“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 VI

THE STRUGGLE IN IOWA FOR ANTI-PUBLIC SMOKING BANS: 1970s TO 2008

At the turn of the century, tobacco was illegal in 14 states. We rode out that cycle of anti-smoking sentiment, and we’ll ride out this one, too.¹

¹Ellen Merlo, at 21 (Oct. 24, 1994), Bates No. 2040236685/705 (untitled). Merlo was senior vice president for corporate affairs at Philip Morris. Tobacco was not illegal in any state at the turn of the century or since.
Non-Smokers’ Struggle Against Exposure to Tobacco Smoke: Its First Meager Fruits in Iowa, 1970-1982

It does not require the foresight of a prophet to declare that the time is not far distant when civil law will make it impossible for fathers to smoke in the presence of their children.¹

The completely unregulated atmosphere that prevailed in the Iowa House and Senate inundating all non-smoking members with their colleagues’ secondhand smoke lasted from 1933² until the mid-1970s, when, at the very same time that the legislature, in sync with a national trend, began considering bills restricting and/or prohibiting smoking in various public places—by 1974 such bills had been introduced in 39 state legislatures and by 1975 in all 50³—the Iowa House also reversed a half-century of smoking laissez-faire. Then in 1978, at the tail end of the first wave of statewide enactments that had begun in Arizona in 1973, the Iowa legislature passed a weak law, which was taken over in large part verbatim from the Minnesota Clean Indoor Air Act⁴ without, however, adopting its neighbor’s comprehensive coverage of non-governmental commercial public places such as restaurants and stores. What it did copy from MCIAA and shared with virtually all similar state enactments of the period was the dysfunctional system authorizing owners and managers of covered places to permit smoking in designated areas, which undermined the protection that was such laws’ raison d’être and would remain a constant feature of the Iowa act for the next 30 years.

Iowa’s First Feeble Forays into Public Smoking Control Legislation in the Maelstrom of the National Drive for Nonsmokers’ Rights

¹Frederick Pack, Tobacco and Human Efficiency 37-38 (1918).
²See above ch. 18.
⁴See above ch. 24.
In December 1969 Ralph Nader petitioned the Federal Aviation Administration for a total smoking ban in airliners on the grounds of fire hazard as well as of irritation and health risks linked to breathing tobacco smoke. Then in January 1970 he filed a petition with the Interstate Commerce Commission and the U.S. Department of Transportation requesting rulemaking proceedings for the creation of a rule prohibiting tobacco smoking on motor vehicles carrying passengers in interstate commerce. His petition contended that “smoking constitutes a serious hazard to the health of...all nonsmoking passengers.”

Two months later, after the aforementioned bills had been filed in Congress and neighboring Illinois and elsewhere, three liberal Iowa House Democrats (non-smoking lawyers who admired Nader) filed Iowa’s first modern public smoking regulation bill, which included a preamble with the legislative finding that “the act of smoking tobacco products and the inhalation of tobacco smoke is detrimental to the health of the citizens of the state of Iowa and that the best interests of the citizens of the state would be served by the restriction of smoking in all public transportation services.” It provided that those offering such services “shall permit smoking by passengers inside the transportation conveyance only under the...condition[]” that “[s]eparate facilities shall be provided for smoking and nonsmoking passengers in such a manner that nonsmoking passengers are not exposed to the smoke or odors caused by smoking passengers.” Since, as one of the sponsors later observed, almost everyone in
the legislature smoked and Democrats were a hopeless minority, the bill’s advocates would have been under no illusion as to its chances of passage. The historical discontinuity was by this time stark enough that the Des Moines Register had to remind its readers that “[s]uch a restrictive cigarette law would not be entirely new to Iowa,” referencing (somewhat less than relevantly) the 1896-1921 ban on selling cigarettes. Neither this bill nor identical bills filed three years later in both chambers (by liberal Democrat Minnette Doderer and right-wing Republican David Stanley) saw any action, although in the interim (1971) the Interstate Commerce Commission had issued a regulation confining smoking (but not smoke) to the rear 20 percent of seats on interstate buses, and in 1973 the Civil Aeronautics Board required airlines to provide no-smoking (but not no-smoke) areas. To be sure, the state of federal bureaucratic enlightenment at the time was nicely reflected in the CAB’s assertion that “the attitude of many nonsmokers appear[s] insensitive to the rights of smokers. Smoking is a lawful activity, and requiring smokers to abstain totally on flights would cause many of them severe discomfort. ... The segregation of smokers...strikes an equitable balance, allowing neither smokers nor nonsmokers to infringe on the reasonable exercise of the rights of others.”

Iowa’s first non-transportational no-smoking bill was filed one month after the Nonsmokers’ Bill of Rights, under the auspices of the National Interagency

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12 George Mills, “Bill to Cut Smoking on Bus, Plane,” DMR, Mar. 15, 1970 (1T:4) (published after Mezvinsky had prepared but before he had filed the bill).

13 S.F. 15 (Jan. 11, 1973) (by Minnette Doderer (D) and Ralph Potter (R)); H.F. 494 (Mar. 26, 1973) (by David Stanley (R)). When asked years later whether this bill had not been a little bit ahead of its time, Doderer replied: “’73, it sure was. Forbidding it? I suppose regulating it or something. I was smoking then. But then you can find any period in my life when I was smoking!” “A Political Dialogue: Iowa’s Women Legislators,” Box 1, Folder: Transcripts: Minnette Doderer, Part I at 66 (June 27, 1989), in Iowa Women’s Archive, University of Iowa.


Council on Smoking and Health, 17 had been adopted on January 11, 1974, the tenth anniversary of the publication of the surgeon general’s consensus report on smoking. Fittingly, that surgeon general himself, Luther Terry, by now a consultant to the American Cancer Society on tobacco and health, was one of the signatories at the ceremony at Congress Hall in Philadelphia, where the original Bill of Rights had been signed. The three articles of this new bill of rights were, to be sure, modest:

Non-smokers have the right to breathe clean air, free from harmful and irritating tobacco smoke. This right supersedes the right to smoke when the two conflict.

Non-smokers have the right to express—firmly but politely—their discomfort and adverse reactions to the tobacco smoke. They have the right to voice their objections when smokers light up without asking permission.

Non-smokers have the right to take action through legislative channels, social pressures or any other legitimate means—as individuals or in groups—to prevent or discourage smokers from polluting the atmosphere and to seek the restriction of smoking in public places. 18

The limited scope and character and especially the lack of enforcibility of these rights of were rooted in the as yet preliminary and underdeveloped understanding of the health impact of secondhand smoke exposure. Terry himself expressed this view fully: apart from the “few non-smokers...genuinely sensitive to tobacco smoke” who “can be made very uncomfortable or even ill by exposure to significant amounts of tobacco smoke,” and others with emphysema, bronchitis, and heart disease, who could suffer “deleterious effects” from exposure, “the vast majority of non-smokers simply find intense tobacco smoke to be unpleasant or obnoxious. And even though they may not suffer any health dangers, they do have a right to be protected from such unpleasantness. It is in this light that we are observing increased concern in the rights of the non-smoker.” 19

Still devoting significant resources to the mission of keeping the population in a state of denial as to the lethal impact of smoking on smokers, the Tobacco

17 On this organization, see above ch. 23.
19 Luther Terry, “Reflections After Ten Years on Advisory Committee’s Report on Smoking and Health” at 13 (Jan. 11, 1974), Bates No. 502669820/32 (delivered at the Non-Smokers Bill of Rights Congress) (also printed in CR, Feb. 1, 1974 at S 1073-74, Bates No. TIMN0151701/2). On the development of the science of secondhand smoke over the following 15 years, see below ch. 26.
Institute despaired over the “massive media coverage” of the “‘event.’” That non-smokers still had a huge resistance force to overcome was reflected in the increase (from 50 to 52 million) in the total number of smokers during the 10 years since the issuance of the 1964 surgeon general’s report (although public health officials took solace from the fact that 10 million had quit smoking, that in the absence of educational efforts trends suggested that the number of smokers would have reached 75 million, and that the adult prevalence rate had fallen from almost 42 percent in 1965 to about 35 percent). Moreover, despite declines in 1963-64 and 1967-69, total consumption of cigarettes had risen 13 percent from 1963 to 1973; yet, while annual per capita consumption of those 18 and older at 4,148 had almost regained the 1964 level of 4,194, the latter had marked a decline of 3.5 percent from the 1963 peak). Most discouraging to Terry were the failure to reduce youth smoking and the dramatic increase in smoking among girls.

To be sure, the cigarette manufacturers in 1974 were very concerned that since 1963 the gap between actual consumption and the projected potential based on sales before 1963 amounted to 464 billion cigarettes or a loss of $8.36 billion: “Figure the companies’ market shares and their profit percentages.... You will be frightened.” The Tobacco Institute could not “help but feel” that this gap was “directly related to the anti-smoking campaign of our adversaries.” And the 1974 survey of the public’s attitudes toward smoking and the tobacco industry that Roper conducted for TI gave the companies good reason for deep pessimism in general: Roper itself was inclined to view its findings on behalf of its customer “‘with considerable alarm’...As far as the battle for public opinion is concerned,

21Jane Brody, “Decade’s Warnings Fail to Cut Smoking,” NYT, Jan. 11, 1974 (1, at 8:1-3).
22Luther Terry, “Reflections After Ten Years on Advisory Committee’s Report on Smoking and Health” at 8 (Jan. 11, 1974), Bates No. 502669820/7 (delivered at the Non-Smokers Bill of Rights Congress).
the tobacco industry has reached—if not passed—the critical point.... Barring some dramatic new evidence or development, further erosion would seem predictable.” This conclusion was based especially on one of the study’s “most significant findings”—“the very widespread support for segregation of smokers in most public places” that was shared “almost as widely” by smokers as non-smokers. By this time, 90 percent of non-smokers and 80 percent of smokers favored separate sections on trains and airplanes, while 64 percent and 42 percent, respectively, backed sectioning in workplaces and offices, and 60 percent and 34 percent, respectively, supported it in eating places. Even more portentous was that 39 percent of all non-smokers already favored a smoking ban in all public places, while 59 percent (and even 48 percent of smokers) backed it in retail stores, 28 percent in eating places, 22 percent in workplaces/offices, and 63 percent in college classrooms.

House File 1164, which was introduced by 31-year-old Davenport Democrat Gregory Cusack in 1974, reproduced largely verbatim the statute enacted in 1973 in Arizona. Cusack, a former college teacher, community organizer, director of the League of Women Voters Education Fund, Davenport city councilman, and a member of Students for a Democratic Society while a graduate student in history at the University of Iowa during the Vietnam war, considered himself one of the most (if not the most) left-wing Iowa legislator

31Iowa Official Register: 1973-1974, at 61 (55th No., L. Dale Ahern ed.). Although according to this official source Cusack at this time ran Cusack and Associates, a real estate and insurance business, Cusack later stated that he had been teaching part time. Telephone interview with Greg Cusack, Bellevue, IA (Apr. 10, 2008).
during the 1970s, although neither his constituents nor his colleagues may have been aware of his politics. A non-smoker who was very sensitive to smoke, 34 years later he was, nevertheless, unable to recall having filed, let alone anything about, his pathbreaking bill. However, on being told that he had been the sole sponsor, he speculated that he had probably filed it at the request of a constituent, about whom he could remember nothing.\textsuperscript{32} Cusack’s one-paragraph bill, declaring the smoking of tobacco in any form a “public nuisance and dangerous to public health,” prohibited it in a hallway, elevator, indoor theater, library, art museum, concert hall, auditorium, or “vehicle which is used by or open to the public.” Nevertheless, Cusack authorized those in custody or control of a theater, library, art museum, concert hall, or auditorium to “designate restricted areas therein which, upon posting with the words ‘smoking area,’ lawfully may be used for smoking.” Violations were subject to fines ranging from $10 to $100.\textsuperscript{33} In spite of its brevity, H. F. 1164 thus already contained the hallmark permissiveness that continued to mar the Iowa law into the twenty-first century. The Republican-controlled House took no action on Cusack’s bill.

Although Cusack’s and the other early bills fell by the wayside without needing any intervening opposition and it is unclear whether the cigarette manufacturers engaged in any lobbying against them, the Tobacco Institute had definitely become a lobbying force in Iowa before this time. In 1967, for example, after having been alerted to a bill draft in Iowa requiring the disclosure of tar-nicotine content on packages, TI “immediately prepared a brief outlining the limitations and objections to such a bill; and as a result of our efforts, the proponents of the bill indicated that they were at least temporarily persuaded that such legislation was not appropriate at this time.”\textsuperscript{34} Again in 1969, it intervened against a bill that would have required disclosure of ingredients on cigar wrappers: “Even though this was a cigar bill, we actively opposed it as a matter of principle and on the assumption that its passage would pave the way for a disclosure of ingredients bill for cigarettes.”\textsuperscript{35}

\begin{itemize}
\item \textsuperscript{32}Telephone interview with Greg Cusack, Bellevue, IA (Apr. 10, 2008).
\item \textsuperscript{33}H.F. 1164 (Feb. 11, 1974, by Cusack).
\item \textsuperscript{34}Frank Welch to [Tobacco Institute President] Earle Clements, Re: State Anti-Tobacco Legislative Activity, 1967, at 18 (Aug. 14, 1967), Bates No. 1002909099/119.
\end{itemize}
Senate File 106 in 1975

Tobacco adversaries...march under the banner of medical credibility and public welfare respectability. [S]omewhere along the line the industry...has not met the issues, invested sufficient institutionalized efforts or utilized available manpower to the extent necessary.

While the tobacco industry has well staffed organizations on the national level with adequate resources to represent the industry, on the state level this isn’t so. Compared to the state organizations of the trucking, automotive, insurance and liquor industries, we do not measure up favorably.36

By 1975 the anti-second-hand smoking campaign had assumed crisis proportions for the cigarette manufacturers. At R. J. Reynolds, public affairs chief James Dowdell, warned his boss, senior vice president Charles Wade, in February that “unless we can find some way to reach the State legislators who are being convinced by the anti-smoking crusaders that passive smoking constitutes a health hazard, there inevitably will be more and more prohibitions placed upon smoking in public.” If, he predicted, an Arizona-like ban passed by the New York State Senate became law, “I don’t think we would have any problem in measuring the drop in State per capita consumption.” The Tobacco Institute’s state activities department was doing the best it could to defeat bills, but its efforts were being hampered by lawyers’ fears that any compromises on restrictive legislation would “be tantamount to an admission of guilt,” opening the way to even more tort suits. Worse still: “We know that smokers themselves will not speak out for their rights to smoke. In fact, if we can believe the opinion polls, the majority of smokers are convinced that their smoking does indeed constitute a health hazard to nonsmokers.”37

The cigarette oligopoly viewed the “accelerating trend” in the increasing support for “segregating and prohibiting smoking in various public places” with growing alarm.38 Between 1970 and 1975, according to one survey, even the proportion of smokers falling into this group had risen from 42 percent to 51 percent, while that of former and never-smokers rose from 61 and 68 percent to 77 and 82 percent, respectively. A May 1976 Roper study (“Public Attitudes Toward Cigarette Smoking and the Tobacco Industry”) paid for by the Tobacco Institute revealed that nationally 80 percent of all respondents (“and almost as

36 An Open Letter to Manufacturer Management from the Board of Directors of the Coordinating Board of Tobacco Trade Associations at 1 (June 6, 1975), Bates No. 500023310.
37 J. S. Dowdell to C. B. Wade, Jr. (Feb. 20, 1975), Bates No. 500000272.
many smokers”) favored separate sections for smokers in buses, trains, planes, and theaters, and more than 75 percent of all people (and almost as high a proportion of smokers) favored “segregating smokers in libraries or museums.” Support for such segregation at indoor sporting events had risen from 40 percent in 1974 to 67 percent, while at public meetings, eating places, and train, plane, and bus terminals it rose from 57 to 62 percent, 50 to 57 percent, and 44 to 54 percent, respectively. Moreover, more than 50 percent of all people and 33 percent of smokers favored separate sections for smokers in offices and other workplaces. Complete bans received less support than segregation, but it too was high and rising:

Two-thirds of all people and over half of all smokers would ban smoking in doctors’ or dentists’ waiting rooms. Over half of nonsmokers and smokers alike continue to favor a ban on smoking in libraries or museums, and in retail stores.

Support for a complete ban on smoking in theaters increased from 42% to 46%.

A complete ban at “indoor” sporting events went up from 13% to 30%.

The ban on smoking in all public meetings went up from 27% to 34%.

There is also support at the 30% to 20% level for a ban on smoking in city, state, or federal buildings, in taxis, on trains, planes, or buses, in barber or beauty shops, and in restaurants.

At a lower level of support, 17% of all persons would ban smoking in work places or offices, and 16% favor a complete ban in airplane terminals and in train or bus stations.

At a loss for any better arguments, TI President Horace Kornegay “likened the anti-smoking campaign to segregationist campaigns.” Speaking at the annual meeting in North Carolina of an organization of flue-cured tobacco growers and manufacturers—who may have been experiencing cognitive dissonance and wondering just what was wrong with race segregation—he charged that “‘[i]t seems incredible that many politicians who support and fought for civil rights are now willing to erect new barriers that divide our people into opposing camps on the basis of smoking or nonsmoking.’”

By the time the Iowa legislature convened in 1975, two neighboring states had already enacted public smoking laws. In 1974 both South Dakota and Nebraska passed bills strikingly similar to Arizona’s in terms of coverage, the

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gaping exception for designated smoking areas, and the penalty. Like the Arizona law, South Dakota’s covered elevators, indoor theaters, libraries, art museums, concert halls, and public buses, adding only elementary and secondary school buildings; it also made violations a misdemeanor subject to a fine ranging from $10 to $100.\textsuperscript{42} Acting one week later and declaring that smoking tobacco in any form was “dangerous to the health and welfare of each person,” the Nebraska legislature added hospital patient rooms and patient areas to the six public places covered by the Arizona law.\textsuperscript{43}

The 1974 state elections seated “the most equitably apportioned legislature in the nation, now controlled by Democrats who were younger, more urban, and more diverse occupationally than members of previous General Assemblies.”\textsuperscript{44} In 1975, with the Iowa House, in the wake of Watergate, dominated 61 to 39 by Democrats for the first time in a decade,\textsuperscript{45} Cusack filed a bill similar to his 1974 measure, this time dropping the references to public nuisance and health, but extending the so-called prohibition to “all halls and meeting places of governmental bodies...which by law are open to the public.” Again, the House took no action on it.\textsuperscript{46} But the 1975 session finally witnessed initial action on a Senate bill, which was carried over to the next session and passed by that chamber in 1976. In a Senate narrowly controlled by the Democrats 26 to 24,\textsuperscript{47} Senate File 106 was introduced by Democrat Kenneth Scott, a farmer, and 14 other Democrats (including Majority Leader George Kinley) and nine Republicans. The very brief bill was similar to Cusack’s without the extension to governmental places.\textsuperscript{48} The House took no action on the identical bill\textsuperscript{49} filed by Cedar Rapids Democrat and ex-smoker\textsuperscript{50} Jim Wells, who worked at Quaker

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  \item \textsuperscript{42} 1974 S. Dak. Laws ch. 243, at 509 (Feb. 22). Two years later the legislature reduced the violation to a petty offense. 1976 S. Dak. Laws ch. 157, § 36.2, at 227, 277.
  \item \textsuperscript{41} 1974 Nebraska Laws L.B. 600, at 327 (Mar. 1). The next year Nebraska repealed the fine. 1975 Nebraska Laws L.B. 75, at 160.
  \item \textsuperscript{44} James Larew, \textit{A Party Reborn: The Democrats of Iowa 1950-1974}, at 127 (1980).
  \item Frank Stork and Cynthia Clingan, \textit{The Iowa General Assembly: Our Legislative Heritage 1846-1980}, at 8 (n.d.).
  \item H.F. 193 (Feb. 11, 1975, by Cusack).
  \item Frank Stork and Cynthia Clingan, \textit{The Iowa General Assembly: Our Legislative Heritage 1846-1980}, at 8 (n.d.).
  \item S.F. 106 (Feb. 4, 1975, by Scott et al.).
  \item H.F. 32 (Jan. 21, 1975, by Wells).
\end{itemize}
Non-Smokers’ Struggle Against Tobacco Smoke Exposure in Iowa, 1970-82

Oats as a member of the Retail, Wholesale, Department Stores Union,51 and was motivated to file the bill by “seeing a man smoking in a closed elevator with children present.”52

When the Senate Human Resources Committee recommended Scott’s bill on March 1153—to the consternation of the Tobacco Institute, which reported it on the first page of its Newsletter under the rubric, “Nonsmoker Issue”54—it worked from a prepared committee amendment,55 which expanded the scope of buildings in which smoking might be prohibited, while retaining in modified form the authority conferred on those in custody of covered places to permit smoking by making available “smoking areas adjacent to such facilities within the same structure.” The new no-smoking areas included waiting rooms, rest rooms, lobbies, and hallways of hospitals, clinics, and laboratories, as well as public buildings owned or controlled by state or local governments—all of which were subject to designation as smoking areas. Also covered were the waiting rooms of the offices of physicians, dentists, and other health care givers as well as the buildings or portions of buildings housing businesses engaged in the retail sale of tangible personal property or taxable services—“if the practitioner or group of practitioners in custody or control of the waiting room elect to be covered by the

52James Lynch, “Former C.R. Lawmaker Recalls Smoking Ban Fight,” Gazette (Cedar Rapids), Apr. 10, 2008 (7A:1-3 at 2). In the immediate wake of the passage of a relatively comprehensive anti-public-smoking bill in 2008, the Cedar Rapids Gazette permitted Wells to celebrate his having gotten “the ball rolling” in 1975 (despite the fact that Cusack’s bill antedated his by a year). Although his bill “‘didn’t go anywhere,’” Wells remembered having “‘caught hell’” and “‘lost a lot of good friends....’” In 2008 Wally Horn (who as Senate majority leader in the 1990s killed anti-smoking rules for the Senate) recalled that in 1975 “[w]e just looked at Jim and said, “You’re ahead of your time.’”54 Why Horn, who did not smoke, found it necessary to add that “[w]hen it was over...there were no hard feelings,” is unclear. Id. At the signing ceremony for H.F. 2212 on April 15, 2008, Governor Chet Culver repeated the erroneous story about Wells—who was present and applauded—stating that the whole effort had begun in 1975 with Wells, who had filed one of the very first bills to regulate smoking. Http://www.radioiowa.com (audio file) (visited Apr. 15, 2008).
53[Senate Human Resources Committee, Minutes] at 1 (Mar. 11, 1975) (copy furnished by SHSI Des Moines).
54TIN, No. 120, Apr. 8, 1975, at 1, Bates No. TIMN0116776.
55Unfortunately, the committee amendment is lacking at the State Archives. Email from Assistant State Archivist Meaghan McCarthy to Marc Linder (Oct. 15, 2008). The text of the amendment is taken from the Senate Journal.
prohibition and penalties prescribed by this Act." Republican Senator Richard Ramsey (who ultimately voted against the bill in 1976) moved to strike this proviso, but nonsmoking Senator William Gluba of Davenport (a member of Ralph Nader’s Public Interest, Common Cause, Americans for Democratic Action, the ACLU, the American Academy of Political and Social Science, and a former member of the UAW), who strongly supported smoking regulation, argued that the amendment—which presumably would have made regulation more stringent by making coverage mandatory rather than elective—“would kill the bill,” and Ramsey’s killer amendment was defeated. The bill also prohibited smoking on railroads, buses, and airplanes providing departures originating in Iowa “except in those areas, not exceeding fifty percent of the passenger seating capacity, where smoking” was not prohibited by any other laws. Finally, the amended bill required those in custody or those on duty in the buildings to inform any violators they observed that smoking was prohibited by law. During committee discussion, Republican Senator Philip Hill, a lawyer for the Equitable Life Insurance Company of Iowa in Des Moines, opposed the bill, “even though he does not smoke and finds smoking objectionable,” because he was “opposed to the concept.” The committee nevertheless recommended passage as amended to the full Senate, which, however, failed to take up the bill before the session ended.

The House of Representatives Takes a Tiny Step Toward Cleaning Its Own Air

Continued adverse publicity and adoption of a wide scale of legislation that labels smoking a public nuisance and that insists that smoking infringes on rights and endangers the health of non-smokers could well lead to declining public acceptance of smoking and

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58[Senate Human Resources Committee, Minutes] at 1 (Mar. 11, 1975) (copy furnished by SHSI Des Moines). Presumably the killing would have been done at the behest of those health care givers who would not have elected to be covered.
60Iowa Official Register:1975-1976, at 41 (56th No., Pam Peglow ed.).
increased feelings of guilt and embarrassment on the part of smokers. The end result could well be more and more people quitting smoking. This may represent the greatest danger of all.\textsuperscript{62}

In the midst of these initial efforts at statewide partial public smoking bans in Iowa, in 1975 the House also undertook the first small step toward re-regulation in the legislature itself. After Democratic Representative Charles Poncy, a former AFSCME union local president,\textsuperscript{63} had proposed an amendment to the rules prohibiting smoking in committee rooms during meetings,\textsuperscript{64} 25-year-old Democrat John Patchett of Johnson County offered an amendment to the amendment prohibiting smoking in the House chamber while the House was in session,\textsuperscript{65} which in effect would have restored the rule that had been in effect from 1884 to 1923. Patchett’s amendment lost on a close non-record roll call vote of 41 to 46. The House then voted 63 to 24 on a roll call vote to adopt Poncy’s minimalist amendment.\textsuperscript{66} Recalling the debate at a distance of 32 years, Patchett described it as good-natured.\textsuperscript{67} Thenceforth according to Rule 49: “Smoking shall not be permitted in the House Committee Rooms while a committee is meeting.”\textsuperscript{68} That not all smokers opposed the new rule was attested to by Democrat Robert Krause, who recalled more than three decades later that “I probably lit up” while Patchett was offering his amendment, but nevertheless voted for it afterwards.\textsuperscript{69}

The imaginability of actually banning smoking in public places had spread by this time even to local government—or at least to the mind of one city council member in Iowa. In April 1975, Dorothy Strohbehn, who served on the Council Bluffs city council from 1972 to 1984 and had engaged in such acts of anti-
smoking guerrilla warfare as hiding ashtrays during city council study sessions in small rooms and voting against issuing cigarette sales permits to hospitals,\textsuperscript{70} announced that she had requested the city legal department to draft an ordinance that would prohibit outright smoking in all public (i.e., local government) buildings, including city hall, the courthouse, library, and all fire stations. Motivating her proposal by reference to the council’s concern about air pollution as reflected in its recent consideration of an ordinance to ban backyard burning, Strohbehn added that she would be also be distributing copies of a newspaper article summarizing the results of a study that showed the harmful effects for nonsmokers of being in the same room with a smoker.\textsuperscript{71} The \textit{Tobacco Institute Newsletter} may have celebrated the news that the Council Bluffs city council had declined to act on the proposed ban,\textsuperscript{72} but the mere fact that the initiative had emerged in one of the state’s larger cities suggested that the germinating nationwide revolt against unprotected exposure to tobacco smoke had not taken a detour around Iowa.

\textbf{Senate File 106 in 1976}

Of course there are those who are annoyed by cigarette smoke, just as there are those who object to heavy perfumes, garlic on the breath, barking dogs or any of a thousand other things. But there is no issue between smoker and nonsmoker which cannot be solved through mutual common courtesy and respect for the rights of others.\textsuperscript{73}

In 1976 the focus in the Iowa legislature shifted back to the statewide public smoking ban (S.F. 106), against which, significantly, the chief tobacco industry lobbyist, George Wilson, lobbied, formally representing the Iowa Association of Tobacco Distributors (IATD), of which he was the executive director.\textsuperscript{74} As of

\textsuperscript{70}Telephone interview with Dorothy Strohbehn, Council Bluffs (Mar. 28, 2009).
\textsuperscript{72}\textit{TIN} # 123, at 2 (May 20, 1975), Bates No. 500016465/6. Decades later Strohbehn, who was nonplussed that the Tobacco Institute had even been aware of her proposal, was unable to remember the precise fate of her proposal. Telephone interview with Dorothy Strohbehn, Council Bluffs (Mar. 28, 2009). The city clerk was unable to locate the minutes for the relevant council meeting at which the ordinance would have been considered. Telephone interview with Judith Ridgely, Council Bluffs (Mar. 29, 2009).
\textsuperscript{74}George A. Wilson [signed], Iowa Senate Lobbyist Registration, Form L-1 (Jan. 12,
1978, there were 18 states in which the tobacco industry shared lobbyists to deal with taxation and health, i.e., smoking restriction, issues; of these 18 lobbyists 14 were state tobacco distributor association executives.\textsuperscript{75} From a somewhat different perspective: in 20 states the Tobacco Institute and the Tobacco Tax Council retained the same lobbyist; in seven of them that lobbyist was the association director. Wilson was one of these seven.\textsuperscript{76}

In spite of having signed a lobbyist registration form stating that he lobbied against S.F. 106, many years later Wilson insisted that, while he had observed the progress of such bills, he had never in his entire lobbying career lobbied against an anti-smoking bill because his tobacco wholesaler-client never took a position on such bills in order not to dissipate political lobbying capital that could better have been spent on measures of greater importance to them (specifically, the Iowa Unfair Cigarette Sales Act). When asked whether wholesalers would not have opposed such laws because they would presumably have reduced smoking and therefore sales, Wilson offered the empirically erroneous and implausible justification that they did not seem to have had that impact wherever they had been enacted.\textsuperscript{77}

A more detailed but somewhat suspect account was offered by another tobacco lobbyist, who worked for and with Wilson from 1976 to 1980. Almost three decades later, Marcia Hellum, one of the first female lobbyists in Iowa, stated that the tobacco industry (including the Tobacco Institute) had never requested that she and/or Wilson lobby against any clean indoor air bill. Wilson, she insisted, had regarded opposition to such measures as “penny wise and pound foolish” because such restrictions (for example on elevators) had been around “forever” and had been implemented on account of health concerns. She sought to make Wilson’s attitude more comprehensible by embedding it in the context of his father’s having had to have almost his whole jaw removed as a result of

\textsuperscript{75}Martin Haley Companies, Joint Liaison Committee (Sept. 14, 1978), Bates No. 502415693/6-7. Because “the health problem evolved later than the tax problem...Tax Council lobbyists were already at work on annual retainers, and the [Tobacco] Institute tended to utilize lobbyists as needed , on an hourly rate basis.” Martin Haley Companies, Joint Liaison Committee at 5 (Aug. 22, 1978), Bates No. 03678341/8.

\textsuperscript{76}State Lobbyist List (Dec. 1, 1978), Bates No. 03678300/7-8.

\textsuperscript{77}Telephone interview with George A. Wilson, Jr., Des Moines (Apr. 11, 2007). On the UCSA, see below ch. 26.
smoking-induced cancer (without, to be sure, explaining how this matrix was consistent with Wilson’s having smoked and represented the tobacco industry for half a century). When confronted with the fact that by 1978 the Tobacco Institute had for four years been orchestrating nationwide resistance to enactment of such laws, which transcended in scope and importance by far scattered ordinances banning smoking on elevators or in theaters (as a fire risk), Hellum could offer no explanation as to why the cigarette companies would not have pursued a similar strategy in Iowa.\textsuperscript{78} The trustworthiness of her account also suffered from the fact that despite her unequivocal denial that she had ever lobbied against an anti-public smoking law or that a client had ever requested her to do so, like Wilson, she too had signed a lobbyist registration form in 1976 stating that she was lobbying against that year’s anti-public smoking bill (S.F. 106) on behalf of the IATD.\textsuperscript{79}

Hellum’s description of cigarette companies’ disinterest in fighting anti-public smoking legislation in Iowa is also difficult to reconcile with statements, squarely addressing the question of regulation of public smoking, made in 1978, just after the Iowa Clean Indoor Air Act had gone into effect, by a Brown & Williamson Tobacco Company official at an IATD convention to which Hellum had invited him. Although he conceded, speaking on behalf of the manufacturers, that “our buyer/seller relationship [sic], by definition, necessitates a low-key but nevertheless hardheaded adversary relationship between our two groups,” he stressed that they had “much more in common than in conflict. And this is all to the good because our solidarity and comradery [sic] have never before been of more importance to our survival than today. I am referring, of course, to the fact that our industry now faces it’s [sic] greatest challenge—the Smoking and Health Issue [Public Smoking Issue—‘the right to smoke’]. This challenge is so serious and contains such far reaching consequences for everyone in this room tonight, that it will require all of the good will, cooperation and combined strengths of

\textsuperscript{78}Telephone interview with M. H. Sam Jacobson, Oregon (June 18, 2007). Under this name Hellum teaches at Willamette College of Law. She also characterized the materials that the Tobacco Institute had sent to her and Wilson in the 1970s as “amazing” in a “Neanderthalic sense” of demonstrating both a “head-in-the-sand” attitude and being written in the style of a Reader’s Digest sweepstakes advertisement offering no substantive information. Wilson’s like-named father had been governor of and U.S. senator from Iowa.

\textsuperscript{79}Marcia L. Hellum, Iowa Senate Lobbyist Registration (Jan. 21, 1976) (copy furnished by SHSI DM). She also registered to lobby against H.F. 32, the identical bill filed in the House by Wells. Marcia L. Hellum, Iowa Senate Supplementary Lobbying Declaration Reporting Changes or Additions (Jan. 21, 1976) (copy furnished by SHSI DM).
every wholesaler and manufacturer in the industry...to stave off our determined and organized adversaries.”

After S.F. 106 had been returned to it, the Senate Human Resources Committee recommended the bill as amended by the committee. Very similar to the bill that the committee had recommended in 1975, it included two significant changes. First, it empowered those in custody of public cultural buildings to “permit smoking by persons seated at any table provided for the purpose of consuming food or beverages served or provided on the premises”; and second, it prohibited smoking in any room of a health care facility used for the recuperation or care of patients except in designated rooms, subject to the proviso that those in charge provided a sufficient number of nosmoking rooms to accommodate those who wanted them. Two members of the committee, which approved the amended bill by a vote of 10 to 1, stressed the public health dimensions. Non-smoking committee chairman, William Gluba, who called the evidence that smokers were affecting nonsmokers’ health “overwhelming,” said the bill boiled down to recognizing the rights of the 70 percent of the people in the country who did not smoke. Republican William Plymat, a key sponsor, counted only 16 smoking colleagues, whereas 34 did not smoke: “There are senators who are enduring the smoke of other senators and murmuring about it.” Plymat, who was “allergic” to tobacco smoke, pointed out that 27 states already had similar laws and neighboring Minnesota’s was “much tougher.” In contrast, the Iowa bill provided only a “friendly warning” for those smoking in “forbidden territory”: the law would work only if “people accepted regulations. Nobody is going on a witch-hunt.”

The five and a half hour Senate floor debate on March 3, 1976 underscored that amendment-studded S.F. 106 was a “toothless tiger”: not only did it authorize virtually all building operators to “exempt themselves” (and expose the nonsmoking users) by simply designating virtually all parts of their buildings smoking areas, but the minimum $5 fine made deterrence at the very least questionable. The three leaders of the “pro-smoking forces,” Democrat Richard Norpel and Republicans Willard Hansen and Calvin Hultman (a future majority and minority leader and, on his departure from the Senate in 1990, a Philip Morris lobbyist), were all cigar smokers. Hansen’s attempt to defeat the bill by

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80[No author], “Iowa Speech” at 2, 4-5 (July 26, 1978), Bates No. 690145178/9/81-82. The words in square brackets were handwritten on the typescript.


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persuading his colleagues that passage would bring about a prohibition of smoking in the Senate chamber—an odd argument since more than two-thirds did not smoke—was rejected by Scott, who noted that the Senate Rules Committee would resolve that issue.\textsuperscript{83}

The first amendment filed in the debate was offered by Hultman. Although it struck out the entirety of the committee bill (itself an amendment), it was, with a few exceptions, remarkably similar to it. Chief among the changes was the further relaxation of the already quite permissive provision relating to public cultural buildings: Hultman would have empowered those in custody to “permit smoking by persons on the premises and...make available smoking areas in such facilities within the same structure where smoking is not prohibited by any statute, ordinance, or lawful rule of this state or any of its political subdivisions and where the words ‘smoking permitted’ are posted.”\textsuperscript{84} The \textit{Register} characterized this amendment as “permitting smoking in all but posted no-smoking areas—the reverse of what the bill provides.”\textsuperscript{85} Hultman would also have further relaxed the provision relating to retail stores—which under the committee version were subject only to elective coverage—by making the failure to post and keep on display no-smoking signs a conclusive presumption that the custodian had not so elected. Hultman would also have discouraged enforcement by making the prosecuting witness liable for court costs and reasonable attorney fees for a defendant who was acquitted. And finally, the amendment would have authorized school boards to make rules to regulate (as an alternative to prohibiting) the use of tobacco by students. Hultman’s amendment lost on a close 21 to 26 vote, with 12 of the 13 senators who ultimately voted against the bill voting Yea.\textsuperscript{86}

Then Democratic Senator Richard Norpel, an insurance agency owner from a northeast Iowa town on the Mississippi\textsuperscript{87} and strong opponent of smoking regulation, offered an amendment to strike the prohibition of smoking (subject to

\textsuperscript{83}Dan Piller, “Iowa Senate OK’s Curb on Smoking in Public,” \textit{DMR}, Mar. 4, 1976 (1A:6, 3A:5).


\textsuperscript{87}Iowa Official Register: 1975-1976, at 45 (56th No., Pam Peglow ed.). Norpel also operated a clothing business and was a real estate salesman.

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designation of smoking areas) in public buildings owned or controlled by state or local government. It lost by a vote of 16 to 29 despite having secured the votes of the Democratic Majority Leader George Kinley and the Republican Minority Leader Clifton Lamborn. Republican Philip Hill, another senator who generally opposed smoking restrictions, offered an amendment to strike the prohibition on smoking in the offices of doctors and other health care providers (insofar as they elected coverage), which was adopted 26 to 18 against the votes of the bill’s strongest supporters. However, Hill’s other amendment, which would have eliminated the coverage of services establishments, lost 14 to 31.

At this point in the debate Hultman and Democrat Norman Rodgers tried to kill the bill by means of a tabling motion. The overwhelming 36 to 10 vote defeating the motion prefigured the final outcome. On back-to-back voice votes, the Senate adopted two amendments offered by the bill’s sponsor, Scott, to convert the electability of coverage by those in custody of retail stores into mandatory coverage subject to designation of smoking areas, and, even more importantly, to add similar coverage of restaurants.

Hultman then succeeded in securing an overwhelming majority (35 to 4) for his amendment creating a grace period in retail store facilities so that no convictions for unlawful smoking were permissible until conspicuous nosmoking signs had been posted for at least 30 days, but failed on a non-record roll-call vote of 15 to 25 to persuade a majority of senators to abolish the bill’s penalty provision altogether. On a 24 to 19 vote the bill was then further weakened by

90State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly 715-17 (Mar. 3) (S-5150A). The amendment was presumably drafted inartfully, since its adoption would have meant that smoking would have been prohibited in retail stores absolutely without any provision for designated smoking areas.
94State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly 721 (Mar. 3) (S-5276). In between Hultman’s amendments, the extreme anti-regulationist Norpel unsuccessfully filed an amendment to require the furnishing of
making the 10 to 100 dollar penalty apply only to second and additional offenses and reducing the penalty for a first offense to five dollars,\textsuperscript{95} but Hultman’s amendment to impose all court costs, including reasonable attorneys fees, on the person filing charges if the accused was found not guilty lost 13 to 30.\textsuperscript{96}

The most extensively debated amendment, at least in the Des Moines Register’s view, proposed allowing school districts to set aside rooms for teenage smokers. Offered by two Democrats from Cedar Rapids, it was purportedly designed to enable students to use the restroom without being exposed to smoke, although one of its proponents apparently recognized that it violated the minimum smoking age law.\textsuperscript{97} It failed by a vote of 20 to 23.\textsuperscript{98}

The lowest level of understanding of the underlying public health problems was displayed by Republican Willard Hansen, whose amendment would have required anyone entering public cultural buildings to “have adequately, and with such frequency, bathed his [sic] or herself so as to preclude body odors from emitting from his or her person or in the alternative made appropriate application of any artificial substances which produces [sic] an aroma sufficient to subjugate any body odors.” For good measure Hansen would also have required people entering such public buildings to have brushed their teeth or cleansed their dentures at least once a day and gargled commercially sold substances strong enough to “subjugate any unpleasant odors emitting from the oral cavity.” Hansen’s detour was promptly declared an impermissible frolic by the chair, who ruled that it was not germane and thus out of order.\textsuperscript{99}

As the debate drew to a close, Hultman, according to the Register, “tried to

\begin{itemize}
  \item a brass spittoon with a value of at least 50 dollars in every nosmoking area. \textit{State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly} 721 (Mar. 3) (S-5269).
  \item \textsuperscript{95}\textit{State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly} 721-22 (Mar. 3) (S-5273, by Republican Forrest Schwengels). A number of the bill’s severest opponents were absent or did not vote.
  \item \textsuperscript{96}\textit{State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly} 722 (Mar. 3) (S-5275).
  \item \textsuperscript{97}Dan Piller, “Iowa Senate OK’s Curb on Smoking in Public,” DMR, Mar. 4, 1976 (1A:6, 3A:5). The representatives were James Redmond and Steve Sovern.
  \item \textsuperscript{98}\textit{State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly} 723 (Mar. 3) (S-5277). This amendment was identical to Hultman’s earlier amendment S-5267, which had lost 21 to 26. It is unclear why such strong supporters of S.F. 106 as Gluba and Plymat voted for Redmond’s amendment after having voted against Hultman’s.
\end{itemize}
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shake senators” with an amendment legalizing marijuana, but withdrew it on discovering that it would not pass. Norpel, too, withdrew his, which at first blush appeared merely whimsically or petutantly provocative: “Persons employed in or using the buildings mentioned in this section who do not smoke shall not enter areas designated as smoking areas.” Though Norpel, to a moral certainty, did not invest it with this deeper meaning, he inadvertently alluded to the reality that designated smoking areas would become de facto off limits to nonsmokers.

In the end the Senate passed S.F. 106 by a large non-party-line majority of 35 to 13 with 19 Democrats and 16 Republicans favoring and seven Republicans and six Democrats opposing it. As passed, S.F. 106 prohibited smoking in any elevator—coverage of which Philip Morris considered a “costless...compromise”—indoor theater, library, art museum, concert hall, auditorium, “or other similar facility open to the public,” subject to the exception that those in custody of the buildings housing them (except elevators) “may permit smoking by persons seated at any table provided for the purpose of consuming food or beverages served or provided on the premises and may make available smoking areas adjacent to such facilities within the same structure where the words ‘smoking permitted’ are posted.” The bill also prohibited smoking in those portions of railroads, buses, and planes with departures originating in Iowa which were set aside as non-smoking areas by the person in control of the carrier, and required those areas to “be of sufficient capacity to accommodate all persons who do not wish to be seated in a smoking area.” Subject to the exception for smoking areas designated by the person in custody, smoking was also prohibited in any waiting room, rest room, lobby, or hallway of any clinic, medical laboratory, hospital, or similar facility; the same

100 Dan Piller, “Iowa Senate OK’s Curb on Smoking in Public,” DMR, Mar. 4, 1976 (1A:6, 3A:5). The amendment would simply have added “marijuana” to the list of tobacco products the inhaling or exhaling the smoke of which or the possession or control of which in a lighted form defined “smoking” under S.F. 106. State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly 724 (Mar. 3) (S-5283).


103 [Philip Morris], Project Down Under—Group Presentation to Senior Management at 1, 3 (June 26, 1987), Bates No. 2021502671/3.

104 S.F. 106, § 2(1) (as amended and passed by the Senate Mar. 3, 1976).

105 S.F. 106, § 2(2) (as amended and passed by the Senate Mar. 3, 1976).
arrangement applied to any room in such facilities used for patient care or recuperation as well as in a health care facility, except that the person in custody or control could designate individual rooms as smoking rooms, provided that that person also provided “a sufficient number of rooms in which smoking is not permitted to accommodate those persons who desire such rooms.”

Subject to the designation of smoking areas by the controlling governmental body, officer, or agency, smoking was also prohibited in any public building owned or under the control of the State of Iowa or any of its political subdivisions. The prohibition of smoking in any building or portion thereof occupied by any business engaged in retail sale of tangible personal property or taxable services was subject not only to the designation of smoking areas, but also to the proviso of a grace period of 30 days after conspicuous “smoking prohibited by law” signs had been posted. Smoking, except in designated areas, was also prohibited in restaurants. The enforcement scheme was very lax: the person in custody of the facility or any employee on duty “who observes any person smoking in that facility in violation of this Act shall inform that person that smoking is prohibited by law in that facility or that area....”

Similarly, the penalty, which covered anyone who smoked in a no-smoking area or failed to post the required no-smoking signs was a mere five dollars for a first offense and $10 to $100 for additional offenses.

Despite the clear Senate majority, the House considered neither S.F. 106 nor the rather expansive H.F. 1130 filed by Wells and 21 other representatives in 1976, which tracked the 1975 Minnesota law. After the failure to debate S.F. 106, § 2(4) (as amended and passed by the Senate Mar. 3, 1976).


S.F. 106, § 6 (as amended and passed by the Senate Mar. 3, 1976). In fact, because the penalty provision was incompetently drafted, using “and” rather than “or,” it literally but nonsensically applied only to a person who committed both offenses. Oddly, this provision, which was not in the committee bill or amendment, was added by floor amendment offered by one of the most extreme opponents of regulation, Willard Hansen, and adopted by a vote of 38 to 10, most of the bill’s leading supporters, including its sponsor, Scott, voting Yea. State of Iowa: 1976: Journal of the Senate: 1976 Regular Session Sixty-Sixth General Assembly 725 (Mar. 3) (S-5284).

H.F. 1130 (Jan. 23, 1976, by Wells). This bill was the source of future Iowa law by extending coverage to restaurants, retail stores, offices, educational facilities, and hospitals, while excluding private enclosed offices occupied exclusively by smokers even
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106 in the House in 1976, representatives by 1977 were hopeful that chances for passage in the new general assembly were greater, as Wells put it, “‘if only because [House Speaker Dale] Cochran has quit smoking,’” because his opposition had “‘had a lot to do with its failure....’”113 A few days later, Wells and 22 other representatives filed H.F. 285, a bill that was virtually identical to S.F. 106, but the House took no action on it.114

The Avalanche of State Anti-Smoking Bills in the Second Half of the 1970s and Cigarette Manufacturers’ Increasing Alarm

Although no element as found in cigarette smoke has ever been demonstrated to be the cause of any human disease, anti-smoking groups have bombarded the public with an unceasing attack on cigarettes for more than two decades. ...

The anti-tobacco fanatics are now attempting to portray smokers as social outcasts. They are seeking not only social ostracism, but laws banning smoking in an immense variety of public places. In a nation built on a foundation of personal freedom and individual rights, such an attempt to control public behavior through bureaucratic compulsion should be repulsive to every citizen.115

At the close of the 1976 state legislative sessions, Tobacco Institute President Kornegay, in a possibly face-saving mode, tried to lower the state of alarm among the members of TI’s executive committee by stressing that, although since 1972 31 states had enacted some sort of legislation relating to the restriction of

though they might be visited by nonsmokers (§ 4); it was also forward-looking in excluding factories, warehouses, and similar workplaces not usually visited by the general public (§ 5), as well as in limiting the mandated use of “physical barriers and ventilation systems...to minimize the toxic effect of smoke in adjacent nonsmoking areas” to “existing” ones (§ 6). Not adopted by later enactment were: its proviso that the labor and public health commissioners establish rules to restrict or prohibit smoking in workplaces where close proximity of workers or inadequate ventilation caused smoke pollution detrimental to nonsmoking employees’ health and comfort (§ 5); and the requirement that proprietors “make reasonable efforts to prevent smoking in prohibited areas by...[a]rranging seating to provide a smoke-free area” and “[a]sking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoke” (§ 6).


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smoking, only of 18 could it “be said that there are in varying degrees troublesome laws affecting our industry.” And even among these 18 the variation ranged from Oregon’s segregation in public meetings to Minnesota’s coverage of a “multitude of situations.” The other 13 failed to meet the troublemaking threshold because they either applied only to elevators, certain forms of transportation, or the House chambers during sessions, or lacked enforcement or administrative provisions.\textsuperscript{116}

Taking stock in a much more pessimistic and realistic vein, R. J. Reynolds—which classified only eight of the 31 states as imposing “[t]oken [r]estrictions”\textsuperscript{117}—identified an undeniably upward trajectory of anti-smoking groups’ initiatives: whereas in 1971 and 1972 only two bills were enacted (California’s mandate to all public carriers of space for nonsmokers and New Jersey’s smoking ban in public transit vehicles), in 1973 five of 29 bills were enacted in 18 states, in 1974 six of 65 in 25 states, in 1975 20 of 160 bills in 48 states, and in 1976 seven of 161 in 39 states. Extrapolating, Reynolds predicted that in 1977 the “growing militancy of the anti-tobacco forces and the increasing self-consciousness among smokers will probably result in the introduction of bills restricting smoking in all of the 21 states that do not have no-smoking laws on the books.” At 80 percent it rated the probability that Iowa would enact the model bill circulated to state legislators in the wake of the adoption of the Nonsmokers’ Bill of Rights in Philadelphia in January 1974 by the National Interagency Clearinghouse on Smoking and Health, but Reynolds did not view the probability of passage of a measure as stringent as Minnesota’s as exceeding 50 percent in any state.\textsuperscript{118}

Nevertheless, R. J. Reynolds not only projected 1977 to be “the most difficult year the Industry has yet had to contend with,” but lamented that the “Tobacco Institute still does not have the resources they need to respond fully to the

\textsuperscript{116}Status of Restrictive Legislation as of 9/16/76 (Remarks delivered to Executive Committee of the Tobacco Institute by Horace R. Kornegay, President and Executive Director), Bates No. 501800442.

\textsuperscript{117}RJRT, State Legislative Relations, “State Smoking Restriction” at 4 (Oct. 31, 1977), Bates No. 500006978/82.

numerous bills to restrict smoking that will be introduced.” In particular, the need for scientific and medical witnesses to testify before state legislative committees would be commensurately greater than ever before, but the company hoped that the Institute’s newly retained medical director and its law firm (Shook, Hardy & Bacon) would find the witnesses “so urgently needed to counter the very serious though unsupported charges that are increasingly influencing legislators to believe that smoking constitutes a health hazard to nonsmokers.” As for 1978 and beyond, all that Reynolds could foresee was the likelihood of the increasing intensity and scope of anti-smoking legislative intervention, which could be defeated only if the Institute launched a “concerted all-out effort to mobilize smokers to speak out for their right to smoke.” If not, and if the industry was also unable to prove the health hazards of smoking to be unfounded, then, the company’s director of corporate affairs conceded, at least internally, that “the objective of the anti-tobacco forces to ban all smoking in public, and, eventually, bring about complete prohibition of smoking, may, in the long run, be accomplished.”

The sixth biennial “Study of Public Attitudes Toward Cigarette Smoking and the Tobacco Industry,” which TI paid Roper to conduct in March 1978, brought even worse tidings for the industry. The central implication of Roper’s finding was that “anti-smoking forces...are well on the way to making the same sale about the effects of smoking on the non-smoker as they have already made with respect to the effects on the smoker.” The ominous fact that more than two-thirds of non-smokers and even almost half of all smokers believed that smoking was hazardous to non-smokers’ health was “the most dangerous development to the viability of the tobacco industry that has yet occurred.” As anti-smoking groups succeeded in convincing non-smokers of the health consequences of exposure to smokers’ smoke, “the pressure for segregated facilities,” which were already backed by “majority sentiment,” would “change from a ripple to a tide.” Indeed, Roper already foresaw the possibility that support for segregation could turn into “support for a total ban.” With 69 percent (up from 57 percent in 1974) of non-smokers and 40 percent (up from 30 percent) of smokers believing that non-smokers were harmed by cigarette smoke, Roper concluded that its customer’s battle to convince the public that passive smoking was not dangerous might already have been lost (although it nevertheless argued that “[t]he strategic and

199James]. S. Dowdell, “Smoking Restrictions” at 6-7 (Nov. 15, 1976), Bates No. 500656976/81-82.

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long run antidote to the passive smoking issue is...developing and widely
publicizing clear-cut, credible evidence” that it was not harmful). Especially
troubling to the cigarette oligopoly must have been the finding that its pet cure-
all—namely, that courtesy not legislation was the answer—was the argument in
opposition to anti-smoking laws that had registered the greatest loss of support
since the 1976 survey. Significantly, a majority of those surveyed approved of
segregating smokers in every public place about which they were asked and was
larger than in 1976: trains, airplanes, and buses (91 up from 83 percent); theaters
(83/81 percent); eating places (73/57 percent); indoor sporting events (73/67
percent); public meetings (67/62 percent); train, plane, bus stations (62/54
percent); workplaces and offices (61/52 percent). Support for total bans was
lower, but for a number of locations nevertheless impressively high: doctors’ and
dentists’ waiting rooms (69/65 percent); retail stores (55/52 percent). That the
figures for some other locations—for example, trains, planes and buses (26/25
percent), eating places (23/22 percent), and work place and offices (17/17
percent)—were significantly lower, may have merely been an arbitrary and
artificial function of the sequence of the questions: if, Roper conceded, it had
“asked about banning before mentioning the acceptable alternative of segregation,
the sentiment for banning might have been substantially higher.”

Such public attitudes fully undergirded the public policies embodied in the
avalanche of proposed and enacted state-level anti-smoking legislation. The mid-
1970s, to the chagrin of the Tobacco Merchants Association of the U.S., which
was, as always, monitoring, witnessed an explosive increase in the volume of
proposed state-level anti-smoking/tobacco legislation: whereas between 1950 and
1970 somewhat more than 500 restrictive bills were filed (or about 24 per year),
and for the overlapping period of 1966 to 1974 the corresponding figures were
470 and 52, a total of 386 bills or an annual average of 129 were introduced from
1975 to 1977. The average number of annual enactments also rose sharply from
two to five to 14 for the three periods.

121 Roper Organization, “A Study of Public Attitudes Toward Cigarette Smoking and
the Tobacco Industry in 1978,” 1:10, 9, 6 (May 1978), Bates No. 966071061 (Bates
numbers not printed on text pages).

122 Roper Organization, “A Study of Public Attitudes Toward Cigarette Smoking and
the Tobacco Industry in 1978,” 1:18 (May 1978), Bates No. 966071061 (Bates
numbers not printed on text pages).

123 Roper Organization, “A Study of Public Attitudes Toward Cigarette Smoking and
the Tobacco Industry in 1978,” 1:29-30 (May 1978), Bates No. 966071061 (Bates
numbers not printed on text pages).

of the 1970s bills and laws made the quantitative growth all the more impressive: between 1975 and 1977, when some type of anti-tobacco bills was filed in all 50 state legislatures, 84 percent of the bills and 88 percent of enactments concerned restricting smoking to certain places or areas. Little wonder that TMA warned of an "uphill legislative battle on the State level" for 1978.125 (Ironically, a decade later a Tobacco Institute that was incapable of admitting even internally that it was trapped in an endgame, described its deteriorating situation this way: "What was considered an onerous bill in 1970, or even 1980, might now be viewed as a reasonable approach even by the industry to a typical public smoking bill introduced in 1988.")126

By the end of 1977, according to an inclusive listing by TMA, 33 states had enacted 52 separate measures restricting smoking, which ranged from Kentucky’s ban on school property (exempting adult employees in assigned rooms) to Minnesota’s and Utah’s “comprehensive” laws, which “effectively restrict smoking in any public place, with the exception of bars.”127 In considering these initial regimes, it is crucial to recall that, as TMA pointed out, like their counterparts on airplanes, they provided very little if any protection from secondhand smoke exposure because, “[w]ith the exception of transit vehicles, elevators, and some cultural areas, where the designation of a smoking area would be difficult, the vast majority of enactments...[merely] restrict smoking to designated areas” rather than banning it.128 Classifying the statutes more closely, TMA identified six states that restricted smoking in business or work places, 19 in cultural places, seven in indoor sports arenas, four in restaurants (though two applied only to restaurants with 50 or more seats), five in food stores, 22 in health

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127Tobacco Merchants Association of the United States, “Special Report: Restrictive Legislation” at [i] (n.d. [Dec. 31, 1977]), Bates No. 504295163/5. Three other states had created restrictions other than through legislative enactment. For the list, see id. at Bates No. 504295170/1.
128Tobacco Merchants Association of the United States, “Special Report: Restrictive Legislation” n.p. (n.d. [Dec. 31, 1977]), Bates No. 504295163/4. Why it would have been any more difficult to designate smoking areas in cultural institutions than in restaurants is unclear. As the TMA noted, the report failed to deal with restrictions imposed by municipalities. Id. at viii, Bates No. 504295174.
facilities, 17 in public/government meetings, and 26 in transit vehicles.\textsuperscript{129}

\section*{Senate File 2022 in 1978: Iowa Finally Enacts Very Limited Regulation of Public Smoking}

Although Iowa belonged to the definite minority of states that had as yet failed to take any statewide action to limit public smoking, momentum began mounting when, at the beginning of the 1978 session, the \textit{Register}'s Iowa Poll revealed that of adult Iowans (65 percent of whom did not smoke) 64 percent thought that persons who smoked should be legally restricted to limited areas in restaurants, theaters, and auditorium lobbies, and 57 percent agreed about limiting smoking in government buildings. Even 47, 53, and 46 percent of smokers agreed with the same proposition regarding restaurants, lobbies, and government buildings, respectively. From these responses the \textit{Register} concluded that “by overwhelming margins, the nonsmokers want an Iowa version of the Minnesota no-smoking law, which limits smoking to specified areas of most public places.” To be sure, the heterogeneity of anti-smoking positions, which lagged behind even the rudimentary scientific knowledge of the day, was reflected in the fact that 35 percent of non-smokers did not even object to others smoking in the same car.\textsuperscript{130}

On January 10, two days after the poll’s release, Democrat Joan Orr (a member of Common Cause, the Iowa Civil Liberties Union, and the People’s Unitarian Church)\textsuperscript{131} and a bipartisan group of 24 other senators introduced Senate File 2022,\textsuperscript{132} which was virtually a copy of S.F. 106 as passed by the Senate in 1976. The next issue of the Tobacco Institute \textit{Newsletter} reported that


\textsuperscript{130}Arnold Garson and James Flansburg, “Iowans Back Public Curbs on Smoking,” \textit{DMR}, Jan. 8, 1978 (1A:6, 11A:1-2). Although the survey questions were propounded as stated in the text, the graphic in the article mistakenly stated the question as whether “you favor no smoking areas....” The survey provided no underlying demographic explanation of the finding that 44 percent of Democrats but only 25 percent of Republicans smoked.


\textsuperscript{132}S.F. 2022 (Jan. 10, 1978, by Orr).
Iowa was one of four states in which “[b]road smoking restriction bills” had been introduced.\(^{133}\)

On January 11, 1978, the day after S.F. 2022’s introduction in the Senate—which Democrats continued to control 26 to 24\(^{134}\)—Republican Governor Robert Ray included in the recommendations accompanying his state of the state address to the legislature this very modest proposal: “Anti-Smoking: Since two-thirds of Iowa’s adults choose not to smoke, government can be of real service by restricting smoking to designated areas in government buildings. In addition, this can spur the private sector to take similar action voluntarily.”\(^{135}\) Four weeks later identical bills were filed by 19 Republicans in the House and 11 Republicans in the Senate, which incorporated Ray’s recommendation by merely prohibiting smoking—subject to a “limited number” of designated smoking areas—in public buildings owned by state or local government, but neither chamber took action on them.\(^{136}\)

January 11 also witnessed a federal intervention that created a substantive textual context against which Iowa’s anti-smoking legislative activity must be evaluated. The Carter administration’s secretary of Health, Education, and Welfare, Joseph Califano, Jr., (who two years earlier had, at his 11-year-old son’s urging, quit smoking),\(^{137}\) announced, to great publicistic fanfare, a “major initiative aimed at discouraging Americans from smoking....” As one component of this program Califano encouraged the states to strengthen their smoking laws and regulations or, if they lacked such, to introduce bills to enact them. In that connection Califano sent governors HEW’s model clean indoor air law, which he characterized as “representing some of the best elements of existing State legislation”\(^{138}\)—such as Minnesota’s and Alaska’s.\(^{139}\) Califano’s program also

\(^{133}\)TIN, No. 190, Jan. 24, 1978, at 7, Bates No. 500065086/91

\(^{134}\)Frank Stork and Cynthia Clingan, The Iowa General Assembly: Our Legislative Heritage 1846-1980, at 8 (n.d.).


\(^{136}\)H.F. 2153 (Feb. 8, 1978, by Hansen and 18 others); S.F. 2098 (Feb. 8, 1978, by Murray and 10 others).


\(^{138}\)Joseph Califano, Jr. to James Hunt, Jr. (Governor of North Carolina) (Jan. 11, 1978), Bates TI36310457.

\(^{139}\)Address by Joseph A. Califano, Jr., Secretary of Health, Education, and Welfare, Before the National Interagency Council on Smoking and Health, Shoreham Hotel,
included a new smoking policy for HEW’s own buildings, which “bans smoking in conference rooms, classrooms, auditoriums, elevators and shuttle vehicles. Within practical limits, the work areas of smokers and non-smokers will be separate and physically distinct. In recognition of the rights of individuals who wish to continue to smoke, smoking areas will be established. But the general rule will be ‘No Smoking—except in smoking areas.’ Most importantly, it will be the policy of the Department that smoking in shared work areas will be prohibited at the request of non-smokers whose health is affected.”

To be sure, the Carter administration immediately signaled its rejection of this approach in the form of an official White House press release the same day by Dr. Peter Bourne, Carter’s special assistant for health issues, stating his “concern over the effect of...proposals such as the prohibition of cigarettes in a number of places.” Although he conceded that “people...should receive notice of whether proprietors and employers allow smoking” and that “[t]hose who are offended by smoking should be separated from those who are not so offended,” Bourne insisted that “the ultimate effort of government...should not be to make outcasts of smokers. Such efforts are doomed to failure.”

HEW’s Model State Clean Indoor Air Act prohibited smoking in public vehicles or indoor public places (broadly defined to include “any enclosed area” while it was open to the general public, parts of public schools open to students, and portions of health facilities in which patients were permitted) except in designated smoking areas. The power to designate of an owner or other person in charge of a public place or vehicle was subject to two provisos: (1) that “reasonably substantial areas” of these places or vehicles were “not designated as smoking areas”; and (2) “existing physical barriers and ventilation systems are

Washington, D.C. at 17 (Jan. 11, 1978), Bates No. 508083171/87. It is unclear why HEW deemed the Alaska statute to be a model since it declared that with regard to covered places except means of transportation and laboratory waiting rooms “reasonable smoking areas must be provided, unless prohibited for the protection of the public safety or the protection of and preservation of the building and its contents” and that “[t]o the extent practicable, the state shall require its lessees or sublessees to provide separate smoking areas.” 1975 Alaska Laws ch. 125, § 18.35.320(a) and (b).


141 The White House, Statement of Dr. Peter Bourne, Special Assistant to the President for Health Issues (Jan. 11, 1978), Bates No. 89781455.

142 Model State Clean Indoor Air Act, § 3(2), Bates No. TI36310459.

143 Model State Clean Indoor Air Act, § 4(a) and (b), Bates No. TI36310459/60.
adequate to minimize the deleterious effects of smoking on adjacent areas which are not designated as smoking areas.” These two conditions in fact imposed more stringent restrictions on owners’ discretion than the Minnesota Clean Indoor Air Act because: (1) requiring “reasonably substantial” nosmoking areas precluded owners, for example, from designating an entire restaurant as smoking- permitted except for one or two tables as was not uncommon in Minnesota; and (2) unlike MCIAA, which merely provided that “existing physical barriers and ventilation shall be used to minimize the toxic effect of smoke in adjacent non-smoking areas” — meaning, presumably, that however much minimization they achieved was legally acceptable — under HEW’s Model Act owners’ designation of smoking areas was not lawful unless the existing barriers and ventilation were adequate to the objective of achieving the minimization of smoking’s deleterious effects on adjacent nonsmoking areas. The Model Act also went beyond MCIAA, which required owners to ask smoking violators to refrain from smoking only if a customer or employee requested such intercession, by making this duty absolute and unconditional. And finally, HEW’s Model Act was more capacious than MCIAA with regard to the coverage of workplaces by virtue of requiring the state labor department to adopt regulations to restrict smoking in workplaces “(1) in which smoking, alone or in combination with environmental substances, deleteriously affects the health or comfort of workers who do not smoke; or (2) if a worker has submitted a written request that smoking be restricted.”

