces in the tobacco-health-cigarette-sales-to-minors controversy” could cause. The industry saw the tobacco-health problem as “particularly difficult because there is no clearcut issue.” Because there was “just

48 1959 Iowa Laws ch. 119, at 160. Presumably for the sake of uniformity, the amended law increased from 16 to 18 the age at which it was lawful to buy and be sold tobacco other than cigarettes.
50 State of Iowa: 1961: Journal of the Senate of the Fifty-Ninth General Assembly 921-22 (April 21) (S.F. 284 by Hansen et al.). Coleman cast one of the 9 Nays. Another bill that would simply have repealed the ban died in committee. S.F. 368 (by Butler et al.).
51 The companion bill was H.F. 562 (by Dietz).
52 “Vending Machine Bill Is Approved by Senate,” ADT, Apr. 21, 1961 (1:6-8).
53 Iowa Official Register: 1961-1962, at 47 (49th No., Edward Mason ed.).
54 “Vending Machine Bill Is Approved by Senate,” ADT, Apr. 21, 1961 (1:6-8).
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about as much "scientific research" against as proving the basic premise that cigarette smoking contributed to the incidence of cancer, "the entire issue will undoubtedly be fought along emotional rather than factual lines." The problem for the industry lay not in anti-tobacco groups' scaring adults into abstinence, but rather in making it "as difficult as possible for minors to obtain cigarettes with an ultimate objective of seriously curtailing smoking by future generations. This is the point at which the vending industry could well be seriously hurt. It is the ill-founded premise that 'most minors purchase their cigarettes from vending machines' that is at the heart of our problem." The tactical response was a call for a "common front" and "sensible self-policing" by operators to remove the most conspicuous unsupervised machines and to post all machines with labels stating that it was illegal for minors to buy cigarettes.  

Against the background of this potential crisis for the cigarette vending machine industry, in 1963 Senator Hansen filed another bill to repeal the ban. The same arguments were deployed, opponents' claims of racketeering pitted this time against Hansen's feeling that about half of the court-approved remote-control machines were (presumably because of fear of prosecution) not being used. Following Senate passage by a vote of 36 to 12, "without debate" the bill "sailed through" the House with an impressive 83 to 19 majority. Repeal of the almost quarter-century prohibition ushered in an era of lawful cigarette vending machine sales in Iowa that has survived into the twenty-first century—despite bills to reinstate the ban, calls for statewide bans in all states

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56S.F. 126 (Feb. 4, 1963, by Hansen et al.).
611963 Iowa Laws ch. 97, § 2 at 156.
62Iowa Code § 453A.36.6 (2007). In 1997 the legislature limited cigarette vending machines to locations at which "the retailer ensures that no person younger than eighteen years of age is present or permitted to enter at any time." 1997 Iowa Laws ch. 136, at 281.
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by the Secretary of Health and Human Services and the Institute of Medicine, the agreement to a nationwide ban by the cigarette companies in the (unimplemented) 1997 Global Settlement Agreement, and the advent of total statewide bans in two states and numerous local communities.


65Institute of Medicine, Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths 212-14 (Barbara Lynch and Richard Bonnie eds. 1994).