In early March the Iowa Senate Human Resources Committee defeated by a vote of 9 to 3 a motion by Republican Rolf Craft, an economics professor, to remove retail stores and restaurants from the scope of public places in which smoking was prohibited and defeated by a vote of 7 to 5 a separate motion by Republican John Murray to remove retail stores. The committee then voted 9 to 3 to specify that jurisdiction for enforcement be in magistrate court. Finally, it voted 11 to 1 to recommend the bill’s passage as amended.

The Senate debate on S.F. 2022 took place on March 21. Just how little electoral room was available for enacting a comprehensive anti-smoking law was signaled at the outset when 12 Republicans and one Democrat offered as an amendment the aforementioned gubernatorially inspired bill that would have

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144 Model State Clean Indoor Air Act, § 4(b)(1) and (2), Bates No. TI36310459/60.
145 1975 Minn. Laws ch. 211, § 5, at 633, 634. On MCIAA, see above ch. 24.
146 Model State Clean Indoor Air Act, § 5(3), Bates No. TI36310459/61.
147 Model State Clean Indoor Air Act, § 7(a), Bates No. TI36310459/61.
148 Senate Committee on Human Resources, Mar. 7, 1978, Minutes at 10 (copy provided by SHSI DM); Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly 474, 484 (Mar. 7-8).
pared back smoking prohibitions to encompass only public buildings owned by state or local government.\textsuperscript{149} Republican Edgar Holden, who sought support for the amendment by noting that Governor Ray wanted it, based his advocacy on using publicly owned buildings as “‘the guinea pig’” for a change: if it worked, the legislature could then expand the prohibition to privately owned buildings. Orr, S.F. 2022’s floor manager, urged adoption of the unamended bill on the grounds that nonsmokers’ rights had to be protected because smoking contributed to lung cancer, chronic bronchitis, and emphysema. Avoiding that issue and seeking to shift the focus of the debate, Republican James Briles opposed the broader scope of the bill because it “would work against free enterprise by driving out of business the operators of small establishments who are forced to adhere to no-smoking regulations.” Imparting a more subtle twist to the argument, Holden, a real estate developer and telephone company president, insisted that the business owner “should be able to make the decision on whether to ban smoking in any area.” Orr’s counter-argument, while trenchantly accurate, was, apparently unbeknownst to her, equally destructive of the rationale for the massive exception embedded in her own bill (and still basic to the law three decades later): “[J]ust because you’re the proprietor of a business doesn’t mean you have the right to pollute somebody who doesn’t want to be polluted.”\textsuperscript{150} Ultimately the amendment lost on a tie vote of 25 to 25 because two Republicans who had sponsored the amendment withdrew their support.\textsuperscript{151}

After Orr had barely succeeded in securing a 26 to 23 vote in favor of her amendment to include waiting rooms in airports and railroad and bus stations in the prohibition,\textsuperscript{152} Holden, who had a reputation for being very pro-business,\textsuperscript{153}

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\textsuperscript{149}Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly 612, 1963-64 (Mar. 21) (S-5349). The one Democrat was Louis Culver, who had not been among the original supporters of S.F. 2098. Before the vote on this amendment the Senate adopted an amendment to it that added the provision in S.F. 2022 that prohibited smoking in rooms in health care facilities used for patient care or recuperation. Id. at 612, 1977-78 (S-5386).


\textsuperscript{152}Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly 613, 1959-60 (Mar. 21) (S-5334).

\textsuperscript{153}Email from former Senator Beverly Hannon (Mar. 7, 2007).
\end{flushright}
offered his crucial amendment—which he had already filed two months earlier on January 18, at the same time that he filed another amendment to limit coverage to government-owned buildings—to gut the bill by excluding retail stores and restaurants.\textsuperscript{154} Coverage of these locations, which, according to the \textit{Register}, “drew the most debate,” would, Holden insisted, create an impossible no-win enforcement situation for business owners inasmuch as smokers would be angry if they could not smoke where they wanted to and, conversely, nonsmokers would be angry if smokers smoked in nosmoking areas. His fellow Republican Briles, who persistently voted against anti-smoking bills, alleged that the bill “would work against free enterprise by driving out of business the operators of small establishments who are forced to adhere to no-smoking regulations.” Another Republican, Philip Hill, cast aspersion on the model Minnesota law by reporting that one time he was seated for half an hour in the nosmoking section of a large restaurant in Minneapolis without being served, and only when he moved to the smoking section did a waitress take his order, thus “subtly” using “starvation” to motivate customers to ignore the law.\textsuperscript{155} In contrast, Republican Roger Shaff, an assistant minority leader, offered a more personal reason for supporting the bill: “He noted that restaurants now often posted signs saying ‘no shirt, no shoes, no food’ and said, ‘I’d rather sit next to someone with no shoes than someone smoking.’”\textsuperscript{156}

The 30 to 17 vote to exclude these two essential locations of any comprehensive regulation of secondhand smoke exposure revealed how minimal the Iowa legislature’s commitment to this burgeoning public health movement was as yet. Broken down by party, the vote showed a significant difference: while 17 Republicans voted for reduced coverage and only five against, Democrats split 13 to 12.\textsuperscript{157} Nevertheless, the fact that even Democrats could not

\textsuperscript{154}\textit{Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly} 613, 1806 (Mar. 21) (S-5027). Holden withdrew the amendment to confine coverage to government buildings as soon as the aforementioned similar amendment had been defeated 25 to 25. \textit{Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly} 612, 1806 (Mar. 21) (S-5026).

\textsuperscript{155}Bonnie Wittenburg, “Senate Passes Curb on Public Smoking in Iowa,” \textit{DMR}, Mar. 22, 1978 (A1:1-2, at 5A:1). Hill’s account accords with numerous reports from the early days of the Minnesota law, when restaurant owners were engaged in guerrilla warfare against it. See above ch. 24.


\textsuperscript{157}\textit{Journal of the Senate: 1978: Regular Session Sixty-Seventh General Assembly} 613-14 (Mar. 21).
muster a small majority for comprehensive coverage prefigured the persistent backwardness that would characterize Iowa’s anti-smoking legislation for the next 30 years. On the final vote the diluted bill passed 39 to 8, the no votes being equally divided between Republicans and Democrats.158

The Iowa debate over smoking in restaurants was but one of many occurring in state legislatures in the 1970s. Indeed, by the middle of the decade restaurants had become such a contentious site of struggle over exposure of nonsmokers to smoke that many state restaurant associations urged their members to create nosmoking sections in order to forestall further legislative intervention, advocated by anti-smoking groups such as the American Cancer Society and American Heart Association, that might require physical barriers, installation of ventilation systems, or reserving a fixed proportion of tables for nonsmokers. But the debate took on a different shape in Iowa, where, the Nation’s Restaurant News declared later in 1978, “the state restaurant association helped deliver a resounding defeat to a recent smoking bill” and “there has been no effort to enlist voluntary support of no-smoking sessions [sic; must be “sections”].”

Apart from pointing out that more and more non-smokers—who by this time outnumbered smokers by three to one—were recognizing secondhand exposure as a health hazard, a legislative analysis prepared by the National Restaurant Association in 1979 listed among the non-obvious arguments that proponents had adduced in favor of applying nosmoking laws to restaurants that: a “non-smoker doesn’t linger over a second cup of coffee and a cigarette, so business in the special section does 30% more business than the rest of the restaurant”; under a smoking ban “restaurants could reduce their ventilation requirements and thus conserve energy”; and exemption of restaurants from smoking ban laws “would bring charges of unequal enforcement from businesses not exempted.” On the other hand, arguments advanced by opponents of no-smoking laws included the following: many owners had never received a complaint from a customer; owners were “annoyed” by problems associated with creating nosmoking sections; bans would place owners in “the embarrassing position of becoming policemen”; according to a 1976 survey conducted in Minnesota (where the country’s most comprehensive law had gone into effect a year earlier), 80 percent of “restaurant


diners couldn’t care less whether smoke gets in their eyes or lungs while eating”; anti-public smoking legislation imposed “high economic costs...for the redesign of dining areas, installation of dual air circulation systems, and...other necessary adjustments”; and there was no proof that tobacco smoke injured nonsmokers.  

Despite the large majority that S.F. 2022 garnered in the Senate, the Register warned that it was “expected to face rough going in the House where similar proposals to restrict smoking have become bottled up in committees dominated by smokers.” The chair (W. R. Bill Monroe) and vice-chair (Jack Woods) of the House committee to which the bill was referred, State Government, were both heavy smokers. At the committee meeting on April 6, Wells’s aforementioned bill, H.F. 285, was taken up, but instead the committee decided to consider S.F. 2022. Democrat Diane Brandt then distributed an amendment that she had filed a week earlier reintroducing coverage of restaurants (which the Senate bill had included until it was struck on a floor vote) and mandating the provision of nosmoking areas in them. The minutes disclosed that chairman Monroe “was in doubt”—a reaction that committee member John Patchett three times.


161 Bonnie Wittenburg, “Senate Passes Curb on Public Smoking in Iowa,” DMR, Mar. 22, 1978 (A1:1-2, at 5A:1). The most recent bill to have suffered that fate was presumably the aforementioned H.F. 285, which Wells had filed in 1977.


163 Email from John Patchett to Marc Linder (Mar. 24, 2007). Patchett served on the committee with them in 1978. In 1985, Woods filed several weakening amendments to H.F. 102, which was designed to strengthen the anti-public smoking law. See below ch. 26. For example, he proposed to exempt the public areas of bus and air terminals. H-3265 and H-3266 (Mar. 6, 1985) (inserted into the bill book at the University of Iowa Law Library). In 1986, he filed amendments to exclude all restaurants and to authorize owners to designate entire public places as no smoking areas. H-5021 (Jan. 20, 1986) and H-5039 (Jan. 23, 1986) (inserted into the bill book at the University of Iowa Law Library).


165 Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 2 (copy furnished by SHSI, DM). The minutes did not give the text of Brandt’s amendment, which was, however, included in Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 1454-55 (Apr. 6) (H-5951). For reference to Brandt’s withdrawal of her freestanding identical amendment, see below.

166 Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 2 (copy furnished by SHSI, DM).
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decades later interpreted as perhaps meaning that because Monroe opposed the bill, “he was just trying to avoid it.”\footnote{Email from John Patchett to Marc Linder (Mar. 30, 2007).} Adoption of the restaurant amendment on a show of hands by a vote of 8 to 6 clearly demonstrated that, being closely divided, the committee was hardly inclined to give the militant anti-smokers carte blanche. The remaining votes underscored this virtual stalemate. The motion by Democrat Bob Arnould, another smoker, to defer the bill until the next meeting—which could be taken as an effort to kill it—was opposed by Patchett; deferral barely lost on a seven to nine vote.\footnote{Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 3 (copy furnished by SHSI, DM).}

At this point the proceedings took on an entirely different cast as another smoker,\footnote{His fellow member Patchett was “[p]retty sure Vern smoked.” Email from John Patchett to Marc Linder (Mar. 30, 2007).} the committee’s ranking Republican, Vern Harvey—a housebuilding businessman who had been a helicopter pilot in the Vietnam War and awarded a Bronze Star, and left the Army as a captain\footnote{Iowa Official Register: 1977-1978, at 73 (Vol. 57, Joni Keith ed.).}—distributed his amendment, which added “where designated,” “except,” and “no” in several places in the coverage section, inverting the default position, as it were, so that instead of smoking’s being prohibited everywhere, unless owners designated areas as smoking, areas became nosmoking only where owners so designated them. On a voice vote the Ayes had it, and the amendment was adopted,\footnote{Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 3 (copy furnished by SHSI, DM).} which eliminated the bill’s most far-reaching element. The disputed nature of this transformation was visibly on display in the motion for reconsideration, which just lost by a vote of 9 to 10 on a show of hands.\footnote{(In case clarification was necessary, three weeks later chairman Monroe unambiguously explained the purpose of Harvey’s amendment during the House floor debate by observing that, without the amendment to

167 Email from John Patchett to Marc Linder (Mar. 30, 2007).

168 Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 2 (copy furnished by SHSI, DM).

169 His fellow member Patchett was “[p]retty sure Vern smoked.” Email from John Patchett to Marc Linder (Mar. 30, 2007).


171 Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 3 (copy furnished by SHSI, DM). Curiously, the text of the amendment in Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 1454-55 (Apr. 6) (H-5951), included “except” in three places it was lacking in Harvey’s amendment. The description by David Yepsen, “Betting Bill Back on Track After Quick Maneuver,” DMR, Apr. 7, 1978 (1A:5-6, at 5A:1)—“Instead of creating smoking areas, the bill would create ‘no smoking’ areas”—failed to capture the essence of the change: instead of creating a presumption that all areas were non-smoking unless the owner designated smoking areas, the amendment created a presumption that all areas were smoking unless the owner designated nosmoking areas.

172 Minutes, [House] State Government [Committee], Apr. 6, 1978, 12:15 p.m. at 3 (copy furnished by SHSI, Des Moines).
reverse the bill by allowing smoking in any area not designated as no-smoking, “the bill favors non-smokers....” On a recorded roll call S.F. 2022 then passed 13 to 3, the three no votes being cast by the chair, vice-chair, and Norman Jesse, another heavy smoker.

Looking back, but without specific recall, Patchett concluded that he and other anti-smoking members voted against Harvey’s amendment, but nevertheless voted for the bill itself in committee because they assumed (correctly as it turned out) that the full house would reject Harvey’s amendment anyway; if he and his allies had voted against the bill in committee and defeated it, “it would never have gone to the floor—so this would have been the only chance to keep it alive. I think you can get the flavor that there was a fair amount of game-playing going on this one.”

The fact that Monroe, Woods, and Jesse, three “moderate to liberal Democrats who would otherwise generally support ‘good government’ type of legislation” voted against the amendment (and were among the 15 members who voted against the bill on its third reading) suggested, three decades later, to anti-smoking Patchett, who had served on the committee with them, that “[t]hese votes often had much more to do with whether you were a smoker and your perceived rights relating to smoking—not contributions, lobbyists, or anything else.” While certain that the tobacco industry “must have had one or more lobbyists (probably from one of the bigger firms that handled multiple clients),” Patchett, who speculated that it “may also have had one or more corporate lobbyists fly in for this type of thing,” was unable to recall names, in part because the whole issue had lacked the salience that it later assumed: “At that time, they simply weren’t a major presence in the Iowa Legislature. There just weren’t that many bills affecting them, as I recall. This whole issue was just beginning to emerge. Other groups that probably would have been involved...would be the restaurant association.” In fact, the tobacco industry had three lobbyists in Iowa at the time, including George Wilson, who represented the Tobacco Institute, and Charles Wasker.

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174 Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 1453 (Apr. 6). Again, curiously, the committee minutes did not even mention the number of nays, let alone name any names.
175 Email from John Patchett to Marc Linder (Mar. 24, 2007).
176 Email from John Patchett to Marc Linder (Mar. 30, 2007).
177 Email from John Patchett to Marc Linder (Mar. 24, 2007).
178 Telephone interview with Charles Wasker, Des Moines (Mar. 30, 2007). In a later
Six days after the House Committee on State Government had recommended passage of S. 2022, the Philip Morris USA public affairs department, in an update on legislative activities and other government relations matters for senior management, after reporting that the bill had passed the Senate and the House committee, noted under the rubric “PM-U.S.A. Action,” that the Tobacco Institute “advised us on April 12 that there is nothing that the manufacturers can do at this time.” Why the industry counseled inaction in the face of House floor action is unclear, especially since the memo outlined proposed responses to other governmental anti-tobacco/smoking action.¹⁷⁹

When S.F. 2022 reached the House floor late in the day on April 28, it “breezed through the House with a minimum of debate.” Supporters in their eagerness to secure passage said little, while all of the opponents’ attempts to weaken the bill failed.¹⁸⁰ The proceedings began with Monroe’s offering the State Government Committee’s aforementioned crucial amendment. On a non-record roll call vote it was defeated 21 to 48.¹⁸¹ (At this point Democrat Diane Brandt withdrew her aforementioned amendment to include restaurants and mandate a non-smoking section in them.)¹⁸² As with the committee poll itself, this vote, too, was ambiguous since the amendment could have been rejected both by those who opposed coverage of restaurants and by those who opposed the inversion of the bill’s no-smoking default position. That Monroe was no friend of the bill was underscored by his warning the members that a statutory prohibition on smoking might also apply to the House chamber itself. In response, the bill’s floor manager, Don Avenson—a smoker who had voted against banning smoking in House committee rooms in 1975 and would vote against banning it in the House chamber in 1979—pointed out that the House created its own internal rules.¹⁸³

¹⁷⁹[Philip Morris] Public Affairs, USA, Update for Senior Management (Apr. 12, 1978), Bates No. 1000217591. Three decades later, ex-Representative Patchett’s educated guess was that the tobacco industry had seen “the handwriting on the wall—the votes were pretty well locked in.” Email from John Patchett (Mar. 24, 2007).


Another opponent of smoking regulation, Republican Richard Welden, then offered a floor amendment that would have removed the penalties from the bill. Congressman Lyle Scheelhaase argued that the enforcement provision was “unworkable and unmanageable,” while Republican Thomas Lind predicted that it would have the same effect on smoking that Prohibition had on drinking and the 55-mile per hour speed limit had on speeding. Wells, long one of the leaders of the legislative anti-smoking campaign, admitted that “the bill could be improved but...said it is the best the Legislature can do this year. ‘This is far from a perfect bill but it is a start....’” This sentiment was echoed by Republican Julia Gentleman—whose votes on anti-smoking bills were erratic—who argued that “[i]f we need to put some teeth in it or clarify it, we can do it next year.” In addition, supporters cautioned that adding new amendments that the Senate would have to approve in the final days of the session might inadvertently kill the bill. Advocates of the change, advancing a splendid example of a self-fulfilling prophecy, sought to justify the proposal on the grounds that enforcement would be difficult in general, but that in particular there would be no way to keep track of the number of offenses anyone had committed, thus rendering the increased penalty for repeat offenders inoperable. The very close, non-party-line, 39 to 42 vote by which the House barely defeated the attempt to eliminate the only means of enforcing the prohibition fully, and the 40 to 40 tie vote by which it rejected an amendment to eliminate the enhanced penalty for second and additional offenses confirmed the reality of Wells’s lament that there was no majority for a stronger bill.

On the bill’s final reading, the House passed S.F. 2022 by a large majority of

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(1A:3, 7A:4-6). On Avenson’s votes, see State of Iowa: 1979: Journal of the House: 1979: Regular Session Sixty-Eighth General Assembly 1:279 (Jan. 19). State of Iowa: 1975: Journal of the House: 1975: Regular Session Sixty-Sixth General Assembly 1:315 (Feb. 14). Three decades later Avenson observed that “in 75 I was the house assistant majority leader and in 79 I was the house democratic leader and in neither case did I use my power to preserve smoking in the house chambers I always respected my members more than that.” Email from Don Avenson to Marc Linder (July 13, 2007). At this late date Avenson no longer recalled having floor managed the bill. Id.

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67 to 15. Of the 15 No votes 13 were cast by Democrats, 11 or 12 of these dissenters being smokers. In signing the weak bill, which failed to cover public commercial places and empowered owners to permit smoking and smoke virtually anywhere and everywhere, into law, Governor Ray engaged in simultaneous over- and understatement in declaring that it crystallized “‘a realization that people who don’t smoke have a right to breathe fresh air,’” while enabling smokers “‘to find a place.’” In the event, smokers would, for the next 30 years, continue to find quite a few places.

Coming five years after Arizona’s pioneering legislation and in the midst of the initial tumultuous phase of nationwide anti-smoking enactments, the Iowa law covered many more public places than the Arizona statute, but applied to a much narrower universe than the three-year-old MCIAA. In particular, unlike the latter, the Iowa law failed to cover restaurants, retail stores, other commercial establishments, offices, or workplaces. In the end, S.F. 2022 prohibited smoking (subject to the quasi-ubiquitous exception of designated smoking areas from which only elevators were excluded) in the following locations:

Public cultural facilities: indoor theaters, libraries, art museums, concert halls, auditoriums, and other similar facilities open to the public.

Transportation: railroad passenger coaches, buses, and airplanes, and other common carriers.

188 Journal of the House: 1978: Regular Session Sixty-Seventh General Assembly 2:2044 (Apr. 28). In tracking the progress of S. 2022, a TI senior vice president incorrectly reported to his superiors that the vote had been 65 to 15. Jack Kelly to Company Representatives TI Committee of Counsel Re: Significant Legislative Developments (May 2, 1978), Bates No. 85645146. This error was reproduced in Tobacco Institute, State Legislative Report SLR-78-18, at 1 (May 18, 1978), Bates No. 89781321/2.

189 According to John Patchett, Monroe, Jesse, Woods, Arnould, Dyrland, and Wyckoff were definitely smokers, whereas Horn, Pavich, and Griffee were not. Email from John Patchett to Marc Linder (Mar. 24, 2007). According to Don Avenson, Baker, Garrison, Miller, Scheelhaase, and Welden smoked. Email from Don Avenson to Marc Linder (July 13, 2007). Lind had smoked, but had stopped by this time, according to his son, Jim Lind. See below.

190 “‘Non-Smoker Must Breathe Fresh Air’...Ray Signs Bill,” DMR, May 9, 1978 (9A:5-6).

191 See above ch. 24.

192 1978 Iowa Laws ch. 1061, § 2(1), at 297.

193 1978 Iowa Laws ch. 1061, § 2(1), at 297.

194 1978 Iowa Laws ch. 1061, § 2(2), at 297.
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Waiting rooms: in railroad and bus stations and airports. 195
Medical facilities: waiting rooms, rest rooms, lobbies, and hallways of hospitals, clinics, medical laboratories, and other similar facilities. 196
Patient care rooms: rooms in health care facilities, hospitals, clinics, or other medical facilities used for patient recuperation or care. 197
Government buildings: public buildings owned or controlled by the state of Iowa or its political subdivisions. 198

Whereas MCIAA placed some constraints on some owners’ discretion to designate smoking areas in the form of physical barriers and ventilation and the administrative regulations went further in virtually requiring owners who lacked barriers or ventilation to create four-foot spaces between smoking and nonsmoking areas, 199 S.F. 2022 conferred unbridled discretion on those in custody or control of covered places to enable smokers to continue smoking. In general, the Iowa legislature’s failure to establish an administrative structure for implementing and enforcing its program of public smoking restrictions signaled a lower level of interest in ongoing oversight of this new dimension of active protection of public health. This lack of concern with compliance was clearly reflected in the absence of a provision (such as was contained in MCIAA) 200 empowering the state Health Board or any affected party to seek an injunction of repeated violations of an owner’s duty to “make reasonable efforts to prevent smoking....” 201 The only respect in which the Iowa law exceeded MCIAA in stringency was its requirement that the person in custody or control of a covered facility “who observes smoking in that facility in violation of this Act shall inform the person that smoking is prohibited by law in that facility or that area of the facility,” 202 whereas owners in Minnesota were required to “ask[ ] smokers to refrain from smoking” only “upon request of a client or employee suffering discomfort from the smoke....” 203

The Iowa measure owed its comparative weakness, especially in the face of

196 1978 Iowa Laws ch. 1061, § 2(4), at 297, 298.
197 1978 Iowa Laws ch. 1061, § 2(5), at 297, 298.
198 1978 Iowa Laws ch. 1061, § 2(6), at 297, 298.
199 See above ch. 24.
200 1975 Minn. Laws ch. 211, § 7 subd. 3, at 633, 635.
201 1975 Minn. Laws ch. 211, § 6, at 633, 634.
202 1978 Iowa Laws ch. 1061, § 5, at 297, 298.
203 1975 Minn. Laws ch. 211, § 6(e), at 633, 634.
the precedent set by its northern neighbor three years earlier, to a number of salient differences between the forces that were responsible for bringing the two pieces of legislation to fruition. The most important difference between the Iowa and Minnesota processes is that Iowa lacked any organization even remotely resembling the single-issue Association for Nonsmokers Rights, which articulated the need for statewide regulation of public smoking, drafted the legislation, enlisted a devoted and highly knowledgeable and intelligent legislator to sponsor the bills, mobilized grass-roots support, savvily launched media and public education campaigns, and systematically lobbied legislators. In particular, Iowa lacked any figure like political science professor and former legislator Edward Brandt, who proposed a legislative strategy to ANSR, wrote the bills, and brought his scholarly analysis, legislative experience, and intense and health-conscious personal objections to exposure to smoke to bear on the process. Unlike the situation in Minnesota, where the Lung Association initiated, financed, and helped staff ANSR, in Iowa no health group appears to have promoted anti-secondhand smoke legislation. The Iowa legislature also lacked a scientifically educated, forceful, and galvanizing figure like Phyllis Kahn, who, while also being chief author of numerous other bills (ranging from decriminalization of prostitution to promotion of bicycling), was personally and passionately invested in combating the exposure of nonsmokers to tobacco smoke (as witnessed by her simultaneous feisty leadership of the struggle to ban smoking in her own workplace—the House floor). In contrast, none of the chief legislative sponsors of the Iowa bills in the 1970s appears to have identified her- or himself as closely with or cared as intensely about the issue as Kahn. The only respect in which prospective legislation in Iowa faced fewer obstacles was the absence of coordinated pro-smoking lobbying by powerful industry groups, which may have been a function of the lower threat level posed by the weaker Iowa proposals and less able advocates. And finally, ANSR’s permanent organization, existence, and continuous advocacy of more encompassing legislative amendments and more stringent regulatory intervention throughout the 1980s lacked a counterpart in Iowa, where promotion of more comprehensive legislation was discontinuous, sporadic, unorganized, and dependent on the more or less spontaneous seriatim emergence of individual legislators to carry on the struggle.

Enforcement as an Afterthought

For the first time in the history of the tobacco controversy, the millions of consumers who

\[204\text{H.F. 1807 and H.F. 920 (1975).}\]
use the product we grow and manufacture are being brought under the same kind of attack that has been levelled against the industry. Pressure is building to change the role of government from persuader to policeman.\(^{205}\)

On the eve of the law’s effective date (July 1, 1978), it began to dawn on law enforcement officials as well as on some legislators that S.F. 2022 did “not say how a violator is to be brought before a magistrate” or what a “civil fine” meant. Moreover, Democratic senator Earl Willits, who had supported the bill, conceded that its enforcement provisions were “‘a little weak, to say the least.’” Believing that the law was “‘generally popular’” and that “[m]ost Iowans are law-abiding,” he placed his trust in “‘good self-enforcement....’” As for those who proved unworthy of his trust, Willits “‘assume[d] they could be charged the same as in a criminal offense,’” but “it would not actually be a criminal proceeding,” though “a law officer could issue a citation for an offender to appear before a magistrate.” The Iowa Solicitor General was not sure whether the statute created a civil or criminal process—whether “‘you file a civil lawsuit and serve the offender’” or “‘have a policeman arrest the violator....’” Willits speculated that someone observing a violation might be able to “‘file a complaint like a criminal preliminary information, perhaps in the nature of a small claim....’” Although the general services director of Polk County (whose county seat is Des Moines) said that she would call the sheriff’s office to have any smoking violator removed from the county courthouse, the sheriff’s office had not yet decided what to do if called. And finally, the state Attorney General, Republican Richard Turner, who was expected to issue an opinion the day before the law went into effect, reminded the public that his interpretation of state laws was “‘just one man’s opinion—and what does he know?’”\(^{206}\)

A statewide survey conducted by the *Des Moines Register* a few days after the law had gone into effect revealed widespread (but anecdotal) skepticism by local government officials about enforceability. For example, the Polk County buildings and grounds supervisor, though unsure as to how to handle a violator, was much more certain that attempted enforcement would “‘be a good way to get a black eye.’”\(^{207}\) Three months later, the attorney general had still not weighed in, but the state’s General Services Director, who was in charge of enforcement in state buildings, insisted that he had never seen anyone smoking in violation at


the statehouse (though, interestingly, the Register did not deem it worth mentioning the whereabouts of the designated smoking areas). As ked what he would do if he did witness a violation, he “quipped: ‘I’ve hired a hit man from Chicago—$1,000 a head’ to deal with violators.” Asserting that it did not require an immediate answer, the attorney general assigned a low priority to writing his aforementioned opinion on enforcement, which was further delayed because of a disagreement among his staff as to whether civil or criminal procedures were called for. 

In fact, Attorney General Turner, who was defeated in the November election, never issued an opinion on the law’s enforcement before he left office, leaving the task to his Democratic successor. Perhaps as a reaction to this delay, in January 1979, Senator Craft (the economics professor who had unsuccessfully moved to eliminate coverage of restaurants and stores) filed an amendatory bill to increase the minimum civil fine for an owner’s failure to post nosmoking signs to $10 for a first violation and $20 for a second violation, while making further violations simple misdemeanors. In addition, the bill would have conferred rulemaking authority on the state transportation department regarding smoking in common carriers and on the general services department regarding all other covered public places. However, the bill died in subcommittee.

The focus of the attorney general opinion, issued in March 1979, more than eight months after the law had gone into effect, was on determining whether enforcement was to be effected by way of civil action or criminal punishment. Rejecting purpose and objective sanctions as making criminal punishment distinctive, the newly elected Attorney General, Tom Miller, found it instead in “the intentional use of the formal moral condemnation of the community as an additional feature of the sanction.” As applied to the statute at hand, he concluded that “regulations of smoking in public places do not evince an intent to employ the formal moral condemnation characteristic of criminal punishment. The behavior regulated has not been traditionally regarded as criminal. Smoking per se is not regulated; only the place at which the activity may be conducted is

controlled.” He adhered to this view despite his recognition that most other states that regulated smoking in public places used criminal sanctions; instead, he chose to place greater weight on the fact that the Alaska statute, which also used the term “civil fine,” expressly provided for enforcement only by civil complaint or citation (even though the Iowa law did not). Miller then interpreted the statute as requiring that the county attorney pursue the actions for the civil fines because it was his statutory duty to prosecute all proceedings necessary to recover penalties accruing to the state or his county. In a newspaper interview the same day, Miller called the question a “close” one, “the problem being that they (lawmakers) used the term “civil fine.” That’s really a contradiction in terms.” Subtly the attorney general perpetuated the tradition of questioning governmental enforceability of the smoking prohibition by “acknowledging” that self-enforcement—by which he or the reporter presumably meant voluntary or nonsmoker-aided compliance—“remains pivotal to the law’s chance for success, but added that ‘some role can be played’ by the courts.”

Within eighteen months of the law’s enactment, it became clear that, regardless of whatever clarity the attorney general’s opinion might have created concerning the proper enforcement procedures to be used, “thousands of Iowans” smoking in defiance of the ban were risking a civil fine, but it was not, in the Register’s view, “much of a risk” because the “police concede they are doing little to stop them.” Since the law had gone into effect, only 18 people had been charged with violating it, all of them pupils in Waterloo public schools who had been caught smoking in school buildings in a mass arrest. That even they had been charged shocked an official of the attorney general’s office who had been unaware of any such actions, though he conceded that it might be necessary to scrutinize the state of enforcement. None of the numerous state and local law

enforcement officers contacted by the *Register* knew of any enforcement efforts, though one “top ranking police type” did confide, under a promise of anonymity: “‘Hell, I’m as guilty as anyone in having broken this law.... Sometimes I have to be reminded that I’m smoking where I shouldn’t be.’” The *Register* contrasted non-enforcement in Iowa with the “more hard-line approach in cracking down on illegal smokers in other states,” but did report that some Iowa officials warned that with the accumulation of evidence concerning the health consequences, the public might demand not only stricter police enforcement, but also more designated nonsmoking areas, including coverage of restaurants.216

### The House Expands the Scope of Its No-Smoking Rule: 1979

Renewed effort was made to limit the exposure to secondhand smoke in the House itself in 1979.217 Two non-smokers, Democrat Craig Walter, a pro-business moderate218—who, ironically, in his later career as a lobbyist, represented the Iowa Restaurant Association and Iowa Lodging Association in opposition to bills to repeal the preemption of local anti-smoking ordinances whose enactment the Tobacco Institute had engineered in 1990219—and moderate Republican John

216Roger Moore, “Puffing Outlaws Defy Iowa Ban,” *DMR*, Jan. 2, 1981 (1A:1-3, 10A:2-4). The reference to a call for additional designated nonsmoking areas was based on a misunderstanding of the structure of the law: it provided for no designated nonsmoking areas; all areas were nonsmoking unless those in charge of buildings designated some of them as smoking.

217Though unable to “recall why an effort was not made to ban smoking in the Chamber during the ‘77-’78 term,” Patchett reasoned: “With the ban in effect for committee rooms during that time, we may have just made an assessment that there weren’t enough changes in the makeup of the House to pass the more extensive ban and that we should leave well enough alone.” Email from John Patchett to Marc Linder (Feb. 18, 2007). From 1975-76 to 1977-78, the Democratic majority shrank from 61 to 59 of 100 seats. Frank Stork and Cynthia Clingan, *The Iowa General Assembly: Our Legislative Heritage 1846-1980*, at 8 (n.d.). Tobacco lobbyist Charles Wasker claimed that the tobacco industry never cared about internal House/Senate smoking rules. Telephone interview with Charles Wasker, Des Moines (Mar. 30, 2007).


Non-Smokers’ Struggle Against Tobacco Smoke Exposure in Iowa, 1970-82

Pelton,\textsuperscript{220} offered an amendment to the House Rules to expand significantly the no-smoking zone to “the chamber of the house except in the perimeter area while the house is in session.”\textsuperscript{221} The House, control of which Republicans had regained (56 to 44),\textsuperscript{222} voted 51 to 39 to adopt the change. Although not strictly along party lines, the vote did reveal a significant divergence: whereas almost two-thirds of Democrats (22-12) voted for the rule (and most of the 12 casting No votes were smokers), only a bare majority of Republicans (29 to 27) did.\textsuperscript{223} The

\textsuperscript{220}Email from John Patchett to Marc Linder (Feb. 18, 2007).


\textsuperscript{222}Frank Stork and Cynthia Clingan, The Iowa General Assembly: Our Legislative Heritage 1846-1980, at 8 (n.d.).

\textsuperscript{223}State of Iowa: 1979: Journal of the House: 1979: Regular Session Sixty-Eighth General Assembly 279-80 (Jan. 19). The new rule was embodied in Constitution of Iowa as Amended, Statutes Pertaining to the General Assembly, Joint Rules, Senate Rules, House of Representatives Rules, Lobbying Rules, Ethics Rules for the Sixty-Eighth General Assembly 1979-1980, at 99 (Rule 55) (Frank Stork and David Wray comp. n.d.). A 1979 House member later identified at least 10 of the 12 Democrats who voted Nay as smokers; of the other two he was unsure. Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007); email from Rod Halvorson to Marc Linder (Aug. 9, 2007). All 10 members who were absent or not voting were Democrats. Because of the large turnover in House membership between 1978 and 1979 and the large number of members who were absent or did not vote on S.F. 2022 in 1978 or the amendment in 1979 any comparison of the consistency in voting is of limited value. Nevertheless, of the 15 members who voted against the bill in 1978 only four voted on the House chamber smoking ban in 1978: of these, three opposed it and one voted for it; of the 39 who voted against the ban in 1979 only 18 had voted on passage of S.F. 2022 in 1978: of these, three voted against it and 15 in favor. Of the three (Jesse, Lind, and Welden) who voted Nay both times, Jesse was a heavy smoker, Welden smoked, and Lind had smoked, but had stopped by this time, according to his son, Jim Lind (who was elected to his father’s Senate seat on the father’s death and as a child had hated exposure to his parents’ smoking), who attributed Thomas Lind’s votes to his generally “libertarian” position, which also caused him to oppose child-proof medicine bottle caps. Telephone interview with Jim Lind, Waterloo (June 3, 2007). Arguably a better test of voting consistency results from comparing the vote on the ban in 1979 and the vote on the amendment to eliminate penalties from the public smoking bill in 1978 because some who voted for final passage may have done so only halfheartedly after having failed to gut the bill. Of the 39 members who had voted to gut the bill in 1978, 21 voted on the ban in 1979; of these, 13 (or 62 percent) also voted against the ban, while 8 (or 38 percent) voted for the ban; of the 39 members who voted against the ban in 1979, 18 had also voted on the amendment in 1978; of these, 13 (or 72 percent) had voted to gut the bill in 1978, while 5 (or 28 percent) voted against eliminating penalties. In other
vote was all the more remarkable because Republicans and Democrats, spurred on by the shift in control, were at that time engaged in a titanic struggle over the House rules characterized by perfect party-line votes.\footnote{Patchett later characterized the bipartisan proposal as important because “this rule wasn’t ‘procedural’ (all of which are partisan and controlled by the majority party).”} Although the relatively close vote signaled the contentiousness of the issue, Walter later commented that after the ban had gone into effect, he was never subjected to recrimination for having initiated this curtailment of smokers’ freedom to smoke in the chamber.\footnote{Telephone interview with Craig Walter, Clive, IA (June 2, 2007).} In 1981, when the Republican-controlled House changed the main no-smoking area from the “chamber” to “on the floor of the house,”\footnote{House Resolution 3 (Rule 55), in \textit{State of Iowa: 1981: Journal of the House: 1981: Regular Session Sixty-Ninth General Assembly} 130 (Jan. 20).} it also defeated, by a non-record roll call vote of 37 to 54, a proposed amendment to relax the ban by introducing this language: “Smoking shall not be permitted on the floor of the House from 8 a.m. to 5 p.m. or while the House is in session...”\footnote{Former Representative Patchett provided this context for understanding these changes: The “Chamber” of the House would encompass the entire chamber. The distinction between the Chamber and the “floor” of the House is effectively an artificial one—as they are essentially one and the same. The perimeter of the House has traditionally had “couches” where members and staff could gather, along with certain invited guests. The area of the floor where the members’ desks are located is very crowded. Since the Chamber has a very high ceiling and is quite large, the compromise (necessary to achieve passage) allowed some smoking on the very edge but kept the main part of the Chamber smoke-free. Some smoke might have drifted, but probably not much for those on the floor itself. Most evenings (Monday through Thursday) there would be several members (a handful) who would come back after dinner and do some work, catch up on reading, etc. Since most members do not have offices in the Capitol, it was often the only time to be...}  

Former Representative Patchett provided this context for understanding these changes:

\footnote{Email from John Patchett to Marc Linder (Feb. 18, 2007).}  
\footnote{Telephone interview with Craig Walter, Clive, IA (June 2, 2007).}  
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able to work in relatively moderate quiet. While I wasn’t there in ’81, there were probably enough members who would like to smoke while doing this evening work—and didn’t think it would affect many others since there would be very few people present at that time. But you can see by the results that it did not carry the day.²²⁹

The same year anti-smoking advocates in the House and Senate unsuccessfully sought to strengthen the weak clean indoor air act. Democrat Rod Halvorson filed a bill that would have covered food service establishments, but authorized them to permit smoking in one-half of their seating capacity. It would also have facilitated enforcement by: requiring the state public health commissioner to adopt rules to enforce the law; substituting a (criminal) simple misdemeanor penalty for the civil penalty; and distributing one-half of the revenue collected from the fine to the person who contributed information that aided in the violator’s conviction.²³⁰ But the bill languished in subcommittee for a year, only to be reassigned in 1982 to a second subcommittee and die without further action.²³¹ Leadership’s opposition insured the bill’s demise,²³² but it was, nevertheless, as Halvorson later interpreted it, “probably...a sign of support...and also a realization that it would take mostly Democrats to pass the bill” that the Republican Judiciary Committee chair Nancy Shimonek reassigned it to a subcommittee with a Democratic majority.²³³ A similar but somewhat weaker bill that Wells filed in the Senate²³⁴ suffered the same fate,²³⁵ which the Tobacco Institute scorecard logged as having “died at adjournment.”²³⁶

²²⁹Email from John Patchett to Marc Linder (Mar. 3, 2007).
²³⁰H.F. 644 (Feb. 27, 1981, by Halvorson). The penalty for commission of a simple misdemeanor was a maximum of 30 days in prison and/or a maximum $100 fine. Iowa Code § 903.1.3 (1979). The bill would also have inserted the provision from the 1975 Minnesota law requiring the public health commissioner to adopt rules prohibiting smoking in factories and warehouses where the workers’ close proximity or inadequate ventilation caused hazards detrimental to nonsmoking workers’ health and comfort.
²³²Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).
²³³Email from Rod Halvorson to Marc Linder (Aug. 9, 2007).
²³⁶Bates No. TCAL0406489 (May 5, 1982).

Last month [Tobacco Institute President] Sam Chilcote told me he believed the ETS issue, with all its political, social and economic ramifications, posed a greater threat than any other single tobacco issue.¹

By the mid-1980s cigarette manufacturers had become fully aware that the popular and expanding nationwide movement, triggered by cumulative individual and increasingly collective frustration and anger over a lifetime of compelled inhalation of smokers’ tobacco smoke and now fueled by scientific and medical discoveries of the morbid and mortal health consequences of such exposure, was, by means of both legislated restrictions and prohibitions on where smoking could lawfully take place and "social opprobrium," depressing the incidence and daily consumption of cigarettes.² How successful the cigarette manufacturing companies’ defense of the indefensible was in the face of an increasingly activist and sophisticated anti-smoking movement in Iowa in the mid-1980s is the focus of this chapter.

The Tobacco Industry’s Failed Campaign to Disrupt the Formation of a Scientific Consensus on the Health Consequences of Secondhand Smoke Exposure

Significantly, Defendants were well aware of, and worried about, this issue as early as 1961 when a Philip Morris scientist presented a paper showing that 84% of cigarette smoke was composed of sidestream smoke, and that sidestream smoke contained carcinogens. In addition to understanding, early on, that there was a strong possibility that ETS posed a serious health danger to smokers, Defendants also understood the financial ramifications of such a conclusion. ...

Despite the fact that Defendants’ own scientists were increasingly persuaded of the

¹William Kloepfer, Jr. [TI senior vice president, public relations] to John Berard and Peter Sparber (May 24, 1984), Bates No. TI10411104.

²JRN, The ETS Issue: Science and Politics at [3] (May 1987), Bates No. 2023551401/3. This four-page memo may have been written by John (Jack) R. Nelson, who at the time was manager of public affairs research and issues planning at corporate affairs, Philip Morris, Inc., the next month became director of corporate affairs planning, and in 2002 became president for operations and technology of Philip Morris, Inc. Philip Morris Glossary of Names, http://legacy.library.ucsf.edu/glossaries/pm_gloss_n.jsp
strength of the research showing the dangers of ETS to nonsmokers, Defendants mounted a comprehensive, coordinated, international effort to undermine and discredit this research. Defendants poured money and resources into establishing a network of interlocking organizations. They identified, trained, and subsidized “friendly” scientists through their Global Consultancy Program, and sponsored symposia all over the world from Vienna to Tokyo to Bermuda to Canada featuring those “friendly” scientists, without revealing their substantial financial ties to Defendants. They conducted a mammoth national and international public relations campaign to criticize and trivialize scientific reports demonstrating the health hazards of ETS to nonsmokers and smokers.

Defendants still continue to deny the full extent to which ETS can harm nonsmokers and smokers. Some Defendants, such as BATCo, R. J. Reynolds, and Lorillard, flatly deny that secondhand smoke causes disease and other adverse health effects; some, such as Brown & Williamson, claim it’s still “an open question”; and others, such as Philip Morris, say that they don’t take a position and that the public should follow the recommendations of the public health authorities. To this day [2006], no Defendant fully acknowledges that the danger exists.  

How sudden (though by no means discontinuous) the breakthrough in the science of passive smoking beginning about 1980 was can be gauged by the conclusion reached as late as 1979 in the surgeon general’s encyclopedic synthesis of Smoking and Health: “In summary, a substantial proportion of the normal population experiences irritation and annoyance on being exposed to cigarette smoke. The eyes and nose are the areas most sensitive to irritation.... Healthy nonsmokers exposed to cigarette smoke have little or no physiologic response to the smoke, and what response does occur may be due to psychological factors. There probably is a slight reduction in the maximum exercise capacity in older nonsmokers exposed to levels of CO occasionally found in involuntary smoking situations.” (Although the cigarette companies should have welcomed this almost innocuous conclusion, the day before the report was issued and without even having seen it, the “Tobacco Institute said it is the report, not

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3United States v Philip Morris USA, Inc., 449 F.Supp.2d 1, 800-801 (D.D.C. 2006), aff’d, 566 F.3d 1095 (D.C. Cir. 2009). Strictly speaking, the “confidential” 1961 paper, while stating that sidestream smoke constituted 84 percent of cigarette smoke and listing numerous compounds in cigarette smoke identified as carcinogens, did not specifically identify any of them as present in sidestream as distinguished from mainstream smoke. Philip Morris Incorporated, “Tobacco and Health—R&D Approach,” Presentation to R & D Committee by Dr. Helmut Wakeham at 1, 9 (Nov. 15, 1961), Bates No. 2024947172/5/83

smoking, that could be dangerous to your health.”)⁵

Going far beyond the very limited findings on the health impacts of secondhand smoke exposure published in the 1960s and 1970s—and synthesized in the same surgeon general’s report—which focused on the psychomotor effects of carbon monoxide, annoyance to nonsmokers, greater probability of respiratory disease among children of smoking parents, patients with pre-existing coronary artery and chronic lung diseases, and possible allergic reactions to tobacco smoke,⁶ the new learning on several scientific fronts radically transformed understanding of the extent and multifaceted nature of the morbidity and mortality caused by involuntary smoking.⁷ A landmark study published in March 1980 in the New England Journal of Medicine found that nonsmokers who lived in a house in which smoking was not permitted but for 20 or more years worked in a closed environment where smoking was permitted exhibited not only lower forced mid-expiratory flow rates and forced end-expiratory flow rates than unexposed nonsmokers, but also flow rates not significantly different than those of light smokers and non-inhaling smokers.⁸ An accompanying editorial by two members of the National Institutes of Health underscored both the qualitative advance achieved by the study and the gaps that still remained to be filled:

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⁶U.S. Department of Health, Education, and Welfare, Smoking and Health: A Report of the Surgeon General 11-1-11-41 (n.d. [1979]). See also Luther Terry, Jesse Steinfeld, Nicholas Krikes, Stanton Glantz, and Robert Fallat, “Proposition 5, Second-Hand Smoke and the Nonsmoker” (n.p. [1]) (Dec. 27, 1978), Bates No. 503646909/10 (paper written by two former surgeons general and anti-smoking militant Stanton Glantz which identified the same limited scope of health effects of secondhand smoke and also agreed that there was a “right to smoke”).


Until now the case against smoking in the general environment has often been anecdotal, based on annoyances, feelings, and sometimes more objective physical reactions such as eye and nose irritation. ... Because of the inconclusive nature of the evidence, the case against smokers has not been especially strong and the feelings and psychological reactions of smokers are as vehement as those of nonsmokers. But now, for the first time, we have a quantitative measurement of a physical change—a fact that may tip the scales in favor of the nonsmokers.

The question must be asked whether White and Froeb’s new evidence is sufficient to initiate new legislative actions that would further restrict smoking in public places. This is, of course, a difficult and delicate question. On the one hand, the evidence presented is statistically sound and significant; on the other hand, there is no proof as yet that the reported reduction in airways function has any physiological or clinical consequences.9

Less constrained by the norms of science than the demands of profitability, just three days after the article appeared, the senior scientist at Philip Morris informed the company’s research director that it was “an excellent piece of work which could be very damaging to our business.” Characteristically, the scientist knew no better person to initiate the “independent review” by a member of the medical profession needed to craft a “rebuttal” (which, if done by the tobacco industry, “would have little impact”) than Ragnar Rylander,10 the professor whom Philip Morris had been paying for years to churn out whitewashes of the health consequences of smoking.11 Unsurprisingly, the Association for Non-Smokers’ Rights, the organization responsible for passage of the country’s first comprehensive statewide regulation of smoking in public places (the Minnesota Clean Indoor Air Act),12 promptly hailed the study as “the first indisputable evidence that a steady long-term diet of other people’s smoke causes a measurable dysfunction in the lungs just as damaging as if the passive smoker indulged in smoke.” To be sure, ANSR conceded that the study “does not, however, prove that the smoke in a restaurant or waiting room is anything more than annoying to people who are not allergic to it.”13

Then on virtually the same day in mid-January 1981 Greek and Japanese studies published in two different medical journals finally uncovered

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11On Rylander, see above ch. 23.
12See above ch. 24.
13“Study Proves Secondhand Smoke Deadly,” *ANSR* 8(1):1, 3 (July 1980).
epidemiological evidence of the impact of the numerous carcinogens in secondhand smoke in the form of lung cancer among nonsmokers exposed to spousal smoking. A four-page (retrospective) case-control study by Dimitrios Trichopoulos and colleagues at the University of Athens School of Medicine compared 40 nonsmoking female lung cancer patients and 149 nonsmoking control women with respect to whether and how much their husbands smoked. Compared with the control women, the lung cancer patients were 1.8 times more likely to be married to an ex-smoker, 2.4 times more likely to be married to a man who smoked between 1 and 20 cigarettes a day, and 3.4 times more likely to be married to a man who smoked 21 or more cigarettes a day.\textsuperscript{14}

The most serious limitation that the Greek investigators identified in their study, which was “offered principally to suggest that this issue should be pressed,” was the small number of cases\textsuperscript{15}—a weakness that did not mar the Japanese study, which for that reason bore the brunt of the cigarette oligopoly’s attacks. In a three-page paper published two days later in the \textit{British Medical Journal}, Takeshi Hirayama, the chief of the epidemiology division of the National Cancer Center Research Institute in Tokyo, set forth the results of a 14-year prospective study of 91,540 nonsmoking housewives aged 40 and over measuring their risks of developing lung cancer according to whether and how much their husbands smoked. With the risk ratio of lung cancer among nonsmoking wives of nonsmoking husbands set at 1.00, that for those of husbands who were either ex-smokers or smokers of 1 to 19 cigarettes a day was 1.61 and that for those of husbands who smoked 20 or more cigarettes daily reach 2.08. Moreover, Hirayama also found that the relative risk of developing lung cancer by passive smoking was almost one-half that among women who smoked.\textsuperscript{16}

In the wake of these explosive findings, the cigarette companies, now more than ever, “[f]earing government regulation to restrict smoking in public places and sensing a decrease in the social acceptability of smoking,...were faced with a major threat to their profits. ... In response,” as Federal District Judge Gladys Kessler concluded a quarter-century later in her massive thousand-page, double-columned judicial opinion skewering the cigarette manufacturers’ decades of lethally profitable racketeering, “Defendants crafted and implemented a broad strategy to undermine and distort the evidence indicting passive smoke as a health


Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

hazard. Defendants’ initiatives and public statements with respect to passive smoking attempted to deceive the public, distort the scientific record, avoid adverse findings by government agencies, and forestall indoor air restrictions.”

More specifically in the case of Hirayama’s study, the Tobacco Institute launched a media campaign—which succeeded in reaching a huge audience within a very brief period of time—to create the impression that a noted statistician had identified a mathematical error in the paper that invalidated the study. The extent to which the cigarette oligopoly was willing to overreach when its interests were threatened was indicated by the fact that two of the tobacco industry’s own consultants turned against the campaign, stating internally that Hirayama’s study was correct and that the Tobacco Institute had persisted in the campaign knowing that it was correct. Indeed, by the early 1980s scientists at a Philip Morris laboratory in Germany had themselves confirmed the tumorigenic, morbid, and lethal effects of sidestream smoke on rats—research results that the company, unsurprisingly, preferred destroying rather than publishing.

Despite having survived the Tobacco Institute’s attempted assassination, by itself Hirayama’s study did not immediately persuade even the new surgeon general, C. Everett Koop, who in the preface to his first report on smoking and health (which was devoted to cancer) unequivocally declared that cigarette smoking was “the chief, single, avoidable cause of death in our society and the

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19INBIFO Institut für biologische Forschung, “Integrating Report: 21-Day Smoke Inhalation Study with Mainstream and Sidestream Cigarette Smoke on Standard Reference Cigarette Type 2R1 on Rats” (July 29, 1982), Bates No. 2029190329.
most important public health issue of our time," to venture a bolder statement than that: “Although the currently available evidence is not sufficient to conclude that passive or involuntary smoking causes lung cancer in nonsmokers, the evidence does raise concern about a possible serious public health problem.”

In his foreword to the volume, Koop’s boss, Dr. Edward N. Brandt, Jr., the assistant secretary for health in the Department of Health and Human Services—who, ironically, had quit smoking just a year earlier when he assumed his position and later died of lung cancer at age 74—while characterizing the nature of the epidemiological correlation in Hirayama’s study as “unresolved,” nevertheless observed that “for the purpose of preventive medicine, prudence dictates that nonsmokers avoid exposure to second-hand tobacco smoke to the extent possible.” At their press conference on the occasion of releasing the report, too, both Brandt and Koop had urged nonsmokers to avoid inhaling cigarette smoke “even though the link between such passive smoking and cancer is still a matter of scientific debate.” Based on the Greek and Japanese studies, the conclusion of the chapter of the 1982 surgeon general’s report devoted to involuntary smoking and lung cancer reflected the as yet tentative and unsettled state of the science: “The evidence currently available suggests that involuntary smoke exposure may increase the risk of lung cancer in nonsmokers, but limitations in data and study design do not allow a judgment on causality at this time.”

But the interest in epidemiological studies remained intense both because the chemical constituents of sidestream smoke were similar to those of mainstream smoke—indeed, in mouse skin assays condensate of the former was more tumorigenic per unit weight—and because the dose-response relationship between voluntary smoking and lung cancer had been established and a threshold

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24Thomas Maugh, “Edward Brandt, Jr., 74,” LAT, Sept. 5, 2007 (B8) (misleadingly stating that Brandt was a nonsmoker).
for effect had not been established. Similarly, the 1984 surgeon general’s report on smoking and chronic obstructive lung disease registered little in the way of robust research findings concerning the impact of involuntary smoke exposure on pulmonary function in normal healthy adults, though children of smoking parents did exhibit increased prevalence of respiratory problems and greater frequency of pneumonia and bronchitis. But just two years later, the proliferation of epidemiological spousal smoking exposure studies conducted in North America, Asia, and Europe during the five years since the publication of Trichopoulos’s and Hirayama’s pioneering papers enabled the National Resource Council and the surgeon general to issue reports placing their imprimaturs on the crucial finding of a statistically significant increase in the risk of lung cancer among nonsmoking spouses of smokers compared to nonsmoking spouses of nonsmokers—a conclusion that became anticipatorily generalizable since there was “no reason to believe...that the excess risk associated with involuntary smoking is restricted to exposure from spouses.” The NRC report, which had been undertaken at the request of the Environmental Protection Agency and the Department of Health and Human Services and was published in November 1986, summarily estimated that increased spousal risk, based on the set of new epidemiological studies, at 34 percent.

A month later, in transmitting to Congress the 1986 surgeon general’s report on The Health Consequences of Involuntary Smoking, Secretary of Health and Human Services Dr. Otis Bowen declared that “the judgment can now be made that exposure to environmental tobacco smoke can cause disease, including lung cancer, in nonsmokers.” Based on the evidence in the report Bowen observed that “the choice to smoke should not interfere with the nonsmoker’s choice for an environment free of tobacco smoke,” while Koop’s direct superior, Dr. Robert Windom, assistant secretary for health, added that “it is clear that actions to

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Protect nonsmokers from ETS exposure not only are warranted but are essential to protect public health.”

33 Secretary Bowen’s conclusion that it was “also clear that simple separation of smokers and nonsmokers within the same airspace may reduce but cannot eliminate nonsmoker exposure to environmental tobacco smoke” was of crucial significance for the public regulation of smoking by virtue of rendering scientifically obsolete what by then had become the nationally recognized policy norm of designated smoking areas embedded even in what the 1986 report itself judged to be (with one exception) the most extensive and restrictive statewide public smoking statutes.

Koop himself explicitly underscored the link between science and public

35U.S. Department of Health and Human Services, The Health Consequences of Involuntary Smoking: A Report of the Surgeon General 266-76 (1986). The exception was the Washington Clean Indoor Air Act. Id. at 269, 271-74 (erroneously dating the law to 1983). In 1985 the Washington legislature passed the bill, which banned smoking outright (thus prohibiting the designation of smoking areas) in a number of public places including: the public areas of retail stores; lobbies of financial institutions; office areas and waiting rooms of government buildings; museums; classrooms and lecture halls of schools, colleges, and universities; seating areas and hallways contiguous to them in concert halls, theaters, auditoriums, exhibitions halls, and indoor sports arenas; and hallways of health care facilities. 1985 Wash. Laws ch. 236, §§ 4(a) and (b), at 822, 823-24. These provisions by and large codified smoking bans that the state Board of Health had promulgated as administrative rules in 1975, but without any enforcement mechanism. Wash. Adm. Code. §§ 248-152-030 and 248-152-050 (1975); see above ch. 15. By two votes the Senate in 1985 failed to strike these absolute bans from the bill. Senate Journal—1985—Regular Session Forty Ninth Legislature State of Washington 1:1339-40 (Apr. 15). To be sure, while the bill was before the legislature the Tobacco Institute emphasized that it was less restrictive than the regulation because it permitted owners to designate restaurants in their entirety smoking areas (thus suppressing the fact that the law, unlike the regulation, was backed by penalties). 1985 Wash. Laws ch. 236, § 4(b), at 822, 824; Alexander King to William Buckley, Subject: Washington State Legislative Assessment—No. 3 (Apr. 1, 1985), Bates No. TNWL0002364. The cigarette manufacturers were able to rely on a considerable number of legislators to water down the bill, which had initially contained as Part II the Smoking Pollution Control Act, which required employers of office workplaces to prohibit smoking altogether if any nonsmoking employee objected to smoke and an accommodation satisfactory to all affected nonsmoking employees could not be reached. State of Washington, 49th Legislature, 1985 Regular Session, House Bill No. 62, § 14 (Jan. 18, 1985), Bates No. TNWL0026979/84.
policy by noting that the “scientific case against involuntary smoking as a health risk is more than sufficient to justify appropriate remedial action, and the goal of any remedial action must be to protect the nonsmoker from environmental tobacco smoke.” The kind of action he had in mind transcended both merely separating smokers and nonsmokers and reducing rather than eliminating the exposure. And although he argued that the new smoking policies that the report’s data necessitated “should not be designed to punish the smoker,” Koop insisted that smokers’ “addictive behavior” should not let them off the hook: “it is the smokers’ responsibility to ensure that they do not expose nonsmokers to the potential harmful effects of tobacco smoke.”

The report’s lengthy final chapter on restrictive smoking policies made it clear just how far state laws fell short of the science-based model that would satisfy the goals that the surgeon general had limned. Classifying the statutes into five groups of increasing protectiveness and restrictiveness, Koop’s report found that: 9 states (including two of Iowa’s neighbors, Illinois and Missouri) had enacted no statewide restrictions at all; 8 states had enacted only “nominal” laws, regulating smoking in one to three public places, excluding restaurants and private workplaces; 14 states (including Iowa and neighboring South Dakota) had enacted “basic” laws regulating four or more public places, excluding restaurants and private workplaces; 10 States (including neighboring Wisconsin) had enacted “moderate” laws regulating restaurants but not private workplaces; and 9 states (including Iowa’s neighbors Minnesota and Nebraska) had enacted “extensive” laws regulating private workplaces.

At the press conference accompanying the report’s release Koop predicted that The Health Consequences of Involuntary Smoking would become the same kind of “‘turning point’” that the original 1964 had been. However, the pace at which this new point would turn would greatly exceed that of its predecessor because the intervening two decades had witnessed such an upheaval in scientific understanding of, popular attitudes toward, and governmental restrictions on smoking that by 1986 even the Reagan administration health hierarchy unabashedly favored regulation of public smoking. In contrast, in 1962, shortly after he had announced that he would establish a committee of experts to review comprehensively all data on smoking and health, Surgeon General Luther Terry

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met with representatives of several health organizations, federal agencies, and the Tobacco Institute at which “it was agreed that the proposed work should be undertaken in two consecutive phases,” the first being an “objective assessment of the nature and magnitude of the health hazard” to be performed by experts, whereas Phase II “[r]ecommendations for action were not to be a part of the Phase I committee’s responsibility.”

Demonstrating that in contemplation of the especially strong nail that had just been driven into coffin nails’ coffin the manufacturers of what Koop identified as the “single agent...responsible for approximately 16 percent of all deaths annually in the United States” had become even more desperate and transparently mendacious than they had been in response to the 1964 report, the Tobacco Institute engaged in threadbare character assassination. The New York Times gave it space to spread its contemptible accusation that Koop had placed his “political agenda above scientific integrity.” Revealing that the looming endgame had apparently deprived the producers of the world’s most lethal consumer commodities even of the capacity to recognize that their propaganda served only to mock themselves, the Tobacco Institute risibly charged that: “A comparable example might have been if Carrie Nation, in the years before Prohibition, served as Surgeon General and issued a ‘scientific’ report providing the political ammunition to secure passage of the 18th amendment the Volstead Act.”

For internal consumption only, a few months later an especially aggressive Philip Morris document offered this analysis of the industry’s predicament:

If a thousand more consciously unbiased studies of ETS and disease risk in non-smokers were conducted, these are the best conclusions we could hope for:

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39 U.S. Department of Health, Education, and Welfare, *Smoking and Health: Report of the Advisory Committee to the Surgeon General of the Public Health Service* 8 (n.d. [1964]). Even at the press conference accompanying the report’s release, Terry stated in response to a question as to whether he “anticipate[d] a second committee to recommend legislative executive [sic] action” that at the time he did “not anticipate assembling such a committee.” “Transcript of Press Conference by Surgeon General’s Committee on Smoking and Health” at 9 (Jan. 11, 1964), Bates No. 69000006/15. For the argument that Terry astutely “kept the committee away from the political morass that circled around the tobacco questions,” see Allan Brandt, *The Cigarette Century* 221 (2007).


41 Scott Stapf, “A Propaganda War Against Cigarettes,” *NYT*, Jan. 4, 1987 (F2:3-6 at 4-5).
1. ETS remains a suspected but unproven cause of disease in exposed populations.
2. ETS studies demonstrating disease risk can be explained by errors inherent in epidemiological research.
3. ETS has not been biologically established as a cause of disease in non-smokers

Please note that this is generally what we say (when we’re forced to talk about it) to discount cause and effect [sic] the link between active smoking and disease in smokers. Moreover, this is the best outcome we can expect from scientists. We will never find an unbiased scientist who concludes that ETS exposure has been proven safe for non-smokers.42

The situation, for the exacerbation of which the high-ranking corporate official hesitantly made the industry’s stonewalling in part responsible, both posed dangers to cigarette sales potentially more catastrophic than those created by the gradual disclosure to the public of the health impact on smokers, of which the manufacturers had been aware for years, and left more room for the industry to maneuver—provided that it relied on less transparent and more sophisticated prevarication and intransigence:

There is an analogy to our present situation and the situation the industry faced after the 1964 Surgeon General’s Report linking active smoking to disease. Then we faced a crisis of social acceptability over our product. We faced an anti-smoking movement and laws designated to curb smoking. As the scientific establishment slowly closed ranks against our position, we then sought to gather scientists to rebut the Report. The “controversy” over active smoking and disease soon subsided and we were left isolated on the issue. Since then, the product liability threat has all but silenced us on the active smoking issue outside the courtroom.

What the industry didn’t do in 1964 and the ensuing decades was mount an aggressive public relations campaign to counter the Surgeon General. The Tobacco Institute handled the issue as a “controversy” and the companies did their best to keep the brands out of the battle. Perhaps it was a prudent course considering the litigation we face today and the industry’s slow but steady growth between 1964 and 1982.

However, today the industry is declining and the ETS issue seems unlikely to evoke serious product liability litigation. Indeed, the same scientific uncertainty that keeps anyone from concluding ETS is harmless will also make it very difficult to prove ETS is harmful to any one individual. Low dose exposure is all but impossible to identify as the cause of disease in a specific person. Thus, we have much more operating freedom on the ETS issue than we had on the active smoking issue.

... What we need is an aggressive public relations campaign to:

1. Restore reasonable doubt in the minds of smokers that ETS is harmful to

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anyone.

2. Buttress the belief in smokers that smoking is a right which no government organization or individual is entitled to revoke.

We already possess the basic scientific critique of the ETS research necessary to fuel the campaign. More scientific research will not significantly strengthen this critique and may only add to the fear of smokers on this issue.

Unless we act now to counter this incidence decline, there will be little left to defend of the industry.... 43

The rest of this chapter will examine how effectively anti-smoking advocates in Iowa were able to overcome the cigarette oligopoly’s phony claims and real money.

Jo Ann Zimmerman’s Initiative of 1983-84: House File 248

[S]moking fight[s] in Senate (and state). Boy, have there been some! 44

The Seventieth General Assembly (1983-84), both of whose houses were controlled by significant Democratic majorities—28 to 22 in the Senate and 60 to 40 in the House—engaged in an important effort to amend an anti-public smoking law that from its inception in 1978 had lagged behind that of the national leader (Minnesota) and had become even more backward during the intervening years as Minnesota made its regime more stringent by means of administrative rule (for example, by requiring restaurants to set aside at least 30 percent of its seating capacity for the nosmoking section) 45 and other states and local governments enacted more rigorous legislation. For example, in 1979 neighboring Nebraska enacted the Nebraska Clean Indoor Air Act, 46 which, in the view of the Tobacco Merchants Association of the U.S., “duplicates and rivals classic Minnesota restrictive law for most restrictive in nation.” 47 By this time, for example, numerous states had already covered the following types of public places that the Iowa law still excluded: educational facilities (20); food stores

44Beverly Hannon, [untitled notes] (Feb. 22, 1997), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA.
45See above ch. 24.
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(11); retail stores (9); restaurants (11); and workplaces (4).\textsuperscript{48}

The primary sponsor of the chief anti-public smoking bill, H.F. 248,\textsuperscript{49} was first-term Democrat Jo Ann Zimmerman, a registered nurse, health planner, and former smoker,\textsuperscript{50} who in 1986 would be elected Iowa’s first female lieutenant governor.\textsuperscript{51} As early as January 7, 1983, more than six weeks before Zimmerman introduced the bill, the Tobacco Institute in its “1983 Legislative Outlook” had classified smoking restriction legislation in Iowa (as well as in 15 other states) in the highest ranked group—“Likely to be Introduced/Even to Pass.”\textsuperscript{52}

Although throughout this discussion the focus remains on legislators, anti-smoking lobbying organizations such as the Iowa branches of the American Lung Association, American Heart Association, and, especially, the American Cancer Society, were, as anti-tobacco militant and state legislator Rod Halvorson put it many years later, an important part of the struggle “all the time.” Not only did they furnish legislators with vital statistics and arguments, but, even more significantly, they provided, through their members and supporters, a “comfort base” in the form of a constituency that enabled individual legislators to pursue a crucial public health objective without appearing to be following some idiosyncratic will-o’-the-wisp.\textsuperscript{53}

Zimmerman later revealed the impetus for the proposed legislation in a newsletter: a future constituent had challenged her to write a bill recognizing the rights of nonsmokers as equal to those of smokers.\textsuperscript{54} The constituent, who was unable to work in an environment in which people smoked, had made this request when Zimmerman was door knocking in the fall of 1982 during her first campaign for a House seat; persistent, after her election, he called her in December to remind her.\textsuperscript{55} Filing the bill in 1983 was, accordingly, a rather spontaneous event: Zimmerman’s only cosponsor, James O’Kane, happened to sit behind her in the

\begin{footnotesize}
\textsuperscript{48} See Tobacco Institute, Smoking Restriction Laws in the Fifty States and the District of Columbia (Jan. 1982), Bates No. 81511773. See also Tobacco Institute, State Activities Division, \textit{StateLine} (May 18, 1984), Bates No. TIMN0245209.

\textsuperscript{49} H.F. 248 (Feb. 21, 1983, by Zimmerman and Democrat James O’Kane).

\textsuperscript{50} Dewey Knudson, “Iowa House Clears the Air with Wide Ban on Smoking,” \textit{DMR}, Feb. 16, 1985 (2A:1).

\textsuperscript{51} http://sdrc.lib.uiowa.edu/iwa/findingaids/html/ZimmermanJoAnn.htm

\textsuperscript{52} “1983 Legislative Outlook” (Jan. 7, 1983), Bates No. TI03870841/2. Legislation in no state was deemed “Likely to be Introduced/Likely to Pass.”

\textsuperscript{53} Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).


\textsuperscript{55} Email from Jo Ann Zimmerman to Marc Linder (Mar. 29 and 30, 2007).
\end{footnotesize}
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House chamber, “saw the bill and asked to sign on.”

Where H.F. 248 went beyond the existing statute, it was in large part taken verbatim from the 1975 Minnesota law (although it curiously lacked the latter’s public policy preamble stating its purpose as protecting “the public health, comfort and environment”), but it also adopted several of that law’s most prominent defects. On the other hand, the bill failed to incorporate the more comprehensive coverage that the Minnesota Health Department had grafted onto the Minnesota Clean Indoor Air Act by means of administrative rules in 1976 and 1980. The bill expanded the universe of covered public places by incorporating workplaces, restaurants, retail stores, offices, other commercial establishments, and educational facilities. Like the Minnesota law, it ignored public health considerations by expressly excluding “a private, enclosed office occupied exclusively by smokers, even though the office may be visited by nonsmokers.”

While conferring, like the Minnesota statute, a unique exemption on bars, which alone could be left without any nosmoking area, the bill, like the MCIAA regulations, also limited this exemption by excluding from the definition of “bar” any establishment that provided seating and tables for serving meals to more than 50 people at one time. Also like MCIAA, the bill did not require building owners to do anything to shield nonsmokers from the smoke emanating from designated smoking areas other than to use “existing physical barriers and ventilation systems...to minimize the toxic effect of smoke in adjacent nonsmoking areas”; and as was the case in Minnesota, one-room public places were in compliance if they merely reserved and posted one side of it as a non-smoking area. H.F. 248, which went beyond the Minnesota law by prohibiting designated smoking areas on elevators, adopted that state’s exclusion of

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56Email from Jo Ann Zimmerman to Marc Linder (Mar. 29, 2007).
571975 Minn. Laws ch. 211, § 2, at 633.
58See above ch. 24.
59H.F. 248, § 1(2) (Feb. 21, 1983).
60H.F. 248, § 1(4) (Feb. 21, 1983).
61H.F. 248, § 2(1) (Feb. 21, 1983). Since the Iowa legislature did not empower or direct any agency to promulgate regulations to implement the clean indoor air law (and no enforcement or litigation is known ever to have taken place), the meaning of “one side of a room” was never clarified. Nevertheless, the Iowa legislature can be presumed to have known that the rules adopted by the Minnesota Health Department did not define the statutory term to mean one half of the room, but merely “a contiguous portion of the room, including any seating arrangements.” Minn Code of Agency Rules 7 § 1.442.H (1980). See above ch. 24.
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factories, warehouses, and similar workplaces not usually visited by the public as well as MCIAA’s mandate that the bureau of labor establish rules restricting or prohibiting smoking in workplaces in which “close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.”\(^6\) From Minnesota the bill also took the imposition on those in control of public places of the responsibility to “make reasonable efforts to prevent smoking” by “[a]sking smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoker [sic; presumably should be, as in MCIAA, “smoke.”]” As worded, this duty was interpretable as encompassing requests to smokers who were violating the law by smoking in nonsmoking areas, but whose drifting smoke caused nonsmokers discomfort. This result was even more compelling in connection with Zimmerman’s adoption of the Minnesota language requiring proprietors to “[a]rrange seating to provide smoke-free areas”\(^6\) —a much more capacious term than “no-smoking area,” which had to be interpreted to mandate protection for nonsmokers in nonsmoking areas from exposure to smoke drifting from designated smoking areas. And, finally, like the 1980 MCIAA rules,\(^6\) H.F. 248 required those in control of a covered building post signs on all major entrances stating that smoking was prohibited except in designated areas.\(^6\)

H.F. 248 was immediately referred to the State Government Committee,\(^6\) where it languished during the 1983 session. The following year it was assigned to a subcommittee consisting of three anti-smoking militants, Jean Lloyd-Jones, Johnie Hammond, and Darrell Hanson,\(^6\) returned three weeks later to the committee, and made a committee bill.\(^6\) At the committee meeting on February

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\(^6\)H.F. 248, § 2(1) (Feb. 21, 1983).
\(^6\)H.F. 248, § 3 (Feb. 21, 1983).
\(^6\)H.F. 248, § 4 (Feb. 21, 1983).
\(^6\)State of Iowa: 1984: Journal of the House: 1984: Regular Session Seventieth General Assembly 1:552 (Feb. 22). Zimmerman later recounted that she had “probably agreed to changes and converting it to a Committee Bill.” As a lobbyist for the PTA before being elected, Zimmerman had learned that “bills voted out of committee as a Committee Bill had a greater chance of passing and appeared to have more power than a bill with an individual’s name as primary sponsor.” Email from Jo Ann Zimmerman to Marc Linder (Mar. 28, 2007).
22, 1984, H.F. 248 was substituted for H.F. 2140,\textsuperscript{70} the bill that Republican Dorothy Carpenter, an assistant minority floor leader, had filed in January banning smoking in food service establishments with a minimum occupied seating capacity of 32, unless a contiguous area of not more than 50 percent of the serving area was designated for smoking\textsuperscript{71} and that had been sent to the same subcommittee consisting of Lloyd-Jones, Hammond, and Hanson.\textsuperscript{72} The spirit in which the anti-smokers approached the legislative process was captured by a newspaper cartoon included in the minutes depicting two smokers seated inside a jet engine of an airplane, one saying to the other: “You had to ask to sit in the smoking section...” A handwritten annotation below, which appears to have been made by Hammond and alluded to the contemporaneous battle over smoking in the House itself, added: “Imagine where they’ll seat you in the House.” With Lloyd-Jones managing the bill, the committee debated a subcommittee amendment.\textsuperscript{73} The “[l]ively discussion”\textsuperscript{74} began with an amendment to the amendment by Democrat Emil Pavich—who in 1991 would file a key amendment to the cigarette sales law desired by the cigarette companies to preempt local ordinances\textsuperscript{75}—to increase the threshold for bar coverage from 24 to 50 seats, which was adopted. Democrat Eugene Blanshan offered an amendment to

\textsuperscript{70}[House] State Government Committee Minutes (Feb. 22, 1984) (copy furnished by SHSI, Des Moines).

\textsuperscript{71}H.F. 2140 (Jan. 25, 1984, by Carpenter).


\textsuperscript{73}[House] State Government Committee Minutes (Feb. 22, 1984) (copy furnished by SHSI, DM). The handwriting is very much like Hammond’s signature on the minutes as vice chair.

\textsuperscript{74}Although the subcommittee amendment was not included in the file at the State Archives, an undated amendment to H.F. 248 filed by Lloyd-Jones is preserved, which struck out restaurants and retail stores and inserted verbatim the new section on food service establishments from H.F. 2140; it weakened Carpenter’s bill by raising the threshold level of coverage from 32 to 50 persons. The amendment also deleted H.F. 248’s coverage of one-room public places. House File 248 (n.d., by Lloyd-Jones); SHSI, DM.

\textsuperscript{75}[House] State Government Committee Minutes (Feb. 22, 1984) (copy furnished by SHSI, DM).

\textsuperscript{76}See below ch. 28. His motivations were unclear. According to Iowa legislator Minnette Doderer, Pavich “never does anything controversial...and I don’t know how you can argue with Emil, because he never takes a stand.” “A Political Dialogue: Iowa’s Women Legislators,” Box 1, Folder: Transcripts: Minnette Doderer, Part I at 79 (June 27, 1989), in IWA.
include “church, temple, synagogue, and meeting room” among the public places in which smoking was prohibited, but “Lloyd-Jones resisted Blanshan’s amendment as frivolous,” and he withdrew it. Democrat and smoker Bob Arnould offered an amendment, presumably designed to make enforcement more difficult, by adding a requirement that someone “knowingly” fail to perform a duty, which the committee adopted. In the end, however, the bill gained only 10 ayes, which did not amount to a majority of the committee’s 23 members, even though only six members voted nay.\footnote{[House] State Government Committee Minutes (Feb. 22, 1984) (copy furnished by SHSI, DM). The vote was not by roll call. The discussion of the amendments debated at this committee meeting is vitiated by the lack of the text of the committee amendment—which apparently differed significantly from the bill as filed—which was not appended to the minutes and is not in H.F. 248 as preserved at the State Archives. Email from Meaghan McCarthy, archivist, SHSI, DM (Apr. 4, 2007).}

In trying to reconstruct almost a quarter-century later why her bill had been killed in 1983-84, when her party enjoyed such an impressive majority, Zimmerman noted that in her first month in the House (January 1983) she had already “done” a health bill, for which she had lobbied before being elected, and, despite the leadership’s hesitation to have her “do the whole thing,” dominated the debate, thus suggesting to the powerful speaker of the house, Don Avenson, that she “would be pushing him.” Although she could no longer remember what Avenson had said about the anti-smoking bill, her conclusion was that in 1983-84 “the biggest obstacle was the Senate. If the Senate leaders said they did not want to deal with the smoking issue, then Avenson had to consider what he wanted to get through both the House and Senate, and what it would cost him in chits.” Moreover, even without being able to recall the “machinations” involved in getting H.F. 248 out of committee, Zimmerman observed that: “If Avenson, or another member in leadership said it was dead, leadership/Avenson sometimes told committee chairs not to spend a lot of time on debate in committee as the bill would probably not be scheduled for debate. There are tricks to making something happen outside the purview of leadership—but one always has to look at what chits you spend doing this—especially if you are asking for other things to happen. This bill would have generated a lot of debate.”\footnote{Email from Jo Ann Zimmerman to Marc Linder (Mar. 28, 2007).} The facts underlying Zimmerman’s observations on Avenson’s House leadership are reconcilable with a somewhat different evaluation by Rod Halvorson, one of Zimmerman’s anti-tobacco colleagues, who argued that Avenson—regardless of his having acquiesced in smoking bans in the House itself—had not been a “friend” of the anti-tobacco struggle; rather, dismissing militants such as Halvorson and Johnie

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77[House] State Government Committee Minutes (Feb. 22, 1984) (copy furnished by SHSI, DM). The vote was not by roll call. The discussion of the amendments debated at this committee meeting is vitiated by the lack of the text of the committee amendment—which apparently differed significantly from the bill as filed—which was not appended to the minutes and is not in H.F. 248 as preserved at the State Archives. Email from Meaghan McCarthy, archivist, SHSI, DM (Apr. 4, 2007).

78Email from Jo Ann Zimmerman to Marc Linder (Mar. 28, 2007).
Hammond as “purists,” he had often aligned himself with and aided the pro-tobacco policies of Senate Majority Leader Bill Hutchins.79

The Blow-Up Between Cigarette Manufacturers and Iowa Wholesalers

Anti-smoking activists...are campaigning for laws to segregate smokers or to prohibit smoking in various public places. Their campaign is well orchestrated and publicized. The views of smokers, and of the business people who serve them, have not been nearly as well heard. Often, their opposition arises at the eleventh hour when a law is well on its way to enactment.80

The travails of H.F. 248 coincided with a blow-up between the Tobacco Institute and its Iowa lobbyist, which was not public knowledge and of which Zimmerman was not aware at the time.81 Unlike Representative John Patchett, who during his tenure in the Iowa House from 1973 to 1980 did not perceive tobacco lobbying as prominent, Zimmerman recognized it as soon as she began in 1983 as a major presence, albeit somewhat less so than that mounted by the pharmaceutical and alcohol industries.82 But even Patchett, for whom in retrospect it “makes sense...that the tobacco industry started investing a lot more in Iowa and elsewhere from the early 80s on, given the bigger picture,” knew the tobacco lobbyist George Wilson in the 1970s as “one of the three or four ‘heavy hitters’ I would have thought of—serving multiple, business-oriented, moneyed clients.”83

George A. Wilson, Jr., a Des Moines lawyer and son of the same-named former Iowa governor and U.S. senator, had been a tobacco lobbyist since 1954.84

79 Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007). In assessing Halvorson’s account of Avenson’s leadership it is worth noting that after he left the legislature Avenson as a lobbyist has represented Casey’s General Stores, a convenience store chain that may be the single largest seller of cigarettes in Iowa. http://coolice.legis.state.ia.us.
81 Email from Jo Ann Zimmerman to Marc Linder (Mar. 28, 2007). Lawrence Pope, the Republican House Majority Leader during the 69th General Assembly (1981-1982) and later a tobacco lobbyist in his own right, stated that he had been aware of it. Telephone interview with Lawrence Pope, Des Moines (May 11, 2007).
82 Telephone interview with Jo Ann Zimmerman, Des Moines (Mar. 28, 2007).
83 Email from John Patchett to Marc Linder (Mar. 29, 2007).
For some years he was both executive director of the Iowa Association of Tobacco Distributors and legal counsel/lobbyist for the Tobacco Institute, that is, the cigarette manufacturing companies.\textsuperscript{85} The cooperative relationship between these two organizations began to be stressed in 1982. Crucial to understanding the underpinnings of this fracture was the divergence in legislative priorities: whereas for the Iowa tobacco wholesalers retention of the Unfair Cigarette Sales Act, which set minimum wholesale and retail prices and guaranteed minimum profits,\textsuperscript{86} was the main thrust and a constant of Wilson’s lobbying on their behalf throughout his career,\textsuperscript{87} the cigarette companies’ entirely negative agenda entailed vehement opposition to the “The Big Four Issues”—legislation on taxation, smoking restrictions, sampling/advertising, and self-extinguishing cigarettes.\textsuperscript{88}

\textsuperscript{85}On the extant Iowa Senate Individual Lobbyist Registration forms from 1976-1978 and 1981 in the Iowa State Archives Wilson listed himself as representing the IATD in each year and the Tobacco Tax Council in the last three (in addition to a variety of non-tobacco clients). Copies furnished by SHSI, DM. No House forms have survived for the years 1976 to 1986. Email from Meaghan McCarthy, SHSI, DM (Apr. 12, 2007). In an interview Wilson claimed that he could not remember whether he had ever represented the Tobacco Institute, adding that he thought that Charles Wasker had. He cagily observed that in any event his tobacco lobbying income all came from the IATD (thus concealing the fact that the Tobacco Institute had funneled his lobbying fees through the IATD). Telephone interview with George A. Wilson, Jr., Des Moines (Apr. 11, 2007); see below. As early as 1978 a Tobacco Institute register of state lobbyists included a handwritten notation that Wilson lobbied for the Tobacco Tax Council, Tobacco Institute, and IATD. State: Lobbyist (Sept. 7, 1978), Bates No. 03678309/10. See also State Activities: TI & TTC Lobbyists (n.d.), Bates No. TCAL0413957; States Where TI & TTC Retain Same Lobbyist: 1978, Bates No. 03678307. A TI document from 1981 also listed Wilson as its and the TTC’s legislative counsel. State Summary (Mar. 1981), Bates No. 03667261/78.

\textsuperscript{86}“Senate Votes 5-Cent Cigarette Tax Boost,” \textit{DMR}, May 22, 1981 (1A:6, at 3A:1). Opponents such as Senate Democrat George Kinley (a smoker) asked: “‘Why are we guaranteeing profit to the wholesalers and retailers of cigarettes? What the hell kind of system is this when the Legislature gives an industry a guaranteed profit in the millions?’” In response, “[s]upporters claimed price competition on cigarettes would threaten the economic existence of mom-and-pop grocery stores by allowing larger retailers to sell cigarettes at below cost.” Tom Witosky, “Iowa Senate Votes to Raise Minimum Price of Cigarettes,” \textit{DMR}, May 7, 1983 (2A:2). See also “Cigarette Tax Boost Voted; Session Ends,” \textit{DMR}, May 23, 1981 (1A:5, at 3A:1).

\textsuperscript{87}Telephone interview with George A. Wilson, Des Moines (Apr. 11, 2007).

\textsuperscript{88}Tobacco Institute, Field Staff Meeting (1985), Bates No. 6805011768/86. For a list of 15 states and several cities with sampling restrictions at the end of the 1980s, see Existing Sampling Bans/Restrictions (Apr. 3, 1989), Bates No. 670845079Y. Without
In September of 1982 Wilson wrote to John Kelly, a Tobacco Institute senior vice president in charge of state activities, regretting the need to ask him to give up a weekend “to help us resolve a possible conflict,” but emphasizing that it was “far better to resolve differences, if any, prior to the time when the legislature meets.”989 Exactly what conclusions Kelly and Wilson reached is unclear, but in early November, Kelly directed a background memorandum to the Tobacco Institute’s State Activities Policy Committee (copied to many others including Wilson) explaining that in 1981 the Iowa legislature had passed a five-cent cigarette tax increase, which was to sunset automatically in 1983.99 However, in 1982 the legislature considered making the increase permanent subject to amendments reinstating the state cigarette fair trade law (which IATD vigorously supported), and banning all cigarette sampling (which the cigarette manufacturers vehemently opposed). Because of the controversy sparked by the former amendment, Kelly reported, the whole package failed. The experience nevertheless persuaded “[l]egislative counsel” (i.e., Wilson) and Kelly that the five-cent tax increase proposal would reappear on the legislative agenda in 1983 because the deepest economic depression of the post-World War II period (“downturn in the general economy”) had left the state of Iowa strapped for revenue. Consequently, Kelly proposed a Tobacco Action Network mobilization in Iowa to be scheduled for the time between the election a few days later and the convening of the state legislature in January.91 By telling them that making the increased tax permanent “would cause hardship on [sic] those” who sold

mentioning the more than 1,500 deaths annually caused by fires ignited by cigarettes, a Tobacco Institute senior vice president in charge of state activities, regretting the need to ask him to give up a weekend “to help us resolve a possible conflict,” but emphasizing that it was “far better to resolve differences, if any, prior to the time when the legislature meets.”989 Exactly what conclusions Kelly and Wilson reached is unclear, but in early November, Kelly directed a background memorandum to the Tobacco Institute’s State Activities Policy Committee (copied to many others including Wilson) explaining that in 1981 the Iowa legislature had passed a five-cent cigarette tax increase, which was to sunset automatically in 1983.99 However, in 1982 the legislature considered making the increase permanent subject to amendments reinstating the state cigarette fair trade law (which IATD vigorously supported), and banning all cigarette sampling (which the cigarette manufacturers vehemently opposed). Because of the controversy sparked by the former amendment, Kelly reported, the whole package failed. The experience nevertheless persuaded “[l]egislative counsel” (i.e., Wilson) and Kelly that the five-cent tax increase proposal would reappear on the legislative agenda in 1983 because the deepest economic depression of the post-World War II period (“downturn in the general economy”) had left the state of Iowa strapped for revenue. Consequently, Kelly proposed a Tobacco Action Network mobilization in Iowa to be scheduled for the time between the election a few days later and the convening of the state legislature in January.91 By telling them that making the increased tax permanent “would cause hardship on [sic] those” who sold

989Letter from George A. Wilson to John D. Kelly (Sept. 14, 1982), Bates No. 85704171.

9901981 Iowa Laws ch. 43, § 1, at 175 (tax to begin on July 1, 1981 and expire on June 30, 1983).

91TAN Action Request from Jack Kelly to State Activities Policy Committee (Nov. 5, 1982), Bates No. 680580246/7. On TAN, see below this ch.
cigarettes for a living and those who consumed them. Kelly planned to motivate
the industry’s “volunteers” to repeat this message to their state legislators.

Although there may be a gap in the correspondence between TI and IATD
following the November 6 letter in the online collection of the tobacco industry’s
internal documents, on December 17, 1982, TI President Samuel Chilcote wrote
to IATD President James Gordon (with copies to Wilson and Kelly) to confirm
in writing the relationship between the two organizations for 1983:

IATD will continue to assist in the tobacco industry’s government relations and public
affairs support programs. Specifically, we ask that you and your members support the
efforts of our legislative counsel, Charles Wasker, on matters of mutual concern to The
Institute and IATD. In improving our total industry support program in Iowa, we ask also
that IATD, for our mutual benefit, continue assisting Roger Sandman, our Area Director,
as he expands the reach and impact of the Tobacco Action Network.

In consideration for IATD [sic] continued support of such mutual objectives, IATD
will receive a contribution of $10,000.... In addition to your contribution, your Executive
Director [Wilson] will be reimbursed on an actual cost basis for travel expenses related to
trips outside your State that we may request him to make.

For Wilson as a legislative consultant the TI budget had provided $5,000 for 1980
and $10,000 for 1981. The Tobacco Institute’s nationwide list of state lobbyist
and association agreements for 1982 specified that the fee for Wilson, retained
through IATD and representing both it and the Institute, was $27,000, whereas
that for Wasker, retained directly as a lobbyist, was only $3,500. Thereafter,
however, TI’s annual payments to Wasker rose sharply to $20,000 in 1983,
$23,000 in 1984, $28,000 in 1985 and 1986, $31,000 in 1987, and $33,000 in

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92 Sample TAN Volunteer Letter, Bates No. 680580248.
93 Sample Letter, Bates No. 680580249.
94 Letter from Samuel D. Chilcote, Jr. to James Gordon (Dec. 17, 1982), Bates No. 03675845. On the only extant Iowa Senate Individual Lobbyist Registration forms for Wasker between 1976 and 1986—those for 1984-1986—he listed himself as representing the Tobacco Institute. Copies furnished by SHSI, DM. A former TI Midwest regional vice president observed that it was important to keep in mind that Chilcote and Wasker were “best friends,” who had known each other from careers in or representing the distilled spirits industry. Telephone interview with Michael Brozek, Madison, WI (June 5, 2007).
95 Schedule B The Tobacco Institute 1981 Budget Legislative Consultants Field Administration-Northern Zone (July 23, 1981), Bates No. TIMS0025149.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

Ten days later Wilson responded to Chilcote, referring to a meeting that TI Vice President Robert Hanrahan had held with Wilson and several IATD officers on December 14 concerning the organizations’ relationship. Claiming that either Chilcote’s letter must have been written before Hanrahan’s report or Hanrahan had failed to communicate to Chilcote the result of the meeting, Wilson noted that what Hanrahan had told them about the relationship generally agreed with the first of the paragraphs quoted above: “However, our committee suggested that the contribution of $10,000 was not acceptable and that if a revision were not made, we would discontinue our relationship with the Tobacco Institute and its programs in the State of Iowa.” In addition to the overriding issue of money, a conflict had emerged between the two organizations concerning legislation. On June 30, 1983, the state’s temporary cigarette tax increase from 13 to 18 cents was going to sunset, but Wilson knew that the legislature, because of the condition of the state treasury, would not allow this automatic repeal to go ahead. In his view, the legislature’s need to consider the cigarette tax created additional problems that would also have to be addressed, including: making the tax permanent or increasing it by some amount; prohibiting sampling of cigarettes; increasing tax on other tobacco products; “[a]s always present, the question of public smoking”; and the Unfair Cigarette Sales Act. Wilson emphasized that UCSA, which, by mandating minimum prices, tended to raise wholesalers’ and retailers’ profits while depressing sales, had, as Chilcote “would expect,” to be “the number one priority of our Association. ... The other items are certainly of concern to us, as they would be to the entire tobacco industry.” In this spirit Wilson then warned Chilcote that: “If our relationship does not continue, you should understand that our primary responsibility will be to correct the problem of the Unfair Cigarette Sales Act, and the Tobacco Institute will assume the responsibility for the other items.”

97[Tobacco Institute], State Activities Division, 1986 Proposed Budget (Sept. 18, 1985), Bates No. 680544610/90; [Tobacco Institute], State Activities Division, 1987 Proposed Budget (Sept. 26, 1986), Bates No. 684019007/16; [Tobacco Institute] [untitled] (Dec. 29, 1987), Bates No. TIMS0022453/4.

Chilcote’s reply, a draft of which was dated January 4, 1983 and approved on January 12 (“O.K. by me”) by James R. Cherry, the Lorillard vice president and general counsel, was sent on January 17, and focused on the possible differences in legislative desiderata between the manufacturers and wholesalers/retailers without offering to renegotiate the $10,000 fee that manifestly preoccupied Wilson. Despite claiming that he did not understand IATD’s “‘position,’” Chilcote nevertheless understood IATD’s commitment to maintaining the UCSA and even declared that both sides had “always recognized that, at times, the interest of different parts of the industry will diverge” and “this is one of those times.” In turn, he expected Wilson to understand that the manufacturers’ “first priority has always been and will continue to be the defense of the entire industry against increased tobacco taxes, anti-smoking legislation and attempts to limit the marketing of our products.”

Little wonder that years later Wilson remarked that the wholesalers had had their doubts as to whether the cigarette manufacturers had supported UCSA. Chilcote’s admonition should be read in the context of an internal Tobacco Institute document from the end of 1981 in preparation for a joint lobbyists’ meeting before which “all negotiations and arrangements” with individual state lobbyists had to be completed. Although Iowa was ranked in the lowest priority group, its entry did make it a requirement to “review sampling matters with Wilson....” And well the Tobacco Institute might have foreseen a looming conflict since sellers, as Wilson asserted much later, opposed sampling on the grounds that it reduced sales. The Tobacco
opposition to sampling was based on their acceptance (at face value) of the manufacturers’

public claim that sampling’s (like advertising’s) purpose was not to expand the market, but merely to gain market share at competitors’ expense; consequently, all such giveaways would have reduced wholesalers’ sales without any prospect of future increases.

Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007). Unenlightening was Calvin Hultman, who had been a pro-tobacco state senator until 1990 and Philip Morris Iowa lobbyist thereafter; when pressed on the same question, he evasively and/or unhelpfully replied: “It’s just a difference in philosophy.” Telephone interview with Calvin Hultman, West Des Moines (May 19, 2007). Wilson’s successor as lobbyist on behalf of the Iowa tobacco wholesalers organization in 2007 was also unable to explain, but asked one of the larger members, which offered three reasons, which he himself characterized as “self-serving” and not a complete answer: first, regardless of eventual impact on the market, it had not wanted to be giving away product that could have been sold; second, it had not wanted to bear the responsibility for any compliance with the relevant state revenue department regulations; and third, it had not wanted to be publicly associated with the tobacco manufacturers’ efforts to purvey cigarettes, which might have involved underage smokers (a reason characterized by their lobbyist as “the high road”). Telephone interview with Craig Schoenfeld, Des Moines (June 6, 2007).

104The legislature imposed the cap of four in 1974, lowering it from five, which had been set when the law was first enacted. 1939 Iowa Laws ch. 73, § 35, at 102, 118; 1974 Iowa Laws ch. 1116, § 2, at 368, 369.

105Kurt Malmgren, Briefing for Mr. James H. Johnston Chairman R. J. Reynolds Tobacco Company at 63 (Sept. 27, 1989), Bates No. TIMN350847/909.
guarantee that the sampling issue would be deleted, the bill had to be ‘killed.’ In our business as legislative counsel, as you well know, no such guarantee could be given legitimately; and if it were, it would not have been worth the paper it was written on.” The bill passed by a vote of 26-24, but after a motion to reconsider had been adopted, sampling was never mentioned during the renewed discussion, and the bill died because the vote of 25 to 24 lacked a constitutional majority.\textsuperscript{106}

\textsuperscript{106}Letter from George A. Wilson to Samuel D. Chilcote, Jr. at 1 (Jan 24, 1983), Bates No. 85704162. According to the Senate \textit{Journal}, the bill, S.F. 2299, failed to pass. An amendment by Democrat Arthur Small to do away with sampling passed on a voice vote, but an amendment to repeal UCSA lost 22 to 27; the bill then lost for lack of a constitutional majority 25 to 24. \textit{State of Iowa: 1982: Journal of the Senate: 1982: Regular Session Sixty-Ninth General Assembly} 1200-1201 (Apr. 14), 1314-15 (Apr. 20), 1991-92 (S-5601, by Small), 2066 (S-5706, by Holden et al.). See also Diane Graham, “Cigarette Price-Fixing Law Survives Veto,” \textit{DMR}, Apr. 15, 1982 (7A:1); Diane Graham, “Senate Shifts on Cigarette Price Bill,” \textit{DMR}, Apr. 21, 1982 (2C:3-4). Unfortunately, a quarter-century later Small had no recollection of the events. Telephone interview with Arthur Small, Iowa City (Apr. 8, 2007). Lawrence Pope, who was the Republican House Majority Leader from 1979 to 1982, later characterized Wilson as a “very powerful” lobbyist, who had beaten him on this issue, but when asked to explain the basis of Wilson’s power, he was unable to do so. Telephone interview with Lawrence Pope, Des Moines (May 11, 2007). In considering a bill to make the temporary cigarette tax increase permanent, the Senate Ways and Means Committee had voted to repeal UCSA as proposed by Republican Edgar Holden, but Wilson, who claimed that it was not a price-fixing statute, but merely a prohibition on selling below cost, said his clients would fight it because it would harm small retailers, who could not compete against large-volume retailers. In contrast, Democrat Bob Rush argued that the law was on the books only to benefit 20 tobacco distributors. At the same time, the committee voted to remove all restrictions on free cigarette samples. Against the argument of Republican Jack Hester (who had opposed repeal of UCSA) that all free samples should be banned, supporters asserted that it was “no different than when a store hands out cheese or other food samples to customers.” Diane Graham, “Smokes Bill Puts Industry in a Huff,” \textit{DMR}, Mar. 31, 1982 (6A:1). TAN undertook an effort to mobilize support against the restriction of handing out samples, offering such pseudo-reasons as that the technique was not designed to encourage non-smokers to smoke and that it provided many jobs for people handing out samples at a time of high unemployment. Letter from Roger Sandman to TAN Volunteer (Apr. 1982), Bates No. 680580272. The much ballyhooed cigarette lobbying juggernaut was far from universally successful on the question of sampling; in fact, its incompetence was at times comic, as described by a TI official: “[M]any times in the past, a sampling bill has been debated in the state capitol, while samplers—at the very same time—have been working the street in front of the capitol. This is absolutely one area where closer coordination between marketing and government relations in essential.” Kurt Malmgren, \textit{Briefing for Mr. James H. Johnston Chairman R. J. Reynolds Tobacco Company at 59 2587
Having subtly revealed his prowess as a tobacco lobbyist, Wilson then launched into a considerably less subtle lament about the opprobrium associated with that occupation in Iowa, combined with a doubtless unusual disparagement of his client’s product—especially since Wilson himself smoked—calculated, presumably, to justify a wage increase based on the job’s unpleasantness:

Tobacco representation for anyone is not an easy burden to carry. This product does not enjoy a favorable attitude with the majority of our population; and even the people who use it, generally say they would be better off if they didn’t. It is hard to find legislators, possibly outside of the tobacco South, who really want to lead a fight to defend tobacco against taxation, smoking restrictions, and so forth. Cigarettes are not manufactured in this state; tobacco is not grown in this state; tobacco distributors have businesses in this state.

Not because of the popularity of tobacco products, but because distributors provide jobs, pay taxes and have votes, are they able to provide some impact on the legislative process in Iowa.

The Tobacco Institute determined what our services were worth to your organization last year; and in light of what we see happening during this session, we are not prepared to accept anything less.

Wilson had changed his tune considerably since August 1981, when, toeing the party line, he had assured TI’s TAN house organ that: “Smoking has to be a courtesy matter. Basically it is something that comes down to a social grace.” By 1983, however, since legislators had already begun contacting Wilson about coming tobacco legislation, he wanted the Tobacco Institute to decide quickly whether it wanted the relationship to continue so he could give them “an appropriate response.”

Wilson got neither a quick response nor the additional money he wanted. On February 17, Chilcote wrote back that TI’s position remained unchanged and enclosed the check for $10,000. This exchange appears to have ended four
days later when Wilson advised Chilcote that IATD’s position also remained unchanged and returned the check. As late as November of that year, however, in transmitting the revised proposed budget for 1984 to the State Activities Policy Committee, Chilcote was still listing $10,000 for 1983 and $5,000 for 1984 for Iowa as a “Contingency” under the item “Contributions to Wholesale Associations.

The break-up with Wilson and IATD was sufficiently important that shortly thereafter, Kelly, TI vice president for state activities, sent a memorandum to the members of the State Activities Policy Committee—consisting of Shephard Pollock, the president and CEO of Philip Morris, Kinsley van Dey, Jr., the president and CEO of Liggett, W. Eugene Ainsworth, Jr., vice president of R.J. Reynolds, Ernest Pepples, the senior vice president and general counsel of Brown & Williamson, and James Cherry, vice president and deputy general counsel of Lorillard—attaching the correspondence with the Institute’s former lobbyist in order to keep them “fully apprised” in case their companies received questions from Iowa wholesalers. Four days later Cherry, in turn, wrote a partly sarcastic memo (“Re: Iowa Lobbyist”), attaching the same correspondence to higher-ups at Lorillard, which merits quotation in full:

You may remember that during last year’s session of the Iowa legislature we discovered our lobbyist, George Wilson, who is also executive director of the state wholesaler association, was trading a cigarette sampling ban for an unfair cigarette sales act. On the eve of a decisive vote, he advised us with brazen candor that his loyalties were not with us. We immediately dispatched Kelly and Flaherty to Iowa and commissioned them to take such measures (any measures, save those involving violations of the local weapons law) as might be necessary: (a) to the demise of the sampling bill; (b) to a guarantee that Wilson would not again have a like opportunity to traffic in our interests.

These assignments were accomplished by Jack and Bill, and with a sense of political delicacy (vis-a-vis Wilson and his association) that does them credit. A new lobbyist was hired to represent us, and the funding arrangement with the local association was

$10,000 (Feb. 24, 1983), Bates No. 85704161.

113 Letter from George A. Wilson to Samuel D. Chilcote, Jr. (Feb. 28, 1983), Bates No. 85704159.

114 Samuel D. Chilcote, Jr. to W. E. Ainsworth et al., Re: State Activities Division - 1984 Budget (Nov. 10, 1983), Bates No. 03676534/88. An earlier budget proposal from August did not qualify these sums as a contingency. [No title] (Aug. 1983), Bates No. 2024731043/74. According to these documents Wasker’s lobbyist fee was $20,000 for 1983 and $25,000 (or $23,000) for 1984.

115 Memorandum from John D. Kelly to State Activities Policy Committee (Mar. 11, 1983), Bates No. 85704158.

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commensurately adjusted (from $26,000 to $10,000). From that time to this, Sam Chilcote has been struggling manfully to maintain the good will of Wilson and his colleagues, but Wilson has not been making it easy and the attached correspondence reflects that.\(^{116}\)

Recipients of the correspondence at Lorillard understood the tricky situation that Wilson had created for the tobacco companies. One jotted down in a comment to Cherry: “Could someone from the mfr group with a special relationship with the Iowa Assn try to act as intermediary—or should we just let the Assn ‘swing in the wind.’ Can they hurt us legislatively? I’ll bet they can.”\(^{117}\)

Despite the appearance that TI regretted having lost Wilson (or at least the alliance with the wholesalers), replacing Wilson with Wasker was part of a nationwide plan “to retain lobbyists on direct basis instead of through wholesaler associations,” which it had accomplished in almost all states.\(^{118}\) Despite Wilson’s implausible after-the-fact claim that IATD had monitored but never taken a position or lobbied on anti-smoking laws in order not to dissipate its lobbying strength on other, more important, issues,\(^{119}\) IATD presumably had no rational self-interest in terminating its opposition to anti-public smoking laws, which

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\(^{116}\) Memorandum from J. R. Cherry to C. H. Judge, J. R. Ave, and A. J. Stevens (Mar. 15, 1983), Bates No. 03675833. Curtis Judge was TI executive committee chair at the time and the next year became Lorillard’s chairman and CEO; Robert Ave was executive vice president for marketing and future president and CEO; and Arthur Stevens was general counsel. William Flaherty was the president of the Tobacco Tax Counsel. The State Activities Division credited the change of legislative counsel with the defeat of the sampling bill. Report of Tobacco Institute Activities 1982-1983 Confidential, at 18 (Dec. 31, 1982), Bates No. 2015018182/202.

\(^{117}\) Memorandum from J. R. Cherry to C. H. Judge, J. R. Ave, and A. J. Stevens (Mar. 15, 1983), Bates No. 03675833 (handwritten notation dated 3/19). The initials, which are difficult to decipher (EJS?), do not seem to correspond to those of the three named recipients, but might be Stevens’. Another officer, whose response bore an illegible name or initial, also weighed in with a “Fine with me” on the grounds that “Wilson’s now threatening to do what he was already doing.” Memorandum from J. R. Cherry to C. H. Judge, J. R. Ave, and A. J. Stevens (Mar. 15, 1983), Bates No. 85704157 (handwritten notation dated 3/18).

\(^{118}\) Report of Tobacco Institute Activities 1982-1983 Confidential at 18 (Dec. 31, 1982), 2015018182/202. Illinois and North Dakota were the only states in which the shift had not yet been effected.

\(^{119}\) Telephone interview with George A. Wilson, Des Moines (Apr. 11, 2007). When asked whether anti-smoking laws would not reduce smoking and sales, his empirically untenable response was that they did not seem to have had that impact wherever they had been enacted.
appears to have united all sectors of the tobacco industry. Thus, despite the rupture between manufacturers and distributors, and the lack of unified lobbying, Zimmerman’s bill nevertheless died before even reaching the House floor.

The Tobacco Action Network

“It’s hard to get worked up about an infringement of your rights when you realize it’s for your own good.”

The formation of the Tobacco Action Network dated back to 1977 as a reaction to the Tobacco Institute’s perception of a qualitatively new threat to the industry posed by a new initiative by the American Cancer Society. In 1976 the ACS embarked on a program to reduce smoking (Target 5), to promote the enactment of state and local legislation to restrict public smoking and regulate cigarette sales and advertising, and to develop a congressional “anti-smoking caucus” to support similar federal legislation. By February 1977, TI President Horace Kornegay, a former North Carolina congressman, had begun warning friendly audiences that: “The end of the tobacco industry as we know it is not..."
unthinkable.” A week later at TI’s annual meeting Kornegay emphasized that whereas previously the Cancer Society had used propaganda and social pressure to induce people to quit smoking, now, in a “new turn of the screw,” it “for the first time...plans to openly lobby to bring about the vast power of government to bear on a matter of personal behavior.” In a bizarre rhetorical self-projection, Kornegay, accusing ACS of adopting the Nazi counter-offensive tactic near the end of World War II, declared that it was seeking to “turn the tide of a losing war against smoking by breaking through our weakened defenses on the Hill with a series of propaganda hearings and media events, in order to bring grassroots pressure on Congress and create ‘a mandate’ for disabling legislation.” In response, Kornegay proposed a three-point “reactive strategy”: (1) resisting and containing the “punitive legislation, especially in Congress”; (2) identifying legislators and interest groups that might oppose ACS’s strategy and involving them in ad hoc coalitions; and (3) in “face-to-face negotiation at the highest level” deterring “corporate leadership” that might be “the motivating force behind the Cancer Society attack on tobacco.” More tentatively he ventured as a fourth step an “initiative strategy...to dramatize our industry’s unmatched record of self-regulation and responsibility.” Listing such past pseudo-actions as ending “cigarette promotion to students” and “technical assistance to the FTC on ‘tar’ and nicotine testing,” Kornegay asked his audience whether 1977 was “the year for a voluntary agreement on a policy of maximum levels of tar and nicotine.” If so, he perorated, the industry would put the final touches on the “drop in the tar and nicotine content of American cigarettes” as “the story of how responsible business operations under the free market mechanism can meet public demand—and the demand of many of its critics—for a product they want.” Oratory like this prompted even Barry Goldwater years later to cry: “Hogwash. I’ve watched the tobacco industry make promise after promise to avoid government oversight for the past 40 years. With every promise, they give an

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124 Remarks of Horace R. Kornegay, President[,] The Tobacco Institute Annual Meeting Tampa, Florida at 6 (Feb. 24, 1977), Bates No. TO48625/30.

125 Remarks of Horace R. Kornegay, President[,] The Tobacco Institute Annual Meeting Tampa, Florida at 3 (Feb. 24, 1977), Bates No. TO48625/27.

126 Remarks of Horace R. Kornegay, President[,] The Tobacco Institute Annual Meeting Tampa, Florida at 5 (Feb. 24, 1977), Bates No. TO48625/29.

127 Remarks of Horace R. Kornegay, President[,] The Tobacco Institute Annual Meeting Tampa, Florida at 7-8 (Feb. 24, 1977), Bates No. TO48625/31-32.
inch, grudgingly, and buy enough time to hook another generation.”

Four months after the Tobacco Institute’s annual meeting, Kornegay presented to the executive committee the “plan to deal with...an unprecedented condition of jeopardy” brought on by “the million dollar Cancer Society attack,” which “[w]e all agreed...would produce more legislative assaults on tobacco and tobacco smokers than we had faced before.” The “fundamental change...in the type of industry representation the Institute provides” involved “a move from the present reactive mode of operation to a calculated pro-active posture.” The change in Kornegay’s posturing relevant in the present context was his proposal to create

a Tobacco Action Network, or if you will, a grass roots army of supporters in the precincts. Our opponents have taken the battle to the states and localities. This shift poses a double barrel threat to use. On the one hand it increases the likelihood of state and local antismoking legislation. And on the other it erodes our strength on Capitol Hill and encourages parallel Federal anti-smoking legislation.

Despite its “pro-active” nature, TAN was, according to Kornegay, still merely one of several “defensive measures, imposed on us by a hostile environment,” which could not on their own “supply us with a positive posture, with winning issues....” Nevertheless, it was an indispensable component of the “longterm blueprint for Victory,” which Kornegay assured the executive committee was “in the planning stage....” In the meantime, until that Endsieg emerged, TAN would be crucial, as early as January 1978, in—as a pre-Power Point accompanying slide put it—identifying new anti-tobacco legislation and developing a “response capability to anti-smoking activities” by increasing “the effectiveness of state and local activities including the reach of Institute regional staff and independent lobbyists.” By alleviating the problem that the Tobacco Institute was now spread ‘too thin,’” TAN would help “[i]dentify, locate, assess the attacks” embodied in “[a]nti-smoker group political pressure” and “‘passive
smoking’ legislation,” which ominously might diminish the prevalence of smoking and “reduce tobacco industry revenues considerably.”

By 1979, the Tobacco Institute had developed a full-blown libertarian position in defense of a beleaguered minority subjected to discrimination, stigmatization, and criminalization. The chief points of what would soon thereafter be elevated to the status of “[t]he TAN philosophy” were:

- that every adult citizen should have the basic right of freedom of choice, whether he or she smokes or not...
- that the proper role of government is to inform, to present the facts as they are revealed, and to recognize half-truths and untruths for what they are, so individual citizens can make up their own minds about how they want to live their lives...
- that government at all levels has already encroached too far in many areas that are best left to individual discretion and personal judgment...and where smoking is concerned, to individual courtesy and consideration...
- that the issue of smoking is best resolved in a free and natural way, by people among themselves—without resorting to unenforceable legislation that is certain to create ill feelings as it attempts to segregate those who use tobacco.

Once it was operating, TAN also revealed another goal: “In the long range, to help generate a sense of common cause among everyone with pro-tobacco interests, with the ultimate goal of creating a more positive image of tobacco and the tobacco family.” The chairman of the board of Brown & Williamson Tobacco described TAN as “an organization on a state-by-state basis of the friends of tobacco who can be mobilized to generate constituent communications to state legislators and Congressmen.” TAN presented itself to its target audience of “volunteers” as consisting of “concerned citizens like you who believe that personal freedom should be preserved...that there doesn’t have to be

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a law for everything.....” Declaring its objective as opposing “the enactment of restrictive anti-tobacco laws and the imposition of punitive taxation,” TAN insisted that every time it defeated such measures, reining in government growth was synonymous with “retaining that single greatest concept of American liberty—freedom of choice.”\textsuperscript{137} The Tobacco Institute warned potential volunteers that the impact of the numerous and “unrelenting” critics’ steadily increasing demands for governmental “prohibition, regulation and coercion” would, if successful, have an enormous impact on “your business and your own personal conduct....” If the anti-tobacco groups’ recent legislative successes were left unchecked, “the blind denial of public and private individual rights” and the “destruction” of the tobacco industry would be the result. The contribution that TI expected from a “volunteer” was, in the first instance, informing his state TAN office of any tobacco or smoking question taken up by his local government. In addition to contacting legislators, either on his own initiative or when asked by TAN headquarters, when an anti-tobacco measure was pending, a volunteer could seek support from other groups such as the Chamber of Commerce (whose “members shouldn’t have to enforce anti-smoking laws on their premises”), convention bureau (which “doesn’t want visitors to your community to find they can’t smoke in public places”), and the police (who “shouldn’t waste time enforcing no-smoking laws”).\textsuperscript{138}

To inform employees of tobacco industry businesses (“member[s] of the tobacco family”) of the existence of TAN, TI drafted a letter over Kornegay’s signature reminding them of the “severe attack” to which the industry and its consumers were being subjected and stressing the need to take action to “preserve the industry, protect jobs and defend our individual freedoms as citizens....” After encouraging recipients to volunteer to take part in the new program to “counteract the organized, anti-tobacco movement,” Kornegay revealed the two-way nature of TAN’s communication and action system by pointing out that they would be “alerted to unfair or unreasonable legislative proposals,”\textsuperscript{139} to which they presumably would be expected to respond by transmitting protest letters prepared by TI.

In light of the enormous and comprehensive lobbying resources that the tobacco industry had been bringing to bear on all legislatures in the United States for years, the insinuation that it had been turned into an underdog by scattered anti-smoking groups was risible. At the same time, however, it is unclear whether

\textsuperscript{137}“Your...Tobacco Action Network” (n.d.), Bates No. TIFL0039746/9.


the message to the TAN foot soldiers that the struggle over smoking could be conducted without encountering passion among legislators was—especially since so many of the latter either smoked or were involuntarily exposed to tobacco smoke at their workplace, the statehouse—a product of deceit, self-deception, or ignorance. The Illinois/Iowa TAN director articulated this position in 1980: “The public smoking issue is not considered among the high priorities of the state government. Most of our legislators probably don’t have strong feelings one way or another about where and when people may or may not smoke. Such an issue, when considered in the chambers of government, can be defeated when people like you and me express our opposition to these proposals.”

Although the Tobacco Institute accorded Iowa a relatively high priority with respect to fending off enactment of state smoking restriction laws, the state was rather late in organizing staffing and beginning operations. With George Wilson as its legislative counsel, when Iowa TAN started up in January 1980, eighteen state programs were already operating, some (such as New Jersey and Pennsylvania) having begun as early as August 1978. In February 1980, of 16,554 enrollees nationwide, Iowa reported only 56. But between March 1981 and May 1981, “as the result of a vigorous campaign” by IATD, which “recruited new volunteers from businesses—grocery stores, restaurants, cocktail lounges, shops—where tobacco products are sold and in which anti-smokers want to restrict tobacco usage,” and in particular owing to Wilson’s efforts to get the project underway, Iowa enrollment exploded 14-fold, from 169 to 2,425 (which became its peak figure), while national enrollment rose only 22 percent, from

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141An internal TAN document from July 1977 listed the 50 states in five groups of 10 each; 20 states, including Iowa, were asterisked, indicating that no smoking restriction law had been enacted in them. Iowa was ranked third in the second highest group; California was the highest ranked state in the highest ranked group, while Texas (whose legislature was not going to be in session in 1978) was the lowest of the lowest. “States in Order of Priority Tobacco Action Network” (July 15, 1977), Bates No. TIMS0036275 (the Bates number stamped on the document, TIMS00036275, appears to be erroneous).


143Tobacco Action Network, Quarterly Report State Audit (Aug. 31, 1979), Bates No. TIMS0036272 (the stamped Bates number erroneously included three initial zeroes).

144“Iowa TAN Leaders Spread the Message,” TO 6(4):10 (Aug. 1981). The article claimed that Iowa led all other states “in the proportion of enrollees” in TAN, but it failed to specify the denominator.

Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

42,021 to 51,237. However, over the next five years, Iowa TAN enrollment stagnated, while national enrollment rose strongly at least through 1983, before leveling off.

To be sure, TI purported not to be concerned about numbers:

The quality of TAN volunteers is more important to a successful TAN program than the quantity. Recruits should be men and women in key areas who may have important contacts and who will respond promptly to requests for action. Potential TAN members include:

- **Sales representatives** of the TI member companies.
- All others receiving their direct livelihood from tobacco-related organizations and industries—other employees of TI member companies, tobacco growers, wholesalers, exporters, warehousemen, vendors, retailers.
- All others who benefit from the tobacco industry—employees of TI member subsidiaries, major suppliers to the industry.
- Others sympathetic to the industry position—friends of the tobacco industry, civil libertarians, people who enjoy smoking, owners, operators, and employees of businesses adversely affected by legislation that restricts or prohibits smoking.

TI was particularly interested in identifying potential volunteers with “personal relationships with legislators at the municipal level, county level, state level, and national level” who were members in local organizations.

By about 1984, TAN, according to Michael Brozek, the TI Midwest regional vice president in the 1980s, proved to be an ineffective organization and was permitted to dribble out of existence rather than being formally terminated. Brozek—who by 2007 was a lobbyist in Wisconsin and declared during an interview that “I’m smoke-free now, haha” and that he had omitted all mention of that part of career from his autobiography on his firm’s website—insisted that any legislator with an IQ over 60 knew that TAN letters were mass produced.
In fact, TAN limped on for several years until TI, goaded by several regional vice presidents, and especially by Brozek himself, tried but ultimately failed to transform it into a more serviceable tool. After four years of fruitless discussions of how to make the tobacco industry’s “primary grassroots vehicle” more effective, the process entered into a more decisive phase in December 1986 when Dennis Dyer, the New England regional vice president, sent a memo to Roger Mozingo, the head of State Activities, observing that “[u]nfortunately” the potential scope and impact of TAN, which had originally been “designed to provide a structure for an industry grassroots counterbalance for the burgeoning anti-tobacco movement,” had been “perverted and ‘oversold’” to the cigarette companies. The result was that TAN was unable to fulfill “any of the expectations” despite “an enormous...support structure and budget.” Dyer concluded that as a “hodgepodge of indifference,” TAN had become a “beemoth” that had “done the State Activities Division’s and the Tobacco Institute’s reputation nothing but harm since its inception.”

Dyer’s memo triggered “frank and serious discussions” about TAN, which prompted the formation of a study committee composed of Mozingo, four of his highest ranking subordinates, as well as Dyer, Brozek, and the Southwest/Great Plains regional vice president, Stan Boman. By the end of 1986, the three regional officials and Walter Woodson, the State Activities communications manager, had formed a subcommittee charged with writing a report on options and recommendations for TAN, which were to be presented to the full committee during a day-long review at the end of January.

Despite Woodson’s admonition that the project was to be “forward-looking...not a rehash of past mistakes,” the process motivated Brozek and Boman to circulate thrashing critiques of the existing TAN. According to Brozek’s embarrassingly frank confession, TAN had become cumbersome, tedious, expensive and unmanageable due to its sheer size and lack of effectiveness.

\[\text{REFERENCES}\]

\[\text{Dennis Dyer to Roger Mozingo, Re: Idea #2 (Actually a revamp of an old idea) (Dec. 16, 1986), Bates No. TIOK0023591/2.}\]
\[\text{Walter Woodson to Stan Boman, Michael Brozek, and Dennis Dyer, Subject: TAN (Dec. 30, 1986), Bates No. TIOK0023590.}\]
\[\text{Walter Woodson to Stan Boman, Michael Brozek, and Dennis Dyer, Subject: TAN (Dec. 30, 1986), Bates No. TIOK0023590.}\]
of credibility as a consequence of shifting agendas and underutilization. In short, TAN became an 80,000 name “paper tiger” that staff members laughingly patronized by enrolling the names of friends, relatives and even pets in order to meet imposed “quotas.” These quotas were perfect for impressing Tobacco Institute supervisors, but did nothing to impress legislators.\textsuperscript{154}

Since the governmental world had also recognized TAN for the sham it was, Brozek continued, the “tobacco industry is ‘perceived’ by state legislatures and state executive branches as having little or no constituency.” Consequently, Brozek brutally concluded, “we can either quit right now or clearly demonstrate that there is a ‘legitimate,’ non-manufactured constituency supporting the tobacco industry in each state.” The chief method that Brozek offered for achieving the goal of insuring that “the legislative and executive branches throughout the United States feel the ‘perception of constituency’ regarding tobacco industry issues” was disaggregating cigarette companies’ state legislative programs into defined issues such as taxes, smoking regulation, sampling, and advertising: “By focusing our operatives by issue, rather than mobilizing our operatives for every issue, we can attain a more motivated and effective local constituent contact effort. ... In essence, not a S.W.A.T. Team approach, but a ‘SQUAT’ Team approach (shit or get off the pot). Quite simply put, dump the bad names, maintain the good names, pick your fights by issue....” To be sure, Brozek’s insistence that TAN’s chimerical character did not merely constitute a waste of resources, but actually created the important negative consequence that tobacco lobbyists’ overreliance on the vastly inflated number of TAN activists gave them a “false sense of security”\textsuperscript{155} appeared inapplicable to Iowa, where TI’s prize lobbyist, Charles Wasker, was neither gullible enough to take TAN’s Potemkin village for reality nor so lacking in resources that he would have had to resort to make-believe reserve armies of supporters to attain his impressive string of legislative successes. In the end, despite Brozek’s doubtless accurate criticism of TAN, his recommendation to purge the membership lists, focus on primary selective interest groups of member company representatives, wholesalers, and retailers, mobilize only smokers who had been “qualified” through the primary group members, and recruit each group only for specific issues in which they were especially interested\textsuperscript{156} was hardly designed to forge a “grassroots”

\textsuperscript{154}Michael Brozek to George Minshew, Re: 12/30/86 Woodson Memorandum Regarding TAN Redesign at 1 (Jan. 13, 1987), Bates No. T129261787.

\textsuperscript{155}Michael Brozek to George Minshew, Re: 12/30/86 Woodson Memorandum Regarding TAN Redesign at 1, 2, 3 (Jan. 13, 1987), Bates No. T129261787/8/9.

\textsuperscript{156}Michael Brozek to George Minshew, Re: 12/30/86 Woodson Memorandum
organization that could plausibly have been regarded as a match for the proliferating mass anti-tobacco movement, especially since the advent of the scientific underpinnings of the resistance to secondhand smoke exposure.

Three days later Boman, reacting to Brozek’s blast, went him one better by charging that TAN, having been “ill-conceived...from its inception,” had “become an unwieldy and largely useless monstrosity.” His suggestions, too, amounted to little more than “streamlin[ing] the grassroots program.”

The memorandum drafted by the four-member Grassroots Program Subcommittee presented a minimalist approach culminating in the elimination of “the polite fiction that TAN has a useful membership of 85,000”—although an “activist response rate of 5-10 percent is exceptional on any issue,”—and the more “efficient mobilization of a limited quantity of known activists” generating “much better percentages” in the 90-percent range. That the revamped TAN was in no sense a “respon[se] in kind to anti-tobacco grassroots efforts,” but merely an attempt to manufacture greater verisimilitude of “evidence of popular support for industry perspectives to a variety of legislative audiences” was disclosed by the admission that all that would be accomplished under the new program was a demonstration that a “relatively small cadre of well-educated, motivated activists can be managed to handle our response needs...to the wide variety of anti-tobacco legislation.”

Already at the Tobacco Institute board of directors’ winter meeting in February 1987, Mozingo announced that State Activities had “completed a thorough review and reorganization of this program...previously known as TAN, or the Tobacco Action Network,” which had resulted in “strengthening our relationship with...tobacco family allies...and establishing realistic expectations of assistance from the tobacco family elements.” After having carefully avoided spelling out for the cigarette company overseers that those new expectations would be lowered, Mozingo let the oxymoronic cat out of the bag about how TI manufactured “public support for tobacco positions”: “While we must have top-to-bottom industry grassroots support for our issues, it is clear that the tobacco grassroots element—apart from actual smokers which you gentlemen are successfully tapping—is a very limited universe.” In order to free itself from the


158Grassroots Program Subcommittee (Boman, Brozek, Dyer, Woodson) to Roger Mozingo, Draft Memorandum at 1, 2, 19 (Feb. 6, 1987), Bates No. TIOK0023570/1/88.

159Grassroots Program Subcommittee (Boman, Brozek, Dyer, Woodson) to Roger Mozingo, Draft Memorandum at 3, 4 (Feb. 6, 1987), Bates No. TIOK0023570/2/3.
narrow confines of simulating and choreographing “grassroots” contacts by the small number of cigarette company sales staff, wholesalers, and retailers, TI was forced to “expand our general ally and coalition programs” to animate support from chambers of commerce, labor union leaders, hotel/motel association executives, restaurant owners, grocers, bowling alley owners, police and fire officials, and minority group members.160

The stripped-down version of TAN, designed to “generate popular...support for industry positions” that emerged from the review process was fleshed out in guidelines that TI issued in August 1987 following a field staff meeting. Although it was clear that TAN’s total membership of 85,000 was a “fiction,” even the subset of 17,000 “activists” “may also be inflated”: each region was charged with identifying the “real” ones—“a relatively small, but dedicated cadre of activists drawn primarily from member companies’ sales forces”—and “discard[ing] the names of those who are unwilling to help consistently on our issues.” In this overoptimistic view, the term itself would allegedly become “redundant” by the end of the “activist identification process” when “TAN members will, by definition, be activists, or they will be discarded from the TAN rolls.”161

The best that Brozek was able to say about TAN after he had “revamped and reconstituted” his region’s “activist resource list” in early 1988 was that it was now “categorized by issues and motivation in order to maximize credibility on the state legislative district level.”162 TI’s 1989 strategic plan boasted that through TAN and its list of individual smokers and activists it could effectively reach a wide audience,163 but whether the claim was true and, more importantly, if true, whether such a duly informed audience could decisively influence legislators, appears doubtful. By 1992, Kurt Malmgren, the head of the State Activities Division, testified at a deposition that TAN was “not used very much anymore.”164 By 1993 TAN’s budget had been reduced to $25,000.165

160Roger Mozingo, Remarks at 5-6, [Tobacco Institute] Board of Directors Winter Meeting (Feb. 1987), Bates No. TIMN0319361/5-6.
161Tobacco Action Network Guidelines at 1 (Aug. 14, 1987), Bates No. T121080063. Iowa TAN’s total membership as of July 23, 1987 was 2,266, of whom only 180 (or 8 percent) were activists; nationally 20 percent were activists. Id., Bates No. T121080066/7. The meeting had taken place in June. Tobacco Institute, State Activities Field Staff meeting Agenda (June 7-9, 1987), Bates No. 513336943.
162Michael Brozek and Daniel Nelson to William Cannell, Re: Minnesota Plan/Status Report (Feb. 18, 1988), Bates No. TIMN457532/43.
163Strategic Plan for the Tobacco Institute (Sept. 1989), Bates No. 507660140/50.
164Kueper v. R.J. Reynolds Tobacco Co., Report of Proceedings, at 5346 (Cir. Ct. 20th
The Next Abortive Effort: House File 102 in 1985-86

Here is another bill that the good ole boys had fun with—jerking me around, HF102, smoking in public places.166

In contrast to the unplanned process that prompted Zimmerman to file the anti-smoking bill in 1983, she noted many years later that:

By 1985, I had spoken to many businesses about what Pepsico had done in their wellness campaign to decrease smoking by employees—and discovering how much money they saved on illnesses attributable to tobacco smoking, lost time as smokers take more breaks and do not statistically complete as much work as nonsmokers, plus Pepsico discovered they cleaned the windows less often in nonsmoking offices, dry cleaned the drapes less often and painted the walls less often in nonsmoking offices. I had begun to gain business support for the bill. I had an intern helping me (a nurse if I remember) make calls to businesses to gain support. We concentrated on businesses whose leaders were on governing Boards of organizations which had registered against the bill.167

Undaunted by the orchestrated death of H.F. 248 two years earlier, Zimmerman, who had become intent on reducing tobacco in the environment, regarded the measure as beginning “the process of cracking down on smoking in the work place.”168 She filed a very similar bill in the 71st General Assembly (1985-86), both of whose houses Democrats controlled by almost identical majorities to those in the previous legislative period (60 to 40 in the House and 29 to 21 in the Senate). H.F. 102, which 12 Republican and 9 Democratic cosponsors filed with her at the beginning of the first session,169 differed from the previous version in a number of disparate respects. While making it clear that it covered “all” retail stores, offices, and other commercial establishments, it added exclusions for residential rooms for students and others at educational institutions, and each resident’s room at a health care facility, but also lowered

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165 Tobacco Institute 1994 Budget (Nov. 12, 1993), Bates No. 93797932/95.
166 Beverly Hannon [untitled note for IWA] (Oct. 16, 1995), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (3), IWA.
167 Email from Jo Ann Zimmerman to Marc Linder (Mar. 29, 2007).
168 Email from Jo Ann Zimmerman to Marc Linder (Mar. 29, 2007).
the exemption level for bars from serving meals to 50 to 32 people at one time.\textsuperscript{170} Finally, deterrence was increased by subjecting to the civil fine—which was changed from a minimum of five dollars to a maximum of $100—the owner of a public place who knew about a person smoking in a nosmoking area but failed to advise that person of the prohibition.\textsuperscript{171}

By 1985-86, a coalition of organizations had formed to work toward an Iowa Clean Air Act.\textsuperscript{172} To be sure, even at this point, Zimmerman’s bill did not even remotely create equal rights for nonsmokers and smokers since, except on elevators, smokers’ right to smoke always trumped nonsmokers’ right to breathe clean air by virtue of the bill’s permitting the creation of unimpeded juxtaposition of smoking and nonsmoking areas. (Indeed, in 1979, the Virginia Supreme Court held that a city ordinance that made it unlawful to smoke in a restaurant except in designated smoking areas and that the city enforced by permitting one table to be designated as nonsmoking was an unconstitutional exercise of the police power because the means it used were not reasonably suited to achieving the legislature’s goal of protecting nonsmokers from toxic smoke: “If smoke exhaled in such an environment is toxic, its harmful effects are ambient. Yet, the ordinance requires posting a sign which leads the non-smoking diner to expect that the place he has chosen to patronize is a wholly protected environment. By relying on the sign, he will be exposed to ‘the toxic effect’ from which the ordinance purports to protect him. Hence, these requirements tend to defeat the very legislative purpose the ordinance is supposed to promote.”)\textsuperscript{173} Nor was Zimmerman unaware of the bill’s limitations. In filing the new bill at the end of January 1985, Zimmerman, supported by a coalition of Iowa health groups, conceded that the new proposal was “only a partial step,” which “wouldn’t ban smoking in offices and other areas, such as a strict no-smoking ordinance approved in San Francisco last year. She said the state eventually should take that step also. If Americans quit smoking and changed their diet and exercise patterns

\textsuperscript{170} H.F. 102, §§ 1-2 (Jan. 28, 1985). Curiously, the bill also modified the language of H.F. 248 and MCIAA from requiring owners to “ask[ ] smokers to refrain from smoking upon request of a client or employee suffering discomfort from the smoker [sic]” to a “person claiming discomfort from the smoke.” H.F. 102, § 3 (Jan. 28, 1985).

\textsuperscript{171} H.F. 102, § 6 (Jan. 28, 1985).

\textsuperscript{172} Press Release, Newsletter (Jan. 24, 1986), in Jo Ann Zimmerman Papers, Box 2, Folder: Political Career, Iowa House of Representatives, Newsletter, 1983-1986, IWA.

\textsuperscript{173} Alford v. City of Newport News, 220 Va. 584, 586 (1979). The restaurant owner was represented by Charles Morgan, Jr., a former civil rights lawyer associated with the Tobacco Institute. It is unclear why the court’s logic failed to prompt successful litigation to invalidate similar ordinances and laws in other states.
‘we could cut health care costs in half....’”174 (In his January 1985 budget message, Republican Governor Terry Branstad—who, under prodding from his wife, had banned smoking in the governor’s mansion, making his own mother walk outside to smoke175—requested an increase in the state cigarette tax to equalize a reduction in the federal tax on the grounds that: “Smoking does not need to be made more attractive.” But since he expressly observed that the resulting cost of cigarettes to the consumer would not increase, the anti-smoking impact was null.)176 Conspicuously missing from the Iowa Clean Indoor Air Coalition, which was composed of a dozen health-related organizations such as the Iowa affiliates of the American Cancer Society, American Lung Association, and American Heart Association,177 was the Iowa Hospital Association. Instead, Zimmerman noted years later, it joined the Tobacco Institute, the hotel and restaurant industry, and the Iowa Association of Business and Industry as registered lobbyists against Zimmerman’s bill on the grounds that its members “should not be forced to make patients...quit smoking in the hospital.”178

Two weeks later—in the interim, Democrat James Wells, the anti-smoking stalwart in the House who had become a senator, and planned to ask the Senate Rules Committee “to force his smoking colleagues to sit in the back row of the...Senate,”179 had filed an identical bill in the Senate180—the House Committee

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174“Anti-Smokers Promote Bill to Curb Puffing,” DMR, Jan. 30, 1985 (2A:1), in Jo Ann Zimmerman Papers, Box 2, Folder: Political Career, Iowa House of Representatives, Newspaper Clippings, Miscellaneous, 1985, IWA. The San Francisco ordinance, which went into effect on July 4, 1983, attracted considerable media attention, although it was not the first or strongest such local law; it required office workplaces to institute smoking policies that accommodated both smokers’ and nonsmokers’ needs, but mandated a smokefree work area where the accommodation was not acceptable to nonsmokers. Wallace Turner, “Smoking at Office Restricted by a New San Francisco Law,” NYT, June 4, 1983 (9); Stanton Glantz and Edith Balbach, Tobacco War: Inside the California Battles 22-23 (2000).

175Telephone interview with Terry Branstad, Des Moines (July 2, 2007). In the late 1970s, his wife had informed him that she was also banning smoking in their house; as a result his mother stopped visiting them for years. Id.


177“New Bill May Expand Public Puffing Bar,” Shoppers, Feb. 6, 1985, in Jo Ann Zimmerman Papers, Box 2, Folder: Political Career, Iowa House of Representatives, Newspaper Clippings, Miscellaneous, 1985, IWA.

178Email from Jo Ann Zimmerman to Marc Linder (Mar. 30, 2007).

179“New Bill May Expand Public Puffing Bar,” Shoppers, Feb. 6, 1985, in Jo Ann Zimmerman Papers, Box 2, Folder: Political Career, Iowa House of Representatives,
on State Government recommended passage of the bill as amended by the committee, whose chair and vice-chair were anti-smoking activists, Jean Lloyd-Jones and Johnie Hammond, Democratic women representing the university towns of Iowa City and Ames, respectively. The committee, by a vote of 16 to 2, “toned down” the bill by proposing two major changes. First, instead of following the 1975 Minnesota statute in requiring the bureau of labor and public health commissioner to issue rules restricting or prohibiting smoking in factories and warehouses “where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees,” the committee amendment merely mandated that employee cafeterias in such locations have designated nosmoking areas; and second, it halved the maximum civil fine (now renamed a “penalty”) from $100 to $50. Uncritically imbuing blue-collar workplaces with the attribute “private,” even Iowa City liberal Democrat Minnette Doderer favored deleting both the Minnesota language and subcommittee’s addition of cafeterias, thus excluding factories and warehouses altogether, on the grounds that: “I don’t think we can get into all the private places in the state.... We have an obligation on public places.” But her motion failed by a vote of 13 to 7.

Apart from individual members’ filing numerous amendments, the House took no further action on the bill in 1985 before adjournment. Many of the amendments were designed to weaken it by exempting certain public places such

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Newspaper Clippings, Miscellaneous, 1985, IWA.


as beauty salons, businesses operated only by the owner, the public areas of bus terminals, of airport terminals and of railroad depots, barber shops, and—the most likely to succeed—restaurants with a seating capacity of fewer than 32 persons, and retail stores and offices with less than 200 square feet of floor space. The amendment least likely to be adopted was filed by Democrat Johnie Hammond and Republican Darrell Hanson, two of the bill’s strongest supporters: it added to the monetary fine for smoking in a non-smoking area the penalty of “death on a pyre of smoldering cigarettes.” Nor was passage its purpose. As Hammond explained two decades later: “One year the opponents used the strategy of piling on so many amendments that leadership would not take the time to debate them. So I added my own amendment: the penalty for violating the Clean Indoor Air Act was ‘death on a pyre of smoldering cigarettes.’”

In 1985 the Democratic-controlled House took a major step toward a complete smoking ban in its own space. The rules resolution extended the scope of the ban by deleting the exception for the perimeter and simply prohibiting smoking “on the floor of the house while the house is in session.” Immediately two unsuccessful attempts were made to roll back the proposed extension. Democrat Jack Woods, a smoker, argued for retention of the old rule; pointing out that Speaker Don Avenson smoked, he joked: “‘If he gets out of the chair, comes down and lights up, the sergeant-at-arms is going to have to grab him and say, ‘Book him.’” Woods sought to reintroduce the exception for the “perimeter

188H-3234 (Mar. 5, 1985, by Pavich).
191H-3292 (Mar. 8, 1985, by Tabor).
192H-3291 (Mar. 8, 1985, by Tabor).
193H-3502 (Mar. 27, 1985, by Paulin).
194H-3323 (Mar 12, 1985, by Hammond and Hanson).
195Email from Johnie Hammond to Marc Linder (Feb. 21, 2006). Zimmerman offered an alternative exegesis: “When we got upset with the guys trying to control everything, and excluding us, we piqued them with these kind[s] of things.” Email from Jo Ann Zimmerman to Marc Linder (Mar. 29, 2007).
196House Resolution 4, at 17 (Rule 50) (Jan. 15, 1985).
197Dewey Knudson, “Iowa House Clears the Air with Wide Ban on Smoking,” DMR, Feb. 16, 1985 (2A:1-2). In fact, according to ex-Senator Beverly Hannon, Avenson’s willingness not to seek to impose his personal preferences on the House distinguished him from Senate Majority Leader Hutchins: “The House even voted itself non-smoking with Avenson, the Speaker, a smoker. He was a different kind of cat than the Senate
area,” but his amendment lost on a non-record roll call vote by 34 to 48. After opponents’ rearguard actions had been defeated, anti-smokers seized the initiative to expand the ban beyond the scope of the rules resolution. Democrat Clay Spear asked and answered his own rhetorical question: “Is it fair that members of the Fourth Estate [the press] smoke while we are prohibited from smoking? ... What’s fair for us should be fair for those at the speaker’s station and those in the press box.” The House then adopted his amendment to include those two locations within the ban. The very sharp debate revealed deep animosities between smokers and nonsmokers. Republican Kyle Hummel—who had smoked three packs of unfiltered Camels from time he entered the military in 1953 until 1981 and had voted against the ban on smoking in the House

199Journal of the House: 1985: Regular Session Seventy-First General Assembly 458 (Feb. 15) (H-3013). That Jochum was still a heavy smoker in 2007 was confirmed by email from a former legislator who requested anonymity to Marc Linder (July 13, 2007).
200Dewey Knudson, “Iowa House Clears the Air with Wide Ban on Smoking,” DMR, Feb. 16, 1985 (2A:1-2). The otherwise informative article mistakenly asserted that the expanded ban meant that smoking in the House had “gassed its last” by including “puffers’ last retreats,” whereas in fact a total ban was not imposed until 1993.
203Telephone interview with Kyle Hummel, Vinton, IA (June 26, 2007). Hummel quit smoking on Dec. 1, 1981, both because it was too much trouble to reach agreement with people on where he could smoke and because he recognized the health hazards. Neither his parents nor any of his eight siblings smoked; in part he began smoking in the military because during marches soldiers were given a ten-minute break every hour and if an officer saw that soldiers were not sitting and smoking, he would order them to perform tasks. The incentive structure that Hummel experienced was not unique: a former marine reported that in the late 1960s marines who did not smoke during smoking breaks were required to do sit-ups. Telephone interview with Jim Witkowski (Minnesota Health Dept.), St. Paul.
Chamber in 1979—lambasted his colleagues’ “‘sanctimonious attitude’”;
turning reality on its head, he charged that the expanded ban was tantamount to
telling smokers to leave the House chamber: “‘We not only are not encouraging
them to take part in the process....  We are telling them to get out of the room.’”
Zimmerman pointed to the dangers of secondhand smoke exposure, while
Republican Ray Lageschulte stressed that no one had the right to pollute the air
for anyone else.  Reflecting smokers’ weight in the leadership, Democrat
Minnette Doderer, a self-confessed “‘temporarily...ex-smoker,’” observed that:
“‘Some mighty important people in both caucuses smoke, and if they get mad at
us, we are in trouble.’” Finally, a frustrated smoker, Democrat Gary Sherzan,
chiding his colleagues for having “‘become fond of regulating other people’s
behavior,’” added that if what they really wanted to do was outlaw cigarettes,
they should go ahead and do it.

In the interim between the 1985 and 1986 sessions, Brozek, TI’s Midwest
regional vice president, informed headquarters that even during the legislative
recess, “Iowa media has [sic] become extremely active with increasing coverage
of anti-smoking activities.  It is the opinion of our legislative counsel that our
industry will face two major issues: statewide smoking restriction and the
potential of a cigarette liability bill.” In addition, he noted, if coupled with
such limitations on smoking, a bill banning the handing out of free samples “may
become a part of a complete and comprehensive anti-smoking package.”
Brozek expressed this concern despite having already reported to Washington that
Iowa lacked such local grassroots organizations as a Group Against Smoking
Pollution (GASP) or Association for Nonsmokers Rights (ANSR) branch.
Consequently, the American Lung Association of Iowa referred any calls it received about these groups to their offices in Colorado and Minnesota, respectively.208

Interestingly, in spite of Iowa’s backward and stagnant anti-public smoking law—in the mid-1980s (and until 2008) it was still less comprehensive than Minnesota’s original 1975 statute—at the end of 1985 TI despaired that: “Of the six states in Region IV, Iowa is the least reliable in garnering support of tobacco segments. Its wholesaler association, notwithstanding recent overtures by TI staff...has not been responsive to general tobacco legislative concerns. It can be said that if a choice came to a vote on the state’s minimum mark-up law or an increase in the state’s cigarette excise tax, the wholesaler association’s choice would be no surprise [namely, for the mark-up law].”209

However, H.F. 102 had not died, and at the beginning of the 1986 session, by a vote of 14 to 1,210 the House State Government Committee once again recommended its passage, this time subject to a different set of amendments.211

The principal changes included: (1) a requirement that educational and health care facilities “provide a sufficient number of rooms in which smoking is not permitted to accommodate all persons who desire such rooms”; and (2) deletion of the penalty imposed on public place proprietors who knew that someone was smoking in a nosmoking area and failed to advise the smoker of the prohibition.212 (Despite the deletion, opponents of the bill nevertheless faulted the bill on the House floor on the grounds that even asking customers to stop smoking or remain in designated smoking areas would not “help business.”)213

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208Michael Brozek to Hurst Marshall, Re: GASP (June 26, 1985), Bates No. TITX0037767.


Now that Zimmerman’s bill after four years had finally made it to the House floor, a wildly exaggerated account of its scope and efficacy in the Des Moines Register declared that under this “‘equal rights bill’ for non-smokers” “smokers would be unwelcome in most public places and meetings or would be shunted off into designated smoking areas,” and fines would be imposed on “[r]enegade smokers....” Although the article quoted Hammond, who was “‘concerned about shoppers,’” as stating that “large areas of shopping malls would be included as nosmoking areas,” in fact neither H.F. 102 nor any later Iowa law (until 2008) did any more than leave it up to those in charge of public places (except elevators) to decide how to apportion the floor space between smokers and nonsmokers without imposing on proprietors any duty to insure that nonsmokers’ air space was not polluted by smoke drifting from one area to the other. In that sense Hammond (unintentionally and unknowingly) identified one of the scheme’s central flaws in praising it as “designed to be as simple and low-cost as possible for businesses and institutions charged with enacting it.” And although she may have been technically correct in asserting that the bill was “modeled after nosmoking laws in Minnesota,” she failed to mention that Minnesota’s implementing Health Department regulations, while far from stringent, at least potentially offered considerably more protection from secondhand smoke to nonsmokers than the bare Iowa statute—never supplemented by regulations—ever would.

A week later, on January 23, when the House took up H.F. 102, Hammond offered the committee amendment, to which, in turn, Republican farmer Hugo Schnekloth offered an amendment expanding the universe of “public places” to include churches and exclude bathrooms. Going much further with what was presumably designed as a killer amendment, he proposed changes that would have eliminated designated smoking areas, thus making public places nonsmoking, while at the same time also both eliminating proprietors’ duties except for posting nosmoking signs and retaining the 1978 statute’s first-violation penalty of five dollars. The House adopted the inclusion of churches (and thus possibly the

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216 On the 1976 Minnesota regulations, see above ch. 24.
innovation of designated smoking areas therein), but on a non-record roll call defeated all the rest of Schnekloths proposals by a vote of 34 to 54. If these remaining provisions are regarded as having been intended to provoke the bill’s withdrawal or death, then the number of votes it secured accurately reflected the number of No votes on final passage later that day.

Claiming that the bill would “create a ‘nightmare’ for restaurant owners” forced to separate smokers and nonsmokers,219 Des Moines Democrat Jack Woods, a heavy smoker who had persistently sought to undermine anti-smoking bills, offered an amendment to exclude all restaurants from coverage.220 Relying, perhaps, on Hammond’s assurance that she had spoken to members of the Iowa Restaurant Association, who had said that they could “‘live with’” the bill,221 the House rejected Woods’s amendment.222 It then adopted two limiting amendments by Republican Donald Paulin excluding restaurants seating fewer than 32 persons and offices and waiting rooms with fewer than 200 square feet of floor space as well as sleeping rooms in hotels and motels.223 Republican farmer Virgil Corey, who in the end voted against the bill, offered an amendment requiring a ten-foot space separating a smoking from nonsmoking area in single-room public places—six feet wider than Minnesota’s alternative to 56-inch-high barriers—but the House rejected even this reasonable albeit feckless measure.224 Woods came back with an even more radical amendment, this time gutting the entire bill by permitting an owner or manager to designate an entire public place as a smoking area, but the House rejected it too.225 Having filed such an amendment, Woods

223Journal of the House: 1986: Regular Session Seventy-First General Assembly 146, 147 (Jan. 23) (H-5015 and 5025). Because the former amendment struck the line of the committee amendment that included the word “churches” that the House had just voted to insert by adopting Schnekloths amendment, the latter was “plac[ed] out of order,” thus eliminating it. Id. at 146. The Register erroneously reported that in the bill as passed “public place” was defined as including churches. Jane Norman, “Iowa House Approves Fine for Smoking,” DMR, Jan. 24, 1986 (1A:1, at 2A:5).
appeared to be engaged in a very special kind of self-fulfilling prophecy when he declared: “‘It’s kind of stupid and ridiculous to pass a law with no teeth in it.’”

Before voting on the bill’s final passage, the House adopted an amendment by Democrat Clay Spear restricting enforcement by weakening the requirement that proprietors ask smokers to refrain from smoking on request of someone claiming discomfort from smoke: now the person in control of a public place would be required to intervene with regard only to smoking that was taking place in a no-smoking area. Thus, what had potentially been a powerful means for overcoming the bill’s failure to protect nonsmokers from exposure to drifting smoke was diluted so as to apply only to formal violations of the ban on smoking in nosmoking areas—even in public places in which the vast majority of the space were designated as a smoking area, thus giving smokers very little occasion to smoke in the tiny nosmoking area. For this very reason Republican Dorothy Carpenter, a nonsmoking social liberal and strong supporter of the bill, divulged a deeper truth about the bill than she herself presumably understood when she defensively observed that “‘[w]e’re not denying these people who wish to smoke.’” On the other hand, however, she was so swept away by anti-smoking rhetoric that she uncritically believed her own propaganda that H.F. 102 was actually an instantiation of the proposition that “‘those who choose not to smoke have the right to have clean air to breathe.’”

In the face of “pleas for free enterprise,” the House at last passed Zimmerman’s bill. Though not strictly along party lines, the 63 to 35 vote rested on a small majority (22 to 17) among Republicans and an almost 70-percent majority (41 to 22) among Democrats.

Whether legislators were reflecting constituents’ positions was called into doubt a few days later by an Iowa Poll revealing that 56 percent of Republicans favored legislation penalizing smokers who smoked in places where the act was prohibited compared with 50 percent of constitutente.
Democrats. Despite House approval, the bill faced “a cool reception” in the Senate, whose majority leader, Democrat C. W. “Bill” Hutchins, in an image nicely captured by Jane Norman for the Register, “smiled and looked at a cigarette smoldering in his hand when asked how the bill will fare. ‘I think it’ll have a tougher go in the Senate.... Historically the Senate has not gone along with that.’” Nevertheless, Republican Governor Terry Branstad supported the bill, but regarded the $50 penalty as too high.

On January 28, the Senate, composed of 15 tobacco users and 35 non-users, referred H.F. 102 to the Human Resources Committee, which was now chaired by anti-smoking activist Beverly Hannon, who appointed herself and two other nonsmokers—Democrat Robert Carr and Republican Ray Taylor, a member of the state board of the American Cancer Society and religious conservative who opposed smoking and drinking for religious and health reasons—to a three-member subcommittee to report back to the full committee.

By this time the Register had detected a shift in support, with a “substantial number of senators—smokers and non-smokers alike”—predicting that the bill would be enacted. This turn of events was surprising not only because allegedly “senators traditionally dislike governing public behavior,” but also because four of the chamber’s six leaders were heavy smokers or snuff dippers. Republican Minority Leader Calvin Hultman, who had been using snuff since he had stopped smoking six cigars a day three years earlier, fit this mold perfectly: “‘We shouldn’t always be telling people how to act.’” The key parliamentary development was the fact that on January 31 Majority Leader Hutchins, who also did not like the bill and had the “power to keep issues he doesn’t like from floor action,” stated that he would not stand in its way because the committee would

\[\text{233} \text{ Jane Norman, “Iowa House Approves Fine for Smoking,” DMR, Jan. 24, 1986 (1A:1).}\]
\[\text{234} \text{ Tom Witosky, “Ban on Smoking Is Likely to Win Approval in Senate,” DMR, Feb. 3, 1986 (1A:2 at 3).}\]
\[\text{236} \text{ State of Iowa: 1986: Journal of the Senate: 1986: Regular Session Seventy-First General Assembly 1:47.}\]
\[\text{237} \text{ Iowa Official Register: 1985-1986, at 41 (Vol. 61, Michael Triggs, ed.).}\]
\[\text{238} \text{ Email from Beverly Hannon to Marc Linder (June 20, 2007).}\]
\[\text{239} \text{ State of Iowa: 1986: Journal of the Senate: 1986: Regular Session Seventy-First General Assembly 1:222 (Feb. 4).}\]
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certainly recommend passage and “this kind of issue had to be decided by the Senate as a whole.” Some senators, however, opposed the bill simply because they themselves smoked. Perhaps the purest exemplar of the unreconstructed smoker was Democrat Joseph Coleman, who had smoked three packs of unfiltered cigarettes a day for almost 40 years and was “getting tired of being the one who get pushed around. I have rights, too, you know.” Other smokers, such as Democrat Joseph Welsh, the Appropriations Committee chairman, belittled the whole issue of smoking as “absolutely irrelevant” and distracting attention from “the key problems we have to resolve.” In contrast, at least one heavy smoker, Republican Jack Nyström, who had repeatedly tried to quit, was open-minded enough to welcome the bill as possibly helping him to stay quit. Former smoker Hannon was “very optimistic” that the time had finally come to enact a nosmoking law because of the “very strong support” that had emerged to recognize nonsmokers’ “right to breathe fresh air,” yet even Zimmerman’s original bill lacked any process to implement such a right, based as it was on the dysfunctional system of designated smoking areas. Since that approach was twinned with the notion of smokers’ and nonsmokers’ ‘equal rights,’ it was unclear how Hannon, who saw the chief hope for passage in a compromise that would “avoid a fiery debate on individual rights,” imagined the implementation of such a parliamentary strategy.²⁴⁰

Hannon’s committee met on February 13, voting 7 to 3 to recommend passage of the bill as amended. The three no votes were cast by Republican Julia Gentleman, who had repeatedly opposed (and would continue to oppose) such legislation, Republican Arthur Gratias and Democrat Charles Miller, a chiropractor.²⁴¹ Gratias, a tea-totaling, nosmoking teacher and principal, insisted that “Iowans can act without the Legislature always having to pass a law....” He admitted that people could “abuse their rights,” but asserted, without explaining, that there were “other ways to handle it.”²⁴² The proposed changes themselves were few, but several were significant. The most prominent, designed perhaps to accommodate the governor, halved the penalty from $50 to $25.²⁴³ Hannon

²⁴¹State of Iowa: 1986: Journal of the Senate: 1986: Regular Session Seventy-First General Assembly 307-308 (Feb. 13). Since the elderly Miller was fast losing his mental powers, his vote, according to Hannon, was neither at the time nor in retrospect rationally analyzable. Email from Beverly Hannon to Marc Linder (June 20, 2007).
²⁴³S-5062 (Feb. 13, 1986, by Human Resources Committee).
sought to justify it on the grounds of greater workability and enforcibility.\textsuperscript{244} Potentially much more important, however, was the deletion of a word that had been in Zimmerman’s bills since 1983; taken from the 1975 Minnesota law, the requirement that those in charge of public places “[a]rrang[e] seating to provide smoke-free areas” created a norm of nonexposure to secondhand smoke that far exceeded the feckless designation of smoking areas from which smoke could drift to nonsmoking areas with impunity for smokers and proprietors. Despite this capacity for protection embedded in the term “smoke-free,” the committee chose to strike it and replace it with “no-smoking,” thus insuring virtually no disruption to smokers or owners and minimal protection for nonsmokers. Hannon’s committee also dropped the language requiring a bar owner who chose to exercise the discretion that the bill conferred on him of designating the entire bar a smoking area to post this designation at the entrances.\textsuperscript{245} Although Hannon’s conclusion that the bill now recognized “‘equal rights for non-smokers’”\textsuperscript{246} was both a wild exaggeration and incoherent since smoking and being protected from smoke in the same public places were increasingly being recognized by science, medicine, and even Iowa state government agencies\textsuperscript{247} as mutually incompatible, her overly optimistic prediction that the amendments had fashioned a “‘compromise that can get through the Legislature’”\textsuperscript{248} underscored that, in Iowa at least, the time was still remote in which a majority could be found for a solidly protective law based on public health principles. (For example, the next year Hannon reiterated that she “would like to see a place set aside for smokers in public places.”)\textsuperscript{249}

Instead of going to the floor, however, the bill was, according to an announcement the following day by the Senate’s president pro tempore, James


\textsuperscript{245}S-5062 (Feb. 13, 1986, by Human Resources Committee). In 1986 the Minnesota Health Department made a similar proposal with regard to a provision in its administrative regulation implementing MCIAA that defined “acceptable smoke-free areas,” but did not actually carry out the change to “nonsmoking” until 1994. See above ch. 24


\textsuperscript{247}See below this ch.


\textsuperscript{249}Beverly Hannon, [Untitled], \textit{Advocate News} (Wilton-Durant), Jan. 8, 1987 (15:2), in Beverly Hannon Papers, Box 14, Folder: Scott County, IWA.
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Wells, referred from the Regular Calendar to the State Government Committee.\textsuperscript{250} Such a decision was presumably made by Majority Leader Hutchins, in this particular case probably because he and his smoking colleagues wished to delay the bill.\textsuperscript{251} At the time, Brozek at TI interpreted the referral as having “temporarily derailed” the bill.\textsuperscript{252} In the event, if delay was leadership’s objective, the State Government Committee provided almost six weeks of it.

In the interim between the House and Senate debates, the Des Moines Register, the state’s leading newspaper and editorially a longtime and ardent proponent of anti-smoking legislation, doubtless sought to intervene in the process subtly by publishing an overview of smoking bans in various state government departments. As early as 1982, the Health Department had issued a smoking ban, compliance with which continued to be “excellent,” and deputy health commissioner Dr. Ronald Eckoff, pronouncing a professional judgment that few legislators would have dared to express lest they jeopardize their re-election, observed that “certainly most of us feel smoking is a poor habit.” Beginning July 1 (the date on which new laws would normally take effect) the Department of Human Resources had decided to prohibit all smoking in its Capitol Complex offices. Relying on “irrefutable evidence” of smoking hazards, Commissioner Michael Reagan concluded that “there is no fair or reasonable course of action that we can take...other than issue a complete ban.” This insight gave the lie to the rhetoric deployed (and perhaps even uncritically believed) by anti-smoking legislators to project the designated-smoking-areas model as the instantiation of an “equal rights” regime as between smokers and nonsmokers. Even the weak Iowa Department of Transportation rule repudiated that approach by permitting smoking in work areas “only if it does not bother neighboring employees.” Or, as the department’s employee safety officer unambiguously glossed the underlying anti-equal rights principle: “That means non-smokers’ rights prevail.”\textsuperscript{253}

In the wake of House passage, the cigarette manufacturing companies ratcheted up their level of opposition as the specter of similar action in the Senate loomed more ominously. During March TI planned to continue its “use of coalitions and phone banks [to] stop the advancement of HF 102,” which was its

\textsuperscript{251} Email from Beverly Hannon to Marc Linder (June 20, 2007).
second highest legislative priority in the Midwest region. On March 18, Brozek—who had noted in his monthly report for February that Zimmerman “is using HF 102 as a campaign issue in her efforts to become Iowa’s next Lieutenant Governor”—wrote to headquarters that during the preceding two weeks the situation regarding H.F. 102 had “deteriorated,” adding unbureaucratically, albeit cryptically: “Due to the efforts of the Governor and his wife, bill author and candidate for Lieutenant Governor, Representative Zimmerman and the Iowa media, many legislative consciousnesses are being tested.” Despite House passage in January, “the strategy has been, and will continue to be, the playing of a ‘time game’ in order to delay the bill’s consideration in the Senate, strategically amend the measure to force the bill back to the House for concurrence and request accurate fiscal impact statements, thereby forcing the measure to a tax or finance committee.” Since the legislature was due to adjourn at the end of April, every day counted in TI’s efforts to defeat the bill. In spite of extensive use of phone banks and strategy meetings with legislative supporters and coalition members, Brozek rated the bill a “toss up.” Hannon, the bill’s floor manager, corroborated this account, observing later in the year that she had had a “deal on the smoking bill,” but that Majority Leader Hutchins “cut me off at the knees....” Years later she recollected that leadership had “let me bring it up as a ‘filler,’ but then kept letting it be deferred. When the anti-regulation guys wanted to defer, they weren’t given a time deadline because it was late in the session, or asked to go back and get their amendment drafted as I was different times when I asked to defer on something.”

The State Government Committee stalled progress of the bill for five and half weeks, not issuing its report until March 25. On that date vice-chair William

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254 Michael Brozek and Paul Jacobson to William Buckley, Memorandum: Monthly Summary - February, 1986 at 7 (Mar. 3, 1986), Bates No. TIMN457989/95. The highest priority was preventing enactment of a five-cent cigarette tax increase in Wisconsin.


257 Beverly Hannon, [untitled note] (Nov. 7, 1986), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (3), IWA.

258 Beverly Hannon [untitled note] (Oct. 16, 1995), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (3), IWA. In this retrospective Hannon referred to Junkins as the Senate leader, but she must have meant Hutchins since Junkins had left the Senate after the 1985 session to run (unsuccessfully) for governor.
Dieleman, a Democrat and life insurance underwriter, who was very religiously oriented in his politics, sought unanimous consent finally to bring up H.F. 102. Describing the bill as “‘designed to help those who have problems with smokers,’” Dieleman saw it as a “‘step toward making sure that all people’s rights are observed.’” The committee then voted 9 to 4 to approve two amendments. The first significantly limited coverage by excluding retail stores and offices with less than 1000 square feet of floor space. The other provision required the state fire marshal to make an annual inspection of each “public place” covered by the bill and to determine and post a notice of compliance within the public place (without explaining whether the compliance in question related to the Clean Indoor Air Act). This rather bizarre second amendment turned out be a “parliamentary trap” laid by opponents in order to thwart enactment of H.F. 102. Because the fire marshal’s inspections would require the expenditure of state funds, the bill’s passage by the full Senate could force its referral to the Senate Appropriations Committee, whose chair, Joe Welsh, had “hinted strongly that the bill could die” there. Committee opponents trained their criticism on what they alleged was the measure’s unenforcibility. For example, Democrat Wally Horn, lacking the capacity to imagine the present as history, asked: “‘Who is going to arrest someone for smoking in a building?’” In addition to Gentleman, the perennial pseudo-libertarian opponent of such regulation, the two heavy smokers, Coleman and Rife voted against even this diluted version of a public smoking bill.

Almost another month passed before the full Senate took up consideration of

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259 *Iowa Official Register: 1985-1986*, at 29 (Vol. 61, Michael Triggs ed.).
260 Email from Beverly Hannon to Marc Linder (June 20, 2007).
261 *Senate State Government Committee Minutes at 2 (Mar. 25, 1986)* (copy provided by SHSI DM).
263 *Senate State Government Committee Minutes at 2 (Mar. 25, 1986)* (copy provided by SHSI DM).
266 *State of Iowa: 1986: Journal of the Senate: 1986: Regular Session Seventy-First General Assembly* 1:881 (Mar. 25). The fourth Nay was cast by Republican Forrest Schwengels; Horn did not vote.
H.F. 102 on April 23. Gentleman, who viewed the bill as “‘a silly waste of time,’” moved the adoption of the amendment that Thomas Lind—who played a prominent role in the House in opposition to passage of the original Clean Indoor Air Act in 1978—had filed on April 4 to amend the State Government Committee amendment. Lind’s amendment went even further than the committee’s by excluding all restaurants and eliminating the distinction between bars with and without the capacity to serve meals to more than 32 people. The Senate adopted it by a vote of 25 to 20, with heavy smokers Hultman, Hutchins, Coleman, and Rife all in favor. But by tying 23 to 23 on the other committee amendment, the Senate eluded the trap to kill the bill in Welsh’s Appropriations Committee.

By a voice vote the Senate then adopted both the weakening amendments recommended by Hannon’s Human Resources Committee and a set of even more far-reaching dilutions proposed by Republican Douglas Ritsema, who had voted against banning smoking in the House chamber in 1979, even though he had found smoking in committee rooms “oppressive.” A nonsmoker who had become more and more conservative during his eight years in the legislature, he came to resent government interference in people’s lives to the extent that he also opposed seat-belt laws. Since he articulated the scope of the principle at stake as bounded by actions that affected other people and nevertheless recognized that smoking created precisely such secondary impacts, he was, even years later, unaware of the self-contradiction inherent in his opposition to the clean indoor air bill, although his vote against the House resolution in 1979 did puzzle him in

269See above ch. 25.
retrospect. Ritsema’s proposals in 1986 excluded work places, meeting rooms, and private, enclosed offices even if they were not occupied exclusively by smokers, in addition to eliminating the requirement that educational and health facilities provide a sufficient number of nosmoking rooms to accommodate everyone who wanted one. The exclusion of workplaces would have been especially destructive of a comprehensive approach to secondhand smoke regulation since at that time large Iowa companies, even though many had instituted nosmoking policies, failed to segregate employees into smoking and nonsmoking areas and permitted them to smoke at their desks.

That Rife’s obstructionist amendment to require the health department to issue rules to determine “the maximum level of toxic effect allowable for nosmoking areas” passed by a vote of 24 to 22 underscored that the Senate was living up to its reputation as the last bastion of know-nothing pro-tobaccoism. In a final wound, the chamber eliminated the coverage of public conveyances with departures originating in Iowa. Although Republican assistant minority floor leader John Jensen pierced proponents’ incoherent equal rights rhetoric, which was anchored to the scientifically almost worthless designated-smoking-areas approach, by insisting that “[y]our right to smoke is valid only when you don’t infringe on my right not to breathe your smoke,” since even Zimmerman’s flawed original bill could not come close to securing a majority, no more advanced measure incorporating Jensen’s insight had any chance of passage in

275 Telephone interview with Douglas Ritsema, Hutchinson, MN (June 21, 2007).
279 State of Iowa: 1986: Journal of the Senate: 1986: Regular Session Seventy-First General Assembly 1:1350 (Apr. 23) (S-5730). The amendment was first defeated 26 to 19 and then passed 28 to 15 on reconsideration. The amendment was filed by liberal Democrat Arthur Small and the motion for reconsideration by the Senate’s only black member, Des Moines liberal Democrat Thomas Mann. Mann later had no recollection of the bill, let alone the amendment. Telephone interview with Thomas Mann, Austin, TX (June 21, 2007). Mann at the same time opposed the mandatory seat-belt law on the grounds that the issue was not whether it saved lives, but whether it was a person’s right to decide whether to use a seat-belt. Tom Witosky, “Senate Sends Seat Belt Law to Branstad, 27-20,” DMR, Feb. 13, 1986 (1A:4-6 at 2A:1).
1986.

After having been thoroughly gutted during 90 minutes of debate, H.F. 102 passed by a vote of 32 to 13, nine of the opponents being Republicans; even in this “virtually meaningless” condition the bill still triggered Nays from Hutchins and Hultman, the tobacco-using Democratic and Republican leaders. Floor manager Hannon, surprised by the intensity of the opposition, had to “admit I really don’t know what the bill does now.” Acknowledging the improbability of restoring it to its earlier condition, she took solace from the attention supporters had been able to bring to the issue. Hannon later divided opponents into two groups. Of the first, encompassing such heavy smokers as Coleman and Rife, who were “vehemently anti[-]regulation,” Hannon judged that she did not think that “it ever crossed their minds that people had as much right to not breathe smoke as they had to put smoke in the air we breathe.” To the second group belonged legislators who “were against any regulations because the restaurant association, taverns and of course tobacco companies were—and those interest groups had PACs whereas the Lung Association and advocates didn’t.”

Coleman voted for the bill in order to be able to move for reconsideration as a delaying tactic, which succeeded inasmuch as the motion was not voted on and defeated until May 2, the last day before adjournment, thus leaving the House without time to concur in the Senate’s panoply of radical amendments even had it so desired. Excoriating the Senate’s destruction of the House bill, the Des Moines Register editorially observed that: “While society wouldn’t consider forcing sober drivers to get off the roads in favor of the drunks, it forces non-smokers to avoid smokers.”

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284 Beverly Hannon [untitled note for IWA] (Oct. 16, 1995), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (2), IWA.


While the 71st General Assembly was debating extension of the anti-public smoking law in 1985-86, it was also considering (and ultimately passed) a seat-belt law (S.F. 499), as were many other states, prompted by New York’s first-in-the-nation enactment in 1984. The rhetoric deployed by opponents of mandatory seat-belt use was remarkably similar to that on display in the smoking debates; significantly, but not surprisingly, opponents of both laws largely overlapped. For example, Republican Kyle Hummel, whose aforementioned irrational attacks on public smoking bans would be repeated in 1987, contributed this thoughtful analysis: “‘There are certain things I am not willing to do to save 150 lives.... [T]here are certain freedoms we have in this country...that supersede the saving of even 150 lives. I don’t know what your motivation is, but I think it’s playing God.’” Senator Joseph Welsh offered this insight into the limits of risk prevention: “‘We have recognized from the beginning of this country, we can’t insulate our people from all hazards.’” Joseph Coleman, the Senate’s leading anti-anti-smoking militant, took umbrage that the seat-belt bill “‘says that we are going to save your life whether you want us to or not,’” while his across-the-aisle confere Jack Rife wondered whether “‘[b]ushing after every meal’” would be next. Because seat-belt use shared with smoking some dimensions of secondary impacts—including deaths caused to other passengers by unbelted human missiles, economic and other losses to families, and medical and economic costs borne by society at large—voting patterns on the two bills present an opportunity to compare the consistency of attitudes. Although no absolute one-to-one correspondence prevailed, most of the Senate’s prominent smoking opponents—including Coleman, Doyle, Hultman, Hutchins, Rife, and Welsh—and nonsmoking libertarian opponents of smoking regulation—including


[^290]: Jane Norman, “‘Buckle Up,’ Iowa House Tells Drivers,” *DMR*, Jan. 31, 1986 (1A:3). Looking back 21 years later, Hummel reflected that he would not repeal the seat belt law, but not because he did not still believe that people should take responsibility for their own actions, but rather because he believed that human nature itself had been changed by the accumulation of government regulation, which made them incapable of doing what was best for themselves; because society had reached the point at which people would do almost anything if there was no law prohibiting it, he had lost his faith in humans’ ability to take responsibility for their actions. Telephone interview with Kyle Hummel, Vinton, IA (June 26, 2007).


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Gentleman, Gratas, Horn, and Ritsema—also voted against the seat-belt bill. Similarly, most prominent advocates of public smoking regulation also voted for mandatory seat-belts.\(^{293}\) Also in the House, which voted on both bills within one week, most prominent advocates (including Hammond, Lloyd-Jones, and Zimmerman) and opponents (including Hummel, Renaud, Van Camp, and Woods) of H.F. 102 cast predictably consistent votes for and against S.F. 499.\(^{294}\)

In evaluating Charles Wasker, the Tobacco Institute’s Iowa lobbyist, after the close of the 1986 session, Brozek, the regional vice president, while crediting him (and his partner Bill Wimmer) with success in “killing” H.F. 102, voiced criticism that cast a comic light on the image of the well-oiled tobacco lobbying machine:

[Wasker] requires a great deal of “on site observance.” In other words, we sometimes have to “sit on him” in order to maintain a modicum of control when tracking and monitoring legislative activity. ... The solution to this problem was by no means easy to attain for Mr. Wasker still feels that our system of deadlines and reporting is nothing more than “posterior protection by use of nonsensical red tape contortions.” I made it clear that I too, feel the urge to complain however, when I pay my mortgage I realize how useful and essential our reporting system is. I suggested to Mr. Wasker that everyone should share my appreciation for this system. Chuck is a little less than diligent when analyzing legislation that he feels is unimportant. ... Both Paul Jacobson and I were rather irritated over the fact that Chuck did not know the specifics of HF 102. After repeated meetings with Paul Jacobson and after Paul’s almost continuous presence in the Iowa legislature, Mr. Wasker grew very familiar with the specifics in HF 102.\(^{295}\)

\(^{293}\)State of Iowa: 1985: Journal of the Senate: 1985: Regular Session Seventy-First General Assembly 1:1080-81 (Mar. 27); State of Iowa: 1986: Journal of the Senate: 1986: Regular Session Seventy-First General Assembly 1:303 (Feb. 12). The Senate voted a second time on S.F. 499 after the House had amended it. Most senators’ votes remained unchanged, but Hutchins switched from Nay to Aye and Hultman from Aye to absent or not voting. Taylor, an anti-smoker twice voted against seat belts, while Gronstal, a smoker who voted for anti-smoking measures, twice voted against S.F. 499, and heavy smokers Drake and Nystrom, who showed some sympathy for anti-smoking bills, voted twice for the seat-belt bill.


\(^{295}\)Iowa Charles F. Wasker Background (June 30, 1986), Bates No. TI22431036/37-38, on tobaccodocuments.org. In the end, Brozek, who was apparently the author, recommended a minimum increase of $2,000 in Wasker’s retainer to $30,000 as “imperative” if his reporting was to be improved. Id., Bates No. TI22431036/39, on tobaccodocuments.org. In his previous year’s lobbyist evaluation recommending that Wasker’s compensation be increased by no less than 9.5 percent, Brozek also sarcastically
The form of Brozek’s good-natured but ironically critical comments about Wasker may in part have been dictated by his own need for “posterior protection” combined with his “knowledge that Wasker was best friends with TI President Chilcote.”

Iowa Citizen Action Network (ICAN):
Vendor of Grassroots Lobbying to the Cigarette Companies

Although the growth of scientific research linking ETS to disease has unquestionably accelerated the smoking restrictions trends, it remains only one argument the antis use against us. Since science did not create the ETS issue, it cannot resolve it. ... In ETS studies, the plausible biological mechanism is present to the satisfaction of almost all scientists.

As elsewhere, in Iowa the Tobacco Institute was applying its strategy of developing and mobilizing allies in coalitions in support of its (anti-)legislative program. In Iowa, as Brozek revealed in his February 1986 report to headquarters, it constituted a remarkable example of strange bedfellows: “In the state of Iowa a new coalition group known as ICAN or the Iowa Citizens [sic] Action Network, has been designated as the front line defense against HF 102, a smoking restriction measure. Additionally, phone banking strategies have already been instituted to counteract the smoking restriction bill when it reaches the Senate State Government Committee.”

So crucial had ICAN become in the battle against H.F. 102 that TI’s Midwest regional director, Paul Jacobson, devoted all of March 17, 18, and 19 to “Mtgs with Wasker, Wimmer (Wasker’s partner); ICAN re pending smoking bill, HF 102.” In turn, the next week, Brozek twice reviewed this bill-specific coalition activity with Jacobson. The

observed that Wasker responded to his requests in a timely fashion ‘‘only if you are operating under Wasker Standard Time.’” Mr. Wasker needs to be cajoled, prodded, teased, chided, nagged, assaulted and literally gang-tackled when attempting to get, what Mr. Wasker feels, is posterior shielding, job securing, nonsensical red tape exercises.”


Telephone interview with Michael Brozek, Madison, WI (June 5, 2007).


Paul Jacobson, Travel/Vacation Plan Week of March 17, 1986, Bates No. TI24190348, on tobaccodocuments.org.
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heightened importance that the cigarette companies attached to the bill was reflected in Brozek’s plans to “[a]ssess and react to changes in Iowa HF 102” on Monday March 31, spend Tuesday and Wednesday in Iowa to deal with the bill, and then reserve Thursday and Friday: “Schedule pending regarding Senate action in Iowa on HF 102.”

The Iowa Citizen Action Network, Iowa’s largest consumer group, was founded in 1979 and ten years later counted 200,000 individual members. ICAN regarded itself as organizing a “statewide progressive coalition to continue the fight for social and economic justice.” This “grassroots” organization, of which the affiliated unions of the Iowa Federation of Labor were the “backbone,” focused on issues of utilities, the environment, access to health care, insurance, and medical liability, and prided itself on having “stood up to intense pressure by insurance companies” and having held the line against regressive tax proposals that favored big businesses. That ICAN had allied itself with the tobacco companies on a vital issue of public health might seem counterintuitive, but a certain logic may have inhered in it.

One reason for the tobacco industry’s interest in availing itself of and subsidizing ICAN’s operations, was, as the Tobacco Institute bemoaned in late 1990 in connection with preparing its strategy “to stop a hodge-podge of local ordinances and to prevent the State Legislature from enacting a state-wide preemptive vending machine restriction bill,” that “TI has had a strange relationship with the Iowa Wholesaler group.” That relationship had, as discussed earlier, ruptured in 1982-83, when IATD and its executive director,

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303“Ten Years of Citizen Action: Iowa Citizen Action Network Tenth Anniversary Program” at 3 (Dec. 8, 1989).


George Wilson, who was also TI’s lobbyist, were unable to reach a compromise with the cigarette manufacturers over their conflicting legislative priorities. In 1986 Brozek—who in September 1985 apparently attended the IATD annual meeting in Des Moines for the purpose of “coalition building” had revealed the strategic necessity for substituting ICAN for IATD as its legislative lobby ally:

For the past several years, the Tobacco Institute has not contributed to the Iowa wholesalers association. This action was taken due to a legislative confrontation and, although we have kept in contact with that group, our relationship can be termed “tepid” at best.

Therefore we have had to pursue other areas and interest groups for allies and coalitions in our legislative support network. One such group, the convenience stores, have indicated interest with regard to excise taxation. Another group, The Iowa Citizens [sic] Action Network (ICAN), has directed its interest to the issue of citizens’ rights with regard to smoking in the workplace. Both groups will be pursued actively during the next legislative session.

A few months later Brozek highlighted ICAN in the same breath with business groups as allies in TI’s environmental tobacco smoke campaign. Under the heading, “ETS Briefing With Allies/Coalition Members,” he informed one of his bosses in Washington of a change in plans regarding briefing a University of Iowa panel on TI’s “scientific witness program.” Because Brozek in the meantime had come to “prefer a more structured and more comprehensive presentation plan,” he decided to “utilize the scientific witness program in order to initiate meetings with state legislators, the Iowa Citizen’s [sic] Action Network, the Iowa Restaurant Association and the Iowa Association of Manufacturers and Commerce.”

307 See above this ch.

308 Attendance was listed on Brozek’s calendar of events. Tobacco Institute Field Staff Meeting (Aug. 11-14, 1985), Bates No. 680501768/2024. However, his monthly summary to the State Activities Division in Washington, D.C. did not mention the activity, although other reports did mention successes at such wholesaler meetings in other states. Michael F. Brozek to William P. Buckley Re: Monthly Summary - September, 1985 (Oct. 4, 1985), Bates No. TIMN0457933; Michael F. Brozek to William P. Buckley Re: Monthly Summary - August, 1985, at 4 (Sept. 5, 1985), Bates No. TIMN0457939/42


310 Michael Brozek to George Minshew, Re: ETS Briefing With Allies/Coalition Members (Feb. 9, 1987), Bates No. TNWL0018977.
In August 1988, Brozek and Region IV director Dan Nelson, in preparation for the 1989 legislative session, accounted to their boss, Paul Emrick, the State Activities Division Northern Sector vice president in Washington, D.C., for the choice of Iowa as the target of a “concerted proactive effort” that would not “generate a ‘negative return’ from our opponents,” that is, “an equally aggressive anti-tobacco situation.” Their objective was to target the Iowa Senate “in order to maintain a majority position thereby enabling our operatives to enforce the sunset provisions in the Iowa cigarette tax increase of 1988.” While acknowledging “the fact that our proactive efforts are, theoretically, centered around that indoor air issue,” Brozek and Nelson interpreted remarks by TI President Chilcote at a staff meeting to mean that “proactive does not equate with compromise.” Characterizing the situation in Iowa as “‘precedential,’” Brozek and Nelson argued that success would make Iowa “one of the very few states or localities to roll back a tax increase.” Provisionally agreeing with the TI’s Iowa lobbyist Wasker that the plan was “doable,” they urged immediate launching of the legislative project rather than waiting until January. Six weeks later they reiterated the higher taxonomic fit, informing Emrick that: “Although not the mandated, strictly construed public smoking issue, the potential for a state tax roll back is far too significant NOT to be termed proactive. Therefore, we have immediately launched our efforts with several diverse groups in the state of Iowa.”

Brozek and Nelson had apparently been influenced to move in this direction by Mike Lux (former ICAN director and an Iowa Federation of Labor vice president) and David Wilhelm (former director of the progressive, union-funded Citizens for Tax Justice), who co-founded the consulting firm Strategy Group and was a Democratic national political operative. Because TI had “used ICAN as an allied group in the past,” Brozek and Nelson suggested immediately working with ICAN to plan for the 1989 Iowa legislative session, during which Citizens for Tax Justice would testify before committees and speak to individual state senators. To secure this cooperation, TI was to budget $5,000 for ICAN in

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311 The Tobacco Institute, State Activities Division (Dec. 1988), Bates No. 2025870848.
313 Michael Brozek and Dan Nelson to Paul Emrick, Re: Comprehensive Public Smoking Program Region IV (Nov. 4, 1988), Bates No. TI08940761/2.
the last quarter of 1988 and $15,000 in 1989 on top of $10,000 for CTJ.\(^{315}\) (Under the rubric, “Special Projects,” TI had paid ICAN $1,000 in 1986 and budgeted another $1,000 for it in 1987.)\(^{316}\)

Two weeks before Brozek and Nelson sent their memorandum, Lux had sent one to Wilhelm on “The Upcoming Iowa Cigarette Tax Fight,” in which Lux gushed over the possibility that an anti-cigarette tax coalition might be able to defeat the drive to repeal the sunsetting of a three-cent tax, thus making Iowa a “landmark state,” which “revers[ed] the tide and actually lower[ed]” its cigarette tax. Lux saw “[t]he key” to winning in moving labor and “progressive citizen coalitions such as” ICAN “into active partnership with other cigarette tax opponents” because the former had “a great deal of clout with the Democratically-controlled legislature....” He went on to tout ICAN as the state’s largest and politically-legislatively most successful citizen’s group with a full-time staff of more than 40—one of whom, Tom Jochum, he boasted, was chair of the House Appropriations Committee—many of whom were door-to-door canvassers. Moreover, at the previous election in 1986, all ten of the state legislative candidates whom ICAN endorsed and worked for were elected. In a handwritten note on behalf of his “business associate,” Wilhelm, in turn, hailed ICAN’s “guys” as “do[ing] what they say they’ll do.” He also assured the Tobacco Institute that its Iowa lobbyist Bill Wimmer “would be very supportive” and that they could get the IFL “on board” as well.\(^{317}\) By November 1988, Brozek and Nelson could tell their boss, Paul Emrick, that ICAN was “our most visible

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\(^{316}\) [Tobacco Institute], State Activities Division, 1987 Proposed Budget (Sept. 26, 1986), Bates No. 684019007/99. The purpose of the identical amounts that TI paid to the Dubuque Chamber of Commerce in those years is unclear.

\(^{317}\) Mike Lux to David Wilhelm, Re: The Upcoming Iowa Cigarette Tax Fight (Aug. 9, 1988), Bates No. TI00260222-3. The handwritten note, signed “David,” was directed to “Jan,” to whom the memo was apparently faxed. Jochum, when informed many years later of Lux’s boast, was nonplussed by the suggestion that he, a supporter of higher cigarette taxes despite being a smoker, had been used as advertising for a coalition with tobacco companies. Telephone interview with Thomas Jochum, Des Moines (July 21, 2007). Jay Larson, one of Lux’s successors as ICAN executive director, remarked that Lux had a tendency to blow things out of proportion. Telephone interview with Jay Larson, Everett, WA (July 19, 2007). More specifically he observed that: “Tom Jocham [sic] worked for ICAN for a very short time helping to coordinate our message and targeting of member outreach activities around the upcoming elections. I can not believe that he knew that Mike had written this in a memo nor do I believe that he would have approved of it if he had known.” Email from Jay Larson to Marc Linder (July 20, 2007).
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grassroots level allied legislative presence” in Iowa, reminding him that “this agreement” had been handled during their personal meetings in Washington with Wasker, Wilhelm, Lux, TI’s public affairs staff, and Emrick himself.318

By 1991, ICAN had indisputably allied itself with the cigarette companies on the issue of increased cigarette taxes, presumably on the grounds that the tax was regressive because it disproportionately affected poor and working-class people, who disproportionately smoked.319 In October 1990, in a forecast of the following year’s state legislative activities, TI’s State Activities Division reported that its Public Affair Division, through its Labor Management Committee, was taking part in a program in which labor unions and ICAN traveled across Iowa “advocating progressive tax alternatives. ... The intention of this effort is not only to elevate the debate on what are appropriate methods of taxation, but also to heighten the chance that selected union groups or ICAN reps would testify against regressive excise tax increases.”320 This seemingly high-minded talk about tax progressivity originated in the cigarette companies’ much more mundane drive to retain as much of their profits as possible: “Two legislative sessions ago, the industry was successful in reducing Iowa’s cigarette tax by three cents per pack (through a sunset clause). It is not lost on the legislature that this three cent tax reduction did not result in any lower cigarette prices to consumers.”321 By March 1991 TI noted internally that: “We agreed to provide support to Iowa Citizen Action Network (ICAN) for proposed tax-related activities in the state. The group requested assistance to produce and distribute two newsletters on the state budget issues.”322 At the same time, as part of its national strategy of creating state coalitions, the Tobacco Industry Labor Management Committee justified its “[m]onthly support” to ICAN on the grounds that it had “a very successful grass roots canvass organization” and was “an effective lobbying and public education organization.”323 ICAN, as Lowell Junkins, the former Iowa Senate Democratic

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318Michael Brozek and Dan Nelson to Paul Emrick, Re: Comprehensive Public Smoking Program Region IV (Nov. 4, 1988), Bates No. TI08940761/2.
319Susan Stuntz to Walter Woodson (Apr. 26, 1990), Bates No. TNWL0049694/5.
323“Labor Management Committee Coalitions” (no date [1991]), Bates No. TNWL0050258/71. The report mentioned a “[g]rant in early 1991 for fair tax campaign.”
Majority Leader and TILMC’s Iowa lobbyist commented years later, was a very left-wing messenger that went knocking on doors all across Iowa with very left-wing issues, but, because it was so strapped for money, had to tack on to them this one anti-anti-smoking issue for the tobacco companies.\textsuperscript{324}

Looking back at the 1991 legislative session and preparing for the next one, a memorandum to TI’s senior vice president for public affairs observed that “[w]e are not out of the woods on the cigarette tax as a funding mechanism, a key plank of the Governor’s plan during last year [sic] budget session, and we continue to work with ICAN to develop ways to build a coalition around the health care issue and to develop opposition to excise taxes as a funding method for the debt and/or healthcare programs.”\textsuperscript{325} By the 1993 session cooperation had intensified to the point that TI recognized ICAN as “instrumental to our grass roots efforts.”\textsuperscript{326} And, as TI senior vice president Mozingo observed as early as 1987, it was crucial to deliver the industry’s tax message “appropriately” to legislators through “grassroots efforts” because: “Frankly, the ‘regressivity message’ can ring a little hollow when delivered solely by legislative counsel. As a result, we also attempt to send the message by way of those who would be hit especially hard by such taxes.”\textsuperscript{327}

Jim Wengert, who had been the president of the Iowa Federation of Labor in the 1980s, while not recalling the episode at the time that “everybody started picking on” smokers, later speculated that perhaps some international unions might have opposed legislation on the grounds that they wanted to bargain collectively over workplace smoking rather than have the state impose one rule on all workers.\textsuperscript{328} This conjectured recollection received empirical corroboration from Mike Lux, who had been ICAN executive director from 1984 to 1987 (and

\begin{footnotesize}
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\item[324] Telephone interview with Lowell Junkins, driving somewhere in Iowa (Apr. 23, 2007).
\item[325] Memorandum [October Report on behalf of Labor Management Committee], The Strategy Group to Susan Stuntz (Nov. 12, 1991), Bates No. TNWL0049609/10. Amusingly, the report went on to mention that TI’s Iowa labor counsel Junkins, had been meeting regularly with (Democratic) Senate Majority Leader Bill Hutchins and House Speaker Bob Arnould “to reinforce their commitment to a progressive agenda.” \textit{Id.} Bates No. TNWL0049609/10.
\item[326] Memorandum from The Strategy Group to Jim Savarese (Jan. 25, 1993), Bates No. TNWL0049259/67. The memo also noted that “AFSCME has played a key role in our progressive tax work in Des Moines.” \textit{Id.}
\item[327] Roger Mozingo, Remarks at [Tobacco Institute] Board of Directors Winter Meeting (Feb. ___, 1987), Bates No. TIDN0002823//33.
\item[328] Telephone interview with Jim Wengert, Des Moines (Apr. 8, 2007).
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as late as 1990 appeared on a TI list of proposed invitees to a Labor Management Committee legislative conference as an ICAN representative. Although he remembered Brozek, the author of the memorandum, Lux characterized the description “front line defense” as “ridiculous.” While indignantly insisting that ICAN had not “carr[ed] water” for the tobacco companies, he did admit that they had a common cause in opposing cigarette taxes. Nevertheless, he retained a “very vague memory” of conversations with “the tobacco folks” in which ICAN took the position that “cigarettes did not deserve all the blame” for workplace health and safety problems, which needed more comprehensive treatment, including good ventilation, than anti-smoking laws held out. Like, Wengert, Lux also recalled having heard unions ask why workplace smoking regulation was not just a collective bargaining concern.

Neither disingenuousness nor a poor memory prevented Ben Zachrich, ICAN’s co-director (1987-89) and lobbyist, from recalling “the darkest day” of his career as a consumer advocate when sometime around 1988 Wimmer, with whom he had worked in (what he regarded as) an ethically unchallenged relationship in connection with the Iowa Trial Lawyers Association on medical malpractice, called him over to his office, gave him $5,000, and Zachrich took the “blood money.” The basis of the quid pro quo was transparent: ICAN was always “scrambling for money” and ICAN’s lobbying for the cigarette companies’ issues gave them “credibility” that they would have been unable to draw on with some legislators. While specifically recalling the battle over the sunsetting of the three-cent cigarette tax rather than the anti-public smoking bill, Zachrich observed that if Wimmer had asked (or in fact did ask) him to speak to legislators about that

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329Fall 1990 Labor Management Committee Legislative Conference (Sept. 1990), Bates No. TNWL0051901. A few years later an internal tobacco industry document stated that “Mike Lux, Vice President of the Iowa State Fed has resigned to accept a position with the Clinton transition operation in Washington D.C. We will miss his energy and commitment to the fair tax issue in Iowa....” Strategy Group to Jim Savarese, Memorandum at 5 (Dec. 8, 1992), Bates No. TNWL 0049483/7.

330Telephone interview with Mike Lux, Washington, D.C. (Apr. 9, 2007). Jay Larson, one of Lux’s successors as ICAN director, later offered a self-contradictory account of these events. Although he denied that ICAN had ever canvassed on the issue of public smoking, he conceded that it was possible that Lux had said that ICAN would canvass against clean indoor air bills because ICAN knew that unions opposed such laws and he therefore might have been willing to take money for doing what ICAN had to do anyway, at least in the sense that ICAN could not possibly have supported such legislation in the face of unions’ opposition. Telephone interview with Jay Larson, Everett, WA (July 19, 2007).
issue as well, he would have done it.\textsuperscript{331} Wimmer, who began as a lobbyist in 1979, later recalled dealing with ICAN on the tax issue, but not about public smoking, except insofar as ICAN was aligned with labor unions on the matter of workplace smoking rules. Although he stated that he did not remember giving ICAN money, if it did receive such money, ICAN would, Wimmer observed, have lobbied the legislature.\textsuperscript{332}

Further bright light was shed on the basis for ICAN-tobacco industry relationship by Jay Larson, its executive director from 1988 to 1992 and lobbyist from 1987 to 1992. A smoker who in the late 1980s and early 1990s did not think smoking was evil, he recalled many years later sitting in the capitol rotunda with the very “entertaining” tobacco lobbyists Wasker and Hultman engaged in the “sociable” activity of smoking. In retrospect he found it unbelievable that he used to go up to Johnie Hammond, the House’s most militant anti-smoker, in the rotunda with a lit cigarette in his hand.\textsuperscript{333} And one of his ICAN co-workers added that Larson had been a “chain smoker” who smoked in the office.\textsuperscript{334} Like Zachrich, Larson admitted that taking money to lobby and canvas on the cigarette tax issue was the aspect of his ICAN career that he was “the least proud of.” The origins of this deal, which had been prompted by the ever-present necessity of meeting a payroll, he associated with Lowell Junkins (or perhaps someone else he could not recall), who had approached him offering money in exchange for opposing cigarette taxes; his conscience had been assuaged by the statement that the money came from unions.\textsuperscript{335}

\textsuperscript{331} Telephone interview with Ben Zachrich, Des Moines (Apr. 11, 2007). Having failed to interview ICAN’s leaders, the authors of an otherwise illuminating piece on the relationship between the cigarette companies and Citizen Action organizations misleadingly understated money’s role in concluding that “their own financial needs...no doubt played some role in the alliance with the tobacco industry.” Richard Campbell and Edith Balbach, “Building Alliances in Unlikely Places: Progressive Allies and the Tobacco Institute’s Coalition Strategy on Cigarette Excise Taxes,” \textit{AJPH} 99(7):1188-96 at 1193 (July 2009).

\textsuperscript{332} Telephone interview with William Wimmer, Des Moines (Apr. 16, 2007).

\textsuperscript{333} Telephone interview with Jay Larson, Everett, WA (July 19, 2007).

\textsuperscript{334} Telephone interview with Amy Logsdon, Iowa City (July 20, 2007).

\textsuperscript{335} Telephone interview with Jay Larson, Everett, WA (July 19, 2007).
The Tobacco Institute Seeks to Co-opt a Skeptical and Resistant Iowa Restaurant Association

Science merely reinforces the social movement against smokers. Rebutting the science will not stop the movement... In focus groups we asked non-smokers about ETS: the health risk was clearly a subordinate concern to their simple dislike of tobacco smoke in the air. No scientific study can instill tolerance in the intolerant.336

By the mid-1980s the Tobacco Institute, having resolved to mount “a complete campaign to stop smoking restrictions,”337 declared that it would “continue to oppose without compromise all public smoking legislation.” Even in “instances...in which a corporation may wish to implement a voluntary policy to avoid facing more restrictive legislated policies” TI would “continue to attempt to discourage implementation of any policy...” However, the cigarette oligopoly’s watchdog might possibly be prepared to deviate from its course of unrelenting public belligerence to make an exception: it would “consider working privately with those corporations who come to us for assistance to ensure that policies that are implemented are fair.”338 In light of the enormous number of cigarettes smoked and the iconic status of smoking in restaurants and the crucial linchpin status that the anti-smoking movement had bestowed on legislating freedom from exposure to secondhand smoke while eating in public, the cigarette manufacturers were not in a position to adopt the same scorched-earth policy vis-à-vis the entire restaurant industry that they had implemented against individual companies that had dared ‘cross’ them by restricting or banning smoking among passengers or employees.339

In an attempt to persuade state restaurant associations to subordinate themselves to the cigarette companies’ legislative desiderata, TI drafted a Proposed Restaurant Manual in 1986. Its objectives included reinforcing their “awareness of: the tobacco industry’s opposition to further restrictions on

337William Kloepfer, Jr. to Samuel Chilcote, Subject: Immediate Public Smoking Communications (Jan. 29, 1985), Bates No. T104110301.
smoking in restaurants[,] the users of tobacco products as a major restaurant market segment[,] legislative and other threats of common concern to the tobacco and foodservice industries[,] and the value of the tobacco industry as an ally.” The first strategy to be deployed to achieve these objectives was “[d]emonstrat[ing] general customer satisfaction with current foodservice practices toward smoking restrictions.” Oddly, the numerous “tactics” that the manual spelled out to implement this strategy included commissioning surveys of restaurant employees’ “attitudes toward their long-time customers” as well as of owners and managers “toward legislated smoking restrictions,” but none of customers’ attitudes.340 Perhaps the Institute deemed it a sufficient demonstration of “customer satisfaction” for a regional director merely to appear at a legislative hearing and tack on, as one did in 1984, to the assertion that it was “far from proven that ambient smoke is hazardous to public health” the claim that “most people, including non-smokers, don’t care whether smokers light up or not....”341 The final tactic suggested by the Manual—yet another pipe dream that the tobacco industry propagated as a technological fix for indoor locations to divert attention from the dangers of secondhand smoke exposure and the need for state intervention to prohibit it—would have rendered voluntary accommodation superfluous: “use of adequate ventilation equipment as an alternative to separate smoking and nonsmoking sections....”342 Ironically, as anti-smoking scholars later pointed out, the cigarette companies persuaded many restaurants “to embrace expensive ventilation systems to avoid non-existent losses in business of going smoke-free.”343

By the mid-1980s, just as anti-smoking advocates in Iowa, undaunted by successive legislative defeats, were intent on incorporating restaurants into the

341Judy Johnson, “Anti-Smoking Bill Doused,” Tribune-Star (Terre Haute), Dec. 14, 1984, Bates No. TIDN0026693. Despite (or perhaps because of) the false statements by Brooke Cheney, the main speaker in opposition, the county council of St. Joseph County, Indiana (of which South Bend, the location of the University of Notre Dame, is the county seat) voted 8 to 0 against the proposed ordinance regulating public smoking.
clean indoor air law, TI, determined to maintain restaurants as locations for continued consumption of immense numbers of cigarettes regardless of the health consequences for nonsmoking customers and employees, strove to animate restaurant associations to cooperate in opposing governmentally imposed restrictions as well as smoking bans. Alone from 1985 to 1987, the number of bills introduced in state legislatures regulating smoking in restaurants rose from 43 to 68, while those approved increased from four to six; the figures for local bills increased from 118 to 169 and 68 to 88, respectively.\textsuperscript{344} Although TI referred to the restaurant industry as “this traditional ally,”\textsuperscript{345} and at least one regional vice president opined that “I cannot think of another TI ally that is more important in the fight against smoking restriction” than the restaurant industry,\textsuperscript{346} the Institute was well aware that the regard was not mutual: “Many restaurant owners ‘do not look at the [tobacco] industry as an ally.’”\textsuperscript{347} Indeed, as TI Midwest vice president Brozek observed many years later, the restaurant industry simply “wouldn’t line up” with the Institute—“you couldn’t control them”—some owners did not even want smoking in their restaurants.\textsuperscript{348} Even when a state restaurant association did join forces with the tobacco industry to help defeat proposed restrictions on smoking, the Institute complained, “[m]any times, once a restaurant is amended out of the bill, the restaurant industry discontinues its involvement.”\textsuperscript{349} The unintended consequence of such exemption, as one of the Institute’s regional field staff pointed out, was the loss of “a tremendous amount of our support”; this staffer even recommended that TI should “encourage associations to ‘hang in there’ and not amend themselves out of the bill. They only find themselves amended back into the legislation further down the road.”\textsuperscript{350}

In fact, the legislative situation became even more complex and fraught with

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345Susan Stuntz to William Kloepfer (Apr. 23, 1986), Bates No. TI05221069, on tobaccodocuments.org. Stuntz was a TI vice president and director of issues management; Kloepfer was senior vice president for public relations.
346Stan Boman to Katherine Becker, Re: Proposed Restaurant Manual (July 1, 1986), Bates No. TIOK0023718.
348Telephone interview with Michael Brozek, Madison, WI (June 5, 2007).
350Proposed Restaurant Manual State Activities Field Staff Comments at 6 (July 28, 1986), Bates No. TIOK0030536/41.
\end{flushright}
snares for any alleged alliance or coalition by the end of the 1980s, once the cigarette companies’ highest state legislative priority became enactment of amendments to clean indoor air acts preempting local ordinances that imposed stricter regulation than the statewide laws. But even as late as 1986, when, in the afterglow of the successive defeats of Zimmerman’s bills, the Midwest regional office did not even list for the central office any “possible smoking restriction issues,” it did note that despite its having contacted the Iowa Restaurant Association, “no real relationship exists. The association is neither very large nor very strong.” At this juncture TI looked favorably on restaurant owners’ voluntarily creating smoking and nonsmoking sections in an “attempt to accommodate the varied preferences of all customers.” The Institute promoted such voluntarism because it “reduces the perceived need by legislators to introduce restrictive legislation that ignores the capacity of a restaurateur to determine and respond to the needs of his particular clientele.”

This approach also served the aforementioned purpose of keeping the restaurant industry on the hook permanently: without the protection of a formal statutory exemption, restaurant owners would retain an incentive to carry their lobbying weight against the enactment of new anti-smoking laws or the strengthening of existing ones. The Iowa Restaurant (and Beverage) Association was not one of the state organizations that had adopted this approach by mid-1986, but in January 1987, just as the legislative session was about to convene, it sent out to members an information fact sheet labeled “[Confidential—For Members [sic] Use Only],” which its current president and CEO assumed was “a result of [a] decision of the board.” After counseling members about IRS audits of restaurant employees for compliance with correct tip reporting, the informational advised that:

NO SMOKING AREAS are becoming more noticeable all of [sic] the time. Several

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353 Lisa Osborne [Tobacco Institute Project Coordinator] to Brook[e] Cheney [Regional Director for region including Indiana], Re: Voluntary Restaurant Program (July 1, 1986), Bates No. TI05221053.
354 Lisa Osborne [Tobacco Institute Project Coordinator] to Brook[e] Cheney [Regional Director for region including Indiana], Re: Voluntary Restaurant Program (July 1, 1986), Bates No. TI05221053.
355 Email from Doni DeNucci to Marc Linder (July 26, 2007).
companies here in Des Moines, along with some state buildings, have outlawed smoking entirely. There is no doubt that a No-Smoking Bill will be introduced again this year in the legislature. It would be a lot better if we can say that the restaurants already have Non-Smoking Sections, and we do not need a law to enforce it. Our main concern is to be able to adjust the size of the Non-Smoking Area to the demand. If we get a law that specifies a certain percent of square footage for Non-Smoking you will not have your flexibility. Please consider setting aside a small area for Non-Smokers and give your customers a choice. It would give you a good idea if it was needed and how much room was required. If we get the wrong bill passed you may not have a choice.\footnote{Iowa Restaurant & Beverage Association, “Information About Your Industry” (Jan. 1987) (copy faxed by Doni DeNucci, IRA Pres-CEO, July 26, 2007).}

Having now adopted this voluntarist-accommodationist strategy to warding off government intervention, after the close of the 1987 Iowa legislative session—from which restaurant owners unconcerned with public health emerged unscathed—the organization reoriented its policy further. Lester Davis, the IRBA’s executive director, contacted the National Restaurant Association, which referred him to the Tobacco Institute, to which he wrote at the end of July 1987 asking for information about its “Smokers Are Welcome Here” Campaign. He explained that: “We were able to have restaurants and bars excluded from the Clean Air Bill last [sic] year. Some of our members might like to let smokers know they are also good business.”\footnote{Lester R. Davis to Jeff Ross (July 31, 1987), Bates No. TI01941669/70.} The relationship between Davis and the Tobacco Institute must have become more focused in the next few months: in mid-October Sharon Ransome, a project coordinator in TI’s Public Relations Division,\footnote{Ransome had begun working at TI in 1985. Samuel Chilcote to Members of the Executive Committee, Memorandum [Headquarters Staff] (Aug. 15, 1986), Bates No. 2021266909/11. Having been graduated from the University of North Carolina at Greensboro in 1985, she began working at the Institute doing online indexing of current tobacco articles and research for member companies. The Tobacco Institute’s Fourteenth College of Knowledge: Student Profiles (June 12-13, 1986), TIMN279457/61.} informed one of her supervisors that she was traveling to Des Moines to meet with Davis on the topic of the “Smokers Are Welcome Here Campaign.” The importance that the Institute attached to the meeting was underscored by the fact that Ransome went through a “dry run” preparation for it with another public relations staff member.\footnote{Sharon Ransome to Susan [Stuntz] (Oct. 13, 1987), Bates No. TI01941309.} On her return from Iowa, Ransome informed Susan Stuntz (who was in charge of public relations issues management) and Brozek of the remarkable discussion without commenting on its remarkableness. In addition
to executive director Davis, the association’s president, Dick Wilderman, who owned Dick’s A & W Restaurant in Des Moines, was also present at the October 16 meeting, during which:

Mr. Davis immediately explained that the association which has twelve hundred members strongly encourages a voluntary approach to smoking in restaurants—designating smoking and nonsmoking sections based on the concept of supply and demand—for two reasons:

1. Restaurateurs are in the business to accommodate the preferences of all customers—smoking and nonsmoking.
2. To dissuade legislators from coming in and requiring the owner/manager to designate a certain percentage of the restaurant as smoking or nonsmoking.

“One after all, a man should be allowed to run his own business as he sees fit,” says Lester Davis.

While Wilderman agreed, he admitted that he would like to see a smoke-free society, and he’s a smoker. Both men emphasized the difficulty of convincing some restaurateurs of the importance of a voluntary program. Davis said restaurateurs are safe for now—during the second term of the Iowa legislature, and believes they have more than a 50 to 50 chance of maintaining [the] exemption for restaurants and bars in the next legislative term, but that’s no guarantee. The vote which originally exempted restaurants and bars from the Iowa Clean Air Act survived on a 29 to 21 vote in favor of exemption.

Mr. Davis explained that The Iowa Restaurant & Beverage Association will hold their annual convention during the last week of October. At that time he will introduce the materials and the idea of the voluntary program. He explained that a decision to engage in a program such as the one we are offering has to made by a joint body. Davis seemed interested in the program and felt it could be of some assistance; however, other members of the association may not share his opinion.360

Ransome, unfortunately, did not include her side of the conversation, record her reaction to the revelation that the president of the Iowa Restaurant & Beverage Association looked forward to a smoke-free society or her evaluation of its possible consequences for the tobacco industry, or comment on owners’ resistance even to adoption of a voluntary program. Wilderman, though unable to recall Ransome or the meeting two decades later, mentioned that he had introduced a nosmoking section in his restaurant—which was pointless since the smoke drifted into it—but stressed that he personally would have preferred enactment of a law because it would have taken matters out of his hands and

enabled him to blame the law if customers complained. Indeed, he insisted that “I’d have loved to go nosmoking,” but “I didn’t have enough balls to ban smoking”; even after he had finally quit smoking in 1990 (following many failed attempts), he still never banned smoking in his restaurant, in part because many of his customers smoked, thus contradicting his own speculation that many owners did not ban smoking simply because they themselves smoked and were not sensitive to the issue. He also acknowledged that a legally imposed total ban would have been “the best thing” that could have happened because customers and employees would have smoked less and revenue would not have fallen.  

Although the minutes of the Iowa Restaurant Association’s conventions from the 1980s are no longer extant, the outcome of the organization’s convention discussion of the TI’s voluntary restaurant program is known from Ransome’s report to the impatiently waiting TI hierarchy on her telephone conversation with Davis three weeks later. The “general consensus” at IRBA “was to not participate” because while some members “thought it might be effective...others thought it might be negative.” The most that Davis himself offered was that the program had “merit, and if he had the power to make the decision singularly, he might opt to participate in one form or another.” The membership’s rebuff to TI was blunt: in the face of IRBA’s encouraging restaurateurs to implement smoking and nonsmoking sections in order to demonstrate to the legislature that owners “are more than capable of governing their own establishments[,] many members remain very adamant about maintaining their own policy which is nobody should be telling me how to run my establishment—not even IRBA.” In the end, while

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361 Telephone interview with Dick Wilderman, Des Moines (June 10, 2007). Wilderman could also not recall any tension between the Iowa Restaurant Association and the tobacco industry or any financial support from the latter to the former. The point that the existence of a law gave a “convenient excuse” to business owners, who could blame government when responding to smokers’ complaints, was made by Republican Darrell Hanson at a House State Government Committee hearing on the chief anti-smoking bill in 1987. Thomas Fogarty, “Smoking Law Gets OK from House Panel,” DMR, Feb. 17, 1987 (2A:3).

362 The IRA’s current president and CEO characterized it as “[v]ery strange” that the organization had the minutes from the 1940s to the 1970s and then 1990s, but not from the 1980s. Email from Doni DeNucci to Marc Linder (July 26, 2007).

363 SMS to Sharon [handwritten note on copy of Ransome’s memorandum] (Oct. 29, 1987), Bates No. TI01941665; [No author, recipient, or title] (Nov. 6, 1987), Bates No. TI01941664; [No author, recipient, or title] (Nov. 16-17, 1987), Bates No. TI01941668; Tobacco Institute, “Executive Summary” (Oct. 16, 1987), Bates No. 506772574/5; [Tobacco Institute], Public Affairs Management Plan Progress Report (October 1987), Bates No. TIMN305174/84.
IRBA would “continue to urge a voluntary program,” all that the association might want from TI was “assistance when the public smoking issue comes before the Iowa legislature once again.”

IRBA may not have officially adopted and acted on the principle that voluntarily creating smoking and nonsmoking sections was the most practical way to persuade the Iowa legislature not to impose such designations, but it did begin cooperating with TI in related areas. Thus in the summer of 1988, Ransome and the State Activities division reported that IRBA (like other midwestern associations) had agreed to help the Tobacco Institute promote its Great American Welcome program, designed to foster hospitality and retail businesses’ “appreciation of smokers’ business and to encourage accommodation of smokers” as a response to the Great American Smokeout.

In launching the Great American Welcome on November 15, 1988—two days before the American Cancer Society’s annual Great American Smokeout—TI announced the pseudo-egalitarian policy of “recogniz[ing] the importance of smoking and nonsmoking customers,” which was “[d]edicated to the simple proposition that smokers and nonsmokers appreciate courtesy.” How and why the cigarette companies imagined that declaring that both “[s]mokers and nonsmokers are good customers” and seeking to mobilize owners “who accommodate all patrons regardless of their decision to smoke” could function

364 Sharon Ransome to Susan Stuntz, Re: Iowa Restaurant and Beverage Association Follow-up (Nov. 18, 1987), Bates No. Tl28680438. Because Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 43, 46 (2009), on http://repositories.cdlib.org/ctcre/tcpmus/IA2009/, relied on an internal TI document (from October 1987) that had been overtaken by events in November (despite the fact that Ransome herself in the document stated that the outcome would not be known until November) and failed to use the documents cited in the text above, the authors were unaware that ultimately IRBA’s membership had rebuffed TI. This ignorance then contributed to their failure to grasp the conflicts between the restaurant owners and the cigarette manufacturers over preemption and restaurant coverage during the legislative debates of the 1990 session. See below ch. 27. The document in question was Susan Stuntz, Chip Foley, and Sharon Ransome, “Public Smoking Issue,” in [Tobacco Institute], Public Affairs Management Plan: Progress Report (Oct. 1987), Bates No. TIMN0305174/82/84.


367 Tobacco Institute, “The Tobacco Institute Announces ‘The Great American
as a meaningful antidote to the Smokeout’s message of the health consequences of smoking\textsuperscript{368} vis-a-vis the vast majority of smokers, who wanted to quit, is unclear. The absurdity of this pathetic initiative two years after publication of the surgeon general’s first major study of involuntary smoking\textsuperscript{369} and the powerful impetus this scientific synthesis gave to the anti-public smoking movement was only underscored by the accompanying visual image of “The Great American Welcome”—published as a full-page ad in \textit{The New York Times} and elsewhere—surrounding two right hands next to each other with thumbs up, one of the hands holding a cigarette.\textsuperscript{370}

Somewhat different in tone was TI’s pamphlet, “Open Door to Hospitality—Accommodating Smokers and Nonsmokers,” which appears to have come out at the end of 1988\textsuperscript{371} and was directed primarily at restaurant owners. “[D]esigned to reinforce the importance of smokers as customers and to provide practical information for the hospitality industry in accommodating smokers and


\textsuperscript{369}U.S. Department of Health and Human Services, \textit{The Health Consequences of Involuntary Smoking: A Report of the Surgeon General} (1986). Such absurd tactics were not new. On the eve of the report’s publication and coinciding with the Great American Smokeout in 1986, Philip Morris announced its Great American Smoker program introduced by Milton Berle instructing smokers that “‘Nobody, and I mean nobody — not the anti-smokers, not the crusaders, not all the moralist groups and the pressure groups in the entire world—have the right to decide for you’” whether to smoke. Philip Morris USA, News: Philip Morris U.S.A. and Entertainer Milton Berle Introduce “Great American Smoker’s Kit” at 3 (Nov. 19, 1986), Bates No. 2024274455/7. TI’s deputy director of public relations, Peter Sparber, pushed this farce one step further by proposing a strategy of making the Great American Smokeout a “liability” for the American Cancer Society—despite the fact that it had “gone to great lengths to avoid the appearance of harassment”—by forming the League Against Smoker Harassment (LASH) and asking members to “‘Back LASH.’” In addition, in order to disabuse the ACS of its “inappropriate preoccupation with smoking,” he explored the possibility of recruiting prominent public officials to ask the ACS board (whose members represented many industries) to broaden its approach to include all “‘causes’ of cancer” in order to confront them with the problem of considering one-day closings of chemical plants or one-day moratoria on coffee and red meat. Peter Sparber to Samuel Chilcote at 3-5 (Oct. 23, 1986), Bates No. TIOK0023532/4-6.

\textsuperscript{370}\textit{NYT}, Nov. 15, 1988 (D32).

\textsuperscript{371}“Production Services” (Dec. 19, 1988), Bates No. 09910965.
nonsmokers,” it was studded with false and deceptive claims, which boiled down to the assertion that “tobacco smoke is rarely the true culprit” in causing poor indoor air quality. Instead, by claiming that “[i]n the vast majority of cases the real problems are poor ventilation and air filtration,” TI left owners with the impression that “courtesy” and technology might render separate smoking and nonsmoking sections superfluous. After all, if one of the chief vices of “legislated smoking restrictions” that “threatened” “an effective host” was allegedly “chang[ing] your image from host...to enforcer,” it was difficult to discern how, “[i]f you establish no-smoking areas” and “[m]ake your smoking policy clear” and “[m]onitor” it, the owner could avoid becoming a “policeman,” albeit of his own rules. Significantly, once the Iowa legislature amended its law to cover restaurants, the discretion conferred on owners to designate smoking and nonsmoking sections was so capacious that it practically extinguished the difference between state-required and self-created designation: indeed, since owners, as the Iowa Restaurant Association would itself concede, could comply with the Iowa law by designating even one table as the nonsmoking section, that obligation might be even less burdensome than the TI’s proposed “flexible approach” of setting up “‘floating areas’...adjusted to fit demand.”

The Tobacco Institute also targeted owners and operators of chain and independent restaurants in Iowa by means of advertisements in the monthly

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378In an earlier and longer version of the pamphlet, the owner of a fancy New York restaurant “sums it up simply: ‘I’m not a policeman. I am a cook.’” Tobacco Institute, “Open Door to Hospitality—Accommodating Smokers and Nonsmokers” (July 1988), Bates No. 87716290/300.
379See below ch. 27.
publication of IRBA to “educate” them “about the negative effects of smoking restriction legislation will have on their business.” 381 In September 1988, the Public Relations Division of the Tobacco Institute—as if TI did anything but PR—informed Davis (with a copy to lobbyist Wasker) that in connection with the Welcome program the Institute had decided to buy a full-page advertisement in six consecutive issues of the IRBA’s monthly magazine. 382 Headlined, “What if they passed a law that took away 30% of your business?,” the ad claimed that this loss would be the result of a smoking ban in restaurants decreed by the legislature or city council. Without making clear the relation to the first claim, TI also asserted that almost 20 percent of the U.S. population would not visit a restaurant that prohibited smoking. Promising that it could help restaurant owners “make sure this never happens,” the Institute offered to “help you develop ways to accommodate all your customers—smokers and non-smokers alike.” And finally, deceptively suggesting that the cigarette companies’ interests were identical with restaurant owners—a suggestion that the companies would strikingly refute in the Iowa legislature in 1990—the Institute stated that it would “help you ensure that your voice is heard when government takes up the issue.” 383

In addition to enabling the tobacco industry to convey its misleading message to whichever Iowa restaurant owners actually read ads in the magazine, the $110 per month that TI paid IRBA for six months constituted modest financial support.

Scientific Advances in Understanding the Health Impacts of Exposure to Environmental Tobacco Smoke Sharpen the Industry’s Visions of the Endgame

For us the crux of the ETS issue is that restrictions and social opprobrium against smoking may reduce cigarette consumption and smoking incidence.... Between 1985...and February 1987...incidence [of smoking] dropped from 32.8% of population to 30.8%. The greatest decline has been among white males, age 30-44. This group is most likely to be subject to workplace restrictions or have children at home or both. Their most likely motivation is the fear that the ETS issue has instilled in them; they fear harming their children or their employment prospects. 385

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382 John Lyons to Lester Davis (Sept. 14, 1988), Bates No. T107731867.
384 Tobacco Institute Check No. 059994 (Feb. 27[?], 1989), Bates No. T144070989.
In spite of the failure of Zimmerman’s bill in 1986, the Tobacco Institute knew that anti-smoking activists would once again reintroduce a statewide smoking bill in 1987. Losing no time, on June 10, 1986, just a few weeks after adjournment, its Midwest regional vice president Brozek and regional director Jacobson held an Iowa Tobacco Action Network Advisory Committee meeting in Des Moines at the Embassy Club on the top (25th) floor of the Financial Center, the state’s tallest commercial building when it was built in 1973. The purpose of the TAN Advisory Committee, which was composed of tobacco member company sales force representatives, was to inform those representatives fully of the “legislative environment and industry needs.” In reviewing the 1985-86 legislative session, the Iowa committee, whose first listed member was none other than Mike Lux, ICAN’s executive director, discussed “State Smoking Policy” and “Environmental Tobacco Smoke/Workplace” as well as upcoming primary and general elections and legislative projections for the next session. Looking forward to continuing the pursuit of legislative allies and coalitions, in early December Brozek informed his superior, George Minshew, that he had decided to take Philip Morris up on its offer to provide TI with its Philip Morris Magazine and coupon lists for use in phone banking efforts during the 1987 Iowa legislative session to oppose smoking restriction bills.

In its year-end “State of the States” report, TI summarized the strengths and weaknesses of the industry’s position in Iowa in somewhat greater detail. The state’s various “tobacco segments” were “not always dependable.” Alluding to the aforementioned breakdown of relations with lobbyist George Wilson’s organization, the report lamented that the “wholesaler association, even with

386 Paul Jacobson to [form letter] (May 28, 1986), Bates No. TI24190305-6, on tobaccodocuments.org.
388 Michael Brozek to George Minshew, Re: 12/30/86 Woodson Memorandum Regarding TAN Redesign, at 3 (Jan. 13, 1987), Bates No. TI29261787/9.
389 Paul Jacobson to Michael Brozek, Re: Revised TAC List - Region IV (Aug. 1, 1986), Bates No. TI24190283/4. The other ten members included three Brown & Williamson Tobacco Corp. employees, and one each from Philip Morris, R. J. Reynolds Tobacco Co., Lorillard, and Liggett and Myers Tobacco Co.
391 Michael Brozek to George Minshew, Re: Philip Morris Proposal for Acquisition of Computerized Mailing Lists (Dec. 2, 1986), Bates No. TNWL0021450.
recent overtures, has not been responsive to general tobacco industry legislative concerns. If a choice between a vote on the state’s minimum mark-up law or an increase in the state’s cigarette excise tax [had to be made], the wholesaler association’s choice would be the former.” Weakening the cigarette companies’ potential legislative influence was the fact that labor unions, which several years earlier they had begun to cultivate as coalition partners within the framework of the Tobacco Industry Labor Management Committee, had become “an unreliable ally” in Iowa because of the “depression” in the farm equipment manufacturing industry and several strikes in animal slaughter plants. Consequently, Iowa labor had “enough problems of its own.” On the bright side, TI tooted its own horn by asserting that “[t]he most valuable resource” that it had provided in Iowa was hiring “the best possible lobbyists...as well as the continuation of the honorarium program.” Although the industry boasted that it had been able to defeat clean indoor air bills for five sessions, “anti-industry forces headed by lung association operatives” had announced a “major new effort” for the 1987 session, which could alter the constellation of forces that until then had favored the tobacco companies: “The Iowa political environment has not succumbed to the national hysteria regarding indoor smoking restrictions.” Bolstered by “more professional fund-raising,” the Lung Association would “be in better financial shape and more able to organize locally regarding their agenda.” Consequently, TI anticipated a strong effort in 1987 by “our adversaries to enact comprehensive workplace smoking measures” accompanied by a ban on handing out free cigarette samples.\footnote{\textit{Tobacco Institute, State Activities Division, “1987 The State of the States: Assessing the economic and political climate of each of the 50 states as they affect the tobacco industry; and evaluating industry resources for action on legislation projected for 1987,” Iowa at 3-4 (Dec. 1986), Bates No. 80420206/86-7.}}

The tobacco industry anticipated the flood of anti-public smoking bills to be filed during the 1987 state legislative session with particular trepidation because it could not close its eyes to the sea change in public attitudes toward the dangers of secondhand smoke exposure that would surely be effected by the publication of two reports at the end of 1986: \textit{Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects} by the National Research Council’s Committee on Passive Smoking in November,\footnote{\textit{National Research Council, Committee on Passive Smoking, \textit{Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects} (1986).}} and the surgeon general’s first major study of \textit{The Health Consequences of Involuntary Smoking} in mid-December.\footnote{U.S. Department of Health and Human Services, \textit{The Health Consequences of}} In October, even before either study had appeared, Peter Sparber,
a Tobacco Institute vice president and deputy director of its Public Relations Division, revealed in a memorandum to President Chilcote that the epithet “obfuscation” would not even remotely begin to do justice to the mendacious campaign that the cigarette industry was about to launch. Sparber recommended that in conversations with the executive committee (consisting of high-ranking cigarette company executives) Chilcote state that: “Our strategy will be to set the public agenda by making an issue out of the many anti-smoker attempts to intimidate our scientists and shut down the scientific debate over ETS.” Continuing in this preposterous vein, Sparber proposed meeting privately with the Secretary of Health and Human Services to request that he investigate the intimidation (allegedly) promoted by Surgeon General Koop. Unsurprisingly, the purpose of these and similar dirty tricks was to “divert public attention away from these two damaging reports [and] make the anti-smokers respond to us....”

The National Research Council study, issued in November, reported that studies of various populations in Europe, Asia, and North America had found the risk of lung cancer to be 30 percent greater nonsmoking spouses of smokers than among nonsmoking spouses of nonsmokers. The surgeon general’s report

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395A few years later as an outside consultant to TI Sparber outdid himself with this contribution to discouraging or reversing mandatory or voluntary smoking bans in restaurants, where, absent laws, owners’ “whims— not necessarily logic or facts— are all that is necessary to set smoking policies”: “Demonstrate that far from being victims, restaurant workers pose a serious public health problem. Comment: Since restaurant workers are largely incapable of speaking out for themselves, we believe the only way that the “restaurant workers as victims of ETS” issue can grow is if the anti-smokers can generate sympathy for them. But, given the public health problems reportedly caused by restaurant workers, it is ironic that restaurant workers could ever be seen as victims of any sort. The best way of countering the antis, is to encourage third parties to increase public awareness of the public health threat posed by restaurant workers. It may be hard to generate public concern over restaurant worker exposure to ETS, when the public is more concerned about contracting rare, Central American strains of tuberculosis from restaurant workers.” Joanna Hamilton and Peter Sparber to Karen Fernicola Suhr, Re: Restaurant Program Observations and Recommendations at 2, 5 (Aug. 17, 1993), Bates No. TI 01621160/1/4.

396Peter Sparber to Samuel Chilcote at 1-3 (Oct. 23, 1986), Bates No. TIOK0023532-4.

397National Research Council, Committee on Passive Smoking, *Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects* 10 (1986). Even after “allowing for reasonable misclassification,” the adjusted increased risk was about 25 percent. *Id.* at 246. The opening sentence in the *Times* report bizarrely asserting that the
turned out to be as traumatic as the tobacco industry had feared. At his press conference on December 16, Dr. Koop presciently predicted that the report would become the same kind of “‘turning point’” in its field that the original 1964 report had been in its. 398 In fact, the new study’s catalytic force was likely to be brought to bear even more quickly and systematically both because Koop lacked the reticence of his predecessor Luther Terry to make policy recommendations 399 and a much better organized and more mature anti-smoking movement was available to propagate and implement his advice. Koop declared point-blank that “the health danger to nonsmokers from coworkers who smoke cigarettes is so clear that smoke-free workplaces ought to be made available to nonsmokers.” 400 Of the three major conclusions of the report itself the first and third would become especially disastrous for the cigarette industry’s battle against regulation of public smoking: (1) “[i]nvoluntary smoking is a cause of disease, including lung cancer, in healthy nonsmokers”; (2) the children of smoking parents had a higher frequency of respiratory infections than those of nonsmokers; and (3) “[t]he simple separation of smokers and nonsmokers within the same air space may reduce, but does not eliminate, the exposure of nonsmokers to environmental tobacco smoke.” 401

A few days after the issuance of the surgeon general’s report, Roger Mozingo, the head of the TI State Activities Division, saw the looming catastrophe too clearly to bother with Sparberesque antics. In a memo to Chilcote he characterized the report as “a watershed event” that rendered projects that would help the industry “‘in the long run’” moot because: “Unless immediate steps are taken to educate our staff, allies and legislators—and to get some relief from the constant barrage of negative press coverage of ETS—there will be no ‘long run.’ The issue is that serious.” To be sure, the “education” Mozingo envisioned was also rooted in mendacious obfuscation designed “to (1) effectively reassure our

Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

allies that the Surgeon General is wrong and (2) then have that message delivered to appropriate lawmakers.” Starting with legislators in crucial states who had received campaign contributions or honoraria, Mozingo proposed “hammer[ing] home” the points that: (1) “ETS does not represent a proven health hazard to nonsmokers”; (2) “if legislators want to go after the real indoor air quality culprit, look to ventilation problems”; and (3) “the surgeon general has replaced scientific integrity with a political agenda.”

One major impediment to convincing legislators that only the cigarette companies with tens of billions of dollars of accumulated capital and future profits at stake were holding high the banner of science and eschewing politics was a bad press:

Unless we can alter the tobacco story lawmakers read every day and hear/see on the news every morning and night, our efforts will be less effective. In our view, the negative tobacco press is one of the keys to the anti’s [sic] success. It makes it difficult for legislators to support our view, much less take the lead in our defense. If we can lessen the impact of some of these stories, and perhaps have our opinions aired or printed, this exercise will be a success.

Mozingo did not bother—presumably because he did not need—to explain to Chilcote why only very selective and manipulable interactions with news media were viable: “Frankly, when a TI spokesperson debates an anti-smoker on, say, McNeil/Lehrer, it seldom helps either the state or federal legislative situation.


403 Roger Mozingo to Samuel Chilcote, Subject: State Activities’ ETS Plan of Action (Dec. 19, 1986), Bates No. TIOK0023509/13. Mozingo’s comment may have been sparked by a sarcastic memo he had received a few days earlier from Dennis Dyer, the New England regional vice president. Responding to Mozingo’s remark that he had not heard one new idea from his staff in two years, Dyer proposed “postur[ing]” smoking restrictions and “other discriminatory devices of the anti-tobacco groups as elitist discrimination, bigotry, and an erosion of our basic freedoms of speech, property, assembly, etc.” He concluded that “[o]ne of the industry’s biggest problems” was being “viewed as the ‘black hats,’ while its opponents appeared as ‘protectors of the ‘faithful.’ From that flows the single most obvious reason why we lose legislation—overwhelmingly negative press coverage.” Dyer speculated that his proposal’s long-term effect “could be the return of balanced review of the issue by the people, press, and elected officials.” By balance he meant that the industry could look back on a “good year” if people had begun saying: “‘Yes, there are health questions here; but there are equally important freedom questions that must be weighed.’” Dennis Dyer to Roger Mozingo, Re: Idea #1 (Dec. 11, 1986), Bates No. TIOK0014388/9.
On-site background press work would be more useful in a legislative sense. Little wonder that just a half-year later an industry facing the credibility crisis that flat-earth societies tend to engender was desperate enough to want to explore the possibility of circumventing the press by becoming the press. As a Philip Morris communications department brainstorming group suggested to top management:

Consider acquiring a major media vehicle. Washington Times and Insight examples (Moonies). When founded, these vehicles were prejudged and ignored. Now they are reputable, respected and consulted. Initially, if we controlled such an information outlet, information would be subject to suspicion and scrutiny. But now Insight has a million and a half readers. This grassroots readership cuts the legs from under effete criticism.

Even before 1986 ended, as the tobacco industry processed the import of the surgeon general’s report and the world’s reaction to it, Hurst Marshall and George Minshew, the Tobacco Institute’s vice presidents for the Southern and Northern sectors, respectively, informed its outside legal and regional staff that it was already clear that the ETS report—which “may be the most devastating politically”—“will play a tremendous role in smoking restriction battles in 1987 and beyond. Indeed, the flood of legislative activity caused by the report could spill over into other issues such as cigarette excise tax earmarking.” In order to insure that 1987 was “a successful year on the smoking restriction front,” Marshall and Minshew declared that the State Activities staff had to be “familiar with the latest pro/con ETS arguments.” To that end, they were scheduling briefing sessions by Covington & Burling lawyer John Rupp and the Institute’s “scientific team” (aka International Air Pollution Advisory Group), which would “would review our side of the story and the solid arguments we can bring to the debate.” Their solidity can be gauged by the fact that exactly six months later Rupp, according to the minutes, was constrained to admit at a Philip Morris brainstorming conference on secondhand smoke: “Where we are. In deep shit.”

In fact, even though the surgeon general’s report could scarcely have been adequately digested by the time the state legislative sessions were underway in

406 M. Hurst Marshall and George Minshew to T.I. Legislative Counsel and Regional Vice Presidents/Directors (Dec. 24, 1986), Bates No. TI12240210/1.
early 1987, that year did turn out to be a record-breaker for the volume of smoking regulation bills. The following table, included in the Philip Morris “Corporate Affairs Issues Handbook” and presumably based on information collected by TI’s army of state lobbyists, reveals 1987 as the peak for introduction and approval of state bills and local ordinances from 1979 to 1988:

<table>
<thead>
<tr>
<th>Year</th>
<th>State Introduced</th>
<th>State Approved</th>
<th>Local Introduced</th>
<th>Local Approved</th>
<th>Total Introduced</th>
<th>Total Approved</th>
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<tbody>
<tr>
<td>1979</td>
<td>114</td>
<td>8</td>
<td>58</td>
<td>23</td>
<td>172</td>
<td>31</td>
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<td>1980</td>
<td>98</td>
<td>1</td>
<td>60</td>
<td>32</td>
<td>149</td>
<td>33</td>
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<td>1981</td>
<td>100</td>
<td>10</td>
<td>65</td>
<td>35</td>
<td>165</td>
<td>45</td>
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<tr>
<td>1982</td>
<td>86</td>
<td>4</td>
<td>79</td>
<td>42</td>
<td>165</td>
<td>46</td>
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<tr>
<td>1983</td>
<td>86</td>
<td>5</td>
<td>120</td>
<td>62</td>
<td>206</td>
<td>67</td>
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<tr>
<td>1984</td>
<td>109</td>
<td>4</td>
<td>180</td>
<td>65</td>
<td>289</td>
<td>69</td>
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<tr>
<td>1985</td>
<td>142</td>
<td>26</td>
<td>232</td>
<td>114</td>
<td>374</td>
<td>140</td>
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<tr>
<td>1986</td>
<td>140</td>
<td>17</td>
<td>255</td>
<td>139</td>
<td>395</td>
<td>156</td>
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<tr>
<td>1987</td>
<td>191</td>
<td>28</td>
<td>301</td>
<td>169</td>
<td>492</td>
<td>197</td>
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<tr>
<td>1988</td>
<td>189</td>
<td>18</td>
<td>253</td>
<td>123</td>
<td>411</td>
<td>130</td>
</tr>
</tbody>
</table>

Thus alone from 1986 to 1987 the number of state bills introduced rose 36 percent compared to a rise of only 23 percent from 1979 to 1986; the proportionate increase in the volume of local ordinances introduced from 1986 to 1987 was also significant, but not so high as in the first half of the 1980s. In spite of the large increase in state bills introduced in 1987, the rate of approval reached 15 percent, the second highest of the 10-year period (to 18 percent in 1985); although the rate of approval of local bills reached its high point in 1987, at 56 percent it was not significantly higher than in most other years.

House File 79 in 1987: Stores Finally Become a “Public Place,”
But Restaurants Remain Excluded

When Zimmerman became lieutenant governor, her bill, as she later observed, became Johnie Hammond’s “baby”...it ended up being Hammond’s bill in the House and Hannon’s in the Senate.409 Hammond, who had grown up in Mississippi and Texas and studied social work, was bothered by smoke “quite a bit.”410 The Zimmerman-Hammond-Hannon “baby” that finally saw the statutory light of day in 1987 fell far short of its progenitrixes’ intentions because it continued to lack what they regarded as its most important feature—coverage of restaurants. The bills that Hammond (H.F. 79)411 and Hannon (S.F. 244)412 filed in 1987 were not exactly identical with H.F. 102, which Zimmerman had filed in 1985 or that the House had passed in 1986. The Hammond-Hannon bill was stricter by virtue of lacking the exclusions of restaurants with fewer than 32 seats and of other public places with under 200 square feet of floor space of H.F. 102 as passed and the exclusion of factories and warehouses of both versions of Zimmerman’s bill; on the other hand, it was less stringent in lacking the provision in H.F. 102 as filed that imposed a penalty on a building proprietor who knew that someone was smoking in violation of the law and nevertheless failed to advise him or her of the prohibition, as well as in providing for a penalty of only $50 compared to the $100 penalty in H.F. 102 as filed.

At the end of January, the House State Government Committee to which H.F. 79 was referred constituted a five-member subcommittee, consisting of Hammond herself and two other Democrats and two Republicans, to report on it. Presumably two of its members, Democrat Dennis Renaud and Republican Philip Tyrrell,413 who prominently opposed regulation of smoking and ultimately voted against the bill on the floor—as Renaud had done regarding Zimmerman’s bill in

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409Jo Ann Zimmerman, Interview with Suzanne Schenken, Summer 1991 at 56, in Jo Ann Zimmerman Papers, Box 1, Folder: Biographical Oral History Interview 1991, IWA.
410A Political Dialogue: Iowa’s Women Legislators,” Box 2, Folder: Transcripts: Johnie Hammond at 26 (Oct. 17, 1991), IWA.
411H.F. 79 (Jan. 21, 1987).
413State of Iowa: 1987: Journal of the House: 1987 Regular Session Seventy-Second General Assembly 1: 87 (Jan. 27). The other two members were Peterson and Shoning, the latter of whom had been a cosponsor of H.F. 102 in 1985.
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

1986—were responsible for the changes weakening the bill that the subcommittee reported back to the full committee at its meeting on February 16. The subcommittee amendment that Hammond offered encompassed several minor changes as well as one major restriction of coverage, one major restriction of enforcement, and one minor strengthening of enforcement. The most important restriction excluded from coverage factories, warehouses, and similar workplaces that the general public did not usually frequent, subject to the exception that their employee cafeterias were required to have a designated nonsmoking area. The committee quickly adopted this change by a show of hands 13 to 6. The major restriction of enforcement weakened the requirement that proprietors ask smokers to refrain from smoking on request of someone claiming discomfort caused by the smoke by limiting it only to smoking that was taking place in a no-smoking area. As a result, what in H.F. 79 was a potentially powerful tool to subvert the bill’s failure to protect nonsmokers from exposure to drifting smoke was defanged to apply only to formal violations of the ban on smoking in nosmoking areas—even in public places in which the vast majority of the space was designated as a smoking area, thus giving smokers very little occasion to smoke in the tiny nonsmoking area. Finally, the minor improvement in enforcement required inspectors of public places subject to inspection under other laws to check for compliance with the posting requirement.

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415 For example, the amendment expressly added lobbies and malls to the universe of named covered public places, but they already met the bill’s definition of a “public place as “any enclosed indoor area used by the general public” and as “other commercial establishments.” Subcommittee amendment to House File 79, attached to [House] State Government Committee [Meeting Minutes] (Feb. 16, 1987) (copy furnished by SHSI DM); H.F. 79, § 1.

416 Subcommittee amendment to House File 79, attached to [House] State Government Committee [Meeting Minutes] (Feb. 16, 1987) (copy furnished by SHSI DM). Although, as already explained, this exclusion of factories and warehouses derived from the 1975 Minnesota statute, the latter directed the Department of Labor and Industry to promulgate regulations “rules to restrict or prohibit smoking in those places of work where the close proximity of workers or the inadequacy of ventilation causes smoke pollution detrimental to the health and comfort of nonsmoking employees.” 1975 Minn. Laws ch. 211, § 4, at 633, 634. See above ch. 24. These rules, codified at Minn. Rules §§ 5205.0900-0950 (1987), were repealed in 1987. *State Register* 12:634, 662 (Oct. 5, 1987).


418 Subcommittee amendment to House File 79, attached to [House] State Government
Before voting on these other provisions of the subcommittee amendment, the committee discussed individual members’ various amendments. First it rejected one—the personal motivation for filing which can only be guessed at—by Des Moines Democrat Florence Buhr, a heavy smoker, to exclude shoe repair shops from coverage by a show of hands 12 to 5.\textsuperscript{419} That Renaud’s amendment to limit coverage of restaurants to those seating at least 50 persons and of offices and waiting rooms with at least 300 square feet of floor space lost on a nine to nine tie vote demonstrated already at this early stage in the legislative process that opposition to complete restaurant coverage—even under a bill that barely constrained smoking—was widespread. The same outcome on Renaud’s stripped-down follow-up amendment containing only the restaurant provision underscored the hard-core character of the membership of the anti-anti-smoking group. Undaunted, Renaud then tried to increase from 32 to 50 the number of people to whom a bar had the capacity to serve meals simultaneously before it was covered (although the only consequence of coverage, since a bar was the only public place that could lawfully be designated a smoking area in its entirety, was that such designation had to be posted at entrances), but the committee rejected it by a show of hands 10 to 8. At last, Renaud achieved a significant weakening of enforcement when the committee by a voice vote adopted his last amendment reducing the penalty from $50 to only $10. This willingness to diminish financial deterrence so drastically also augured ill for enactment of a capacious and strictly enforced anti-smoking law. Finally, the committee adopted by voice vote an amendment offered by Democrat Minnette Doderer (a sometime smoker) eliminating the aforementioned language requiring a request by someone claiming discomfort from smoke\textsuperscript{420} to trigger the proprietor’s responsibility to ask smokers to refrain from smoking as part of his duty to “make reasonable efforts to prevent smoking in the public place....”\textsuperscript{421}

Committee members who opposed H.F. 79 protested that the bill constituted


\textsuperscript{421}H.F. 79, § 3 (Jan. 21, 1987). To be sure, striking that qualifying phrase would have made it even plainer that owners might have been required to ask smokers to stop smoking who were not violating the law in the sense of smoking in nonsmoking areas, but whose drifting smoke was nevertheless causing nonsmokers discomfort.
an “undue imposition” on smokers and business owners.\textsuperscript{422} In particular, Tyrrell, a self-employed insurance agent\textsuperscript{423} who had quit smoking after 36 years, seeing further into the future than any of the bill’s advocates could presumably have even dreamed, complained that the measure was “a step toward the banning of cigarettes in cars and homes.” For him, as for other opponents who had not yet grasped the import of the new learning about the health consequences of secondhand smoke exposure, there was no doubt that: “‘We’re just intruding too much and too far into people’s lives.’” Ignoring Hammond’s admonition that smokers threatened bystanders’ health, thus triggering the state’s obligation to protect the public health, Tyrrell offered up a self-caricature of his know-nothingism: “‘Some of you find tobacco smoke offensive.... To me, cheap perfume is offensive.’”\textsuperscript{424} In the end, rejecting Tyrrell’s motion to defer the bill, the State Government Committee passed H.F. 79 by a vote of 13 to 6.\textsuperscript{425} Nevertheless, the constricted coverage and less stringent enforcement that opponents succeeded in grafting onto the bill before it ever reached the House floor insured that the debate would begin from a less advantageous base for supporters.

When the full House took up H.F. 79 on March 4, Hammond offered the State Government Committee’s amendment,\textsuperscript{426} which Democrat Rod Halvorson, a leading anti-smoking militant, immediately sought to amend by fully covering


\textsuperscript{424}Thomas Fogarty, “Smoking Law Gets OK from House Panel,” \textit{DMR}, Feb. 17, 1987 (2A:3). Section 3 of the Arkansas Protection from Secondhand Smoke for Children Act of 2006 prohibits smoking in all motor vehicles in which a child under the age of six and weighing under 60 pounds is restrained in a child passenger safety seat. In 2007 the city of Bangor, Maine passed an ordinance under which: “It shall be unlawful for the operator or any passenger in a motor vehicle to smoke cigarettes, pipes, or cigars in a motor vehicle, passenger van, pick-up truck or commercial vehicle, regardless of whether the motor vehicle’s windows are down.”


bars as public places. So far ahead of its time that it took two decades for the legislature to catch up with it, the amendment lost on a non-record vote.\textsuperscript{427} Then Democrat Dennis Renaud, a smoker,\textsuperscript{428} succeeding where he had failed in committee, offered an amendment to exclude from coverage restaurants, retail stores, offices, and waiting rooms of under 300 square feet of floor space—apparently without explaining whether his own barber business\textsuperscript{429} fell below the minimum size threshold. Following its adoption on a non-record vote, the committee amendment as amended was also adopted.\textsuperscript{430} When the House resumed consideration of H.F. 79 after a two-day recess, it adopted a series of amendments further diluting the bill. By a non-record roll-call vote of 48 to 39, the House undertook the most significant and high-profile diminution of coverage by adopting Renaud’s amendment to exclude restaurants with a seating capacity of fewer than 50 persons.\textsuperscript{431} Also adopted were two amendments by Democrat Emil Pavich to exclude both retail stores at least 50 percent of whose sales were of tobacco products and even “the portion of a retail store” where they were sold.\textsuperscript{432} After adopting yet two more weakening amendments, excluding lobbies and malls encompassing under 300 square feet of floor space\textsuperscript{433} and hotel/motel rooms from the definition of a covered “public place,”\textsuperscript{434} the House rejected an initiative to expand coverage: on a non-record roll-call vote of 35 to 14, it defeated an amendment to strike the exclusion of dormitory residential rooms


\textsuperscript{428} Email from a legislator requesting anonymity to Marc Linder (Aug. 16, 2007).

\textsuperscript{429} Iowa Official Register: 1987-1988, at 72 (62d vol., Paulee Lipsman et al. eds.). When asked years later why he had opposed restaurant coverage, Renaud offered the non sequitur that restaurants had smoking sections. Telephone interview with Dennis Renaud, Altoona, IA (Aug. 12, 2007).


from the definition of “public place” offered by Republican Mike Van Camp, who had voted against H.F. 102 in 1986. On a close 48 to 46 vote Van Camp’s amendment to prohibit the assessment of court costs in addition to penalties also lost. Finally, the House rejected by a large majority (50 to 23) an amendment offered by the aggressive anti-regulatory Tyrrell that would have created a system of reverse local preemption under which the law would not have been effective in any city or county unless the city council or county board of supervisors passed an ordinance adopting it. Having been substantially watered down by the committee and individual amendments, and thus “contain[ing] plenty of exceptions,” H.F. 79 was able to secure an overwhelming 77 to 18 majority on final passage. Democrats controlled the House by a 58 to 42 majority, but equal numbers of Democrats and Republicans opposed the bill.

On its arrival in the Senate, which had killed Zimmerman’s bill in 1986 and was still controlled by Democrats (30 to 20) and its largely smoking leadership, H.F. 79 was referred to the State Government Committee, whose members, according to chairman Bob Carr, included “five of the heaviest smokers in the Senate”—Democrat Joseph Coleman and Republicans Richard Drake, Jack Nystrom, Jack Rife, and John Soorholtz. As a result, Carr expected the committee vote on the bill to be “very close.” Coleman, the Senate’s most

435State of Iowa: 1987: Journal of the House: 1987 Regular Session Seventy-Second General Assembly 1: 544 (Mar. 6) (H-3089). If dormitory rooms had been covered by the law, then educational institutions would presumably have banned smoking in them altogether since the alternative of designating a smoking area would have made even less sense than in other locations such as stores and offices.


belligerent opponent of smoking regulation in the Senate itself, and “an unashamed two-pack-a-day puffer” who dismissively observed that there were “‘always those that have got to have a crusade,’” was paired with Jean Lloyd-Jones, its most insistent anti-smoker, on the subcommittee to which the bill was assigned.\footnote{Jane Norman, “Bill to Restrict Smoking Likely to Get Senate’s OK,” \textit{DMR}, Mar. 15, 1987 (1B:5-6, at 4B:6).}

On March 12, before the Senate began dealing with H.F. 79, the Clean Indoor Air Coalition, consisting of 30 businesses and organizations, including the American Cancer Society (ACS), American Association of Retired Persons, Iowa PTA, and Drake University,\footnote{\textit{State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly} 1:638 (Mar. 10). Republican Forrest Schwengels was the third member.} organized a hearing before about 60 people at the Statehouse in Des Moines. A former chairman of the Iowa Republican Party, Steve Roberts, of the ACS, revealed how moderate and ready-to-compromise the group was when he contended that: “‘We are not here to support a bill that would cut off the rights of smokers.’” Instead, they were seeking a “balance” to protect nonsmokers from risks associated with secondhand smoke exposure.\footnote{Jane Norman, “Bill to Restrict Smoking Likely to Get Senate’s OK,” \textit{DMR}, Mar. 15, 1987 (1B:5-6).} To be sure, unless he held a highly technical notion of “rights,” Roberts’ position was manifestly disingenuous, since the whole point of the anti-smoking movement was to roll back the norms defining the spaces that smokers, powerfully aided by tobacco companies, had appropriated during the twentieth century. Much closer to the truth came another speaker, Dr. Miles Weinberger, a pediatric and lung disease specialist at the University of Iowa Hospital, who declared: “‘This law will be one incredibly small step in sending the ashtray to the same place we sent the spittoon years ago.’”\footnote{Jane Norman, “State Capitol Crowd Backs Ban on Smoking,” \textit{DMR}, Mar. 13, 1987 (2A:6).}

In an unusual backgrounder on the bill, the \textit{Des Moines Register} interviewed Senate Majority Leader Hutchins, who, without having counted the votes, allowed as H.F. 79 had a good chance of passage, but denied that the fact that he had quit smoking several months earlier had anything to do with the bill’s improved prospects. Indeed, he even asserted that the bill would also have passed in 1986 “‘if we had brought it up.’” He insisted that one reason that the Senate had killed it was that it had also passed a mandatory seat-belt law and raised the
drinking age to 21: “I don’t think it’s wise politically to pass too many of those kinds of bills in one session.... There were just a lot of controversial issues last year and it’s those kinds of things that cause the public to throw people out of office.” Another reason for the bill’s brighter prospects in 1987 was its exclusion of smaller businesses. Although Hannon and Hammond agreed that Iowa was finally “ready to crack down on smokers,” they also recognized that—in a vast understatement—“the tobacco industry has a deep interest in the subject and has been using prominent lobbyists to fight the bill....”

In the event, at the March 31 meeting of the 15-member Senate State Government Committee, Lloyd-Jones reported that she and Republican Senator Forrest Schwengels had signed the subcommittee report recommending passage (meaning that Coleman had not). She then offered an amendment (which would almost immediately become moot) requiring restaurants with a seating capacity of fewer than 50 persons—which the House bill excluded from coverage—if they lacked a designated nosmoking area, conspicuously to post a sign to that effect at the entrances. It was adopted with nine Ayes. Then probusiness/libertarian Republican Senator Julia Gentleman offered an amendment to exclude all restaurants from the bill. She tried to justify it on the grounds that: “You don’t need government to tell restaurants what to do.” The bill’s manager, Jean Lloyd-Jones, who, in the aseptic words of the official minutes, “encouraged the committee to resist the amendment,” in fact countered: “I’ve heard a lot of people say when they go out to eat at a nice restaurant they’d like to sit and enjoy their expensive meal without smoke fumes on their plates.” Broadening her argument to encompass the non-well-heeled, Lloyd-Jones added a plea to “allow us our rights to inhale clean air free from what they call sidestream smoke, which is very dangerous....” Significantly, “with little discussion,” the committee then adopted the amendment with eight Ayes and by a vote of 8 to 4

449Jane Norman, “Bill to Restrict Smoking Likely to Get Senate’s OK,” DMR, Mar. 15, 1987 (1B:5-6, 4B:6). According to ex-senator Beverly Hannon, it is possible that Hutchins might have been speaking for himself and some senators in certain districts worried about reelection. Email from Beverly Hannon to Marc Linder (June 14, 2007).


recommended passage of H.F. 79 as amended. Only three of the five heavy smokers (Coleman, Rife, and Soorholtz), joined by Gentleman, voted Nay. Overall, of the seven smokers three voted No, three voted Yes, and one abstained (at least from voting). To be sure, the two-thirds majority may have been a function of the adoption of the amendment eliminating restaurants, which, while not completely eviscerating the measure, by removing the most contentious location of secondhand smoke battles, presumably made the bill more acceptable to some smokers, libertarians ignorant of the public health consequences, and business owners opposed to any regulation.

When the full Senate took up H.F. 79 on April 22, Senator Edgar Holden, a very pro-business Republican, moved the adoption of his radical amendment, which would have banned smoking altogether in all public places (expanded to include bars and all restaurants) and not simply in designated areas, thus creating a level of protection against secondhand smoke exposure that no state had yet enacted. Given his generally conservative and anti-government intervention views and the prominent anti-regulatory role he had played in resisting passage of the original clean indoor air law in 1978, it is most implausible that Holden could have intended his proposal as anything but a killer amendment. His denial to the contrary notwithstanding, floor manager Lloyd-Jones rejected the amendment as going “too far. ‘We’re not telling you to stop smoking.... We’re just saying give us an area where we can breathe clean air.’” Since the very weak provisions of H.F. 79 did not even purport to satisfy that minimalist criterion, heavy-smoking Republican Jack Rife may have anachronistically accused his opponents of pursuing a strategy that it is very

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458 See above ch. 25.
implausible any of them even dreamed of being able to see realized in their lifetimes, but he nevertheless grasped the truth that nonsmokers “‘won’t be happy until we have an outright ban.”’ For whatever reasons, three-fourths of Holden’s colleagues disagreed with him, defeating his amendment 36 to 13 on a non-record roll call.\footnote{State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 2:2607 (Apr. 22) (S-3723). The first provision of the amendment would have achieved its object by changing “Smoking areas may be designated” to “shall.” The sponsors were: Welsh (D), Rife (R), Linn Fuhrman (R), William Palmer (D), Alvin Miller (D), Soorholtz (R), Schwengels (R), Drake (R), Nystrom (R), Husak (D), Coleman (D), and Riordan (D). Palmer and Miller were also heavy smokers. Email from Beverly} Gentleman then moved adoption of the committee amendment excluding coverage of all restaurants, which the Senate narrowly rejected 23 to 26 on a non-record roll call, thus restoring coverage for the time being.\footnote{State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 1:1463-64 (Apr. 22).} Lloyd-Jones correctly interpreted the vote by reference to the fact that inclusion of restaurants had been, “after all, the major reason most people are supportive of “the bill. Rife’s scare tactic—“I think you’re playing havoc here with the business community”—failed as yet to secure the three vote-switches he needed for passage.\footnote{State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 1:1464 (Apr. 22) (S-3348A).} Counterattacking, a bipartisan group of six Democrats and six Republicans—including the aforementioned five heaviest smokers—led by smoker Joe Welsh offered a floor amendment that would have severely undermined the bill by depriving those in control of public places of the discretion to declare them entirely nosmoking. Since such a power to declare places off-limits to smoking was presumably inherent in private property rights, and since one of the mainstays of prosmoking propaganda had always been the claim that the decision whether to permit smoking should be left to the property owner, this proposed legislative override was astonishing. And going ever further, Welsh’s amendment also imposed an affirmative duty on those in control to “provide sufficient area in which smoking is permitted to accommodate all persons who wish to do so.”\footnote{Jane Norman, “Bill to Ban Smoking Debated in Senate,” DMR, Apr. 23, 1987 (2A:4-5).} Welsh’s justification for the initiative was
incoherent: “‘You can’t change behavior overnight.... By guaranteeing smokers a smoking area we could expect better compliance.’” Since the law notoriously provided no protection from drifting smoke, Welsh failed to address the question as to how compliance with a feckless law could be superior to possibly less than strict compliance with a stringent law. In the event, the amendment failed by a vote of 22 to 26; its supporters were equally divided between Democrats and Republicans, with Majority Leader Hutchins and two of his three assistant floor leaders and two of the assistant minority floor leaders voting Aye. The vote, however, was reconsidered the same day (25 to 22), though Hutchins had further action on it and the whole bill deferred. But before the deferral, the Senate voted 26 to 23 on non-record roll call to adopt an amendment offered by Holden that further gutted the bill by doing away with the enforcement provision altogether by eliminating the owner’s responsibility not only to ask smokers to refrain from smoking in nosmoking areas, but to inform them that smoking was prohibited by law.

The Senate did not resume consideration of H.F. 79 until May 7, devoting “the most time” to Welsh’s amendment that would have imposed the designation of a smoking area in every covered public place. The best argument that Coleman could muster for the requirement was: “‘Just be a little reasonable.’” But floor manager Lloyd-Jones and other senators rejected it on the grounds that “there are businesses in the state that want to set their own policy on whether or not smoking is permitted at all on their premises.” In particular, Robert Carr, the State Government Committee chair, pointed out the incongruous outcome that it “‘would mandate hospitals have a smoking place.’” For reasons that are unclear, further action was deferred at Senator Horn’s request and later in the day Welsh himself withdrew the amendment, thus bringing to an unsuccessful end that opportunistic initiative to nullify private property rights. Instead Welsh offered a new amendment that merely created a new code subsection setting out

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the same $10 civil penalty and prohibiting the imposition of court costs, which was adopted by a voice vote.\footnote{State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 2:1766 (May 7), 2:2695 (S-3803).} Then, moving on to the central provision of the entire bill, Welsh moved to reconsider the Senate’s 23 to 26 vote two weeks earlier rejecting the committee’s amendment excluding restaurants from coverage. Having prevailed on that motion,\footnote{State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 2:1766 (May 7).} Welsh reduced parliamentary power to its most brutal form in replying to Lloyd-Jones’s query as to why he was “pushing” an amendment that the Senate had already rejected: “Because at this time we have the votes to do it.”\footnote{Jane Norman, “Senate Passes ‘Weakened’ Bill on Clean Air,” DMR, May 8, 1987 (2A:1).} And in fact they did—29 of them against only 21 expressing a preference to include restaurants under a regime that would have excluded restaurants seating fewer than 50 people and would have permitted larger restaurants to comply by setting aside just one table as the nosmoking area. Approximately equal proportions of Democrats and Republicans voted to exclude restaurants, but both the majority and minority leaders and two of their three assistant floor leaders, together with almost all of the heavy smokers, joined them.\footnote{State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 2:1766 (May 7).} The Senate then overwhelmingly passed H.F. 79 by a vote of 45 to 5.\footnote{State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 2:1767 (May 7).} In a vast understatement before the bill was returned to the House, Lloyd-Jones, “disappointed at the way this bill is turning out,” bemoaned that “we have greatly weakened it.”\footnote{Jane Norman, “Senate Passes ‘Weakened’ Bill on Clean Air,” DMR, May 8, 1987 (2A:1).} The next day the House voted 75 to 15 to concur in the Senate’s amendments.\footnote{State of Iowa: 1987: Journal of the Senate: 1987 Regular Session Seventy-Second General Assembly 2:1767 (May 7).}

In the end, the new law did expand coverage to encompass workplaces, retail
stores, offices and waiting rooms with at least 300 square feet of floor space, other commercial establishments, educational facilities, and hospitals, clinics, nursing homes, and other health care and medical facilities. In terms of enforcement alone, the measure dismantled much of the meager rigor of the 1978 statute. First, it repealed the requirement imposed on proprietors of informing persons they observed smoking in violation of the law that smoking was prohibited by law. Second, H.F. 79 substituted for this direct intervention two indirect “responsibilities of proprietors”: thenceforward, those in custody/control of a public place were merely required to “make reasonable efforts to prevent smoking in the public place or public meeting by posting appropriate signs indicating no-smoking or smoking areas and arranging seating accordingly.”

(To be sure, just as under the 1978 statute no penalty attached to the failure to comply with the duty to inform, under H.F. 79 the responsibilities section was not subject to penalties, though failure to post signs was.) And third, the bill watered down the prescribed content of the required signs by deleting the language “‘smoking prohibited by law’ or words or symbols of similar effect” in favor of the much weaker “advising patrons of smoking and non-smoking sections.” All of these weakening amendments proved enduring, remaining in the code until 2008.

Once Governor Branstad had signed H.F. 79 into law, the struggle once again resumed to supplement Iowa’s weak anti-public smoking statute by finally incorporating restaurants. At the end of 1987, the Tobacco Institute overestimated the strength or tenacity of the anti-smoking movement in Iowa when it speculated that in 1988 “[t]here may be some attempt to restrict smoking further than in the measure enacted in 1987, but such attempts should be manageable.” On the other hand, its forecast was accurate that “Des Moines is the only likely area of local anti-tobacco activity; smoking and sampling restriction proposals are likely to surface there.”

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476 1987 Iowa Laws ch. 219, § 1, at 367.
477 1987 Iowa Laws ch. 219, § 7, at 367, 368.
478 1987 Iowa Laws ch. 219, § 3, at 367, 368.
479 1987 Iowa Laws ch. 219, § 4, at 367, 368.
480 1987 Iowa Laws ch. 219, at 367.
The Cigarette Oligopoly May Have Won a Partial Victory in Iowa, But Philip Morris Recognizes that Nationally “we are [i]n deep shit”

We propose three strategies:
1. Demonstrate that over-reaction to every day [sic] annoyances is anti-social.
...
3. And most importantly...help smokers realize that obnoxious anti-smokers are the social problem...not smokers themselves.\textsuperscript{482}

During the last week of June 1987, just days before the new law would go into effect,\textsuperscript{483} Philip Morris held a four-day conference at swanky Sea Pines Vacation Resort on Hilton Head Island within the framework of its Project Down Under to deal with the deteriorating “public policy situation” of the metastasizing struggles against involuntary exposure to cigarette smoke reinforced by the recent surgeon general’s report on environmental tobacco smoke and “its alleged harmfulness to non-smokers.” The point of this exercise was not simply to exchange suggestions; rather, as Philip Morris vice chairman R. William Murray explained to Thomas Osdene, the firm’s director of science and technology, he and president and CEO Frank Resnik had “been instructed to...arrive at solutions that can be immediately implemented.” Among the “small” and “select group”\textsuperscript{484} of Philip Morris officials attending were two directors of science and technology, a vice president and general counsel, director of corporate affairs planning, the corporate affairs communications director, vice president for business and planning, and vice president for corporate staff.\textsuperscript{485} The agenda for these participants, who were housed “on the plantation” in “villas” with two bedrooms and a living room, was so studded with breaks, meals, cocktails, free time, and recreation such as golf, tennis, fishing, “beach fun,” and “poolside recreation,” that the conference strongly resembled a fully paid vacation.\textsuperscript{486} To be sure, the


\textsuperscript{483}Initial enforcement, to judge by events in Iowa City, may have been minimal: the police chief there admitted that “I don’t know how to issue a citation on it” and also did not know how long it would take before legal counsel would explain how, when, and where to issue citations so that the police force could begin writing up offenders. Joseph Levy, “Smoking Law Has Little Local Effect,” \textit{DI}, July 9, 1987 (1:2-6 at 2-3).

\textsuperscript{484}R. W. Murray to Thomas Osdene (June 8, 1987), Bates No. 2023551341/2.

\textsuperscript{485}The job titles of the participants listed in Guy L. Smith IV (v.p. corp. affairs) to Operation Downunder Participants (June 17, 1987), Bates No. 2023551344/5, were taken from http://legacy.library.ucsf.edu/glossaries/pm_gloss_a.jsp

\textsuperscript{486}Operation Downunder Agenda (June 17, 1987), Bates No. 2024270524-7.
convener characterized the sessions as including “entertaining meals and enough leisure time to facilitate thought, reflection, and introspection.”

The belligerent bravado that had characterized the industry’s initial response to the release of the surgeon general’s report half a year earlier had largely vanished, replaced, as the profoundly revelatory contemporaneous notes of this grotesque meeting document, by a desperate search for a magical means of avoiding the “devastating effect on sales” of the inexorable constriction of smoking that the anti-environmental tobacco smoke movement was manifestly accelerating. After conceding that a “scientific battle was lost with SG’s ‘86 report,” that the direct problem was the threat to the number of smokers and the number of cigarettes they smoked, and that the broader problem included a “general decline in social acceptability of smoking,” the “[w]orst case scenario” of “[h]ow to support current smokers in face of overwhelming adverse information and publicity,” and the “[l]ogic that if mainstream smoke is damaging, ETS must be too,” conference participants veered off into wholly implausible fixes for a “[b]ig, complex problem” such as “making people feel good about Philip Morris” and smokers.

John Rupp, the Covington & Burling partner who was the key lawyer in charge of overseeing the industry’s response to the ETS challenge, set the tone for the conference by laying out some of the reasons that “we are [i]n deep shit.” The cigarette companies’ [s]erious credibility problem” was in large part a function of the surgeon general’s “tremendous credibility.” With regard to the science of ETS, Rupp argued that despite the cigarette industry’s position that ETS had not been shown to be hazardous to nonsmokers’ health, “[w]e cannot say ETS is ‘safe’ and if we do, this is a ‘dangerous’ statement.” From the legal

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487 Guy L. Smith IV (v.p. corp. affairs) to Operation Downunder Participants (June 17, 1987), Bates No. 2023551344/5.
488 [Philip Morris], Project Down Under Conference Notes at 8 (June 24, 1987), Bates No. 2021502102/109.
489 [Philip Morris], Project Down Under Conference Notes at 11 (June 24, 1987), Bates No. 2021502102/112.
490 [Philip Morris], Project Down Under Conference Notes at 9 (June 24, 1987), Bates No. 2021502102/110.
491 [Philip Morris], Project Down Under Conference Notes at 10 (June 24, 1987), Bates No. 2021502102/111.
492 [Philip Morris], Project Down Under Conference Notes at 9 (June 24, 1987), Bates No. 2021502102/110.
493 [Philip Morris], Project Down Under Conference Notes at 4 (June 24, 1987), Bates No. 2021502102/105.
perspective, the tobacco companies’ position was scarcely any better: most anti-smoking laws were invulnerable to challenge and—or, more accurately, because—“[w]e won’t be able to establish ‘the right to smoke.’” No legal basis for this ‘right.’” Under those circumstances, Rupp’s assurance that there was also “[n]o constitutional right to be free of ETS” offered little comfort since the ever expanding body of unchallengeable state and local smoking bans would eventually provide ample protection to the ever widening majority of non-smokers. In particular at the workplace, Rupp had to admit that it was “[f]rustrating” for his law firm to get referrals from smokers because “[n]ot much can be done except bluff threats.”

The evolving character of the “REAL ADVERSARY out there” that the industry was battling was nicely captured by an especially ominous handwriting-on-the-wall scenario: “Detroit Free Press, NY Times, Miami Herald have all declared non-smoking news rooms. These are people who are spreading the news and their own attitudes have changed.”

The conference turned downright surreal during a 10 p.m. “Brainstorming Session” that dramatically underscored how clueless Philip Morris was. Despite the directive to “come away from Sea Pines with a reasonable, responsible, and rational approach to solving the problem,” the 116 numbered figments of this late-night fevered collective imagination included these bizarre “Solutions to problem”:

2. Develop products that have beneficial value to non-smokers.
11. Create a bigger monster (AIDS).
12. Make it hurt (political risk) to take us on.
15. Make non-smokers fearful of consequences of office smoking bans (drug testing, etc.).
33. Create science journal.
34. Create non-science journal.
39. Infiltrate W.H.O.
43. Mark packages “Please smoke courteously.”
49. Acquire major media vehicle.

494[Philip Morris], Project Down Under Conference Notes at 5 (June 24, 1987), Bates No. 2021502102/106. Six years later the U.S. Supreme Court did in fact recognize that a prisoner did state a cause of action under the Eighth Amendment to the Constitution in alleging that prison officials had with deliberate indifference exposed him to ETS levels—his cellmate smoked five packs of cigarettes daily—posing “an unreasonable risk of serious damage to his future health.” Helling v. McKinney, 509 US 25, 35 (1993).

495[Philip Morris], Project Down Under Conference Notes at 8 (June 24, 1987), Bates No. 2021502102/109.

496Guy Smith IV to Operation Downunder Participants (June 17, 1987), Bates No. 2023551344.
69. Get Nader-like group to examine anti funding.
71. Fund major university media resources and training center for science writers.
73. Support social research on positive aspects of smoking to society.
77. Help select next Surgeon General.
97. Involve non-smoker in mystique of smoking.
112. Cement relationship with women smokers, e.g. child care
114. Condoms in cigarette packages.\textsuperscript{497}

By the sober light of day at 8:15 the next morning, an “[e]xamination of 116 ideas” revealed that “[w]e don’t have anything to slam them with on health issue.”\textsuperscript{498} In objection to what had perhaps been the most startling serious solution—“Adopt end game strategy. Maximize cash flow”—\textsuperscript{499} the morning session had nothing more weighty to offer than that an endgame option as a “controlled retreat [u]sually...accelerates into an abrupt end. Fighting back now is therefore better.”\textsuperscript{500}

Otherwise the most serious proposal concerned support for “segregating” smokers and nonsmokers, a “[m]ajor policy change” and “[g]ood market strategy,” which was marred by the fact that it gave a “foot in the door for antis.” In part this proposal was driven by the insight that if Philip Morris, like the “intransigent” RJR, did not “budge on accommodation,” it would “lose” because it would be perceived as no less “fanatic[]” than the antis; by the same token, the company could “create public perception that we are reasonable by saying we support accommodation”—but only “as long as smokers’ rights are not abridged.” (To be sure, if smokers could continue to smoke wherever and whenever they wished, “accommodation” of nonsmokers’ right not to be exposed to secondhand smoke would be even more of a hoax than laws confining smoking to designated smoking areas.) But at this point, despite acknowledging that “[t]he smoker is the underdog and nobody cares,” since the conference participants insisted that “[a]ll Americans should fear legislation,” virtually all they were willing to concede was the preservation of “free market choice.”\textsuperscript{501} For the purpose of simulating

\textsuperscript{497}[Philip Morris], Project Down Under Conference Notes at 15-17 (June 24, 1987), Bates No. 2021502102/116-18.
\textsuperscript{498}[Philip Morris], Project Down Under Conference Notes at 17 (June 25, 1987), Bates No. 2021502102/118.
\textsuperscript{499}[Philip Morris], Project Down Under Conference Notes at 16 (June 24, 1987), Bates No. 2021502102/117.
\textsuperscript{500}[Philip Morris], Project Down Under Conference Notes at 18 (June 25, 1987), Bates No. 2021502102/119.
\textsuperscript{501}[Philip Morris], Project Down Under Conference Notes at 21-22 (June 25, 1987), Bates No. 2021502102/122-23.
“reasonableness,” the communications group would consider “costless areas of compromise—e.g., ‘We will accept a no-smoking ‘policy’ bill for elevators if you need to pass something.”

Credulity buckles under the claim made at the outset of the third day of the conference, devoted to a group presentation to senior management, that the Philip Morris communications staff viewed the melange of mendacious, outlandish, and trivial proposals as “exciting,” let alone that they believed that the “brainstorm[ing]” constituted “rigorous testing....” The first of four “[b]asic recommendations” was the “Big Chill strategy” of advocating accommodation (to deal with the mere “annoyance” perceived by nonsmokers while denying that scientists had shown any health risk associated with secondhand smoke) and continued opposition to government intervention including a drive to repeal existing restrictive laws. “Big Chill”—designed to “chill anti-smoking rhetoric”—was “the unifying strategy providing...overall direction for the tactics applied to the different target audiences,” and was to be buttressed by support of pseudo-scientific “activity” on ETS and indoor air pollution in addition to a focus on the risible “positive sociological” and vastly exaggerated economic aspects of smoking. The other two recommendations encompassed the wishful thinking of identifying a “rainmaker”-spokesperson (such as Lee Iacocca) who would publicly embody the company’s (fraudulent) “message” and the thuggish “N[ational]R[ifle]A[ssociation] strategy” of “[p]utting some people out of business who are trying to put us out of business.” That these corporate communications specialists conceived of this concoction as a “MIRV” (Multiple Independently Targetable Reentry Vehicle) suggests that they were themselves the primary victims of their own bunkum. This possibility was most visibly on display in the assertion that this pathetically transparent self-interested nonsense would “[m]ake non-smokers perceive ETS as a non issue,” “[i]solate anti-smokers and make them perceived as shrill and unreasonable,” and transform Philip Morris from “black hat’ to at least ‘gray hat’ on this issue.”

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503[Philip Morris], Project Down Under--Group Presentation to Senior Management at 1, 3 (June 26, 1987), Bates No. 2021502671/3.
504[Philip Morris], Summary: Operation Down Under Conference at 1-2 (June 24-26, 1987), Bates No. 2021502679/80.
505[Philip Morris], Project Down Under--Group Presentation to Senior Management at 1, 3 (June 26, 1987), Bates No. 2021502671/3.
506[Philip Morris], Project Down Under--Group Presentation to Senior Management at 2 (June 26, 1987), Bates No. 2021502671/2.
The top corporate brass was interested in probing the risks linked to the overall proposal. When the vice chairman of Philip Morris Companies, Inc., R. William Murray (who until then had been president and CEO of Philip Morris International and later would occupy the same positions at Philip Morris Companies) asked whether the initiative might “just make the situation worse,” he heard an earful:

The situation can’t get any worse. Sales are down, can’t be attributed to taxes or price increases. ETS is the link between smokers and non-smokers and is, thus, the anti’s silver bullet. The Equal Employment Opportunity Council [sic] reports most companies in country are working on regulations to control smoking based on ETS. There is a continual decline in smoking opportunities at work, in travel, in leisure time.

Raising profile of ETS could cause a link back to primary issue. This is the greatest risk. For example, ACS sees us raising noise level, comes back with “You are so responsible now about accommodating non-smokers, what about your own customers who you are killing?”

We have partitioned annoyance and health. Also we can turn valve off of entire program at any time if we see that primary issue is being stimulated.\(^507\)

Despite having learned how widespread and profound the impact of the secondhand smoke rebellion had been, Murray nevertheless revealed that his grip on reality was more rather than less tenuous than his underlings’ by asking the communicators whether they thought that increasing restrictions based on ETS would “not fade out.” Murray was so disconnected from the development most likely to trigger the downfall of his industry that he had to be told there was “a practical irreversibility of laws and patterns of behavior that are [sic] taking effect here.”\(^508\) Apparently unable to believe such a message, he interrogated the messengers again at the end of the session:

Q: (Murray) I am worried about the fact that you say the ETS issue is on a one-way ascendency. Isn’t it possible that it is just at one end of the pendulum?
A: No. Look at the Rust belt news rooms. Five years ago, these were hard core smokers, places where smoking was part of the job description, the style, the support of the staff. Look at California and New York as bellweather markers. Look at airports. Look even at traditional tobacco states in the South where regulations are increasingly proposed and increasingly enacted. The problem is not going to diminish unless we do something about

\(^{507}\) [Philip Morris], Project Down Under--Group Presentation to Senior Management at 8 (June 26, 1987), Bates No. 2021502671/8.

\(^{508}\) [Philip Morris], Project Down Under--Group Presentation to Senior Management at 3 (June 26, 1987), Bates No. 2021502671/3.
Rebuffed on the secondhand smoke front, Murray wondered whether a "'discrimination campaign" might work, but his subordinates had to disabuse him of this pipe dream as well. Noting that the company’s own research had revealed that people perceived discrimination against smokers as “quite different from racial discrimination,” the communications staff dashed Murray’s hopes once again by pointing out that “test ads using this theme tested lowest in terms of believability and acceptability.”

Dishonoraria

Regardless of the relevance of chemistry or physics, it would appear there is no way short of therapy to persuade an individual that smoke need not be an annoyance. The tobacco industry’s use of some of its huge profits to pay “honoraria” to state legislators appears to have originated in emulation of what it must have viewed as a successful (and growing) congressional program. By 1984, the Tobacco Institute had emerged as the top giver of honoraria to members of Congress, its $129,691 being almost double the next highest sum. The combined payments of the industry, including those of R. J. Reynolds Tobacco Co., Brown & Williamson Tobacco Corp., and U.S. Tobacco Co., totaled $173,634, doled out to 109 representatives and 17 senators. These members were able to “make $1,000 to $2,000 in an hour or so by dropping by TI and giving a speech...usually...about whatever they wish..., and unlike campaign contributions, the honorariums goes [sic] directly into the congressman’s pocket.” Common Cause, which compiled these data, stressed that such special interest groups did not give this money “just to hear members talk... These payments, which go directly to the personal benefit of members, are given to gain access and influence.”

509[Philip Morris], Project Down Under--Group Presentation to Senior Management at 8 (June 26, 1987), Bates No. 2021502671/8.
510[Philip Morris], Project Down Under--Group Presentation to Senior Management at 8 (June 26, 1987), Bates No. 2021502671/8.
511W[illiam]K[loepfer] [Tobacco Institute senior vice president, public relations], Preliminary Draft - ETS Project at 8 (May 24, 1984), Bates No. TI10411105/12.
In mid-1984, TI’s State Activities Division began requesting memoranda from Covington & Burling—for many years its leading legal adviser—about the legality of paying honoraria under state laws. In mid-July Daniel A. Rowley, a lawyer at the firm, wrote a letter to Mike Kerrigan of TI about paying honoraria at the Democratic National Convention in San Francisco then taking place. At the request of Roger Mozingo of TI Rowley revised that letter into a memorandum on a proposed honorarium program in Pennsylvania, at the same time noting that “preliminarily it looks as if many of the 20 states you have asked us to review will be very similar to Pennsylvania.” Intimating that any final decision by the tobacco companies would have to be informed by more than statutory law, Rowley added: “Of course, it still will be desirable to determine any local lore through The Institute’s lobbyists in each state to determine if there is any particular sensitivity.”

Responding to a request to examine the legality of the proposed honorarium program in ten states (which did not include Iowa), in October Rowley compiled another memorandum, in which he prefaced very brief summaries of the state laws with some general observations. The background facts, as the client had stated them to him, included TI’s holding meetings periodically in these states at which it would ask state officials to speak, in return for which it was considering paying them an honorarium ranging from $250 to $2,000 (which was to reflect the customary going rate as determined by the local lobbyist). While all ten states prohibited corporate contributions to candidates’ state campaigns, four either included honoraria among contributions or prohibited honoraria payments to non-candidate state officials. In addition, even in the remaining states permitting honoraria “some risk” arose from the further prohibition on corporations’ giving or legislators’ receiving “any money paid for the purpose of influencing the passage or defeat of legislation or some other official action.” Although the risk that “[s]omeone could always argue that the purpose of the honorarium was to influence the official’s conduct” was diminished by making clear that the money was paid for the speech, Rowley conceded that someone might still “challenge the payments if, at some later date, the official involved takes a position favorable to The Institute. This is especially true if certain circumstances exist that could be

that $60,000 had been budgeted to and an estimated $53,000 paid by its Federal Relations Division to give 35 senators and representatives $1,500 each in honoraria; for 1984, $100,000 was budgeted to pay the same sum to each of 67 members of Congress. Tobacco Institute, 1984 Budget (Nov. 16, 1983), Bates No. 93488109/32.

513 Letter from Daniel A. Rowley to Roger Mozingo (July 19, 1984), Bates No. 680545146. Neither the letter to Kerrigan nor the memorandum on Pennsylvania appears to be among the documents archived on the UCSF Legacy or tobaccodocuments website.
read in an unfavorable light (e.g., a payment near in time to an important vote in the legislature).” The possibility of such challenges to honoraria as illegal gifts or contributions was heightened by the public filing requirements imposed on recipients and lobbyists and their employers, which “could alert individuals in the state to the payment...”514

Five months later Rowley responded to another request from the Tobacco Institute, this time for a memorandum on the legality of paying honoraria in the ten other states that prohibited corporations (as contradistinguished from corporate political action committees) from contributing money to any political party, organization, or candidate.515 Iowa, one of this second group of states, all of which permitted honoraria,516 had prohibited corporations from directly or indirectly giving anything of value to political candidates until 1976,517 when the legislature, in response to the U.S. Supreme Court’s decision in *Buckley v. Valeo*,518 amended the law to permit corporate PACs to make such contributions. Unlike some states, Iowa did not cap the amount that a PAC was permitted to contribute.519 In spite of this complete freedom to give as much money to candidates as they wished, tobacco companies may have favored honoraria because they constituted income to the recipient-legislators, who could use it freely as they wished without being required to spend it on their election

514The ten states were Connecticut, Massachusetts, Michigan, Minnesota, North Carolina, Ohio, Pennsylvania, Texas, West Virginia, and Wisconsin, of which Connecticut, Ohio, West Virginia, and Wisconsin were the states in which honoraria would not have been lawful. Daniel A. Rowley, Memorandum for the Tobacco Institute: Re: Proposed Honorarium Program at 1-5 (Oct. 10, 1984), in Tobacco Institute, Field Staff Meeting (Aug. 11-14, 1985), Bates No. 680501768/902-6.

515TI also handed out honoraria “to the extent possible” in some states that did permit corporate contributions. Kurt Malmgren, Briefing for Mr. James J. Johnston Chairman R. J. Reynolds Tobacco Company at 8 (Sept. 27, 1989), Bates No. TIMN350847/54.


517Iowa Code §§ 491.69-.71 (1975); Appendix II: State Laws Regulating Campaign Contributions, Expenditures for Political Purposes and Lobbying: Compilation by States (1970), Bates No. 91810501/17. According to Russell Ross, emeritus professor of political science at the University of Iowa and an expert on Iowa government, though unlawful, under-the-table corporate contributions were widespread and unpunished before 1976. Telephone interview with Russell Ross, Iowa City (May 10, 2007).


5191978 Iowa Laws ch. 1078, § 14, at 162, 166 (codified at Iowa Code § 68A.503(3) (2007)).

2672
campaign, even though both parties were required to report it. Rowley informed TI in March 1985 that: “The Iowa Attorney General’s Office has advised us that any payments to state officials are a matter of some sensitivity in the state and that such payments should be made with care to avoid any appearance of a conflict of interest.” Since, as it turned out, most, if not all, of the recipient-legislators in Iowa were heavy smokers who presumably would have voted against restrictions on smoking in any event, it is unclear what sort of interest could ever have arisen; by the same token, however, it is also unclear what advantage the tobacco companies derived from paying legislators who did not require monetary incentives to vote the tobacco way. (The answer again, according to former TI Midwest vice president Daniel Nelson, was that they were Wasker’s friends.) At its State Activities Field Staff meeting in August 1985 TI drilled the participants in the basics of honoraria, stressing that a bona fide event or forum included a TAN Advisory Committee meeting, a wholesaler association convention, a member company sales meeting, or a special legislative briefing. As late as 1988, TI less than candidly characterized the honoraria program as providing a “forum in which key lawmakers and industry representatives can exchange ideas.”

Months before Covington & Burling had even given TI the legal go-ahead for paying out honoraria in Iowa, the practice had already begun. On December 18, 1984, Brozek sent a memorandum to the vice president for legislative support, Bill Cannell, on the “Iowa Honoraria Program,” which followed “numerous discussions” the two had had and “developed a more acceptable solution to a potential problem.” The issue involved John H. Connors—a former president of the Des Moines firefighters union and six-term Democrat from Des Moines (May 11, 2007).

520 Telephone interview with Lawrence Pope (former Iowa state legislator and later lobbyist), Des Moines (May 11, 2007).
521 TI sent a Form 1099 to any recipient of an honorarium in excess of $600. Tobacco Institute, Field Staff Meeting (Aug. 11-14, 1985), Bates No. 6805011768/897.
523 Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).
524 TI Field Staff Meeting (Aug. 11-14, 1985), Bates No. 6805011768/897.
525 [Tobacco Institute], Executive Summary: Public Smoking Issue: State Activities Division, Appendix B at 4 (n.d. [1988]), Bates No. TI07561372/97.
526 Michael Brozek to Bill Cannell, Re: Iowa Honoraria Program (Dec. 18, 1984), Bates No. TI42030094.
527 Jonathan Roos, “House Peers Honor Long-Serving Legislators,” DMR, Jan. 23,
Struggle for and Resistance to Regulation and Prohibition of Public Smoking: 1983-88

Connors—who had just completed his first two (of ten consecutive) years in the largely honorary position of speaker pro tempore, which, though not powerful in its own right, he doubtless owed to being influential and well liked. Brozek wrote that there had been a request (by whom he did not mention) “to have this honoraria recipient flown to Washington, D.C. for a legislative briefing in The Tobacco Institute Board Room,” but after “considering the costs involved, the logistical problems, the timing and the very concept of our honoraria program,” and speaking to Wasker, Brozek instead recommended that “an honoraria contribution be granted during calendar year 1984” under different circumstances. Inadvertently or cynically admitting the artificiality of this arrangement, which staged an opportunity to pay a legislator, Brozek stated that the “outline for the event surrounding this contribution” would be an honorarium of $500 for an appearance before the Iowa TAN Advisory Committee meeting on January 17, 1985, in the Board Room of the Des Moines Club, which would be an “informational and educational forum” to brief the members on important issues for the industry during the 1985-86 legislative session. The event, Wasker had assured Brozek, would comply with all state laws and administrative rules. Remarkably, the Tobacco Institute cut the $500 check to Connors—in response to an “invoice” from Brozek with a “Need by: ASAP” notation—already on December 21, almost four weeks before the meeting, whereas it otherwise paid honoraria in Iowa only after legislators had performed their alleged quid pro quo. Unfortunately, neither the cause of Connors’ apparently urgent need for cash right before Christmas nor—more importantly—the source of TI’s interest in Connors prompting it to go out of its way to accommodate him emerges from the industry’s internal documents. Although the reason for the tobacco industry’s solicitude for nonsmoking Connors is unclear, he was always known as being emphatically opposed to raising cigarette taxes on the grounds that they were unfair to workers. And in fact his votes on key tobacco-related bills reveal him

1997 (6M:2-4). In addition to having been union president for 20 years, Connors had also been a captain during his 28-year career in the Des Moines Fire Department. Id.


529 Email from Beverly Hannon to Marc Linder (June 25, 2007).

530 Michael Brozek to Bill Cannell, Re: Iowa Honoraria Program (Dec. 18, 1984), Bates No. TI42030094.

531 Tobacco Institute, Check Request (Dec. 19, 1984), Bates No. TI42030092/3, and Tobacco Institute Check No. 17795 (Dec. 21, 1984).

532 Telephone interview with former Representative Thomas Jochum, Des Moines (July 21, 2007).
to have been, both before and after the honorarium incident, largely in sync with pro-cigarette company positions: in 1978, he voted to eliminate the penalty in S.F. 2022 and was absent for or did not vote on the bill’s final passage; in 1979, he did not vote on the resolution to ban smoking in the House; in 1981, he voted twice against a cigarette tax increase; in 1987, he voted for passage of H.F. 79 the first time, but was absent for or did not vote on its final passage; in 1987, he voted twice for a cigarette tax increase, but on the final vote on the same bill in 1988 he voted against it; 1990, he was absent for or did not vote on the anti-smoking bill H.F. 209; in 1991, he voted for vending machines, free sampling of cigarettes, and preemption of local ordinances, and was absent for or did not vote on the final passage of the cigarettes sales bill, H.F. 232.533 This voting history must weigh more heavily than a stray anecdote relating that while accompanying another legislator in the 1980s to knock on doors for a fellow Democrat, Connors mentioned that when people asked him whether he minded if they smoked, he would ask them whether they minded if he farted.534 Although many years later Connors was unable to recall ever having given such a talk, the fact that he had been a friend of Wasker’s535 may, under the distinctly non-bureaucratic structure that governed the flow of the Tobacco Institute’s largesse in Iowa, have been all the explanation that was required.

During the latter half of the 1980s TI continued to tout the importance of paying honoraria to state legislators. To the board of directors the head of the State Activities Division explained in 1986 that campaign contributions and honoraria programs were used “with friendly legislators or those who may see the value of our case.”536 Two years later, TI’s Public Affairs Division launched its


534 Email from Beverly Hannon to Marc Linder (June 25, 2007). Connors’ bon mot has been attributed to Steve Martin.

535 Telephone interview with John H. Connors, Des Moines (June 24, 2007). Connors, who had himself been an Iowa Association of Professional Firefighters lobbyist for 17 years before becoming a legislator, and his wife Marjorie did recall that he had once received a check from the tobacco industry, but, not knowing what it was for and after having been told that “they” would tell him later, he returned it; he was unable to remember the year of this incident, which does not seem to fit the facts of the honorarium for which the quid pro quo was unambiguous.

536 Remarks by Roger L. Mozingo, The Tobacco Institute Board of Directors Winter
Conceptual Framework of Comprehensive Public Smoking Program—the latest iteration of the industry’s numerous desperate initiatives to stave off the inevitable. This time the objectives were: “1. To defeat mandatory and voluntary smoking restrictions. 2. To slow the decline of social acceptability of smoking.”

The latter project, at least, revealed a modicum of realism in suggesting the inexorableness of the proliferating unacceptability. In the context of this quixotic but well-heeled rearguard struggle the report noted that honoraria, like corporate campaign contributions, were “helpful in providing forums for lawmakers to hear industry views on ETS and other issues.” In most of the 20 states that prohibited direct campaign contributions, TI provided “honoraria forums for key lawmakers to facilitate an exchange of ideas with industry representatives”—to the budgeted tune of $49,000 in 1988, which represented one-seventh of its budget for state corporate campaign contributions ($350,000), 2 percent of its expenditure of $2.5 million for 61 state legislative counsel (i.e., lobbyists), and less than 0.5 percent of that year’s State Activities Division’s budget.

The exact volume of TI’s expenditures on state honoraria is unclear because of discrepancies among various internal documents, but according to one retrospective five-year overview, they rose from 0 in 1984 to $19,700 in 1985, and $24,900 in 1986, before declining to $20,750 in 1987, and rising somewhat to $21,950 in 1988. Of the total of $87,300 in honoraria paid among 20 different states that TI paid from 1985 through 1988, $12,500 or 14.3 percent went to legislators in Iowa, which received more than any other state and was one of only three states that received such payments in all four years—$1,000, $3,000, $4,000, and $4,500, respectively. To be sure, all these amounts were dwarfed by TI’s state campaign contributions (none of which went to Iowa), which exceeded one million dollars during these years and alone in California in one year amounted to more than twice the total honoraria during all four years.

Data are also available on the identities of the individual Iowa legislators receiving honoraria from 1985 to 1988 and in 1990. (In 1989, state legislators in
only nine states received only $17,450—one-third of the $52,000 that had been budgeted. Iowa legislators, whom the TI document did not identify, received $2,850 or 16 percent of the total, the second highest amount.)

Table 11

<table>
<thead>
<tr>
<th>Recipient</th>
<th>Party</th>
<th>Chamber</th>
<th>Position</th>
<th>Amount ($)</th>
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<tr>
<td>Lowell Junkins</td>
<td>D</td>
<td>Senate</td>
<td>Majority Leader</td>
<td>500</td>
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<td>John McIntee</td>
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<td>House</td>
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<tr>
<td>Bill Hutchins</td>
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<td>Senate</td>
<td>Majority Leader</td>
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<td>Leonard Boswell</td>
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<td>Senate</td>
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<td>Joe Welsh</td>
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<td>Senate</td>
<td>Appropriations Cttee Chair</td>
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<tr>
<td>Thomas Jochum</td>
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<td>Bill Hutchins</td>
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<td>Emil Husak</td>
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<td>Calvin Hultman</td>
<td>R</td>
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<td>Minority Leader</td>
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<td>Richard Drake</td>
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<td>Edgar Holden</td>
<td>R</td>
<td>Senate</td>
<td>Assistant Minority Leader</td>
<td>500</td>
</tr>
</tbody>
</table>

541 Honorarium Payments to State Legislators (Aug. 13, 1990), Bates No. TNWL0038148. The discrepancy between this $2,500 and the abovementioned $3,500 paid to seven senators may be accounted for by the $1,000 that Philip Morris had agreed to pay.
Unsurprisingly, during these years of Democratic legislative control, most of the recipients were Democrats. That almost all were senators and virtually none House members may be explained by the fact that, as the smaller body, the Senate was easier to control; moreover, since the House had proved itself to be more anti-tobacco in prohibiting smoking in its own chamber, the cigarette companies could more realistically rely on the power-holding smokers in the Senate to kill anti-smoking House bills.\textsuperscript{542} That from 1986 to 1990 virtually all the Senate

\begin{tabular}{|l|c|c|c|}
\hline
Year & Name & Party & Position & Amount (in $) \\
\hline
1988 & Bill Hutchins & D & Senate Majority Leader & 1000 \\
& Joe Welsh & D & Senate Appropriations Cttee Chair & 1000 \\
& Wally Horn & D & Senate Assistant Majority Leader & 500 \\
& Leonard Boswell & D & Senate Econ. Dev. Cttee Chair & 500 \\
& James Riordan & D & Senate & 500 \\
& Donald Doyle & D & Senate Judiciary Committee Chair & 500 \\
& Larry Murphy & D & Senate Education Committee Chair & 500 \\
\hline
1990 & Bill Hutchins & D & Senate Majority Leader & 500 \\
& Joe Welsh & D & Senate Appropriations Cttee Chair & 500 \\
& Emil Husak & D & Senate Assistant Majority Leader & 500 \\
& Donald Doyle & D & Senate Judiciary Committee Chair & 500 \\
& Leonard Boswell & D & Senate Econ. Dev. Cttee Chair & 500 \\
& Don Gettings & D & Senate Rules Cttee Vice Chair & 500 \\
& Gene Fraise & D & Senate Justice Sys. Approp. Chair & 500 \\
\hline
\end{tabular}


\textsuperscript{542} Email from ex-Senator Beverly Hannon to Marc Linder (May 15, 2007); telephone
Democratic recipients were well-known allies of Majority Leader Hutchins strongly suggested to one ex-senator that the participation in the honoraria program was designed by Hutchins and lobbyist Wasker as a means of solidifying the majority leader’s power. In fact, according to Daniel Nelson, Brozek’s successor as TI’s Midwest regional vice president, the answer to the question as to the criterion for determining which legislators to give money to, was: “Because Wasker said so.” Payments to the Democratic Senate Majority Leader were a constant in every year; although some of lesser leadership also participated in the program, two recipients (Boswell and Murphy) were in their first term. In 1985, TI, not even using up its $1,500 budget, paid honoraria only to two members: $500 to Lowell Junkins, the Democratic Senate Majority Leader, who left at the end of the year to run (unsuccessfully) against anti-tobacco Governor Branstad and then became a TI lobbyist; and $500 to second-term Republican House member John McIntee, a friend of Wasker who after seeking to become lieutenant governor instead became the (unsuccessful) Republican candidate for a vacant congressional seat in 1986. McIntee’s chief qualification for receiving the money was apparently that he “is a very close friend of TI legislative counsel

Charles Wasker” and “a very close friend of the industry.” Because McIntee was such a loyal supporter, TI regarded his defeat in the congressional election as “not good news for the tobacco industry....” In 1986, the Institute paid $3,000 ($500 over budget) to three Democratic senators and one Representative, including $1,000 ($500 on two occasions) to the new Senate Majority Leader, Bill Hutchins (who after leaving his post in 1992 lobbied his ex-colleagues for R. J. Reynolds Tobacco Company), $1,000 to Senate Appropriations Committee chair, Joe Welsh, and $500 to Thomas Jochum, a smoker, six-term House member and Appropriations Committee chair, who in retrospect regarded acceptance of the money as a lapse in judgment, even though he had never given the tobacco industry a quid pro quo (not even in the formalistic immediate sense of a talk—instead he merely chatted with someone). By 1987, the $4,000 in honoraria ($1,500 over budget) was shared among seven senators: the Democratic Majority Leader Hutchins and the Republican Minority Leader Calvin Hultman (who in 1990 became Philip Morris’s lobbyist) both received $750, while three other Democrats and two Republicans were paid $500. All these honoraria were paid for “presentations” to and meetings with TI staff and representatives of the member cigarette companies during the Council of State Governments conference in Des Moines in August 1987. Honoraria for five Democratic


551 Tobacco Institute, State Contributions Report at 36 (Jan. 4, 1989), Bates No. TNWL00222198/34. Though neither in a formal leadership position nor in the majority, Drake, a heavy smoker, was the Senate’s acknowledged expert on state tax law without whose help it was difficult to pass tax measures. Telephone interview with James Riordan, Des Moines (May 16, 2007).

552 Bates No. TI43971584/93-99, on tobaccodocuments.org. The Tobacco Institute’s
senators in 1988 resulted from—or, perhaps more accurately, were the raison d’être for—the Iowa Economic Outlook Luncheon on September 21, co-hosted by TI’s Iowa lobbyist Wasker and its Midwest regional director Daniel Nelson, and attended by several Philip Morris and R. J. Reynolds salespeople. Nelson justified the expenditure to his superiors in part on the grounds that at the lunch Hutchins had made the encouraging comment that there was a “definite possibility” that the legislature would allow three cents of the state excise tax to sunset, “the biggest obstacle to achieving this major victory” being the Senate’s ability to persuade anti-tobacco Governor Branstad, who operated as “somewhat of a rogue” vis-a-vis his own Republican party and in fact requested repeal of the sunset. However, TI had already heard in February 1988 through “our Iowa magician Chuck Wasker,” to whom it paid $35,000 a year in part to procure such intelligence, that Hutchins was “the key player” on cigarette taxes and that Wasker had “initiated a systematic contact program with 31 key senators sympathetic to our interests....” Consequently, it appears much more plausible that the lunch in September 1988 was designed to reward Hutchins—whose thousand-dollar “speech” the paying audience, as always, found “enlightening and informative” personally and to enhance his power by enabling him to arrange for four other members of his party to receive $500 each for chatting over an honorarium request forms included information on the legislators’ committee assignments, but not on whether they were chairmen. Brozek averred—also on behalf of lobbyist Charles Wasker—to Hutchins that the latter’s “insight...will be beneficial to us all.” Letter from Michael Brozek to Bill Hutchins (Aug. 12, 1987), Bates No. TI43971584/600.


554On the struggle over repeal of the sunset, see below ch. 27.


558Michael Brozek to Bill Hutchins (Nov. 10, 1988), Bates No. T144820138. It seems that the $500 honorarium that Assistant Majority Leader, future Majority Leader, and faithful pro-tobacco-industry-voting Wally Horn and the $1,000 honorarium that Joe Welsh received were for a different economic outlook meeting on October 25, 1988, about which nothing else appears in the online documents. Michael Brozek to Wally Horn (Nov. 14, 1988), Bates No. T144820137; Michael Brozek to Joe Welsh (Nov. 14, 1988), Bates No. T144820135.
expensive free meal.\textsuperscript{559} In 1990, the generator of honoraria was the Annual Iowa Economic Policy Seminar, held in August by the law firm of TI lobbyist Wasker (whose $976 first-class airplane ticket between Iowa and Washington D.C. had recently prompted TI’s Washington headquarters to request his Midwest handler to “encourage” him to fly coach on future Institute trips).\textsuperscript{560} Accurately labeled “Iowa Honoraria luncheon” by Daniel Nelson, it featured seven state senators and a 30-40 member invited audience composed of member company representatives, Iowa trade association executives, and Des Moines area business leaders. Of the seven senators—two of whom (Hutchins and Welsh) Philip Morris informally agreed to pay—three were up for re-election. In his request to his supervisor for issuance of the checks, Nelson listed the leadership positions of each invitee: Boswell (vice chairman of Appropriations); Doyle (Judiciary chairman); Fraise\textsuperscript{561} (chairman of Justice System Appropriations) subcommittee; Gettings (Rules and Administration vice chairman); Husak (Ways and Means chairman); Hutchins

\textsuperscript{559}Although most of the recipients voted favorably to the tobacco industry before and after receiving honoraria, acceptance did not guarantee such votes. See, for example, the votes on H.F. 209 in 1990; State of Iowa:\textit{ Journal of the Senate: 1990: Regular Session Seventh-Third General Assembly} 1: 1107-1108, 1177-79, 1521-22, 1548 (Mar. 15, 19 and Apr. 4); below ch. 27. When Senator James Riordan was read the list of recipients, he viewed himself as the only one who did not fit. By 2007, Riordan—a generally reliable anti-smoking voter despite having chewed tobacco—who could not even recall ever having received an honorarium or having participated in a Tobacco Institute forum in 1988, conjectured that the invitation might have been an attempt by Hutchins and Wasker to secure his support in an upcoming challenge by Senator William Palmer to Hutchins for Majority Leader. Under an alternative scenario, Wasker might have selected him because he had once helped Riordan with a business-related legal matter. Telephone interview with James Riordan, Des Moines (May 16, 2007). In fact, Riordan forgot the vote he had cast in 1987 in favor of the extraordinary amendment to weaken that year’s clean indoor air bill by depriving owners of public places of the power to declare them totally nonsmoking. See above.

\textsuperscript{560}Bates No. TI42680939 (Oct. 22, 1988). On the handwritten note on the invoice, which was addressed to “MB” (Michael Brozek?), “encourage” was substituted for “ask,” which had been crossed out.

\textsuperscript{561}As late as 1995, Fraise, like several other Iowa state legislators, wrote a letter to the Food and Drug Administration, as part of a campaign orchestrated by the tobacco industry, opposing the agency’s proposed regulations to exercise control over tobacco products. He objected, inter alia, to the alleged disbanding of small-town Iowa sporting events (such as sprint cars and rodeos) that would result from prohibiting tobacco companies’ contributions of “big dollars.” Letter from Gene Fraise to FDA (Dec. 28, 1995), Bates No. TI38762630.
(majority leader); and Welsh (Appropriations chairman).562 They purportedly received their $500 for making prepared remarks and participating in a panel discussion with their colleagues.563

In 1991-1992, Tobacco Institute documents on the state honorarium program available online appear to provide only aggregate data without identifying individual recipients (in Iowa). The program was scaled back in terms of expenditures, number of states, and maximum use of budgeted funds. In 1989, state legislators in only nine states received only $17,450—one-third of the $52,000 that had been budgeted. Iowa legislators received $2,850 or 16 percent of the total, the second highest amount. In 1990, legislators in only six states received honoraria, the total amounting to $20,700 from a budgeted allocation of $65,500. Iowa’s $2,500 represented 13 percent, ranking it third.564 By 1991, the Tobacco Institute budgeted only $31,500 for honoraria, of which $2,500 was allocated to Iowa, but the estimate of actual expenditures revealed that only $10,300 was spent in four states, and none in Iowa. For 1992, Iowa was one of seven states budgeted for a total of $16,500, but whether any of its allocated $2,000 was actual spent is unclear.565 The tobacco industry honorarium program in Iowa then apparently came to an end after the state legislature in 1992-93 had largely prohibited honoraria beyond legislators’ out-of-pocket expenses.566

562 Dan Nelson to Pat Donoho, Re: Iowa Honoraria luncheon (Aug. 3, 1990), Bates No. TI23380570-1. According to the Iowa Official Register: 1989-1990, at 32 (Vol. 63, Elaine Baxter ed.), Husak was vice chair of Ways and Means. All seven checks were, despite the agreement with Philip Morris, issued by the Tobacco Institute. Bates No. TI23380543.

563 Letter from Daniel Nelson to Joe Welsh (Aug. 15, 1990), TI43200227, on tobaccodocuments.org. According to at least one (1986) recipient, there was no pretense of giving a talk at all. Telephone interview with Tom Jochum, Des Moines (July 21, 2007).

564 Honorarium Payments to State Legislators (Aug. 13, 1990), Bates No. TNWL0038148. The discrepancy between this $2,500 and the abovementioned $3,500 paid to seven senators may be accounted for by the $1,000 that Philip Morris had agreed to pay.


House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved—But at the Price of Conceding to the Tobacco Industry What Purported to Be the Preemption of Local Anti-Smoking Ordinances

They [cigarette companies] didn’t [have to give money]. We [legislators] all smoked. There were no contributions from tobacco companies. We just smoked.1

Despite the defeat of restaurant coverage in the Iowa legislature in 1987, the anti-smoking forces had good reason for pressing once again for its inclusion in the next iteration of the bill in 1989. After all, although the militant Americans for Nonsmokers’ Rights regarded the provisions regulating restaurants as “probably...the most controversial part of...comprehensive” nonsmokers’ rights legislation because they were “unlike any other public place and must be treated in special ways,” but also “[b]ecause of the extraordinary power of the restaurant associations,”2 by the end of 1988 almost half the states had passed clean indoor air acts that applied to restaurants.3 The chief objective of H.F. 209, as originally filed on February 6 by liberal Democrats Johnie Hammond, David Osterberg, and Jack Holveck, was to close one of the many outsized holes in Iowa’s clean indoor air law by expanding the universe of covered “public places” to include all

1Telephone interviews with Don Avenson, Oelwein (July 12, 2007 and June 13, 2008). A decade later the Johnson County County Attorney stated that because in 1990 the proportion of state legislators who smoked had exceeded the smoking prevalence in the general population, the tobacco industry had not needed to apply a lot of pressure on them. Johnson County Board of Health Meeting (Mar. 8, 2000) (audio tape archived at the Johnson County Public Health Department, Iowa City).


restaurants, which had been excluded since the first law regulating public smoking was enacted in 1978. Within the limitations of the feckless law’s authorization of building owners to designate smoking areas, the bill required all restaurants to “provide a sufficient number of tables and seating at which smoking is not permitted to accommodate all persons who desire such tables and seating.”

(To keep this structure in context, even the Model Ordinance of Americans for Nonsmokers’ Rights provided that its general prohibition of smoking “does not prevent...the designation of a contiguous area within a restaurant that contains a maximum of fifty (50) percent of the seating capacity of the restaurant as a smoking area...”) The same requirement was imposed on establishments that served alcohol, but were nevertheless excluded from the definition of “bars” (because they had table and seating facilities for serving meals to more than 50 people at one time). Innovatively, the bill mandated that all covered retail stores, shopping malls, and public conveyances that had a public address system “announce hourly the measures taken by the public place to comply with this chapter and what is expected of the person using the public place.” H.F. 209 also provided for some enforcement by requiring that the state department of inspections and appeals inspect those facilities that it already inspected for compliance with the law’s existing nosmoking signage requirements. Finally, the bill both quintupled the fine for violations to $50 and eliminated the filing fee charge for complainants.

Smoking in the Des Moines Skywalks

That an increase in the fine was crucial in order to make enforcement possible had become obvious by the late 1980s in Des Moines, where the problem arose in the extensive system of skywalks that had begun being built in the 1980s to
connect downtown buildings. Although there had always been “some concern about smoking” in the skywalks,11 once the establishment of no-smoking policies in many of those buildings had prompted more smokers to smoke in the skywalks, complaints about smoking increased appreciably, and the city traffic director requested that the Skywalk Commission consider a ban.12 Two weeks before the 1987 amendments to the Iowa clean indoor air law, which declared “any enclosed area used by the general public” to be a covered “public place” in which smoking was prohibited “except in a designated smoking area,”13 went into effect, the Skywalk Commission had learned at a public hearing that it did not “need to decide whether to impose its own smoking ban because the walkways fit the state law’s definition of a public place.”14 Two days before the law went into effect, the commission had defeated a proposal to authorize businesses to permit smoking in the skywalk corridors running through their buildings—one commissioner had even unsuccessfully proposed turning the whole skywalk system into smoking and nonsmoking halves as was being done in restaurants—and the whole system thus became smoke-free.15 Because no areas were designated for smoking and nosmoking signs were posted throughout the system, the skywalks became off limits to smoking.16

The Des Moines police department, which was hoping for “voluntary compliance,” immediately announced that enforcement (in or outside the skywalks) would not be a priority. Although the law provided for civil violations and the police dealt only with criminal violations and thus had no citations to issue (and, to boot, the civil citation had to be filed in small claims court where the $15 filing fee exceeded the $10 smoking fine), the police would nevertheless respond to calls by sending out an officer to “advise the individual what the law is.”17 Unsurprisingly, by 1988, one year after the commission had initiated the ban, smoking was not only on the rise in the skywalks, but smokers were

131987 Iowa Laws ch. 219, §§ 1-2, at 367.
becoming more defiant about their violations precisely because they could do so with impunity. The chairman of the commission and the traffic director complained that the state law was effectively unenforceable because it set the fine at a level half of the fee for the citation. Police officers, according to the Skywalk Commission, were “[o]bviously...not enthusiastic about approaching people and asking them” to stop smoking “when they are unable to enforce that request” because such a “confrontation...would result in the officer...having to merely walk away from the situation.”

The city sought to circumvent this problem of fear-of-loss-of-face-induced inaction by passing an ordinance making it a criminal violation to fail to stop smoking in the skywalk at a police officer’s request. The city council did not pass such an ordinance until the end of January 1990, stiffening enforcement by making it possible to arrest violators for loitering, thus subjecting them to a fine of $100 or 30 days in jail. Nevertheless, as the legislature was debating H.F. 209 in the winter of 1990, both the Skywalk Commission and the traffic director...

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19 Melanie Lewis, “Skywalk Smoking Increases Despite Longstanding Ban,” DMR, Mar. 23, 1989 (M1:5); [Des Moines] Skywalk Commission, Regular Meeting - Apr. 19, 1989, Item: Smoking in the Skywalk System (copy furnished by Gary Fox, City Traffic Director). The chairman erroneously stated that the fine was $7; in fact it was $10. Iowa Code § 805.8(11) (1987). A Des Moines city attorney, who had worked for the city in the 1980s, later contested this account, though not its outcome. She insisted that the real obstacle had been that prosecutions had to be conducted by the counties, and that Polk County had made it clear that it had higher priorities than prosecuting smokers. She insisted that had the City of Des Moines controlled prosecutions, the deficit would not have been a problem. Since the skywalks, at least the sections of them that bridge city streets, are city property, the city, both before and after the state legislature amended the law to preempt local governments from passing ordinances stricter than the city law, was empowered to prohibit smoking on its property, just as it banned smoking in city buildings in 1988. Why the city did not apply this approach to the skywalks Moser could not explain. Telephone interview with Carol Moser, Des Moines assistant city attorney (May 29, 2007). Despite Moser’s alternative account, the press reported her as stating that the law was unenforceable “without a financial loss....” Lee Rood, “D.M. Skywalk Smoking Law Starts Monday,” DMR, Feb. 2, 1990 (M1:6).
20 James Thompson (Skywalk Commission Secretary) to Mayor and Members of the City Council [City of Des Moines] (Dec. 27, 1989), Bates No. TI28922820-1.
pointedly emphasized that “ideally the ban would be enforced under the state law with a fine that would cover processing costs.”

Sunsetting the 1988 Cigarette Tax Increase

Also vying for the attention of the legislature in 1989—when Democrats controlled majorities of 30-20 in the Senate and 61-39 in the House—were bills to repeal the sunset provision that had been attached to the 1988 cigarette tax increase as a concession to secure its passage. In the legislative budget priorities attached to his budget message in 1987, Republican Governor Terry Branstad had proposed raising the per pack cigarette tax by 10 cents “[c]onsistent with United States Surgeon General reports on the risks of smoking.” Citing the Lung Association of Iowa, he stated that a smoking employee cost an employer $624 more per year than a nonsmoker, resulting in potential additional annual costs to

22Cynthia Hubert, “Skywalk Puffers Feel the Heat,” DMR, Dec. 7, 1989 (A1:2-3, 8A:1-5); Perry Beeman, “Skywalk Panel Approves Making Smoking a Misdemeanor,” DMR, Dec. 21, 1989 (M1:2-4) (quote at col. 4); Skywalk Commission, Regular Meeting, Item #4: Smoking in Skywalk System (Dec. 20, 1989), Bates No. T128922822; Lee Rood, “D.M. Skywalk Smoking Law Starts Monday,” DMR, Feb. 2, 1990 (M1:6). After the legislature had passed such a law in April, Des Moines corporation counsel Roger Nowadzky stated that tobacco industry lobbyists had assured him that the bill exempted the Des Moines ordinance. Thomas Fogarty, “New Restaurant Smoking Law Called Toothless,” DMR, Apr. 25, 1990 (1M:2-5, 2M:6). The bill contained no such exemption, but since the city, like any other building owner, was (and is) free to ban smoking on its own property without running afoul of the preemption provision, it is unclear why exemption would have been deemed necessary. Unfortunately, many years later the then city attorney could no longer recall the details of this matter. Telephone interview with Roger Nowadzky, Marshalltown (May 25, 2007). The press had also erroneously reported before enactment that the new preemption provision “could hamper” the city’s efforts to ban smoking in the skywalks. Thomas Fogarty, “Senate Passes a Smoking Rule for Restaurants,” DMR, Apr. 5, 1990 (1A:5, at 2A:2). On continued flouting of the ban on smoking in skywalks after enactment of the new law, see “Is the Coast Clear? Sneaking Skywalk Smokes,” DMR, May 6, 1991 (10) (NewsBank).

23Dan Nelson to George Minshew, Re: Region IV General Update (Jan. 3, 1990), Bates No. 507628585.

24Members of Iowa General Assemblies 1981-2002,” at iv, on http://www.legis.state.ia.us/Pubinfo/Library/Members19812002.pdf
employers of $278 million.\textsuperscript{25} The proposal to increase the tax from 26 to 36 cents\textsuperscript{26} was welcomed by health experts and Don Avenson, the Democratic House Speaker,\textsuperscript{27} while the Tobacco Institute promoted obfuscatory counterclaims denying that increased taxes (and prices) reduced teenage smoking or that there were any “net public health care costs of smoking.”\textsuperscript{28} Unsurprisingly, the initiative ran into opposition from the governor’s own party: on the initial House vote in February not a single Republican supported the measure, while 40 voted Nay, causing it to fail 46 to 51.\textsuperscript{29} In March the tobacco industry issued a legislative alert to Iowa businesses requesting that constituents “emphasize to their state legislators the negative impact this tax would have on Iowa’s economy.” In particular, the alert pointed out that tobacco accounted for 16 percent of all non-food sales and 4.5 percent of total supermarket sales; at convenience stores, cigarettes were, after gasoline, the number one product, with tobacco accounting for 18.9 percent of gross profits. The alert named nine House Democrats whom it was especially important to contact before the House voted to reconsider.\textsuperscript{30} The industry’s relative lack of influence in the lower house was reflected in the fact that the only one of the nine who switched on reconsideration went from Nay to Yea (the first time seven had voted Yea, one Nay, and one had not voted). Two months after the first vote, under pressure from the state’s worsening financial prospects and looming adjournment, a more than large enough minority of Republicans changed their votes to pass the bill. But whatever power the cigarette companies failed to wield in the House they more than compensated for among the Senate leadership, where Majority Leader Hutchins quickly signaled that the tax increase did not enjoy much support in the

\textsuperscript{26}H.F. 327, § 1 (Feb. 20, 1987, by Ways and Means Committee).
\textsuperscript{28}Ed. Battison to Michael Brozek, Memorandum Re: The Proposed Tax Rate Increase of 10¢/Pack in Iowa (Jan. 28, 1987), Bates No. T12041375.
\textsuperscript{30}[Author unknown], Legislative Alert! (Mar. 1987), Bates No. T129321979/80.
other chamber, which in fact failed to consider it during the 1987 session.

Branstad returned to the issue in his January 1988 budget message, this time basing his proposal for a yet bigger, 12-cent, rise, again squarely on health considerations: “Smoking has been identified as one of our nation’s greatest health problems. Over 350,000 Americans died last year from smoking related illnesses and it is costing Iowans a lot of money to take care of these problems. So, I think it is appropriate for us to raise additional revenue to help pay for those costs.”

The increase would have boosted the tax to 38 cents a pack, the highest in the country (along with Minnesota’s), but Hutchins, once again, made it clear that it was unlikely that the Senate would support the full amount requested. Two weeks later the Senate Ways and Means Committee nevertheless recommended the House bill, but on February 17, in a significant compromise to secure passage, the Senate adopted by voice vote an amendment (filed by liberal Democratic committee chair Charles Bruner, an educationally aberrant Iowa legislator with a Ph.D. in political science from Stanford) to lower the tax in the House measure from 36 and 34 cents starting March 1, and more importantly, to terminate three cents of the tax on June 30, 1989. The concessions and a day of inter-party negotiations notwithstanding, only a bare majority of senators voted 24 to 23 to approve the amended bill both to balance the state budget and to “force some Iowans to stop smoking or cut down,” but the vote fell two short of the constitutionally required majority of 26 votes. Only six of Branstad’s 21 Republicans supported the bill together with 18 of 29


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Democrats. However, Hutchins, a pro-tobacco smoker who supported the increase for budgetary reasons, arranged the parliamentary maneuvers necessary to reconsider the vote the next day, when, he hoped—and his Republican mirror image, pro-tobacco smoker Minority Leader Calvin Hultman, gave reason to suspect—that two absent Republicans might be prevailed on to vote Aye.\textsuperscript{37} Despite pleas from some Democrats that the tax (the second highest in the Midwest) would make Iowa retail stores “uncompetitive” and cause an “unbelievable” “drain” as consumers drove to adjoining states to buy cheaper cigarettes and everything else while they were at it,\textsuperscript{38} the two absent Republicans reappeared and the bill passed 26 to 22.\textsuperscript{39} The same day the House concurred in the Senate’s compromise, and the eight-cent tax increase subject to the three-cent sunset in mid-1989 went into effect.\textsuperscript{40}

By 1989, Governor Branstad recommended retaining the full eight cents permanently,\textsuperscript{41} and bills were filed by Republicans in both houses to repeal the repeal, but neither got out of the Ways and Means subcommittee, and the Senate in particular opposed the initiative, insuring that the sunset would take place as scheduled.\textsuperscript{42} Bruner, a member of the three-person Senate subcommittee, recalled two decades later that the second vote was there to recommend the bill’s adoption to the full committee, but that such action would have been “pointless” because joint opposition by the Democratic and Republican leaders, Hutchins and Hultman, meant that the Ways and Means Committee would not have taken it up anyway.\textsuperscript{43} Repeal of the sunset also appeared in amendments to two unrelated


\textsuperscript{43}Telephone interview with Charles Bruner, Des Moines (July 3, 2007). Bruner was
bills, but one was declared not germane and the other withdrawn by its sponsor.\textsuperscript{44}

After the Iowa legislature had adjourned, the cigarette industry celebrated the defeat of these rather feeble efforts to repeal the sunset of the three-cent tax as one of its greatest lobbying victories ever. In a special briefing in May for Ralph Angiuoli, the outgoing CEO of R.J. Reynolds Tobacco, the head of the Tobacco Institute’s State Activities Division, Kurt Malmgren, exuberantly proclaimed:

Thanks to our team effort, the impossible happened, a tax goes down this year.

Again, our traditional lobbying efforts were instrumental, as was our ability to coordinate the people and program resources you and others brought to the table.

We also worked with our public affairs division to solidify our relationship with Iowa’s liberal/labor community, via a labor consultant to shore up that side of the aisle.\textsuperscript{45}

At the outset of 1990, Daniel Nelson, the Tobacco Institute’s Midwest regional vice president, to his boss in Washington praised “our Iowa magician Chuck Wasker” for having “sunsetted 3 cents of the cig tax.”\textsuperscript{46} TI’s report card on its Iowa lobbyist, Charles Wasker, credited him with having pulled off a “spectacular victory” in insuring the preservation of the sunset.\textsuperscript{47} The industry’s special fervor

certain that Riordan would have voted with him, while presumably Gentleman, who both times had voted against H.F. 327, would have voted against repealing the sunset.

\textsuperscript{44}Journal of the House: 1989: Regular Session Seventy-Third General Assembly 2:1727 (Apr. 19) (H-4003 to S.F. 363, by Lundby, not earmarking tax for state agency appropriations); Journal of the House: 1989: Regular Session Seventy-Third General Assembly 2:1677, 3012-13 (Apr. 17-18) (H-4070 to H.F. 753, by Schnekloth, earmarking the three-cent cigarette tax for waste tire abatement). Since both of these Republican representatives had twice voted against any cigarette tax increase in 1987 and 1988, it is unclear why they would have proposed eliminating the sunset of the tax they opposed in the first place. In addition, S.F. 703, which was passed by both houses, earmarked three cents of the cigarette tax to back rural community infrastructure improvement bonds, but Governor Branstad line-item vetoed this provision on the grounds that earmarking tax revenue reduced the state’s flexibility in dealing with changing financial needs. Journal of the House: 1989: Regular Session Seventy-Third General Assembly 2:3092 (June 5).

To be sure, S.F. 703 did not repeal the sunset of the three-cent tax, but by removing the tax from general tax revenues, the bill presumably would have put pressure on the legislature to do so.

\textsuperscript{45}Briefing for Ralph Angiuoli R. J. Reynolds Tobacco: Remarks by Kurt L. Malmgren Senior Vice President The Tobacco Institute at 15 (May 24, 1989), Bates No. TI11503432/46.

\textsuperscript{46}Dan Nelson to George Minshew, Re: Region IV General Update (Jan. 3, 1990), Bates No. 507628585.

\textsuperscript{47}Tobacco Institute, Region IV State and Local Lobbyist Evaluation: State of Iowa:
over this tax issue was later explained by Nelson, who characterized combating cigarette tax increases as an even higher priority than achieving local preemption or defeating anti-public smoking bills because the cigarette companies “wanted all the money”: if the total price (with tax) could have been increased by three cents, the tax reduced the firms’ room for raising the price.⁴⁸ Why, however, the infliction of this defeat on the anti-smoking forces was chalked up to consummate lobbying skills is difficult to reconstruct given Senator Bruner’s observation that the Senate’s smoking leadership’s definitive and quasi-instinctual opposition to repeal of the sunset had rendered the outcome a foregone conclusion.⁴⁹ Then House Appropriations Committee chairman Thomas Jochum agreed that once Hutchins had made it clear that repeal would not be taken up in the Senate, it became senseless to consider it in the House and no magical skills were required.⁵⁰ Moreover, since opposition to repeal among some leaders (for example, House Speaker Avenson) was not based on a substantive policy, but on the principle of keeping the promise—made at the time the eight-cent tax increase was enacted in 1988 in order to secure a voting majority—that the three cents would be sunsetted, lobbying magic was hardly needed.⁵¹ On the other hand, Malmgren’s allusion to Iowa lib-labs underscored a crucial dimension of the tobacco industry’s overall legislative strategy in coopting the Iowa Citizen Action Network and the unions active in the Tobacco Industry Labor Management Committee to combat the tax.⁵²

House File 209 Stalls in 1989

The industry’s lobbying and campaign effects should not be ballyhooed. Our aim is a clean iron fist inside a clean velvet glove.⁵³

Charles F. Wasker (June 1, 1990), Bates No. TI23011588/9/91.

⁴⁸ Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).

⁴⁹ Telephone interview with Charles Bruner, Des Moines (July 3, 2007).

⁵⁰ Telephone interview with Thomas Jochum, Des Moines (July 21, 2007). At the same time, Jochum argued that the sunset was not repealed because the legislators had been “rolled” by the tobacco lobbyists. Id.

⁵¹ Email from Don Avenson to Marc Linder (July 20, 2007). Ex-Representative Jochum took the position that generally speaking the argument that the promise to sunset had to be kept had been a smokescreen for some other reason to oppose repeal. Telephone interview with Thomas Jochum, Des Moines (July 21, 2007).

⁵² See above ch. 26.

⁵³ [R. J. Reynolds Tobacco Co.], Social Acceptability of Smoking: Voicing the
After being assigned to a State Government subcommittee chaired by Hammond herself, H.F. 209 made little progress during the 1989 session other than securing the recommendation of the State Government Committee that it pass subject to amendments, which significantly weakened both the existing statute and the amendments embodied in H.F. 209. No sooner had the bill for the first time covered restaurants than Hammond herself at a meeting on March 2, 1989 offered the proposed subcommittee amendment H-3309, which most prominently excluded restaurants with a seating capacity of 25 or fewer. In addition, it eliminated the newly proposed requirement that restaurants provide enough tables and seats for all persons wanting to be seated at such locations. In a constriction of coverage under the law as passed in 1987, Hammond also proposed excluding from coverage all public places containing fewer than 250 square feet of space. After discussion by the full committee, the amendment failed by a show of hands; Hammond asked that the bill be deferred, but Mary Lundby—who would soon emerge as a key opponent of H.F. 209—objected, and Hammond’s motion to defer passed on a voice vote. Five days later, on March 7, the State Government Committee reconsidered its vote on the amendment, giving Hammond an opportunity to explain it; then without any discussion the committee on a non-record roll call voted 12 to 8 to pass H.F. 209 as amended. Hammond may have diluted her own bill in order to overcome obstacles to getting it to full committee and/or out of committee and onto the House floor (or to the Senate), where, she may have hoped, other forces might restore its original vigor.

The cigarette companies nourished an especially contemptuous animus against Hammond, the bill’s chief sponsor. Shortly after the bill’s passage, the Des Moines Register reported that, in the context of an embryonic national campaign, Hammond was advocating divestiture by the Iowa Public Employees’ Retirement System of its tobacco company stock on the grounds that: “It is inconsistent that we enjoy the profits of tobacco companies and then we tell...
people, “Don’t smoke.”” With $34 million of Philip Morris stock held by IPERS at stake, already by the next day, Pat Wilson, Philip Morris’s Midwest regional government affairs director, informed her boss that in response several activities had been initiated, including an analysis of Hammond and obtaining new Iowa counsel. Belittling Hammond’s “reputation of being an anti-tobacco activist at the Legislature,” Wilson alleged that Hammond had tried to add vending machine restrictions to H.F. 209, but that the amendment had “failed miserably.” More damning was the claim that Hammond was “not well respected by her colleagues.” Finally, Wilson attacked Hammond’s bona fides by citing the Tobacco Institute’s and Philip Morris’s lobbyists’ opinion that raising the issue was a way to obtain publicity and money for her legislative race. That new lobbyist (“counsel”) turned out to be former Republican Senate Minority Leader Calvin Hultman, who had just retired. He, in contrast, was “very well respected on both sides of the aisle.” The Philip Morris money machine had also managed to solicit a comment from Republican Senator Jack Nystrom, one of two legislators on the IPERS board, who opined that “Hammond’s idea is ‘stupid and she doesn’t know what she’s talking about.’ ‘Just let her introduce something, we’ll blow it out of the water.’” Finally, another ex-legislator doing the bidding of the cigarette companies, Lowell Junkins, the Democratic Senate Majority Leader as late as 1985, and now the Tobacco Institute’s “labor consultant,” elicited from the president of the Iowa State American Federation of State, County and Municipal Employees, whose members were IPERS beneficiaries, that he saw no problem so long as tobacco stocks were a sound investment. Amusingly, while Philip Morris was instantaneously implementing this elaborate strategy to kill Hammond’s proposal half a year before the legislature was even

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58 William Petroski, “Critics to State: Don’t Invest in Tobacco,” *DMR*, June 10, 1990 (1A:6, 6A:5-6). IPERS also held RJR Nabisco stock and bonds worth more than four times as much.

59 Pat Wilson to Jack Nelson, Subject: Iowa - Divestiture (June 11, 1990), Bates No. 2024672792/3. Ironically, two years later, Don McKee, the AFSCME president, arguably the best-known union official in Iowa, proposed that IPERS divest itself of Time Warner stock because of an anti-police song it had produced. William Petroski, “Divest to Protest Rock Song,” *DMR*, July 25, 1992 (1) (NewsBank). Later he was sentenced to federal prison for embezzling union funds. William Petroski, “McKee Gets Prison Term,” *DMR*, Aug. 5, 1995 (1) (NewsBank). The amendment to restrict vending machines, which was not filed by Hammond, did pass the House and was defeated in the Senate on a relatively close vote of 26 to 19, Hultman and Nystrom both voting with the cigarette companies. *State of Iowa: 1990: Journal of the Senate: 1990: Regular Session Seventy-Third General Assembly 1:1107-1108 (Mar. 15).*
scheduled to reconvene,\textsuperscript{60} the Register article quoted Philip Morris’s vice president for public affairs as calmly acknowledging that “Iowa officials are entitled to invest their state pension money as they see fit” and modestly pointing out that 60 percent of the company’s revenues were derived primarily from food products.\textsuperscript{61}

The only other action on H.F. 209 was the filing of 16 amendments by pro-business Des Moines Democrat Tony Bisignano\textsuperscript{62} and 11 amendments by Republican Mary Lundby.\textsuperscript{63} Bisignano, whose family owned restaurants,\textsuperscript{64} was also president of an American Federation of State, County and Municipal Employees union local representing workers of Polk County,\textsuperscript{65} which in early 1987, as part of a “statewide push for smoke-free worksites,” began planning to remove all cigarette machines from and to restrict smoking in county buildings.\textsuperscript{66} Bisignano, who allowed as “I’d love to quit smoking,” objected that “by jerking the machines, you don’t accomplish anything.” The county board of supervisors may have believed that it was “probably not right to subject the public to having to put up with our smoke’ while doing business at county offices,”\textsuperscript{67} but when it decided to create a “smoke-free environment” gradually over a year by limiting the number of places in which smoking would be permitted until August 1, 1988, when smoking would be prohibited in private offices and allowed only in designated smoking rooms,\textsuperscript{68} Bisignano complained that the policy was “going to extremes’ ....” Although he charged that the county had violated the union contract by instituting the policy without having consulted the union and asked the Public Employment Relations Board to negotiate a new

\begin{itemize}
\item \textsuperscript{60}In fact, almost three years passed before Hammond filed a bill, on which the legislature then took no action. H.F. 543 (Mar. 17, 1993).
\item \textsuperscript{61}William Petroski, “Critics to State: Don’t Invest in Tobacco,” DMR, June 10, 1990 (1A:6, at 6A:6)
\item \textsuperscript{64}Telephone interview with ex-legislator David Osterberg (Apr. 1, 2007).
\item \textsuperscript{65}Iowa Official Register: 1989-1990, at 58 (vol. 63).
\item \textsuperscript{67}Perry Beeman, “Smoking Ban Smolders in Polk County,” DMR, Jan. 9, 1987 (1M:6, 6M:3).
\item \textsuperscript{68}Perry Beeman, “Polk to Limit Smoking Areas,” DMR, June 24, 1987 (7M:6).
\end{itemize}
policy, only 8 percent of Polk County employees signed a petition requesting the board of supervisors to rescind the ban on the grounds that smokers’ “freedom of choice and civil rights [should] be given as much consideration as the nonsmokers’.” Since the policy was already the result of a compromise—several supervisors had supported a complete ban—the chairwoman signaled that reconsideration was unlikely. Carrying on in the House where he had left off in Polk County, Bisignano filed amendments that were designed to weaken the bill, in particular with respect to restaurants. Most of Lundby’s were of a similar character except for her proposal to expand “smoking” to include tobacco chewing. In April, by unanimous consent, H.F. 209 was deferred and placed on the unfinished business calendar, and then in May, not having been withdrawn, defeated, or indefinitely postponed, it was rereferred to the State Government Committee (making it eligible for committee action at the beginning of the second session in January).

At the end of 1989 Branstad recommended that the bill be passed with an exemption for restaurants with more than 31 seats. In a vast understatement of the needs of public health and especially of the 78 percent of Iowa adults who did not smoke, the governor, deploying one of the cigarette oligopoly’s key propaganda terms, grounded coverage in the “courtesy and convenience that we ought to provide our citizens.” That resistance could be expected was immediately made clear by Democratic Senate Majority Leader Bill Hutchins, who suggested that legislators might want a broader exemption for restaurants. Inadvertently pointing to the root defect of the law since its inception (and lasting until 2008)—the conferral on building owners of virtually total discretion to designate as large or as small smoking areas as they wished and the absence of a requirement that physical barriers and ventilation systems other than already

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“existing” ones “shall be used to minimize the toxic effect of smoke in adjacent nonsmoking areas”—Hutchins correctly and pertinently observed: “‘There are small places where you don’t really accomplish that much. All you do is put a no-smoking sign on one table and...if someone smokes, it’s all over the place....’”

The Cigarette Manufacturers Fit Iowa into Their Nationwide Preemption Campaign

[Johnson County Attorney J. Patrick] White isn’t sure how such a pre-emption came about, but he has his ideas. “Legislative history in Iowa is very difficult to go by.... There’s not serious record-keeping. The most frequent version is it was a compromise to get enough votes to pass the basic statute, to win over a couple people more aligned with tobacco. So long as there was specific language to keep local government” from banning smoking they would vote for it.

In the meantime, from Washington the Tobacco Institute had been keeping a close watch on the Iowa legislature in connection with its nationwide panoptic monitoring of possibilities for enacting preemption of local government control. The proliferation of statewide laws and local ordinances restricting smoking had reached the point that in mid-1987 TI’s State Activities Department—whose “mission statement” committed it to “defend against adverse legislation and anti-

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78“Governor: Expand Law on Smoking to Include Most Iowa Restaurants,” DMR, Dec. 28, 1989 (1), Bates No. 507593272. In this regard Hutchins understood more about the reality of the law of the legislature and the laws of physics than one of the leader’s of the Iowa City-based group, Clean Air for Everyone, who, uncritically conflating smoking-free and smoke-free, falsely claimed that the 1990 amendment “create[d] smoke-free areas in all restaurants seating more than 50....” Megan Sheffer and Christopher Squier, “Up in Smoke: An Assessment Process Related to Smoke-Free Restaurant Ordinances in Iowa,” in Needs and Capacity Assessment Strategies for Health Education and Health Promotion 166-71 at 166 (Gary Gilmore and M. Campbell eds. 3d ed. 2005 [1996]).
79Julie Mickens, “Group Pushes to Ban Smoking in Restaurants,” Icon, Oct. 7, 1999 (5:1-2). Four years later White self-contradictorily claimed that because “he had been the Chair of the County Attorney’s Legislative Committee at the time the preemptive language was passed...he knew the history of it.” Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2 (May 7, 2003), on http://www.johnson-county.com/auditor/min2003/030507ws.htm (visited Oct. 23, 2008).
tobacco activities of any nature at state and local levels”—surveyed its field staff and lobbyists to “gain a clearer picture in discussing the question ‘is it prudent and/or possible to seek state level smoking restriction laws which preempt local jurisdictions?’” The conclusion of this “extremely confidential” survey that enactment of a local preemption law might be possible in 22 states (including Iowa) during the state legislative sessions from 1987 to 1989 was based on consideration of six points: (1) the strength of home rule concepts and the likelihood of the legislature’s taking preemption seriously; (2) the history of and prognosis for local smoking restrictions; (3) the strength of the anti-tobacco movement; (4) whether allies would continue to support the tobacco industry’s position and resources could continue to be provided for dealing with the threat of local enactments; (5) whether a statewide smoking restriction law existed, what the possibility was of serious efforts to strengthen such a law, and whether the tobacco companies could defeat them; and (6) whether the tobacco industry weakened “its position on all issues by adopting an alternative position on smoking restriction legislation” and whether such legislation could be controlled.

The “confidential” Iowa report, which was written on June 4, 1987, four days before Governor Branstad signed the clean indoor air law amendments, judged legislative adoption of preemption “possible,” but “only if an attempt were made to strengthen present state law.” Without fleshing out the implications of such a trade-off, the report presumably meant that restaurant and workplace coverage, the law’s most notable gap, was the price that would have to be paid for preemption—assuming that the author did not have in mind enactment, as the Texas report put it, “through some coy, subtle manipulation of the legislative process.” Since the law passed in 1987 was “very weak,” there would

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81"Statewide Smoking Restrictions with Preemption" (ca. 1988), Bates No. 506624412.
82"Statewide Smoking Restrictions with Preemption" (ca. 1988), Bates No. 506624412/3. Iowa was not listed among the four states (California, Missouri, New York, and Wisconsin) in which “[i]nfluencing activity now happening.”
83"Statewide Smoking Restrictions with Preemption" (ca. 1988), Bates No. 506624412.
84"Statewide Smoking Restrictions with Preemption" (ca. 1988), Bates No. 506624412/23.
85"Statewide Smoking Restrictions with Preemption" (ca. 1988), Bates No. 506624412/47.
“undoubtedly be an attempt to strengthen it in 1988 [sic; must be 1989].” The Iowa author (who may well have been a lobbyist himself) regarded the industry’s lobbyists as “[v]ery strong,” tobacco company strength” as “very good,” and (unnamed) “[n]ew allies developed by phone banks also as “very good,” but was constrained to admit that wholesaler strength was “nonexistent” (presumably for the unexplicated reason that in 1982-83 lobbyist George Wilson’s wholesalers split with the manufacturers over the precedence to be given to the Unfair Cigarette Sales Act). Although the report did not pass judgment on the strength of the anti-tobacco movement other than to advise the Tobacco Institute that it continue to try to strengthen the law, the finding that the existing local ordinances that would run afoul of any preemption law were weak appeared to lessen the urgency for enactment. Nevertheless, a certain inexorability seemed to inhere in the process, especially since the “Governor hates tobacco industry, wife active in GASP.” Consequently, regardless of what the tobacco companies might have wished: “Legislature preoccupied with budget problems, as soon as they straighten the budget out, they will probably come after us in this area (workplace smoking).”

In July 1989, Dan Nelson, the TI Midwest regional vice president, responded to a request from Paul Emrick, the vice president for the northern sector, for an analysis of “preemption possibilities” in those states by pointing out that since the bill expanding the Clean Indoor Air Act (H.F. 209) that lobbyist Wasker had “held off” in 1989 would be carried over to the 1990 session, “Wasker will wait to review approved amendment language. Mr. Wasker prefers an outright defeat of any smoking restriction expansion but if his defensive position deteriorates, a preemption amendment is a possibility.” At the beginning of September, the
regional office forwarded to Wasker for his consideration examples of
preemption clauses that the Washington headquarters had furnished.88

The Tobacco Institute’s initiation in 1988 of the Comprehensive Public
Smoking Program (CPSP)89—into which the abortive accommodationist
Operation Downunder had morphed90—added to its primary charge of defeating
legislation adverse to the tobacco industry the “proactive” mission of seizing
opportunities to promote legislation that would benefit the industry. Broadened
still further by the State Activities Division in 1989, the charge came to include:

State preemption bills. One of the industry’s toughest, most time-consuming and
expensive areas is in fighting local smoking restrictions. The Institute will lead industry
efforts to preempt localities’ abilities to adopt restriction laws. ...

Likewise, The Institute will take a hard look at opportunities to preempt local
sampling bans and local taxing authorities.

In addition, The Institute will work to ensure smokers a right to smoke in places of
employment and elsewhere. The basic idea is to carve out a reasonable smoking niche for
tobacco customers.

Further, our proactive efforts also include efforts to roll back existing anti-tobacco
laws in the states and localities to make them more reasonable to the industry and tobacco
consumers.91

The cigarette manufacturing companies were able to intensify the potency of
their new strategy by channeling some of their extraordinary profits into the
financing of legislative counter-agendas at levels designed to force anti-smoking
groups to scatter and dissipate their resources. As the head of TI’s state activities
field staff explained to his regional lieutenants:

The fact that a given CPSP legislative concept may have a limited chance of passage
should not automatically rule out an attempt to work for its passage.

of Philip Morris’s very focused efforts on behalf of enactment of preemption provisions,
this criticism appears to have been misguided.

88Dan Nelson to George Minshew, Action-Trac [Iowa HF 209] (Jan. 16, 1989), Bates
No. TI00301663/4, on tobaccodocuments.org

89Kurt Malmgren to John Kochevar et al., Subj: Comprehensive Public Smoking
Program (CPSP) Update (Feb. 8, 1989), Bates No. TI00260318.

90See above ch. 26.

91Walter Woodson to Roger Mozingo, Subject: Goals of The Institute’s “Proactive”
Program (Aug. 14, 1989), Bates No. TI00260200. The initial round of CPSP projects did
not include any in Iowa. Comprehensive Public Smoking Program Projects in Progress
(Rev. Feb. 8, 1989), Bates No. TILBC010851.

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Set the agenda for the anti-tobacco forces; i.e., push for legislation to tie up the anti-tobacco forces’ resources and put them on the defensive. In this case, outright legislative victory is not the only goal.92

On October 2, 1989, Kurt Malmgren, the head of TI’s State Activities department, sent its “1990 Proactive Legislative Plans” to representatives of various tobacco companies and TI officers. In an accompanying memorandum, Malmgren announced that in 1990 the Institute would expand the effort begun in 1989 to develop and implement plans to enact favorable legislation, while at the same time seeking to “set the tobacco agenda in the state legislatures, rather than simply reacting defensively to our anti-tobacco opponents.” For 1990, Malmgren had targeted 35 states with one or more legislative actions, the first two mentioned being “Preemption of local smoking restrictions” and “Rollback or modification of existing smoking restrictions.” To carry out this “ambitious undertaking” as part of the Institute’s “mission to the industry,” Malmgren stressed that close coordination with the member companies was necessary.93

What the press’s coverage of the preemption issue lacked was more than compensated for by internal tobacco industry documents that defendants have been forced to produce and have been made available on the internet. Iowa was hardly the only or even an especially high-profile example of the cigarette companies’ nationwide preemption campaign,94 their highest state legislative priority in the 1990s.95 Indeed, by 1994, Tina Walls, Philip Morris vice president for government affairs, declared at an internal corporate meeting that enactment

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92Walter Woodson to Kurt Malmgren, Subject: Comprehensive Public Smoking Program (CPSP) Procedures (Jan. 31, 1989), Bates No. TI00261033/6. See also Kurt Malmgren to Regional Vice Presidents/Directors, Subject: Comprehensive Public Smoking Program (CPSP) Procedures (Feb. 14, 1989), Bates No. TI00260320/2.


of preemption legislation in all 50 states was one of the company’s “most important priorities for 1994 and 1995” because smokers’ right to smoke where they worked, played, and lived was “under attack as never before”:

The immediate implications for our business are clear: if our consumers have fewer opportunities to enjoy our products, they will use them less frequently and the result will be an adverse impact on our bottom line.

Even more important, accommodation/pre-emption laws shape the real-world environment in which our customers and their non-smoking friends and associates live every day.

If smokers are banished to doorways and loading docks in front of buildings, it makes smokers feel like outcasts and gives encouragement to the ants.

On the other hand, if we live in a society that accommodates smokers and non-smokers alike, it sends the message that smoking is a viable life-style choice and an adult’s decision to use a legal product should be respected. 96

In mid-1989 a memorandum to the heads of TI’s State Activities department listed Iowa among 24 states in which there was “Low Priority for Local Preemption” because “local activity on smoking restrictions is not customary...or anti-smokers have already achieved tough state laws, making local ordinances ‘unnecessary.’” 97 Since Iowa’s law was so weak, presumably it was the lack of local activity that must have prompted the classification. As of 1987, the Tobacco Institute was aware of only three local smoking restriction ordinances in Iowa. 98 In fact, of the three, which were all passed in 1978, those in Johnston

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96 CAC Presentation #4 (July 8, 1994), Bates No. 2041183751/2. See also Ellen Merlo, (untitled), at 9 (Oct. 24, 1994), Bates No. 2040236685/93.
97 Cathey Yoe [director, legislative information] “Memorandum: State Preemption of Local Smoking Restrictions,” to Kurt Malmgren [senior vice president] et al. (June 20, 1989), Bates No. TI0026-0294. Minnesota’s placement in the same category was presumably motivated by the other rationale.
98 Tobacco Institute, Breakdown of Approved Local Smoking Restrictions (1987), Bates No. 2025833059. See also Tobacco Institute Field Staff Meeting (Aug. 1985), Bates No. 680501768/831.
99 Debate over the action by the Johnston city council was contentious. Described by the local press as “smokers against non-smokers at the Council table,” the council on first reading approved an ordinance that would have allowed smoking in all areas of city hall not designated/posted nosmoking. However, after a motion to waive the second and third readings failed by a vote of 3 to 2, a nonsmoking councilman and another who had recently quit offered a compromise to designate about half of the audience area of the council chambers as nonsmoking, which was adopted unanimously. “Water Main Extension Discussed at Council Meeting,” Northern Polk County News (Johnston), 9(40):1:1-6 at
and Cherokee merely designated smoking areas in city-owned governmental buildings pursuant to the just enacted statewide statute. Only the Ames ordinance imposed an absolute smoking ban—at meetings of the city council and other city government bodies. To be sure, apart from the fact that the 1978 statewide clean indoor air law did not contain a provision preempting local ordinances, even the 1990 preemption amendment no more prohibited cities and counties qua building owners from banning smoking in their own buildings than private owners.

In June 1988, however, Bill Cannell, TI vice president for legislative support and administration, told the executive committee that Des Moines (in addition to Appleton, Wisconsin and Palo Alto, California) was a possible site for rolling
back or repealing local “laws.”

Presumably the perceived opportunity in Des Moines prompted the inclusion in TI’s State Government Relations Legislative Counsel 1989-90 briefing book of Iowa among only 14 states that TI had “targeted” for action regarding preemption of local smoking restrictions as part of the “pro-active” role it had taken in 1989 and would expand in 1990 to develop legislation favorable to the industries. Its goal was “to set the tobacco agenda in the state legislatures, rather than simply reacting to our anti-tobacco opponents.”

The situation Cannell had in mind was the decision by the City of Des Moines to ban smoking in almost all city buildings on June 1, 1988. Since the 1987 amendments to the clean indoor air law had been in effect, the city had been complying by banning smoking except in designated areas. “But,” as the Des Moines Register noted, “a recent trend toward completely smokeless buildings has not been lost on Des Moines city officials.” The city manager, Cy Carney, animated by complaints from municipal workers, such as those who ate in the city hall lunch room, astutely drew the appropriate public health conclusion from the basic flaw in the state statute in a letter to department heads by pointing out that the restriction of smoking to designated areas “has the general effect of confining and concentrating smoking in various parts of city buildings. That, of course, has intensified the smoke in areas which are used by both smoking and non-smoking employees.” Thus, on March 10, 1988, Carney issued a directive “relative to the creation of a smoke free environment in all City facilities in an effort to provide a cleaner, healthier work place,” which prohibited city employees from smoking in any city building or facility; it also applied to the general public except in the public areas of the airport and convention center.

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102 Bill Cannell, Public Smoking Program: State Activities Division Presentation to Tobacco Institute Executive Committee, in Samuel D. Chilcote, Jr., Comments, Executive Committee The Tobacco Institute (Draft #2) (June 16, 1988), Bates No. TI01770102/36.


105 “Ban in Almost All City Buildings Begins June 1, Carney Says,” DMR, Mar. 16, 1988 (3M:3).

For Brozek and Nelson, the heads of TI’s Midwest region, the ban fit well as “an additional target for our Comprehensive Public Smoking Program” since it embodied two matters with which the Institute was authorized to deal: “modification/roll back of existing anti-smoking laws” and “smokers rights.” Having previously discussed the Des Moines ban with headquarters, in September 1988 Brozek and Nelson informed their northern sector boss, Paul Emrick, that its Iowa lobbyist/counsel, Wasker, had recently held “in-depth meetings” with union representatives of the municipal white-collar workers and firefighters, on the basis of which Wasker had “developed a scenario that could force a repeal, or a roll back, in Des Moines.” Wasker’s “objective” was not merely to gauge how “angry” employees’ were about the ban, but to “[e]ncourage and facilitate” their opposition. Notifying Emrick that Wasker had already “urged” that Brozek and Nelson “immediately undertake a preemptive and proactive stance,” they pointed out that in addition to working under an agreement with TI as counsel, Wasker “continues to act in a legal advisory position with potential aggrieved parties.” News of this second function signaled a request for a $15,000 budget for the fourth quarter of 1988 to finance Wasker’s other activities. By October Emrick had already approved a check to Wasker for $10,000 for “Iowa Legal Services/CPSP.” A few days later, in another report to Emrick on CPSP in the Midwest, Brozek and Nelson reiterated that Wasker had determined that the firefighter and white-collar unions were “irritated” over the smoking ban: the former were demanding that the issue be taken up in then ongoing contract negotiations, while the latter and the police union were considering adopting the same position: “Much of this activity has been generated and directed by Mr. Wasker himself,” who had also “extensively organized our legislative strategy

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Moines Clerk’s Office. Whereas violations by employees were subject to “the usual disciplinary process involving violations of work rules,” the general public could only be “courteously advised of our smoke free environment.” Nevertheless, in spite of this lack of enforcement power, one of the city clerks stated that she had never seen any nonemployee smoke in city hall. Email from Karen Herzberg to Marc Linder (May 31, 2007).

107 Michael Brozek and Dan Nelson to Paul Emrick, Re: Targets for Proactive Efforts, (Sept. 6, 1988), Bates No. TI42680947
108 Kurt Malmgren to John Kochevar et al., Subj: Comprehensive Public Smoking Program (CPSP) Update (Feb. 8, 1989), Bates No. TI00260318.
109 Michael Brozek and Dan Nelson to Paul Emrick, Re: Targets for Proactive Efforts, (Sept. 6, 1988), Bates No. TI42680946/7.
111 Michael Brozek and Dan Nelson to Paul Emrick, Re: Comprehensive Public
throughout this past summer and fall.”

The proposed $15,000 budget for 1989 included $10,000 for a survey. Rolling back the Des Moines municipal smoking ban was thwarted: in mid-February 1989 both Brozek and Nelson met in Des Moines with Wasker and Pat Wilson, their counterpart from Philip Morris, to review what in the meantime had turned into a grievance over the ban. The no-smoking policy, however, remained on the books and smoking remained prohibited in city buildings. In the end, then, neither “our magician” Wasker nor the nicotine purveyors’ super-profits were able to implement this “proactive” roll back pipe dream. And by 2007, the Des Moines Professional Firefighters Association did not even permit smoking during union meetings.

Indeed, to judge by information provided two decades later by the presidents of the firefighters and white-collar workers unions in 1988, what Wasker and perhaps Brozek and Nelson as well generated was a vastly inflated picture of the

Smoking Program Region IV (Nov. 4, 1988), Bates No. TI08940761/3.

112Michael Brozek and Dan Nelson to Paul Emrick, Re: Comprehensive Public Smoking Program Region IV (Nov. 4, 1988), Bates No. TI08940761/2.

113Public Smoking Program, Des Moines, Iowa (n.d.), Bates No. TI08940767, on tobaccodocuments.org. It is unclear to whom the $2,500 in honoraria was to be given. Separately it was estimated that $9,000 was spent in Iowa in 1988 and $28,500 was to be budgeted for the Public Smoking Program in 1989; by far the largest item was a phone bank. The location of the non-Des Moines program was not identified. Public Smoking Program (n.d.), Bates No. TI08940766.

114In January 1989, for example, the board of trustees of the Des Moines Water Works unanimously rejected a petition from 89 of the utility’s 205 employees to designate indoor smoking areas so they could “satisfy their nicotine craving” without having to go outdoors in to the cold. Charles Bullard, “Smoking Ban Reiterated,” DMR, Jan. 25, 1989 (6M:4-5).

115Bi-Weekly Report Michael F. Brozek - RVP - Region IV (Feb. 13-14, 1989), Bates No. TI28811593/4; Bi-Weekly Report Dan Nelson - RD - Region IV (Feb. 13-14, 1989), Bates No. TI28811593/7. Although Wilson was Brozek’s counterpart in the sense that she was Philip Morris’s Midwest regional director in Chicago, the cigarette companies (which financed the Institute), according to Brozek, did not trust TI staff; despite having no formal authority over him, Wilson, on visits to his office in Madison, bossed him around, symbolically demonstrating her power by sitting in his chair. Telephone interview with Michael Brozek, Madison, WI (June 5, 2007).

116According to Carol Moser, a Des Moines Assistant City Attorney, who began working for the city in the early 1980s, municipal white collar workers welcomed the ban, while some police were annoyed by its application to police stations, but the ban was never rescinded and was always complied with. Telephone interview with Carol Moser, Des Moines (May 29, 2007).

dissatisfaction among the members. According to Ray Thomas, a union vice president who also owned a cigar store had been the initial link to the tobacco industry representative, who in meeting with Thomas made promises about having a lot of money—$10,000 was a figure Thomas still remembered—to hand out, but the union never saw any of it. And since Thomas supported the indoor smoking ban, his heart was not in any arrangement to foment unrest anyway. Moreover, because smokers were already at that time a minority among the firefighters, the tobacco representative was unable to gain a foothold in the union; and since the nonsmoking majority was vocal, if anyone had said at a union meeting that the union would soon be receiving tobacco industry money, the majority would have rejected it. Similarly, according to Andrew Hennesy, who at the time was the president of the Municipal Employees Association, which represented white-collar workers in the municipal government such as those who worked in city hall, a majority of the members were not opposed to the indoor smoking ban. He recalled no grievances having been filed.

TI’s Midwest regional staff’s analysis of H.F. 209 focused on the proposed expansion of “public places” to include restaurants and the industry’s counter-proposal of preemption. In reviewing its roster of “pro-active” legislative proposals, Region IV analyzed the circumstances that might give rise to a preemption amendment to H.F. 209:

HF 209 remains in its house of origin due to the extensive lobbying efforts of TI, and the Iowa Restaurant Association. The Restaurant Association will stay opposed to HF 209 with or without local preemption clauses if percentage designations are included in the bill. In fact, at this time, the Tobacco Institute remains opposed to HF 209 in its present or deleted form. Several amendments have been considered including the changing of fines, mandates that require public places with a public address system to regularly announce their smoking policy, and additional inclusions or deletions of affected public places.

If HF 209 begins moving through the legislature, we will attempt to amend strong preemption language into Iowa’s Clean Indoor Air Act. Region IV staff has received several examples of preemption clauses which have been forwarded to Iowa counsel, Chuck Wasker, for his consideration.

In the House of Representatives absent an outright kill of the bill, TI counsel will first try to amend the bill in the House. If the bill progresses to the Senate, we will once again

118 Telephone interview with Ray Thomas, Ankeny, IA (May 30, 2007). Thomas did not recall the name of the tobacco industry representative, but from his account it appears that Wasker was that person.

119 Telephone interview with Andrew Hennesy, Des Moines (June 1, 2007). Hennesy did not recall having been approached by or having met with anyone from the tobacco industry.
attempt to kill the bill outright. If our preemption amendment is unsuccessful in the House, we will attempt to amend it in the Senate. Once again, given the large number of amendments that have been considered to HF 209, Region IV staff and our Iowa counsel feel our best opportunity to amend the bill, if it cannot be killed, will be to blend in to the flurry of committee and floor amendments.¹²⁰

Despite TI’s emphasis on implementing a “proactive” strategy, until this point in the analysis it appeared to be using preemption primarily as a tactical weapon to destroy any bill that sought to expand coverage to include restaurants. At this juncture, however, preemption became the priority in its own right to which TI’s national campaign had subordinated coverage. Although TI did not plan any “grassroots mobilization” at that time, it did foresee the need for and potential conflicts with “coalition allies”:

[T]he Iowa Restaurant Association opposes HF 209 and has indicated to Region IV staff that they have no intention of changing their position. In spite of this opposition, if the bill starts to progress we will seek the aid of trade groups interested in state wide [sic] uniformity in smoking restrictions. At the proper time, we will contact the Iowa Restaurant Association and state and local chambers of commerce to educate them on the benefits of uniformity in smoking restriction laws.¹²¹


¹²¹ Kurt Malmgren, “Pro-Active Legislative Targets 1990” at 33 (Oct. 2, 1989), Bates No. TI00310001/42. TI foresaw an even more probable clash of interests emanating from Iowa’s de facto ban on sampling, which resulted from tobacco “wholesalers’ concern with excess amounts of free cigarettes being distributed.” The manufacturers could not successfully amend the law in any “overt” way; instead, they “need to have an amendment inserted into a revenue bill dealing with other subjects” and “to secure a friendly legislator to insert the language...and gain the cooperation of leadership in protecting that language when it is inserted. This methodology does not lend itself to press releases, industry and grassroots mobilizations and other traditional support instruments. In short, if we are not able to accomplish this move quietly, we will be unsuccessful.” The key to pulling off this surreptitious coup was maintaining “low visibility for a large portion of the legislature, capitol press corps and the general public,” while demonstrating to the wholesalers by means of comparative data from states with active sampling programs that the practice did not reduce wholesalers’ and retailers’ sales. Id. at 34, Bates No. TI00310001/43. According to R.J. Reynolds Tobacco Co., the Iowa wholesalers were “adamant with respect to not changing this...extremely restrictive law....” Betty C. Royal
Preemption now seemed to take on a life of its own and become a goal in its own right rather than merely a tactic designed to thwart the passage of more radical anti-smoking bills: the point was to persuade restaurant and other business owners that preemption was of such overwhelming importance for all industries that they should abandon their resistance to coverage for the sake of the greater good of the tobacco industry.122 Years later, Brozek, TI Midwest regional vice president until 1988 (and a Philip Morris lobbyist in Wisconsin for a time thereafter), completely corroborated this analysis. No matter what anyone might say, he declared, by the years 1989-1991, preemption was without any doubt the cigarette companies’ highest state legislative goal simply because they lacked the capacity to fight and win in myriad communities, which would have inflicted “a thousand wounds” on them. Consequently, he confirmed that, if forced to choose between no restaurant coverage and no preemption, on the one hand, and restaurant coverage and preemption, on the other, there was absolutely no doubt that the tobacco industry would have chosen and—in states such as Iowa—did in fact choose the latter, relegating the restaurant associations’ goals to matters of utter indifference.123

This position was subtly and indirectly reinforced in a letter that TI’s communications director Walker Merryman sent at the beginning of 1990 to Lester Davis, the Iowa Restaurant & Beverage Association executive director, in

122Seventeen years later, Calvin Hultman, who had been the Republican Senate minority leader in 1990 before becoming Philip Morris’ Iowa lobbyist, sought to undercut the specific importance of preemption to the tobacco industry by arguing that the overriding need for statewide regulatory uniformity was common to all industries, instancing guns, hog lots, and fertilizer. Telephone interview with Calvin Hultman, West Des Moines (May 19, 2007). In 2007, when she was Senate Republican Minority Leader, Mary Lundby, who in 1990 was a prominent opponent of the bill in the House, also sought to assimilate the tobacco industry’s campaign to this larger issue. Telephone interview with Mary Lundby, on the road near Ames (June 1, 2007).

123Telephone interview with Michael Brozek, Madison, WI (June 5, 2007).
his capacity as a member of the International Society of Restaurant Association Executives, which the Institute had joined two years earlier. Though a form letter, it nevertheless abstractly alluded to circumstances that were on the verge of confronting IRBA, warning restaurant owners and offering them quid pro quo’s at the same time:

[W]e want to make certain we keep the lines of communication open between our two industries so that we may avoid any conflict.

There are obvious legislative and regulatory matters where our interests coincide. Naturally, we intend to vigorously defend the rights of our member companies and will welcome your participation when those matters arise. There may also be times when you need a little assistance on an issue which may not seem to be a logical fit. I want to assure you that we stand ready to play whatever role we can mutually determine.¹²⁴

In reporting right after new year to his boss in Washington on legislative plans for 1990 in the Upper Midwest, TI’s regional vice president, Daniel Nelson—who, 16 years after having quit his post, was still filled with admiration for Wasker’s lobbying prowess¹²⁵—boasted of the “clean records” that “we” had had in 1989 in Iowa (as well as in Minnesota and South Dakota), where “Wasker had a banner year” rolling back a three-cent cigarette tax in addition to killing smoking restriction and advertising bills. Admitting that “[w]e are late out of the blocks on our pro-active efforts,” Nelson characterized their “intended goal” as “interesting” in requiring TI both to persuade the tobacco wholesalers and their lobbyist George Wilson to abandon their long-time support for the (de facto) statutory ban on free distribution of samples as well as to bring them “back on to the team” and to secure their “cooperation...on the whole legislative front”—a task that he “frankly” recognized “may take more time than this leg session will allow.” Finally, without explaining the basis for the innovation, Nelson reported that, unlike the situation in other Region IV states, where labor consultants were hired “initially to work in the area of clean indoor air,” TI was retaining former Iowa Senate Democratic Majority Leader Lowell Junkins as a labor consultant to “work primarily on delivering union opposition to proposed excise tax increases.”¹²⁶

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¹²⁴Walker Merryman to Lester Davis (Jan. 2, 1990), Bates No. TI29842334/75.
¹²⁵Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007). Unprompted, Nelson volunteered this reason for having chosen to work for the Tobacco Institute: “Hey, this is America—there are two sides to every story.” Id.
¹²⁶Dan Nelson to George Minshew, Re: Region IV General Update (Jan 3, 1990), TI28870894-6.
House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved

H.F. 209 Passes in 1990 as Restaurant Coverage Is Traded Off for a Version of Preemption of Local Control that Even the Cigarette Manufacturers Deemed No Broader Than What “Iowa Constitution already says”

“This bill just died of lung cancer.”

Although Lieutenant Governor Zimmerman focused on environmental and health issues in her opening address to the Senate on January 8, 1990, her “Report Card on Iowa” failed to mention smoking. On January 11, by a vote of 14 to 2, the House State Government Committee recommended passage of H.F. 209. For the next day, January 12, the tobacco industry scheduled a high-level legislative forecast meeting, attended by Wasker, TI's lobbyist, Serge Garrison, R. J. Reynolds’ lobbyist, Joe Murray, Reynolds’ state government relations official with responsibility for many states including Iowa, and Pat Wilson, the Midwest regional director for governmental affairs at Philip Morris. Garrison, who had been the director of the Legislative Service (Research) Bureau and thus the Iowa legislature’s chief bill drafter from 1967 to 1984 before joining a corporate law firm in Des Moines, chose to lobby for Reynolds Tobacco

128 State of Iowa: 1990: Journal of the Senate: 1990: Regular Session Seventy-Third General Assembly 1:1-5 (Jan. 8). Zimmerman did not mention smoking in any of her other opening addresses during her tenure as lieutenant governor.
131 RJR, I. Introduction, III. Programs and Resources, A. Legislative, 1. Legislative and Regulatory Counsel, at 3 (May 15, 1989), Bates No. 507639332/7.
132 Dan Nelson to George Minshew, Re: Region IV General Update (Jan 3, 1990), T128870894. On Murray, see RJRT State Government Relations, IV. Staff & Structure, C. State Assignments (Mar. 6, 1989), Bates No. 507619305/6. On Wilson, whose participation was noted as “pending,” see Philip Morris USA, Government Affairs Regions (June 1990), Bates No. 207015962. According to a Philip Morris in-house organ, “all she ever dreamed about while growing up in Billings, Montana was becoming a professional lobbyist.” “Tapgram Profile: Regional Government Affairs Director Pat Wilson,” Tapgram 11(3) (Mar. 1991), Bates No. 2024332327/8.
because, according to his widow, it was a “good-paying client,” although “his heart was not in it.” The $24,000 in 1989 and $26,000 in 1990 (plus about $1,000 in expenses) that Reynolds paid Garrison apparently overcame whatever qualms he may have had. (In contrast, his gross pay in his final two calendar years at the legislature was $48,235.20 and $59,709.42.) Whether he and the entities involved believed that his simultaneous executive directorship of the Iowa Life and Health Insurance Association constituted a conflict of interest is unclear.

By January 16, Nelson, based presumably on information exchanged at this meeting, was able to notify headquarters that it was likely that two amendments—dealing with smokers’ individual rights and uniformity (i.e., preemption)—would be introduced. The chances of passage in the House were, according to Wasker, good, with prospects in the Senate less certain. At this point, Nelson was still adhering to the aforementioned strategy of trying to introduce a strong preemption clause if the bill began progressing and, in support thereof, “educat[ing]” IRBA and state and local chambers of commerce on the “benefits of uniformity in smoking restriction laws.” To be sure, Nelson’s word choice suggested that enactment of preemption was not some second-best necessity, but a goal in its own right: “If the opportunity to advance a preemption amendment occurs, it will be beneficial to have a smokers list mobilization in support of the amendment.”


134 Telephone interview with Caryl Garrison, Des Moines (June 16, 2007).
136 The data for 1983 and 1984 (Garrison’s termination date was Dec. 7, 1984) were furnished by the Iowa Department of Administrative Services. Email from Lisa Elliott, payroll accountant, to Marc Linder (Jan. 24, 2011). For budgetary reasons, the State of Iowa stopped publishing state employees’ salaries between 1980 and 1988.
138 Dan Nelson to George Minshew, Action-Trac: Iowa HF 209 (Jan. 19, 1990), Bates No. TI00301663/4, on tobaccodocuments.org (italics added). Something of a puzzle attaches to Nelson’s knowing that a preemption amendment—which Mary Lundby and Tony Bisignano filed the next day—would be filed: if TI put them up to it, why did it not give them a text that its lawyers had drafted rather than one that it immediately pronounced almost worthless; if (as seems implausible) they filed it on their own initiative, but Wasker knew about it, why did he not persuade them to drop it in favor of one of the texts that TI had sent Wasker months earlier?
regarded the prospects for House passage as good, he stressed that dozens of amendments had been offered to weaken or kill the bill, specifically mentioning one to redefine “smoking” to include chewing.\textsuperscript{139}

On January 19, when the House took up H.F. 209, Hammond offered the aforementioned weakening amendment H-3309,\textsuperscript{140} which the State Government Committee had filed and included in its recommendation of the passage of the bill in 1989.\textsuperscript{141} But even the chief sponsor’s self-censored compromise was quickly overtaken by events. First, the House adopted a floor motion to amend the cigarette sales license law by requiring vending machines to be “in clear view” of the person responsible for preventing purchases by minors and imposing a $500 civil penalty on the cigarette vendor and the retail licensee for a first offense and permit/license revocation for additional violations.\textsuperscript{142} Then the bill’s chief opponent, Democrat Tony Bisignano, and Hammond joined to file an amendment that eliminated H.F. 209’s partial coverage of bars and the public address system announcements (denounced by TI as “‘big brother’ language”).\textsuperscript{143} Based on a deal between the leading antagonists, this amendment was adopted.\textsuperscript{144} Lundby’s amendment to expand the scope of covered “smoking” to include tobacco chewing—which, laudable as it may have been as a public health measure with respect to combating the rise in prevalence of smokeless tobacco use,\textsuperscript{145} was extraneous to the issue of involuntary smoke exposure and may have been designed to subvert support for the bill—lost narrowly (39 to 47) on a non-record roll call vote.\textsuperscript{146} Bisignano then filed a floor amendment raising the exemption...
threshold for restaurants from the 25 seats that the committee itself had proposed to 50, which was adopted on a voice vote. On Hammond’s motion the House then adopted the now amended committee amendment as a whole.  

The bill’s proponents, to judge by the Register’s account of the debate, vastly exaggerated its potential impact by asserting, as did Democrat Rod Halvorson, that it would protect “the people that don’t want interference with their right to breathe clean air....” Hammond may have correctly argued that “[w]e should isolate the smokers from the non-smokers in order to protect their health,” but empowering building owners to designate that and where the twain should meet hardly satisfied that criterion. Although the bill’s failure to protect nonsmokers was manifest even as applied to larger public places, her justification for excluding stores of fewer than 250 square feet on the grounds that it did not “make sense” to include, for example, barber shops revealed the absence of a meaningful public health principle.

Even more momentous was the next amendment, which Republican Mary Lundby and Bisignano had filed two days earlier. (The next year Lundby may have disclosed the personal basis of her opposition to smoking bans. After having revealed in an interview for an oral history of Iowa women legislators that she loved fast cars, she was asked what else she liked that was fun: “I love to play cards. I love to smoke and drink beer with the people downtown.”) Their amendment prescribed that: “Enforcement of this chapter shall be implemented in an equitable manner throughout the state.” Adopted on a close non-record roll call vote of 47 to 43, this provision was the first (and, as it turned out, mildest...
and vaguest) version of preemption designed to deprive local governments of the power to pass ordinances stricter than the weak and “toothless” statewide law. This crucial matter of preemption was not even mentioned in the lengthy account of the debate in the next day’s *Register.* Before Wasker had even had time to “sort[] through the various amendments to get an accurate picture of what form the Legislation is now in,” Nelson, immediately reported to Washington that Wasker had called the amendment “[n]ebulous”; although its wording “was not to our specifications,” it did nevertheless “speak to uniformity of enforcement.”

Lundby’s amendment to prohibit employment discrimination against smokers (or nonsmokers)—another legislative desideratum of the cigarette companies—was held not germane on Hammond’s point of order. Then on successive non-record roll calls, Lundby’s motion to reduce the civil penalty from $50 to $10 was defeated 43 to 46, but her follow-up amendment to reduce the amount to $25 was adopted 54 to 32, prompting Senate Majority Leader Hutchins to opine that the bill’s chances of passing in the Senate had just improved. After defeating Lundby’s final obstructionist amendment to reverse the bill’s facilitation of enforcement by imposing filing fees on complainants, the House passed H.F. 209 by a large majority of 67 to 22. Though by no means along party lines, the vote did reveal a difference between the parties: only 21 percent of Democrats (who controlled the House 61 to 39) who voted opposed the bill in contrast to 31 percent of Republicans. Of the 18 (of 19) female representatives who cast a vote, five or 28 percent opposed H.F. 209; only one (or 20 percent) of five Republican women voted Nay, whereas four (33 percent) of

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155See below ch. 29.
the 12 voting Democrats did. Thus, when party and gender are taken into account, only seven (or 16 percent of) Democratic men who voted opposed the bill, whereas 10 (or 30 percent of) voting Republican men voted Nay. 161

The mindset of some who opposed the bill may be illuminated by the self-observations of Democrat Josephine Gruhn from the small northwestern town of Spirit Lake near the Minnesota border. Still a smoker in her fourth and last term, Gruhn, who was one of only five representatives who also voted against the bill after it had been returned to the House by the Senate, stressed many years later that she and other members had taken the position that the restrictions “infringed” on their rights and took away their “privileges.” Interestingly, she analogized her vote against public smoking to her vote against a bill requiring seat restraints for children in automobiles. And in both instances she readily conceded that over time she learned that she had been mistaken. Although on her own she argued that designated smoking sections in restaurants and other public places were senseless because the smoke wafted over to the no-smoking sections, the main lesson that she drew from her own self-transformation was that what the anti-smoking law had been attempting to achieve should have been phased in over a longer period of time: it was necessary to “sneak up on” smokers rather than impose radical change all at once. 162

Lundby, who had so significantly shaped the bill, was the only one of six Republican women who voted against the bill. Lundby’s explanation of her vote captures her understanding of the requirements of public health: H.F. 209 “was another example of government trying to regulate people’s lives. ‘We’re all celebrating the freedom of Eastern Europe, and we’re giving ours away here.’” 163

161 State of Iowa: 1990: Journal of the House: 1990: Regular Session Seventy-Third General Assembly 1:129-30 (Jan. 19); Iowa Official Register: 1989-1990, at 89-90 (Vol. 63). Of the five women who voted against the bill, two (Florence Buhr and Josephine Gruhn) smoked; of all the men who voted Nay, ex-Representative Gruhn could identify with certainty only one (Stewart Iverson) as a smoker and most as non-smokers. Telephone interview with Josephine Gruhn, Spirit Lake, IA (May 30, 2007). To be sure, it is possible that some representatives voted against the bill because they believed that it was not strong enough—for example, Philip Brammer, who was arguably the fiercest opponent of smoking in the legislature. See below.

162 Telephone interview with Josephine Gruhn, Spirit Lake, IA (May 30, 2007). To be sure, the law in Iowa was so weak in each of its incremental iterations that it always fully satisfied Gruhn’s guideline: the very fact that, as she herself noted, H.F. 209 did not stop anyone from smoking in a restaurant (or protect nonsmokers) is the best illustration.

Little wonder that Lundby was one of only seven Iowa state legislators to whom the RJR Political Action Committee disbursed money later in 1990.\textsuperscript{164} Motions to reconsider filed by Hammond and Democrat Dan Jay, an opponent of the bill\textsuperscript{165} who had opposed restaurant coverage in 1987 and would be praised by the Tobacco Institute in 1991 for defending preemption,\textsuperscript{166} tied the bill up for only three calendar days, and on January 25 Hammond’s was overwhelmingly defeated 8 to 66.\textsuperscript{167}

The greater “clout” that smokers wielded in the Senate made the bill’s fate there uncertain despite the large majority for it in the House. Nevertheless, the primus inter pares of the smokers, Majority Leader Hutchins, commented that the exemption for small restaurants and the reduction in the fine had improved H.F. 209’s chances.\textsuperscript{168}

TI Midwest regional vice president Nelson’s reaction to the House adoption of the preemption provision was muted. In a report to headquarters three days later, he did not even mention it until the fifth paragraph, observing merely that the “[p]reemption language...wasn’t our preference.” Indeed, since it appeared to be “rather weak,” he had had to ask the Washington staff for a legal opinion as to whether the language was even “beneficial to us.” But even if the worst came to the worst, “TI Counsel Chuck Wasker says we should be able to defeat this bill in the Senate.”\textsuperscript{169}

In a more thematic memorandum on “Proactive Legislation 1990 targets” to the same recipient on the same day, Nelson and Alice O’Connor, the leadership of Region IV, directed the faintest of praise at the provision passed by the House, observing that it contained “[l]anguage that could be interpreted as [a] preemption

\textsuperscript{164}Report of Receipts and Disbursements, RJR Political Action Committee Bates No. 507921438/64


\textsuperscript{166}See below ch. 28.


\textsuperscript{169}Dan Nelson to George Minshew, Action-Trac Iowa HF 209 (Jan 22, 1990), Bates No. TI28751244/6. An undated TI document consisting of advance sheets from the Iowa House \textit{Journal} for January 15 with handwritten marginal notations commented next to the text of Lundby’s amendment that it “could be helpful equitable manner” but added “clause to prevent retaliation - nothing local preemption.” Bates No. TI00301654/9.
clause....” Nevertheless, despite her amendment’s inadequacy and the bill’s imminent departure for the Senate, where she would have no influence, they announced that they had “identified Mary Lundby...as a sponsor for our amendment.” By January 22 the midwestern leaders had still not clarified what function a preemption clause was supposed to serve. Since TI’s “proactive” initiative in Iowa was not designed to be embodied in a “freestanding” measure, it had to be attached to a smoking-related bill such as H.F. 209, whose sponsors were supporting it for its anti-smoking features. With the bill’s passage regarded as “likely,” it made sense for the tobacco industry to “intend to protect our preemption clause, strengthen it if necessary, and water down other objectionable portions of the bill.” What injected ambiguity into the strategy was the simultaneous declaration that: “We want a state wide [sic] preemption, however, we prefer to kill 209 outright. We will review our prospects of killing this legislation in the Senate.” The cigarette manufacturers’ first choice would have been simply to add preemption to the existing clean indoor air law without any accompanying strengthening amendment. But since Nelson and O’Connor recognized that passage of such a vehicle was politically undoable, the question became whether second-best was a watered-down version of H.F. 209 with a stronger preemption clause than Lundby’s or the status quo. Odd as it might seem, the latter seems to have been the case: “[S]ince our overall strategy [is] to kill the bill, if possible, we request that member company Grass Routs [sic] Programs be directed against passage of HF209 in the Iowa Senate.” To be sure, even this support program was second best: Nelson and O’Connor would have preferred direct mail or phone mobilization, but, for reasons they did not explain, they implausibly claimed that the “issue of preemption is too technical to translate into” that kind of mobilization.170

Immediately after the House’s adoption of the aforementioned preemption provision, TI’s prioritization of preemption for Iowa shot up. Three days after passage, Diana Avedon, the State Activities department’s legislative analyst,171 sent a memorandum to Melinda Sidak, a lawyer at Covington & Burling, stating that a previous request that she had sent her regarding Iowa’s preemption clause “has reared its ugly head again,” and relaying a request from Nelson for a memo


171In 1986, after one year at TI, Avedon was listed as a word process operator. Samuel Chilcote to Members of the Executive Committee, Memorandum: Tobacco Institute Headquarters Staff (Aug. 15, 1986), Bates No. 2021266909/13. Half a year later she was listed as a secretary to Cathey Yoe, legislative affairs manager. Tobacco Institute, State Activities Headquarters Staff (Mar. 3, 1987), Bates No. TITX0031947.
explaining “why the clause does not preempt local smoking restriction ordinances.” Nelson was especially interested in “language to amend the clause to specifically include local preemption (if that is possible) or sample language that could be used as a separate preemption amendment.” Avedon requested a written response by February 7.172

Preemption was sufficiently important to prompt the R. J. Reynolds Tobacco Company to be monitoring developments on its own. Commenting on the company’s (and industry’s) “potential pro-active accomplishments in 1990,” on January 22, Hurst Marshall, who had previously worked for TI, conveyed to his boss, Roger Mozingo, vice president for state government relations (and former TI vice president), his “best guess” that smoking restriction preemption was “likely” to pass in Iowa.173 Two days later, Marshall sent his weekly Midwest regional report to Mozingo, noting that H.F. 209 had passed the Iowa House with “unclear preemption language.” Marshall—whose report Mozingo graded “good”—added that “RJRT counsel has been sent suggested preemptive language in order to clarify intent and assist in redrafting wording. All activities will be coordinated with TI personnel.” 174 A month later Mozingo himself informed a long distribution list at the company that of the 30 states considering bills to restrict smoking, Iowa was one of six states posing “[t]he most difficult challenges,” but at month’s end he received another update rating passage of preemption in Iowa as still “likely.”176

On arrival in the Senate, H.F. 209 was referred to the Human Resources Committee on January 29,177 which was chaired by the anti-tobacco liberal Beverly Hannon. A week later she appointed a subcommittee consisting of herself, Al Sturgeon (chair), another anti-smoking liberal Democrat, and James

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172 Diana Avedon, Memorandum, to Melinda Sidak (Jan. 22, 1989 [sic; must be 1990]), Bates No. TI0030-1649. Presumably Avedon’s reference to her previous request as also having been made on January 22 was a typo, but the earlier request appears not to be included among the millions of tobacco industry documents on the internet.

173 Hurst Marshall to Roger Mozingo, 1990 Pro-Active Legislative Projections (Region IV) (Jan. 22, 1990), Bates No. 507627588.


176 Henry Stokes to Roger Mozingo, Legislative Projections Update (Feb. 26, 1990), Bates No. 507627542/3.

Riordan, a liberal Democrat whose position on smoking was not clearly delineated, to study the bill further and make recommendations to the full committee.\(^{178}\) Hannon later explained that "as chair I would have appointed the sub-committee, and I appointed them according to the outcome I wanted. I think all chairs did. But I usually always had an opposing voice on subcommittees, so I’m surprised if I just appointed us three unless I had doubts about Riordan. Maybe at that time I thought Riordan was leaning toward tobacco folks. ... I had observed that a couple times he was swayed by forces I didn’t support, like the gambling forces. ... I knew Sturgeon and I were yes votes, and 2 out of 3 is what’s needed, so I might not have cared how Riordan would vote."\(^{179}\) As committee proceedings would reveal a week later, there was reason to question the stringency of Riordan’s anti-smoking stance.

Not knowing these senators’ “leanings,” TI regional vice president Nelson informed headquarters that he would have to check with Wasker. Two days later the word back from the lobbyists was that Sturgeon and Hannon were “strongly against tobacco.”\(^{180}\) Interestingly, Nelson did not mention whether Wasker had reported on Riordan, in particular on whether the $500 honorarium that the Tobacco Institute had given Riordan in 1988 to chat over lunch might have prompted Wasker to regard him as a friendly vote.\(^{181}\)

The Iowa lobbyists—the Philip Morris and R. J. Reynolds lobbyists and TI staff met in Iowa on February 8 to discuss “preemptive smoking restriction legislation” as well as tax study bills and pending vending machine legislation—also informed Nelson that they had “stronger preemption language” and were “looking for sponsors.”\(^{182}\) Then on February 12,
Sidak—who, three months later, testified on TI’s behalf at a New York City Council hearing on a proposal to ban cigarette vending machines that “‘smoking has not been shown to cause cancer or any other disease’”184—weighed in with her response. Without citations, she opined that the language in Lundby and Bisignano’s amendment had been “interpreted by some as a state preemption clause.” Nevertheless, although it was unclear what their “vaguely worded provision is intended to mean, it clearly would not operate as a preemption clause” because it said “nothing whatsoever about the bill’s relationship to local ordinances. Absent “a clear expression of the legislature’s intent to preempt,” Sidak considered it “unlikely” that a court would hold the bill to preempt local regulation of public smoking.185 Sidak then suggested the following language for an amendment:

“Chapters 98 and 98A are expressly intended to preempt all laws, ordinances or regulations by any municipal, county or other governmental unit or political subdivision relating to the consumption, sale, distribution or use of tobacco or tobacco products.” All such laws, whether enacted before or after this Act shall be or become void, unenforceable and of no effect upon the [effective date of the Act].186

Adoption of the phrase “relating to” made this version of preemption rather comprehensive.187

On February 12-13 another flurry of faxes flew between the Tobacco Institute and Covington & Burling concerning the text of an appropriate preemption provision. TI’s Midwest regional director, Alice O’Connor, sent headquarters an amendment drafted by Serge Garrison, Reynolds’ Iowa lobbyist, asking: “In lieu

185Melinda Ledden Sidak, Memorandum at 1 (Feb. 12, 1990), Bates No. TI00372359.
186Melinda Ledden Sidak, Memorandum at 3 (Feb. 12, 1990), Bates No. TI00372359/61. It is unclear why Sidak used quotation marks for the first part of the proposal and omitted them from the second part, which she took virtually verbatim from an Iowa Code provision on obscenity (Iowa Code § 725.9 (1974)), which the Iowa Supreme Court determined to be a statement of express preemption. _Chelsea Theater Corp. v. City of Burlington_, 258 NW2d 372, 373 ((1977)).
187A decade later, in an opinion requested by then Senator Johnie Hammond, the Iowa attorney general observed that in another context the legislature had “expressed its intent to preempt with unmistakable clarity” when it prohibited local governments from making any law, regulation, or ordinance “‘relating to obscenity.’” 2000 WL 33258478, Docket No. 00-11-5 (Nov. 14, 2000). See _Chelsea Theater Corp. v. City of Burlington_, 258 NW2d 372, 373 (Iowa 1977).
of concerns expressed by C&B memo, would this language take care of our concerns? Does it raise any new red flags?” Garrison’s proposal tacked on to the House bill’s single sentence (“Enforcement of this chapter shall be implemented in an equitable manner throughout the state”) the following new text: “For the purpose of the uniform application and equitable enforcement of state and local laws and regulations, this chapter shall supersede any law or regulation which is inconsistent with or conflicts with the provisions of this chapter.” (In 2004, shortly before his death from cancer, Garrison, lobbying for Tobacco-Free Iowa, stated with regard to the enactment of Code section 142B at a House Local Government subcommittee hearing on a bill to repeal local preemption that “I had a few things to do with some of the amendments adopted at that time, some of which I regret.”) Undoubtedly it was considerably weaker than the version Sidak had proposed. A handwritten notation on the fax offered this criticism: “1) Don’t advise. Would not necessarily include vending & sales & distribution. 2) Iowa constitution already says this - could pass something tougher - need word preempt vague - depends.” Since Garrison’s draft was, with minor exceptions that did not alter the meaning, ultimately embodied in the bill that the legislature passed and that remained in the Iowa Code until 2008, this attack on the proposal’s fecklessness by agents of preemption’s beneficiaries will be crucially important in evaluating the litigation over the scope of the provision a dozen years later.

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188 Facsimile Cover memo from Alice O’Connor to Cathy Yoe et al. (Feb. 12, 1990), Bates No. TI00301637.


190 Bates No. TI00301634/6 (untitled and undated though bearing a fax running head of Feb. 12, 1990. The fax bears another running head dated Feb. 9 and a Des Moines fax number together with the sender “RJR USA/Govt Relations.”


192 Bates No. TI00301634/6. Although it is unclear who wrote these comments, it appears that someone at TI did (perhaps issues and legislative analyst, Diana Avedon, though the substance would presumably have been above her pay grade). Avedon did fax the amendment to Melinda Sidak at Covington & Burling, asking whether it was acceptable and whether it raised any red flags, but the web documents do not appear to contain her reply; from a fax cover sheet from Sidak to Avedon it appears that the handwriting, which seems to be a woman’s, is not Sidak’s. Diana Avedon to Melinda Sidak, Memorandum (Feb. 13, 1990), Bates No. TI00301634/5; Melinda Sidak to Diana Avedon, Facsimile Transmission Sheet (Feb. 12, 1990), Bates No. TI00301638.

193 See below ch. 33.
On February 12, Hannon failed to persuade her own Human Resources Committee to recommend a Senate study bill, supported by the Iowa Medical Society, that would have raised the legal age for buying cigarettes and other tobacco products to 21 as well as required that cigarette vending machines be supervised by someone over 21 in order to prevent minors from using them. The bill would also have prescribed a fine and/or imprisonment for those who provided minors with tobacco. The position that Senator Riordan took on the bill suggests why chairwoman Hannon might have had her doubts about his being an anti-tobacco stalwart: he opposed the bill on the grounds that “it would be inconsistent to prohibit the purchase of tobacco by young adults who are legally old enough to join the military, marry and enter into contracts.” First-term Republican Senator Mark Hagerla, a right-wing, pro-business grocery store owner, opposed the bill because, lacking enforcement provisions, it “would do nothing to change the smoking habits of young people.”

Three days later, in a comprehensive overview of “proactive plans” to regional vice presidents for a February 22 policy committee meeting, Malmgren, the head of TI State Activities, reproduced the Midwest region’s rather colorless

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194 *State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly* 1:348 (SSB 2205, by Hannon, Sturgeon, and Corning) (Feb. 5); Human Resources Committee Minutes (Feb. 12, 1990), SHSI DM (information supplied by Meaghan McCarthy, email (June 4, 2007)). “According to the Legislative Services Agency, study bills as we know them today originated in 1989. Before that, there were extremely few of them and they were such informal documents that they were considered ‘throwaway’ ephemeral items with no lasting value to anyone. Supposedly, they were ‘formalized’ in 1989 in response to the public’s perception that lobbyists were writing most of the bills produced by the legislature—this process apparently provided some proof that the legislators were, in fact, conceiving their own legislation.” Email from Mandy Easter, Law Librarian, State Library of Iowa, Law Library (June 6, 2007). Since legislators from the outset are taught to count votes and it is therefore embarrassing to bring up a bill that is voted down in committee, Hannon later suggested an exception to this rule: a legislator might nevertheless risk defeat if she knew that the press would be covering the meeting and she needed press coverage. Email from Beverly Hannon to Marc Linder (June 4, 2007). A bill filed a few days before the committee meeting by representatives not usually associated with the anti-smoking movement would have banned all cigarette vending machine sales, but the House took no action on it. H.F. 2319 (Feb. 7, 1990, by Eddie et al.).

195 Email from Beverly Hannon to Marc Linder (May 29, 2007).

and minimalist report that: “Attempts will be made to amend bill to clarify local preemption clause.”

If the cigarette companies’ expectation was that that attempt would be made at the February 21 Senate Human Resources Committee meeting, at which H.F. 209 was discussed, their lobbyists’ intelligence reports let them down. Though his vote in favor of the bill would not have pleased the tobacco companies, the admonition that Riordan delivered to the committee would have consoled them. Warning his colleagues about “strong public opposition, particularly among small-town cafe and business operators,” Riordan declared that: “This is really big out there.... They are upset that Big Brother is stepping in on them again.” Hagerla asserted that it was “senseless to expand the 1987 act because it has gone virtually unenforced. ‘It’s a worthless piece of paper....’” By a vote of 10 to 2, the committee then recommended passage of H.F. 209, proposing only an amendment of the provision dealing with vending machines. The two Nays were cast by Julia Gentleman, whose anti-state-intervention position is documented later, and Hagerla. In updating headquarters on the bill’s progress Nelson appeared to be surprised or unsettled that: “Our preemption language wasn’t added. We are consulting with TI Counsel Chuck Wasker.”

In contrast, the R. J. Reynolds weekly report was not concerned that no attempt had been made in committee to strengthen the House’s preemption language; implementation of that plan, Marshall knowingly added, would take place during Senate floor debate, which began three weeks later.

No sooner had Senator Sturgeon, the floor manager, offered the Human Resources Committee bill on March 14 than the Senate’s most vociferous
opponent of smoking restrictions, Joseph Coleman, received unanimous consent that action on the bill be deferred. Two amendments filed that day are of especial interest. Republican Minority Leader Calvin Hultman—who by June left the Senate to become Iowa counsel to Philip Morris—together with Coleman and three other Democrats and two Republicans\(^{202}\) filed an amendment that merged the two that Sidak and Garrison, respectively, had drafted a month earlier for TI and Reynolds. It weakened the former by narrowing the capacious scope of “relating to” by limiting it to the latter’s universe of “inconsistent” laws and regulations. It now read:

In order to provide uniform application of this chapter and chapter 98A relating to the regulation of cigarettes, the imposition of tobacco taxes, and the enforcement of smoking prohibitions, this chapter and chapter 98A shall preempt all inconsistent laws and regulations of political subdivisions of this state relating to the consumption, sale, distribution, or use of tobacco and tobacco products. Any laws or regulations of political subdivisions of this state, whether or not enacted prior to July 1, 1990, which are inconsistent with the provisions of this chapter or chapter 98A, are void.\(^{203}\)

Imposing the additional requirement of inconsistency to trigger preemption created wiggle room for local action that might not have met the tobacco companies’ expectations, but may well have been necessary to secure a legislative majority for the provision. On the other hand, retention of “preempt” fulfilled one of Sidak’s desiderata.

More important than this formal filing was Wasker’s behind-the-scenes activity. In his daily update for March 14 to headquarters, Nelson reported that the lobbyist “has sponsors lined up for a floor amendment on preemption and has counted 28 votes in support.” With two more votes than required for passage the game seemed to be over before it had ever begun, but it was complicated by yet another iteration of the aforementioned ambivalence in the cigarette company strategy: “Wasker is checking with Lobbyists from member companies on the

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\(^{202}\) George Kinley (D), Richard Drake (R), Joe Welsh (D) Don Gettings (D), Joseph Coleman (D), Dale Tieden (R). \textit{State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly} 1:1078 (Mar. 14) (S-5490). Kinley, Drake, Welsh, and Coleman were smokers. Email from Beverly Hannon (Mar. 11, 2007). Hultman and Welsh were also the only two senators who the previous fall had appeared on the legislative panel of the Iowa Association of Candy and Tobacco Distributors annual meeting in Des Moines. Bates No. 94136113/28.

question of whether to amend HF 209 or to kill it outright.\textsuperscript{204}

The other amendment was filed by Senator Julia Gentleman (a generally pro-business Des Moines Republican who, three weeks earlier, had cast one of the two no votes on H.F. 209 in committee) to amend the Iowa Code provision on the Legislative Council thus: “The council shall recommend that the senate and house rules shall provide for a prohibition of smoking in the chambers and committee rooms of the senate and house.”\textsuperscript{205} The basis for Gentleman’s advocacy of this position is unclear in light of a statement she had made just a year earlier for an oral history interview. When the interviewer pointed out that her district had supported limitations on smoking in public places except in designated areas, she feistily replied:

They did. Well, I think that’s silly. I did not ever support that; I thought that policy could be put in place wherever anybody wanted to do it, and if the public didn’t like it, they could take their business elsewhere. I’m getting more conservative as I get older, and I really don’t like so much government involvement. But then, of course, one of the tenants [sic] of my republican philosophy was that government only does for people that which they cannot do for themselves. And my party seems to have forgotten that. They want to be everywhere, even into your bedroom.\textsuperscript{206}

Whether Gentleman believed that non-smoking senators who for years had not wanted to be exposed to secondhand tobacco smoke, but whose smoking leadership had refused to ban smoking “could take their business elsewhere” she did not say. Comments she made later, however, revealed that her amendment was merely designed as a provocation to bring to legislators’ attention what they were imposing on the world outside the statehouse.\textsuperscript{207}

\textsuperscript{204}Dan Nelson to George Minshew, Action-Trac: Iowa HF 209 (Mar. 14, 1990), Bates No. T128751244/5.


\textsuperscript{206}“A Political Dialogue: Iowa’s Women Legislators,” Box 2, Folder: Transcripts: Julia Gentleman at 44 (Jan 29, 1989), in IWA.

\textsuperscript{207}In an interview years later Gentleman asserted that she had filed the amendment out of “fairness”—if the prohibition was being imposed elsewhere, why not in the legislature? When asked whether she therefore hoped that it would not be imposed in either setting, she replied that she was not interested in such silly matters, but rather in such important issues as war and “choice”; when asked whether 450,000 deaths annually in the United States...
When Senate consideration of H.F. 209 resumed on March 15, Hultman moved the adoption of his (and Coleman’s) industry amendment striking the House provisions imposing sharper restrictions on cigarette vending machines. Sturgeon pleaded for retention of the $500 penalty (and revocation for a second violation) on the grounds that vending machines gave junior high and high schools “‘ready access to cigarettes.’” In addition, Davenport Democrat Pat Deluhery pointed out, cigarette advertising aimed at minors, which he called a “‘disgrace,’” reinforced the temptation of vending machines. (However, Deluhery apparently did not regard secondhand smoke exposure in restaurants as disgraceful: four days later he voted to exclude them from coverage.) Republican Richard Drake, a heavy smoker and reliable cigarette company vote, fended off these arguments by asserting that the $500 penalty was too high and “out of line” with the fine for selling liquor to minors. In the end, the cigarette oligopoly succeeded in securing a 26 to 19 majority for Hultman’s amendment; though not party-line, the vote nevertheless revealed a difference: Democrats were almost evenly divided (voting 14 to 13 in favor), while two-thirds of Republican toed the tobacco line. Hultman then raised the point of order that Gentleman’s amendment was not germane and the chair, Lieutenant Governor Jo Ann Zimmerman, ruled the latter out of order. When, in turn, Hultman offered his preemption amendment, it died by the same procedural sword that Hultman had just wielded against Gentleman’s. The quality of argument deployed by

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the bill’s fiercest opponents can be gauged by the comment by Jack Rife, who, after referring to himself and his 14 smoking colleagues as “‘us addicted senators,’” called peanut butter sandwiches “‘a very toxic substance.’” Senator Joseph Welsh, another reliable vote for the tobacco industry, then received unanimous consent to defer action on the bill. In his update to headquarters on the day’s proceedings on H.F. 209, TI Midwest regional vice president Nelson, after pointing out that the lieutenant governor, who had been presiding, was “a health care professional,” explained Welsh’s parliamentary move: TI’s and company lobbyists had “arranged for final passage to be deferred so that the pre-emption amendment could be re-drafted in a germane form.”

Undaunted, four days later, Hultman, Coleman, and four of the five colleagues who had offered the previous amendment filed a somewhat less sweeping version of the preemption amendment (which also deleted the application to the cigarette sales chapter of the Code): “For the purpose of equitable and uniform implementation, application, and enforcement of state and local laws and regulations, the provisions of this chapter shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter.”

The adoption, virtually verbatim, of Garrison’s draft embodying the alternative requirement of local action in conflict with state law removed Iowa’s preemption standard even further from TI’s ideal; likewise, the deletion of “preempt” also weakened the provision. This version was thus fully subject to the aforementioned anonymous inside criticism that it added no limitations not already contained in the constitutional home rule article. (This weakness would later reemerge to haunt a Philip Morris-inspired challenged to the validity of a city ordinance—but only until the Iowa Supreme Court helpfully evaded the problem.) In the event, this time preemption secured a 25 to 20 majority, Democratic Majority Leader and future tobacco industry lobbyist Hutchins joining forces with future Philip Morris lobbyist Hultman. Though not completely along party lines, the vote again revealed a difference: whereas the Democrats split evenly (14 to 14), 11 of 17 or almost two-thirds of Republicans

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215 “Debate on Smoking Limit Draws in Other Topics,” CRG, Mar. 16, 1990 (9B:3-5 at 4).
219 See below ch. 33.
voted for cigarette companies’ highest priority.\(^{220}\)

This victory was just one in a long succession that undergirded the image offered by former (smoking) Democratic Majority Leader and then tobacco industry lobbyist Lowell Junkins of Coleman and others as having the power and the cigarette in their hands.\(^{221}\) That future Democratic Majority Leader and anti-prohibitionist Wally Horn voted with them nourished Hannon’s judgment that: “The senators seemed very beholden to tobacco interests, even some who didn’t smoke.”\(^{222}\) The preemption amendment was no stealth clause: the source of the pressure to prevent local communities from enacting stronger measures was publicly known. As Democratic Senator Mike Connolly summed it up: “‘There is no question where this amendment is coming from…. The tobacco lobby out there is flexing its muscle.’”\(^{223}\) In this sense, then, although Iowa was no exception to the general finding that in the 1990s “the tobacco lobby maintains a…far flung political presence, which is deeply entrenched in all states, monitoring every state government with respect to anything that impacts tobacco use and the tobacco industry,” the lobby in Iowa was definitely not “virtually invisible.…”\(^{224}\) To be sure, contributing money to legislators’ campaigns that could make up a significant proportion of their total cost was not the only means available to the cigarette companies for acquiring legislative quid pro quo’s. Many members traveled to the annual meeting of the National Conference of State Legislators, at which cigarette companies offered lavish entertainment and side excursions.\(^{225}\) As a Cedar Rapids physician pointed out a few months after the end of the session about the 1990 meeting in Nashville:

This gala affair is a forum for special-interest groups, the largest of which is the tobacco lobby....

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\(^{220}\) *State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly* 1:1177-78 (Mar. 19). Sturgeon reported that both Hutchins and Hultman were looking for their “parachutes”—that is, lucrative post-Senate employment. Telephone interview with Al Sturgeon, Sioux City (Apr. 28, 2007).

\(^{221}\) Telephone interview with Lowell Junkins, driving somewhere in Iowa (Apr. 23, 2007).

\(^{222}\) Untitled, unaddressed (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.


\(^{225}\) Telephone interview with Beverly Hannon (Feb. 28, 2007).
Our elected state senators continue to allow the use of tobacco products in the Senate offices and chambers despite numerous complaints. Perhaps insight to their reasons for opposition may be found at the Philip Morris breakfast to be held at the National Council meeting. Former Iowa Sen. Cal Hultman will be a host for Philip Morris at that event.

As a physician caring for numerous patients dying due to the ravages of tobacco smoke, I hope local senators would spend “equal time” in my office to receive an “education” about tobacco products to balance that which the tobacco companies will present in Nashville.

Immediately after the preemption vote, Cedar Rapids Democrat Richard Running, a former smoker, offered an amendment from the floor to strike even the partial inclusion of restaurants. Running appeared, based on his floor remarks as reported in the Register, to be a market-knows-bester, arguing that “restaurants have done a good job of voluntarily setting aside non-smoking areas and the Senate should not dictate to them” because he believed that “we are coming down too hard on an important sector of the economy.” His real motivations for filing the amendment, as he explained in an interview 17 years later, were more complex and less pedestrian. Running, who was Director of the Iowa Workforce Development from 1999 to 2006 (when the governor requested his resignation in the wake of a scandal in his agency) after having been a state legislator from 1981 to 1995 and a U.S. Department of Labor regional administrator in Kansas City from 1995 to 1999, stated that one basis for his amendment had been his sympathy for restaurant owners engendered by his parents’ ownership of a restaurant in Wisconsin. More important, however, had been the fact that he had “acquiesced” in the lobbying pressure that beverage and hospitality businesses in Cedar Rapids had brought to bear on him to exclude restaurants from the bill. In particular, he singled out the Hawkeye Area Licensed Beverage Association. In retrospect he insisted that, absent these specific influences, he would not have filed the amendment. Nevertheless, his

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226 Dean Gesme, M.D., “Cigarette Lobby,” CRG, Aug. 12, 1990, clipping in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA. Gesme may have received this information from Hannon herself, who had attended several of these meetings. Email from Beverly Hannon to Marc Linder (Mar. 2007).

227 Running had stopped smoking ten years earlier when he began his first term in the Iowa House. Telephone interview with ex-Senator Richard Running, Des Moines, IA (May 5, 2007).


229 Telephone interview with Richard Running, Des Moines (May 5, 2007). Running
amendment revealed consistence: in 1986, as a House member, he had been one of only 18 Democrats voting against—compared to 41 voting for—the anti-smoking bill that covered only restaurants seating 32 or more persons; and again in 1987 he had been one of only 18 representatives voting against H.F. 79, which, supported by 77 members, would have expanded the coverage of the clean indoor air law to include restaurants with seating for 50 or more persons.

During the Senate floor debate on March 19, 1990, Democrat John Peterson chimed in that “the free enterprise system will solve the problem without government interference.” Having forgotten his majority leader’s aforementioned (inadvertent) insight into the fecklessness of nonsmoking sections, Peterson insisted that: “If you non-smokers stop going there, it won’t be long before there is a non-smoking area.” Hannon’s plaint that the chamber was “not interested in good public health policy” hinted at the hopelessness of the cause. The Senate then adopted the exclusion of restaurants by a non-party-line vote of 26 to 21. In addition to anti-smoking stalwarts such as Hannon and Lloyd-Jones, the losers surprisingly included Hutchins himself. Reacting to the success of the killer amendment, Democrat Al Sturgeon, the bill’s floor manager—appointed by committee chair Hannon probably because he would have fewer problems with the “good ol’ boys” who ran the Senate and made life hard for Hannon, but trusted him—declared: “This bill just died of lung cancer.” Realizing that the
bill’s supporters lacked the votes to pass it, he asked and received unanimous consent to defer action indefinitely on H.F. 209. (Seventeen years later Sturgeon still remained scathing in his appraisal of the generally conservative and ethically questionable Democratic leaders, many of whom were also “incredibly aggressive smokers,” whose attitude was: “I’m a goddamn smoker and fuck you.” By 2007 he forgot that he had even been the anti-smoking bill’s floor manager, but he still vividly remembered that the “smoking bastards” had produced smoke so thick in the Senate that “you could get high on the nicotine.”) As Marshall interpreted Sturgeon’s decision for Mozingo, after the Senate had “gutted the bill...the sponsor recognized the only provision left was preemption so he pulled the bill from consideration.” Commenting on the Senate’s action that same day, R.J. Reynolds opined that further action that year was “questionable.” Even two weeks later the press was still reporting that the bill “was thought to be dead” after the Senate had stripped out restaurant coverage.

Even more specific but nevertheless more ambiguous was Nelson’s account to his superiors of the proceedings, which presumably derived from Wasker:

The bill postponed indefinitely which means it is not likely to come up again prior to adjournment on March 31, 1990. Prior to postponement action, the bill was amended to include our preemption language which prohibits any local regulations from being more stringent than state law. The Senate also took out the smoking restrictions for restaurants. Basically, the bill was gutted in our favor before being shipped out to pasture.

Apart from the slight exaggeration that the preemption language was the Tobacco Institute’s—in fact, it was less capacious than the provision suggested by


Telephone interview with Al Sturgeon, Sioux City (Apr. 28, 2007).


[R. J. Reynolds Tobacco Co.], “1990 Proactive Legislative Opportunities by Category” at 7 (Mar. 19, 1990), Bates No. 507595166/74.


House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved

Covington & Burling—Nelson’s analysis left unexplained whether, with the bill’s (apparently definitive) defeat, the maintenance of the status quo of no preemption constituted a victory for the tobacco industry and its favored outcome (since even the strategists never assumed they could secure passage of a stand-alone preemption bill, although at the end of the day on March 19 they in fact had passed such a bill, in which, to be sure, they knew the House would not concur) or merely second-best to preemption at the price of restaurant coverage.\textsuperscript{242}

An alternative tactical interpretation of Sturgeon’s pulling the bill was also available, though Representative Mary Lundby did not offer it until many years later and then only speculatively: pulling a controversial bill near the end of a session sometimes provides an impetus to create a ground swell of support by signaling constituents and others that backing has to be expressed now or the measure will die.\textsuperscript{243}

The very next day after Sturgeon’s bill pulling—but nevertheless one day too late—the Register published the remarkable results of an Iowa Poll under the understated front-page headline: “Iowans Favor Smoking Curbs in Restaurants.” Asked whether they favored or opposed a law requiring restaurants to provide non-smoking sections, a “whopping 79 percent of Iowans” said they favored it, while only 18 percent were opposed. Contrary to legislators’ claims that attitudes toward restaurant smoking broke down along an urban-rural divide (with city restaurant owners not “overly resistant” to such a law and small-town cafe owners “staunchly resistant” on behalf of the midwestern tradition of farmers’ congregating daily to drink coffee, gossip, and smoke), the poll found that more than 80 percent of Iowans expressed support for the measure regardless of whether they lived in rural areas or cities with populations above 50,000. In fact, the 85-percent support rate among farmers exceeded that for white-and blue-collar workers. Educational levels (presumably reflecting differential smoking prevalence rates) also revealed some difference: 85 percent of college graduates

\textsuperscript{242} Majority Leader Hutchins’ statement many years later that he and not Sturgeon had pulled the bill because that is how the legislature works may have embodied the deeper meaning that even if Hutchins had (had) the votes to pass the now otherwise denuded preemption bill, he knew that it was a waste of time to send it back to the House. Telephone interview with Bill Hutchins, Apache Junction, AZ (May 2, 2007). In contrast, ex-Minority Leader Hultman’s later denial that the bill could have passed only with both preemption and restaurant coverage and his speculation that one side or the other might have been able to live with a bill lacking one of the elements appears implausible, as evidenced by Sturgeon’s killing H.F. 209 once it had been gutted into a preemption bill. Telephone interview with Calvin Hultman, West Des Moines (May 19, 2007).

\textsuperscript{243} Telephone interview with Mary Lundby, on the road near Ames (June 1, 2007).
favored the law compared to 73 percent among those who lacked a high school degree. Finally, age, too, was correlated with varying degrees of support, with more than 90 percent of 18-to-24 year-olds in favor compared to just under 80 percent of those 65 and older.244

Neither the legislative proceedings in Iowa nor the overwhelming majority of Iowans favoring legally imposed nosmoking sections may have been specifically on the minds of the high-ranking Philip Morris executives who, the following day, March 20, met to discuss “Top Secret Operation Rainmaker,” but the developments prompting this new initiative were playing themselves out in Iowa as elsewhere. In response to a question as to what they were trying to accomplish, R. William Murray, the vice chairman of Philip Morris Companies, Inc., noted: “Prevent further deterioration of overall social, legislative, and regulatory climate, and ultimately actually improve the climate for the marketing and use of tobacco products.” Murray viewed the company’s predicament as sufficiently dire that, even “assuming that we are not employing an end game strategy,”245 he discussed possible actions that were irreconcilable with the carefully nurtured profile that a TI vice president had praised just two years earlier: “Many of our current successes are a result of our image as the toughest, non-compromising industry in the country.”246 Among the ways out of the potentially approaching dead-end Murray mentioned: disbanding the Tobacco Institute and replacing it with an “information-oriented” organization that was “not the flat-earth society”; buying a major media outlet such as Knight-Ridder or United Press International; confronting the American Association of Retired People; and the necessity of immediately changing the name of Philip Morris.247 Meanwhile back on planet Earth in Iowa, the cigarette companies and their lobbyist acted as if it were the anti-smoking activists’ game that was approaching its end.

On April 4—after a 16-day hiatus, during which R. J. Reynolds as late as March 29 and April 2 still deemed the whole bill as having been “defeated”248—

248Henry Stokes to Roger Mozingo, Pro-Active Legislative Assessment (Mar. 29, 1990), Bates No. 507627514/5. This assessment was still being circulated on April 2:
just four days before the session ended, Democrat Jack Kibbie called up his motion to reconsider the vote adopting the amendment to remove restaurants from the bill\textsuperscript{249}: the basis for rethinking his position was the aforementioned \textit{Register} poll disclosing that 79 percent of Iowans favored separate sections in restaurants.

Most of the ensuing “contentious debate” predictably focused on restaurants. While Kibbie confessed error, Republican Richard Vande Hoef changed his vote because a restaurateur-constituent had expressed support for legally mandated separate sections. Floor manager Sturgeon denied that the bill’s advocates were “‘picking on smokers.... They can smoke their brains out. They just have to smoke in the places they’re supposed to.’” In contrast, Republican Senator Jack Rife, a heavy smoker, continued to resent the “‘infringement on businesses’ rights.’”\textsuperscript{250} (Since Rife was for many years also a strident legislative opponent of severe penalties for drunk driving\textsuperscript{251} the lethal impact of which—unlike that of secondhand tobacco smoke—it is impossible for the non-drunk to avoid, his laissez-faire attitude toward smoking was at least consistent, albeit marginally less irrational.) Democrat Alvin Miller intoned the “‘pocketbook will dictate’” dogma, according to which owners would provide whatever customers demanded.\textsuperscript{252} Running, the only legislator or lobbyist interviewed years later who could even recall that the bill had died and been revived, reported that between March 19 and April 4 he had received many letters berating him for having excluded coverage of restaurants. In particular he remembered one writer who had expressed the hope that Running would have to eat in smoke for the rest of his life. Oddly, however, these letters were not from his constituents, and Running did not change his vote.\textsuperscript{253}
The motion to reconsider the vote on Running’s amendment to remove restaurant coverage then prevailed by a vote of 29 to 17, after which Running’s motion to (re-)adopt his amendment lost on a non-record roll call by a vote of 20 to 27. Shortly afterwards the Senate passed the whole bill embodying the restored partial restaurant smoking ban and the new preemption provision 37 to 12, with the cigarette companies’ conduit, Hultman, voting yes. Unable to

254 *State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly* 1:1521-22 (Apr. 4). Six of the eight senators who changed their votes on excluding restaurants from March 19 to April 4 were Democrats (Boswell, Horn, Kibbie, Miller, Priebe, and Scott), while two were Republicans (Pate and Rensink).

255 Senator Running stated that as a senator Hultman had been “close” to TI’s lobbyist, Wasker, even before Hultman himself became a Philip Morris lobbyist a few months later. Telephone interview with Richard Running (May 5, 2007).

256 *State of Iowa: 1990: Journal of the Senate: 1990 Regular Session Seventy-Third General Assembly* 1:1548 (Apr. 4). Republican Jack Rife, a heavy smoker who believed that government should not tell business owners how to run their businesses and did not change his vote, much later expressed surprise that Hultman had changed his. Telephone interview with Jack Rife, Wilton, IA (May 5, 2007). In April 1990 a rumor was circulating in the legislature that TI lobbyist Wasker, had taken Hutchins to Florida during Easter break to play golf before the final vote on the public smoking bill. Untitled, unaddressed (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA; Lobbyist List (handwritten note), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA. The problematical core of the rumor (apart from the fact that Easter in 1990 came after the session had ended) was Hutchins’ possible quid pro quo. H.F. 209 presented the cigarette companies with three main issues: 1. preemption; 2. restaurants; and 3. vending machines. On March 15 Hutchins voted to delete entirely the proposed restrictions on vending machines (tobacco companies prevailed); on March 19 Hutchins voted for preemption (cigarette companies prevailed) and against excluding restaurants entirely (cigarette companies prevailed). The bill was then pulled because it lacked the votes for passage and no further action was taken until April 4, when the vote on the amendment to exclude restaurants was reconsidered and several senators changed their votes. But Hutchins voted again with the anti-smoking group to reinstate restaurants. Even if Wasker did take Hutchins to Florida before the final vote on April 4, it is difficult to discern what the quid pro quo was or even was meant to be; after all, on March 19 the bill had virtually been killed; Hutchins had already helped the cigarette companies pass preemption, eliminate the restrictions on vending machines, and keep the bill alive by retaining coverage of restaurants (without which no preemption bill was possible) and did so again on April 4. One extremely speculative resolution of this puzzle is that the tobacco industry placed so much importance on preemption that it had to prompt Hutchins to secure enough votes to revive the bill that had been killed by senators (perhaps pressured by restaurant-owning constituents) opposed to coverage of restaurants who did not understand or agree with the companies’ judgment that partial—but, given the law’s
recall years later why he had voted against reconsideration, Hultman found it plausible that others had changed their votes based on the Iowa Poll results and/or constituent complaints. Wholly implausible, however, was his speculation that Hutchins might have voted for reconsideration because he needed a favor from Sturgeon. 257

Back in the House, on April 7, three days before adjournment, Hammond herself moved that the chamber concur in the Senate’s stronger preemption provision. Having adopted it, the House then passed the whole bill by an overwhelming 90 to 5 majority, 258 saddling Iowa with a very weak statewide public smoking prohibitory law (covering some restaurants) 259 whose gaping

holes local governments were thenceforth purportedly prevented from filling.\footnote{On the litigation over the reach of the preemption provision, see below ch. 33.}

**Kaleidoscopic Accounts of the Reasons for the Resurrection and Passage of H.F. 209**

As in 1987, the number one issue for the industry is the continuing drive by many groups to reduce the social acceptability of smoking. All types of legislation to reduce the opportunity to smoke, coupled with a private business move toward a “smoke free” workplace, is [sic] sending the message to people who enjoy smoking that they will pay a price for their enjoyment. Smokers do not like to receive these uncomfortable social messages on a frequent basis and can be expected to react in various ways. One mode may be feelings of guilt, but another might be hostility toward the forces which are producing the harassment. In any case, the end result is likely to be a cycle where smokers slowly become a shrinking, increasingly embattled minority.

The 1986 report of the Surgeon General which implicated environmental smoke for undesirable health effects in others has produced a significant increase in state level restrictions on smoking. Not since 1975 have so many states passed restrictive laws regarding smoking.\footnote{Telephone interview with Calvin Hultman, West Des Moines (May 19, 2007).}

How it came about that H.F. 209 was resurrected from the bill morgue remains a puzzle—except to Hultman, who years later viewed that framework as “reading too much into it.” Without offering a concrete counter-analysis, he speculated that reconsideration might simply have been driven by an end-of-session “mentality” pushing legislators just to want to get out of town. When pressed as to how a desire to wrap up the session as quickly as possible could be reconciled with adding a bill back to the agenda that had already been disposed of, Hultman self-contradictorily replied that the majority had wanted it.\footnote{R. N. Ferguson to Dr. E. B. Sanders, Subject: Social and Political Context of Cigarette Sales in the US - 1988, at 1 (July 25, 1988), Bates No. 2021556798. Robert Ferguson was the manager of the analytic research division of Philip Morris; Edward Sanders was associate principal scientist for scientific affairs at Philip Morris.}

Nelson’s Tobacco Institute update for April 4 failed to problematize the bill’s reappearance at all: he neither remarked on the fact of rebirth nor commented on whether or why passage was better than no bill or why both defeat and passage

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\footnote{260}{On the litigation over the reach of the preemption provision, see below ch. 33.}
\footnote{261}{R. N. Ferguson to Dr. E. B. Sanders, Subject: Social and Political Context of Cigarette Sales in the US - 1988, at 1 (July 25, 1988), Bates No. 2021556798. Robert Ferguson was the manager of the analytic research division of Philip Morris; Edward Sanders was associate principal scientist for scientific affairs at Philip Morris.}
\footnote{262}{Telephone interview with Calvin Hultman, West Des Moines (May 19, 2007).}
House File 209 in 1989-1990: Restaurant Coverage Is Finally Achieved

could be victories for the cigarette companies.\textsuperscript{263} His silence on the matter may have been a function of the fact that Wasker, as a free-wheeling master lobbyist, often “unilaterally” decided what to do and told Nelson afterwards according to the precept: “I’ll tell you what you need to know when you need to know about it.” This behavior and relationship exasperated Nelson’s hierarchically oriented bosses in Washington, but it proved hard to argue with what they viewed as Wasker’s spectacular successes.\textsuperscript{264}

Exploration of the reasons for the reversal of the bill’s fate is hindered by the fact that, with the partial exception of Senator Running, none of the numerous legislators interviewed 17 years after the events was able to remember that the bill had died, let alone why it had been reanimated, while still others could barely recall the bill’s existence altogether.\textsuperscript{265} Even Running could not remember why his amendment had been defeated on the second vote, but suggested that senators who had voted to exclude restaurants might have received complaints from constituents that had prompted them to change their votes. Much more intriguing to Running, however, was another possibility: hearing during his interview in 2007 about the intense behind-the-scenes campaign that the tobacco industry had conducted on behalf of preemption—of which he said that had known nothing in 1990—he speculated that tobacco lobbyists might have pressured senators to vote for restaurant coverage on the second vote if that was the only way to secure enactment of preemption. As for himself, Running insisted that despite not having changed his vote out of loyalty to those who had initially lobbied him about restaurants, he had also not put up a fight because even at that time he had not been wholeheartedly in favor of complete freedom to smoke in public (and by


\textsuperscript{264} Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007). In addition, Wasker’s pre-existing friendship with TI President Samuel Chilcote (dating back to Chilcote’s employment at and Wasker’s lobbying for the Distilled Spirits Council of the United States) enabled him to take liberties that other lobbyists might not have gotten away with. \textit{Id}.

\textsuperscript{265} For example, neither Ann Wright, who had lobbied on the bill for the Cancer Society and prided herself on her memory for details, nor Carol Sipfle, her counterpart at the Lung Association, remembered the death and rebirth. Telephone interview with Ann Wright, Ankeny (May 4, 2007); email from Carol Sipfle (May 8, 2007). Senator Joy Corning, who the following year became lieutenant governor, barely retained any memory of the bill at all. Telephone interview with Joy Corning, Des Moines (June 3, 2007).
Former Senate Democratic Majority Leader Lowell Junkins, who was a tobacco industry (TILMC) lobbyist in 1990, generally agreed that since the absence of preemption was a “real nightmare” even for Philip Morris, which lacked the resources to lobby every local government in the country that might consider anti-smoking ordinances, it stood to reason that the tobacco industry pressured the restaurant association to acquiesce in coverage as the quid pro quo for preemption. To the extent that the restaurant industry resisted and lost this battle, the defeat was softened by virtue of taking place over a period of time.  

It is noteworthy, as a matter of the quality of legislative policy formation in Iowa, that Senate Majority Leader Bill Hutchins, who was a crucial figure in the passage of the state’s anti-public smoking law, even 17 years later erroneously believed that alcohol caused more deaths in the United States than tobacco, when in fact the latter causes five times as many deaths as the former. Whether this ignorance was a prerequisite for or a consequence of his post-senatorial career as R.J. Reynolds Tobacco’s Iowa lobbyist is unclear. Hutchins stated in an interview in 2007 that he neither recalled how it came about that the bill had been revived nor knew how (or whether) the tobacco companies had persuaded restaurant owners between March 19 and April 4 to abandon their resistance to coverage for the sake of preemption. However, he was clear in 2007 that some time before 1990 he had informed restaurant-type businesses that coverage would eventually come and that he would give them a couple of years to make arrangements to comply with the law. (His claim that such owners needed lead time in order to do the requisite “pretty extensive remodeling” contradicted not

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266 Telephone interview with Running (May 5, 2007).
267 Telephone interview with Lowell Junkins, on the road somewhere in Iowa (Apr. 23, 2007).
268 Telephone interview with Bill Hutchins, Apache Junction, AZ (May 2, 2007).
270 Without specification Hutchins noted that the tobacco companies had “made some mistakes.” Telephone interview with Bill Hutchins, Apache Junction, AZ (May 2, 2007). A decade earlier he had told a reporter that “I happen to believe that they [R. J. Reynolds] are doing a lot of things for the public good,” but offered only a “‘No comment’” when asked whether he supported the firm—which had paid him $40,000 in 1995—“out of conviction or simply for the money....” Martin Kuz, “Snuffed Out,” Cityview, Apr. 10, 1996, at 8 (copy in Johnie Hammond Papers, Box 6, Folder: Legislative Press, IWA).
only reality but his own aforementioned insight that they could comply with the
feckless law by doing as little as putting a no-smoking sign on one table.)
Hutchins also remembered with absolute certainty that he would never have
permitted local governments to gain control over smoking regulations (thus
overlooking the fact that from 1978 until 1990 the Iowa clean indoor air law not
only did not prohibit local control, but expressly permitted it). He based his
opposition to local control on his feeling that local officials were “pretty
irresponsible.” Revealingly, when asked for examples, the only one he was able
to offer to illustrate his “lack of respect” for them referred to what he regarded as
unfair treatment that a local government had meted out to him personally in a
business deal in which he had engaged while a legislator. If Hutchins accurately
reported this idiosyncratic reason for insisting on preemption, it constituted a
basis for his engagement on the issue independently of pressure or encouragement
emanating from the tobacco industry.

Whether in fact Hutchins accurately portrayed his position on the smoking
bill is unclear. Doubt on this score is generated by his incorrect statement that
R.J. Reynolds Tobacco Company never gave campaign contributions to Iowa
state legislators in general and that he specifically never received campaign
contributions from that company. When the interviewer began reading to him the
names of his fellow legislators who had received such contributions from
Reynolds during the Fall 1990 campaign period and the sums given, starting with
the smallest amounts and obviously working upwards, Hutchins interjected: “Did
I get any?” Yes he did: the $1,000 that the RJR Political Action
Committee/RJR Nabisco, Inc. gave Hutchins for Senate on October 12, 1990 was
the highest amount that it reported to the Federal Election Committee for any
state legislator in its pre-general election report. The amounts given were: Sen.
Bill Hutchins (Dem. Majority Leader, $1,000), Sen. Jack Rife (Rep. Minority
Minority Leader, $1,000), Rep. Mary Lundby (Rep. Assistant Minority Leader,
Arnould (Dem. Majority Leader, $300). All of these legislators were in formal

271 Telephone interview with Bill Hutchins, Apache Junction, AZ (May 2, 2007).
272 Report of Receipts and Disbursements, For Other Than an Authorized Committee,
RJR Political Action Committee; RJR Nabisco, Inc. (Covering Oct.1-17, 1990), Bates No.
507921438/64. This was the only tobacco industry FEC reporting form for this period
showing contributions to Iowa state legislators found on tobacco industry documents
websites. For an internal company document showing the same information, see RJRT
State Government Relations 1991 Action Plan and Budget (Nov. 15, 1990), Bates No.
leadership in 1990 and/or 1991 except Coleman, who was, nevertheless, a powerful figure.

The Iowa contributions were part of Reynolds’ nationwide program to support state legislators: after having contributed $23,300 to 107 state candidates in North Carolina and $16,000 to four in Texas during the 1987-88 election cycle, it tentatively budgeted $150,000 in RJR PAC funds for the 1989-90 cycle, Iowa being one of eight states in which it was considering establishing separate RJR state PACs. In 1991-92, RJR PAC contributed another $3,130 to 24 Iowa state
legislative campaigns equally divided between Democrats and Republicans, ranging from a high of $215 to Senator Boswell to a low of $65 to Hutchins. Recipients included heavy smokers and/or prominent tobacco industry advocates such as Bisignano, Horn, Iverson, Lundby, McLaren, and Rife, the last four each receiving $200.\footnote{Data furnished by Iowa Ethics and Campaign Disclosure Board (Apr. 4, 2008). The recipient of one $100 contribution was not an individual legislator, but the “Iowa 2000 Committee,” which was a Republican entity. The RJR PAC contributions for 1991-92 are, for reasons unknown, the only out-of-state tobacco PAC data that the IECDB did not (unlawfully) “purge.” Telephone interview with Karen Hudson, Des Moines (IECDB, Administration/Electronic Filing) (Apr. 4, 2008). For further use of these data, see below ch. 20.}

Of the eight senatorial recipients who voted on the Hultman-Coleman preemption amendment on March 19, 1990, seven (Boswell, Hutchins, Fraise, Hagerla, Horn, Kibbie, and Rife) voted for it, while only Majority Whip Gronstal (a heavy smoker who received $200) opposed it. Similarly, on Running’s amendment to strike restaurant coverage, six voted for it, while only Gronstal and Hutchins opposed it. In addition, Philip Morris’s PHIL-PAC contributed $2,600 to 21 Iowa legislators as well as to the Iowa Democratic Party’s Truman Fund, which funneled money to legislative candidates.\footnote{Jonathan Roos, “Bill Curbs Cigarette Sales to Kids,” DMR, Mar. 28, 1991 (2) (NewsBank). This contemporaneous newspaper article, which was based on examination of records on file at the time at the Iowa Campaign Finance Disclosure Commission, also confirmed the RJRT PAC’s $3,900 in contributions; unfortunately, it did not identify the 21 legislators. These records are among those unlawfully destroyed by the agency. As small as the PHIL-PAC contributions to individual legislators were, former Iowa State Senator Milo Colton has interpreted them to be signals from lobbyists that the legislators should approach them for more during the next election cycle. Email from Milo Colton to Marc Linder (May 29, 2007). Steve Conway, who in 1990 was a Democratic party caucus staffer assigned to Hannon’s Senate Human Resources Committee and in 2007 was special assistant to the Senate president, was “really surprised” by how little money such a powerful lobby had contributed, having imagined that it would have given several times more. Telephone interview with Steve Conway, West Des Moines (June 4, 2007).}

(When told of these surprisingly small sums, former Governor Branstad laughingly opined: “They sold out pretty cheap.” By the same token, he stressed that money was not the only source of the tobacco industry’s power. Outcomes in the Senate were often simply a function of the fact that the leaders smoked and that many senators were too intimidated by leadership to risk good committee assignments and other benefits by voting against its pro-tobacco positions.)\footnote{Telephone interview with Terry Branstad, Des Moines (July 2, 2007).}
Charles Wasker, the tobacco industry’s much ballyhooed lobbyist, offered a much different perspective on H.F. 209’s tortuous career. Still exercising full bragging and proprietary rights 17 years after the events, he asserted that once he had gotten through with Hammond’s anti-tobacco bill in the Senate, it was “my bill.” The reason, he insisted, for H.F. 209’s death in March was Majority Leader Hutchins’ mistaken belief that it was anti-tobacco; but when Wasker told Hutchins shortly before the end of the session that he (Wasker) liked the bill, Hutchins brought it back. After noting that at that point he (Wasker) considered preemption more important than restaurant coverage, he triumphantly responded to the question as to whether the restaurant owners agreed with that assessment: “I didn’t ask them.”

This latter boast, as one Democratic caucus staffer put it later, can also be interpreted as expressing the (empirically correct) judgment that in Iowa the tobacco lobby was simply stronger than the restaurant lobby. If accurate, Wasker’s account would explain how the bill, despite not even being among the top 15 end-of-session priorities of the Democratic party caucus, was able to reemerge for floor consideration. However, one major flaw in Wasker’s logic is that Hutchins’ view of the bill after restaurants had been exempted was not mistaken at all: since the cigarette companies’ highest priority was preemption, and preemption was politically impossible without restaurant coverage as a quid pro quo, Hutchins may have correctly perceived that excluding restaurants would not be in the tobacco industry’s interest. In other words, some pro-tobacco senators (for example, Coleman, Horn, Hultman, and Rife) might have considered the result of restaurant exemption to be the tobacco companies’ dream-come-true of a free-standing preemption bill and thus voted for it, but Daniel Nelson speculatively interpreted their votes (many years later) as a function of their inability to understand the convoluted logic of the firms’ position and of the impracticability of informing them of the right way to vote on the Senate floor in the heat of the battle. As to how so crafty a politician and leader as Hutchins could possibly have mismanaged this vote, one close observer found it thoroughly plausible that a majority leader could not pay close attention to three thousand bills and, instead, had to rely on committee chairs and floor

277 Telephone interview with Charles Wasker, Des Moines (May 14, 2007).
278 Telephone interview with Steve Conway, West Des Moines (June 4, 2007).
279 Telephone interview with Dennis Harbaugh, Waterloo (June 3, 2007). According to Harbaugh, who had been the director of the Democratic caucus in 1990, if a bill that had already died was not a caucus priority toward the end of the session, practically speaking it could return only if it was some senator’s individual priority and that senator was able to arrange a deal involving some other piece of legislation.
280 Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).
managers to give him the appropriate signal, which, in this case Sturgeon had done.\textsuperscript{281}

The mystery surrounding the rebirth of the bill is deepened by information provided by Democrat Wally Horn, who had been an assistant majority leader in 1990. Although many years later he, too, could not recall that the bill had died or that he had changed his vote, Horn did remember with absolute certainty that Majority Leader Hutchins had wanted the bill killed. Horn, for his part, felt exactly the same way as Hutchins (whom he replaced as majority leader in 1993): though a nonsmoker, Horn, perceiving smoking “almost like a right,” was willing to do anything to kill the bill so that people could continue to have the right to smoke wherever they wanted to. From this perspective, in 2007 he speculatively interpreted Hutchins’ vote for restaurant coverage on March 19 as an effort to make the bill too radical to pass. But when confronted with the illogic of voting to kill a bill indirectly when Hutchins could have killed it directly by voting with Horn and the majority who were already doing so, Horn had no response. And indeed, he was “baffled” by his own change of vote, which he could also interpret only as an effort to kill the bill, though he could no longer explain how. Horn, in response to a question, denied both that Hutchins had ever explained to him before the second vote that the tobacco companies had changed their strategy and now wanted the bill passed with restaurant coverage so that they could secure the local preemption that was their highest priority and that he personally would have changed his vote in reaction to such intelligence (though other senators might have done so). He did, however, slyly volunteer that if Hutchins had, instead, informed him that the bill with restaurant coverage and preemption was the weakest measure—that is, the least restrictive of smokers’ freedom to smoke—that could be passed, he would have changed his vote.\textsuperscript{282}

Horn’s denials and memory lapses to the contrary notwithstanding, Lawrence Pope, a former Republican House Majority Leader (1979-82) and smokeless tobacco lobbyist (1995-2000), who throughout was a law professor at Drake University in Des Moines teaching lobbying, characterized Horn as a tobacco industry supporter whose vote change had to be interpreted as clear evidence that word must have reached him one way or another that the industry wanted to trade preemption for restaurant coverage. Indeed, based on his knowledge of them and

\textsuperscript{281}Telephone interview with Steve Conway, West Des Moines (June 4, 2007).

\textsuperscript{282}Telephone interview with Wally Horn, Cedar Rapids (May 6, 2007). Horn was still a senator at the time of the interview. Passing no bill at all might have appeared to restrict smokers’ freedom even less, but, as noted earlier, in the absence of preemption, cities could have passed ordinances that would have significantly restricted smoking in restaurants.
their support for the tobacco industry, Pope judged the seven other vote-changers similarly.283 Ex-Senator Sturgeon frankly speculated to the same effect that by April the cigarette companies must have told their people in the legislature to pass the bill with restaurants included.284

The then lobbyist for the Iowa Restaurant Association, Mark Truesdell, while recalling that passage had been a defeat for his client, speculated that some horse-trading wholly extraneous to the content of the anti-smoking bill might have prompted some senators to change their votes. He also conjectured that during the two-week interim anti-smoking constituents might have expressed their displeasure to senators who had voted against restaurant coverage, prompting some to change their vote. At the same time he distinctly recalled that no tobacco lobbyist (including George Wilson and Charles Wasker) had ever suggested to him that since preemption was more important, restaurant owners should acquiesce in coverage. Moreover, apart from any question of tobacco industry advocacy, Truesdell insisted that owners would have rejected the argument that without preemption restaurants would have been exposed to the risk of stricter local ordinances because it was merely a distant “bogeyman,” whereas statewide coverage was certain reality.285 This view was independently corroborated by the executive director of the Iowa Restaurant Association between 1982 and 1995, Lester Davis, who maintained that in 1990 owners did not regard the risk of the passage of ordinances as significant because the anti-smoking movement had not yet become strong enough to make the threat credible. And as for coverage itself, he argued that owners—even ones who had already voluntarily made their restaurants nonsmoking without any loss in business—had simply not wanted the government telling them what to do.286

Though Daniel Nelson, TI’s Midwest vice president in 1990, was familiar

283 Telephone interview with Lawrence Pope, Des Moines (May 11, 2007).
284 Telephone interview with Al Sturgeon, Sioux City (Apr. 28, 2007).
285 Telephone interview with Mark Truesdell, Des Moines (May 4, 2007). Neither Michael Brozek, the Tobacco Institute’s Midwest regional vice president until 1988, nor his successor, Daniel Nelson, credited the assertion that no tobacco lobbyist spoke to the Iowa Restaurant Association in 1990 about the overriding importance of preemption. Telephone interview with Michael Brozek, Madison, WI (June 5, 2007); telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).
286 Telephone interview with Lester Davis, Johnston, IA (May 3, 2007). Unfortunately (and surprisingly), the April to September, 1990, issues of the Iowa Association of Restaurants newsletter, Appetizer, contained, according to its current president and CEO, nothing on legislative issues at all. Email from Doni DeNucci to Marc Linder (June 7, 2007).
with this latter “1,000-percenter” attitude and confirmed IRBA’s resistance to coverage, he also recalled that it had begun changing its attitude at some point once it came to see the wisdom of the view that demands for smoke-free restaurants were a problem that was not going to go away. He speculated that this change might have been facilitated by increased financial and education participation by Philip Morris and R. J. Reynolds Tobacco in the Association.\textsuperscript{287}

As with Horn, Pope, who had participated in strategy meetings with other tobacco lobbyists, was skeptical of Truesdell’s and Davis’s recollections. Although he deemed it possible that the final deal to cover restaurants and include preemption might have been “cut” without the participation of the association, he considered it implausible that the restaurant business representatives would have been unaware at the time of the “machinations” going on. Moreover, he found it hard to believe that they would not have recognized the extraordinary importance to them of preemption: after all, he reasoned, if, for example, the Des Moines suburb of Urbandale, in the absence of preemption, had passed an ordinance prohibiting smoking in restaurants, it would have “killed” the business there.\textsuperscript{288}

**Post-Mortems**

Hammond’s self-congratulatory gloss that the amended law meant that nonsmokers “can have a meal without having to choke and cough”\textsuperscript{289} was so at variance with experience and the laws of physics that it did not even have to await empirical refutation. The same day that the governor signed the bill,\textsuperscript{290} Lester Davis, the executive director of the Iowa Restaurant and Beverage Association, who estimated that fewer than one-third of restaurants in Iowa voluntarily provided separate seating, praised it for not having “a whole lot of teeth....” The law’s lack of any directives as to apportioning smoking and nosmoking space gave owners broad discretion: “Some will just put in two or three tables and say that’s their no-smoking section....” Consequently, the association opposed the bill, but not so strongly as “tougher” bills debated in earlier years: “It’s not as bad as it could have been....” The law’s glaring toothlessness was not merely substantive in nature: its enforcement may have left everything to be desired. The legislative lobbyist for the Iowa Department of Inspections and Appeals, which

\textsuperscript{287}Telephone interview with Daniel Nelson, Sioux Falls, SD (June 8, 2007).
\textsuperscript{288}Telephone interview with Lawrence Pope, Des Moines (May 11, 2007).
\textsuperscript{290}1990 Iowa Laws ch. 1189 at 265.
was tasked with checking restaurants for the presence of the required signs designating smoking areas, observed that even if inspectors referred violations to county attorneys, state officials did not know whether the latter were authorized to take owners to court. Moreover, it was also an open question as to whether prosecution was even “‘something a county attorney is going to want to mess with.’” Precisely what gratified R. J. Reynolds about the bill—its failure to specify the size of the nonsmoking areas that had to be set aside—prompted the Register’s editor to excoriate the “wimpy” “restaurant smoking” law as creating merely “piddling little restrictions,” which did not even extend to specifying what proportion of the space had to reserved for nonsmokers.

The question as to whether the trade-off promoted public health still preoccupied the American Cancer Society’s lobbyist 16 years later. Ann Wright, noting that the organization had opposed preemption in any form, admitted that in retrospect it was hard to know whether it would have been better to have passed no bill at all. Unlike the situation in some other states, however, the cigarette companies’ preemption initiative in Iowa did not split the (to be sure, rather weak) anti-tobacco coalition over whether to push for restaurant coverage at the price of acquiescing in preemption. Even former Governor Terry Branstad mused in retrospect that perhaps he should have vetoed the bill because the local preemption provision outweighed the benefits of restaurant coverage, which, under the designated smoking areas regime, was, he insisted, as useless as separate sections had been on airplanes.

Four days after the end of the session, Nelson heaped fulsome praise on Wasker in a “Dear Chuck” letter designed both to flatter the lobbyist and curry favor with headquarters:

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291 “Thomas Fogarty, “New Restaurant Smoking Law Called Toothless,” DMR, Apr. 25, 1990 (1M:2-5, 2M:6). To be sure, the previous year the attorney general, in response to an inquiry from a county attorney, had issued an opinion stating that the statute did not appear to create a private cause of action, and that the prosecution of actions fell within county attorneys’ statutory obligation. Iowa Attorney General Opinion #89-5-5(L) (May 24, 1989).


294 Telephone interview with Ann Wright, Ankeny, IA (Feb. 2, 2006).


296 Telephone interview with Terry Branstad, Des Moines (July 2, 2007).
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It goes without saying that you had your usual excellent record. In fact Chuck, it is kind of boring to congratulate you because you lose so seldom.

I am well aware that the preemption amendment to HF209 is probably the best example of the pro-active concept within my region. I intend to make that point very clear to my superiors in Washington, D.C. 297

In its internal report card on Wasker, judging his activities during the 1990 session, TI noted at the beginning of June that he had been “chiefly responsible for severely weakening a smoking restriction bill and then adding a state-wide preemption clause.” That this “pro-active victory” had been “the only significant one in this region” and had come in the wake of his “spectacular victory” in 1989 in preserving the sunsetting of a three-cent cigarette tax undergirded the recommendation that his annual retainer be increased from $40,000 to $45,000, especially since he bore more of the lobbying load than the member cigarette companies’ lobbyists. 298 In fact, TI—which was just one of Wasker’s numerous clients—raised the retainer of its “legislative consultant” to $44,000 in 1991, 299 at a time when legislators’ salary was only $18,100 and even that of the six highest legislative leaders was only $27,900. 300 Despite the preemption provision’s dilution in which the cigarette companies had been forced to acquiesce, the cheering at TI apparently never stopped. A week later Nelson informed headquarters that: “The Region IV office is thrilled with the smoking restriction preemption language that was included in HF209.” 301 And later that year, Kurt Malmgren, the head of the Institute’s State Activities division, confided to the annual convention of the Iowa Association of Candy and Tobacco Distributors that enactment of the restaurant coverage cum preemption law was “without a doubt, a substantial victory.” 302

298Tobacco Institute, Region IV State and Local Lobbyist Evaluation: State of Iowa: Charles F. Wasker (June 1, 1990), Bates No. TI23011588/9/91. The evaluation was presumably Nelson’s. On his previous evaluation and raise from $35,000 to $40,000, see Tobacco Institute, Region IV State and Local Lobbyist Evaluation: State of Iowa: Charles F. Wasker (July 12, 1989), Bates No. TI20892037.
299Tobacco Institute, 1994 Budget: State Activities Division (May 14, 1993), Bates No. TI16561571/87.
301Dan Nelson to Pat Donoho, Re: Proactive and Tax Targets (June 7, 1990), Bates No. TI28842920/1.
302Kurt Malmgren, [untitled], in “1990-2000: What’s on the Horizon? Iowa Association of Candy and Tobacco Distributors 42nd Annual Convention” at 7 (Sept. 14-
Anti-Smoking Senators—Purportedly as Powerless as Inmates in the Maximum-Security State Penitentiary—Make Yet Another Unsuccessful Attempt to Clean the Air in Their Workplace: 1990

At the same time that H.F. 209, designed to reduce secondhand smoke exposure statewide, was making its way through the legislature, “[a]nti-smoking forces [we]re gearing up for a test of democracy in the Iowa Senate. Although no more than 15 of 50 senator smoked, according to Hannon, many were “veteran members....” Consequently, she argued, “we can pass laws regulating smoking in the rest of the state but have no control over own chamber....” In order to overcome this democratic deficit, the anti-smoking senators circulated a note calling for a meeting to discuss restricting smoking in the Senate.  

The impact of the Senate’s laissez-faire smoking policy on the Senate qua workplace was poignantly revealed by the administrative assistant to a member of the Iowa House who on March 16, 1990 wrote to Hannon that the representative, who was running for the Iowa Senate, had requested that she accompany him to that chamber should he be elected. Confiding to Hannon that she and the representative “consider ourselves a team that operates smoothly and productively” and that the latter would tell Hannon that they were “mutually dependent,” she had nevertheless “hesitated to commit myself because smoking is allowed in the Senate itself, as well as in the work areas. Tobacco smoke causes me great physical distress in the form of allergic reactions and headaches.” Rejecting the “argument of infringement of smokers’ rights,” she insisted that: “Smokers choose to smoke; the rest of us cannot choose to breathe—it is a necessity. It seems unfortunate that people can be driven away from jobs they love and are good at simply because smoking is allowed in that work place.”

Hannon herself had good reason to empathize with her correspondent: at the same time she was seeking health care for eye irritation caused by being in a “room full of smokers all day long.” The health care giver’s diagnosis read: “Conjunctivitis is irritation from smoke.”

For March 28, 1990, Lloyd-Jones and two other senators had called an open


304 Letter from Nancy Brooker Bowers (Adm. Asst to Ralph Rosenberg) to Senator Hannon (Mar. 16, 1990), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.

305 Iowa Department of Public Health: Disease Prevention, Case Record (Mar. [?] 19, 1990), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.
meeting on smoking policy that, because of a conflict with another meeting, ultimately was not held, but they nevertheless solicited suggestions for a smoking policy for the next year. From the handwritten suggestions submitted that same day by Hannon, arguably the Senate’s most militant anti-smoker, a sense emerges of how far even she was from proposing a total ban at a time when the House had almost achieved it:

1.) No smoking on Senate floor while in session
2.) Senators smoke in Lounge back of Senate
3.) Secretaries & staff smoke at designated benches which have exhaust fans (to the outdoors)
4.) “Visiting smokers” restricted to those areas.
5.) No smoking during committee meetings unless smokers sit near exhaust fans to outdoors,
6.) No smokers at work stations (computers, typewriters)
7.) Private offices adopt a policy by consensus.
8.) No smoking in lounges adjoining switchboard area, including phone booths.

Significantly, Hannon solicited and galvanized support from outside of the closed circle of her 49 fellow senators. The reservoir of antagonism was close to overflowing: “Several of the clerks and anti-smoking legislators formed a support group and worked on their legislators/leadership to resolve the smoking impasse before some of the clerks quit or there were physical fights. Some of the smoking clerks smoked at the computers. The next person to use it had ashes and odor to contend with. The phone booths senators had to use in the senate lounge reeked from stale tobacco.”

In a piece she published in a small-town newspaper the next day, Hannon reported to her constituents that “[a]s in the past, the tobacco lobby and the Senate smokers [had] savaged” the public smoking prohibition bill (HF 209) that the House had passed. (Hannon’s colleague Don Gettings wanted “smoking opponents to walk out and shut the place down,” prompting Hannon to interject: “fat chance.”)

She reminded them as well that she had
also long been a proponent of Senate rules recognizing non-smokers’ rights. It would be interesting to know whether it is rare for legislators to voice their complaints about their own physical working conditions to their constituents as Hannon did: “Currently smokers can smoke anywhere at any time in the Senate, and they do. Some of the committee meetings I must attend are physical torture.” 310 She then keyed them into the collective action tactics that she and her allies had developed to improve their workplace:

This year some of the Senate pages and secretaries who are especially bothered by the clouds of smoke in which they must work approached some of us non-smoking Senators for help. We held meetings and talked about positive suggestions that we hoped to present to Senate leadership. Some smokers were very offended by this exercise in democracy and informed the pages and secretaries that they were just help and didn’t have anything to say about Senate rules or lawmaking. Some secretaries have been personally harrassed [sic] by co-workers because of our meetings, which are open to everyone.

Irritations spilled over into debate on HF 209. ... An older man who lobbies for the elderly phoned me, very upset after hearing the debate on the radio. He has chronic bronchitis and can’t do his job as well as he would like because he can’t stand the second-hand smoke here at the Capitol. A Senate leader’s wife, who was a secretary used to sit next to me. She has emphysema. There were times I thought she would choke to death at my side. She is now on constant oxygen and can no longer work here or attend legislative events!

What do you think? Do non-smokers have rights too?
If you have comments...please contact me. 311

Poignantly, at this very juncture a correspondence intervened between a prisoner at the maximum security state penitentiary at Fort Madison, who on March 22 wrote Hannon after having read a newspaper article about her fight

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311 Bev Hannon, “Hannon Speaks Out on Public Smoking,” Advocate News (Wilton-Durant, IA), Mar. 29, 1990 (19:3-4). In a later unpublished memorandum Hannon added this background to the incident: “When JoAnn Hutchins, Hutch’s wife, worked for Joe Welsh, I sat right next to them. I used to be afraid she was going to expire right there on the floor from the smoke, she was gasping for breath and leaning on the pull-out shelf. She had emphysema so bad, often had oxygen inhaler and finally oxygen tube in her nose. Joe wouldn’t smoke at his desk because of her, but others smoked wherever they wanted, including Hutch. I don’t know if she was too subservient [sic] not to say anything to him or if he just ignored her. He actually was killing her with second hand smoke.” Untitled (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.
against smoking in the Senate chamber. A nonsmoker who wanted to live in a smokefree environment, he related that the prisoners were “forced to be locked” in their cells 16 hours a day, during which “you are assaulted with a lot of smoke....” Believing that his health and well being had been put in jeopardy by being forced to “live in this type of environment against my will,” he had already filed a section 1983 civil rights action in federal court. To Hannon he complained: “I always see articles in the paper where the state representatives and the governor are always concerned about smoking in public, but I have never seen one thing mentioned about curbing smoking in the state institutions. It’s like we don’t count for anything just because we are locked away for the time being.”

From Hannon (and her nonsmoking colleagues) the prisoner—who knew that “your concern for an inmates [sic] is not on the top of your list in priority of things to accomplish this session”—requested the filing of “a bill that will make the warden set aside a portion of this institution for non smokers [sic].”

Replying a week later, Hannon, after briefly mentioning that she would speak to the Corrections Department, devoted half of her letter to this remarkable piece of self-commiseration, which was presumably designed to put her interlocutor subtly on notice that if she lacked the power to protect herself, it was even less likely that she would be able to help him:

Even though only 14 Senators out of 50 smoke, we non-smokers have been unable to get the Senate to adopt rules that accord us non-smokers any rights at all. Like you, we are assaulted with second-hand smoke most of the day. It has created poor working conditions and poor morale. Some people become physically ill from the smoke.

A few days later Hannon followed up with a “Sorry” letter, explaining that the Corrections lobbyist had informed her that overcrowding as well as conflicting segregation criteria based on gang activity, personal vendetta, and homosexual activities, had prompted the department to terminate its former segregated cell assignments for smokers and nonsmokers.

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312 Stephen Leonard to Beverly Hannon (Mar. 22, 1990), in Beverly Hannon Papers, Box 20, Folder: Corrections; Anamosa Reformatory, IWA.

313 Beverly Hannon to Stephen Leonard (Mar. 30, 1990), in Beverly Hannon Papers, Box 20, Folder: Corrections; Anamosa Reformatory, IWA.

314 Beverly Hannon to Stephen Leonard (Apr. 4, 1990), in Beverly Hannon Papers, Box 20, Folder: Corrections; Anamosa Reformatory, IWA. A year later Leonard, serving a 25-year sentence for attempted murder and other crimes, and Steven Wycoff, serving a life sentence for murder, filed suit in federal district court in Des Moines claiming that the unconstitutional imposition of cruel and unusual punishment entitled them to an order (like the Clean Indoor Air Act) dividing the penitentiary into designated smoking and
nosmoking cells. While requesting that the suit be dismissed, a penitentiary spokesman and the state attorney general’s office noted that officials were considering declaring certain areas nonsmoking or even banning smoking altogether in the prison. William Petroski, “Iowa Inmates in Dispute over Smoking Rights,” *DMR*, May 29, 1991 (1A, 6A), Bates No. TI00911091. Beginning Dec. 31, 1995, indoor smoking was banned in Iowa prisons. William Petroski, “Smoke-Free Prisons Soon,” *DMR*, July 8, 1995 (1) (NewsBank).
Instead of Repealing Preemption of Local Anti-Public Smoking Ordinances in 1991, the Legislature Enacts What the Tobacco Industry Purported to Be the Preemption of Local Cigarette Sales Ordinances

[S]moking legislation in Iowa is largely symbolic; enforcement is minimal and voluntary compliance is expected.¹

The cigarette companies’ victory in inserting preemption into the 1990 amendments to the clean indoor air law did not prompt the anti-smoking forces in the Iowa legislature to abandon the struggle to confer power on local governments to pass and enforce ordinances that were stronger than the weak statewide law that had been on the books since 1978. Already by July 1990, the Tobacco Free Coalition, composed of representatives of the Iowa Medical Society and the Iowa branches of the American Cancer Society, American Heart Association, and American Lung Association, met and identified elimination of the preemption clause of the 1990 Clean Indoor Air Act as one of its four legislative priorities for the 1991 session.² However, in the event, the tobacco industry succeeded not only in defeating the TFC’s repeal initiative, but also in securing enactment of yet another preemption provision, this time purportedly depriving localities of their home-rule powers to issue ordinances regulating cigarette sales, free samples, and vending machines—the last being of special concern since the legislature of neighboring Minnesota just the previous year had defeated the tobacco companies’ preemption bill³ and instead voted to empower local governments to adopt ordinances more restrictive than the new statewide law’s regulation of vending machines;⁴ consequently, that state’s localities were on the way to passing more total bans than those of any other state.⁵


²Carol Sipfle, American Lungs Association of Iowa, to Tobacco Free Coalition (July 30, 1990), in Folder: Tobacco: 1999-, Johnson County Department of Public Health, Iowa City.

³1990 Proactive Legislative Opportunities by Category, at 10 (Mar. 19, 1990), Bates No. 507595166/78; Smoking Control Advocacy Research Center, Action Alert, at 1 Mar. 30, 1990, Bates No. TIMN363192.

⁴1990 Minn. Laws ch. 421 § 3, at 831, 832.

⁵Joseph Sullivan, “Bans on Cigarette Machines Are Upheld,” NYT, Apr. 1, 1994 (B5).
Both sides were aware that the 1991-92 legislative session would witness new drives to pass bills on all these subjects. Intertwined with these measures, as had almost always been the case in recent years, was yet another proposal by Governor Branstad to increase the cigarette tax, which would force the legislature to deal with this issue again. As early as April 27, 1990, less than three weeks after adjournment, Lowell Junkins, the former Democratic Senate Majority Leader who was the Iowa consultant or labor counsel of the Tobacco Industry Labor Management Committee, informed the Tobacco Institute that the cigarette companies’ success on excise taxes—which primarily rested on diverting attention to spending reductions—“was a near miracle” given the estimated $40 million state budget deficit for 1991. Junkins feared a much less favorable outcome in 1991 “unless we have an army of support and not the small cavalry of folks we had this year.” To gain allies he secured the support of Mike Lux, the Iowa Federation of Labor vice president, “in assisting with building a coalition of support for comprehensive clean air legislation and support against the use of excise taxes to balance the state’s budget.” The requisite “formal coalition” might be effected through the Iowa Citizen Action Network. The mention of clean air legislation and IFL and ICAN was an unambiguous reminder that the industry continued to understand cigarette taxes and clean indoor air laws as interconnected programs to restrict smoking; consequently, because opposition to one implicated the other, co-opting left-liberal grassroots labor and consumer organizations was vital for success in a state governed by a Democratic legislature and an anti-tobacco Republican governor.

In the meantime, ICAN itself was busy preparing its “progressive tax alternative plan,” which its director, Jay Larson, submitted to its board in early July. Worried about the regressive impact of proposals to increase excise taxes to deal with a potential budget deficit in 1991, Larson argued that one of ICAN’s “top priorities” should be “a campaign...to lower taxes for those who are having trouble meeting their day-to-day needs” and raise them for those who could afford to pay. However, passing this type of plan would not be easy because organizations such as David Stanley’s Iowans for Tax Relief had “convinced

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Iowans that sales and excise taxes are preferable to income taxes even though most Iowans would pay less taxes under a progressive plan.” Reversing such beliefs would require “extensive public education and grassroots pressure on legislators.” Vital to such a campaign was presenting the plan to 30,000 ICAN members in the group’s newsletter, to 50,000 ICAN members, who did not get the newsletter, through an education piece, and to 500,000 Iowans by means of the newsletter network of ICAN’s affiliates and allies. Larson then envisioned concentrating ICAN’s canvass, which would reach 75,000 people and generate thousands of letters to legislators, in districts in which legislators were “still on the fence”; mail and phone calls in key districts would create still “more grassroots pressure on legislators.” The total expenses for this project were estimated at $79,979.7

It was precisely such large sums that had been driving ICAN into the waiting and outstretched arms of the cigarette companies since at least 1986.8 Two days after Larson had presented his plan to the ICAN board, Junkins furnished a copy to his handlers at the Tobacco Institute, explaining how it might fit into his own strategy for the 1991 session. Following up on his April report, Junkins urged quick action because it was “clear the tax question in this state will be resolved prior to the opening of the session and not after January 1, 1991.” Half a year before the new legislature convened, the major vehicle for increasing state revenues to close the budget deficit was “the ‘easy’ taxes”—excise and sales taxes. Junkins’ plan was to help generate a debate during the upcoming gubernatorial campaign by offering an alternative to those taxes. Whereas Branstad, during his first two terms, had made known his preference for increased cigarette, gas, alcohol, and sales taxes, Junkins hoped that “we can get” the Democratic gubernatorial candidate, House Speaker Don Avenson, “to offer the alternative choices”: since more progressive taxes fit with Avenson’s “philosophy,” Junkins urged “mov[ing] Avenson into this mode quickly.” The point of this exercise was to position the cigarette industry so that during the legislative session it could at least “point at the other choices and not leave us alone as the preference.” To this end Junkins had already secured commitments from ICAN and IFL to initiate “the process of focusing on the choices....”9 (To be sure, Junkins made it clear that he was not overconfident by attaching to his

7Jay Larson to ICAN Board of Directors and other interested parties, Re: A Progressive Tax Alternative Organizing Plan (July 6, 1990), Bates No. TI21010580-2.
8See above ch. 26.
9Lowell Junkins to James Savarese, Dan Nelson, Susan Stuntz, and David Wilhelm, Memorandum: Subject: Suggested Strategy for 1991 Legislative Session (July 8, 1990), Bates No. TI21010572/3.
Enactment of What Tobacco Industry Claimed Was Preemption of Local Ordinances

memo an article from the same day’s Register disclosing that both Branstad and Avenson had stated that it was likely that cigarette taxes would be increased.\textsuperscript{10} The special roles performed by these two organizations that made them virtually unique and indispensable were implicit in the crucial interconnection between excise taxes and anti-public smoking legislation that Junkins highlighted:

A supplementary part of this strategy has to be to get the focus of attention off of cigarettes and the accompanying arguments about their relationship to health. The more complete and comprehensive clean air legislation gives us an opportunity to do this. I do not believe we can win this battle with the clean air alternative alone but we must have the two alternatives, progressive taxes and clean air, linked together.\textsuperscript{11}

Just how tricky managing the tobacco industry’s alliance with ICAN was emerged a few weeks later when Susan Stuntz, TI vice president for issues management, informed Patrick Donoho, State Activities vice president for the Northern Sector, that Philip Morris had offered its own support to the Iowa fair tax program, but that while appreciated, it “should be turned down” because the Institute, through the Labor Management Committee, “will make sure that Iowa Citizen Action has all of the resources it needs to get this project underway.” The reason for excluding cigarette company financing was that “the only way this will work is if ICAN also raises funds of its own.”\textsuperscript{12} Stuntz’s strategical insight was presumably that the whole point of the coalition with ICAN was to tap into its legitimate grassroots organization; if the tobacco industry subsidized it so heavily that it no longer had to raise its own funds through grassroots drives, it would turn into a mere industry front organization—of which the cigarette companies already had more than enough—and lose its unique raison d’être as a large-scale authentic


\textsuperscript{11}Lowell Junkins to James Savarese, Dan Nelson, Susan Stuntz, and David Wilhelm, Memorandum: Subject: Suggested Strategy for 1991 Legislative Session (July 8, 1990), Bates No. TI21010572/3.

\textsuperscript{12}Susan Stuntz to Pat Donoho (July 25, 1990), Bates No. TI21010570. Without being able to pinpoint the date or determine whether the incident was related to that mentioned in the text, Jay Larson, the ICAN executive director between 1988 and 1992, later recalled that Wasker had once approached him on behalf of Philip Morris to ask whether ICAN needed more money; after asking around ICAN, however, Larson decided that taking money from Philip Morris was not doable in contrast to taking it from TILMC, which was okay because that money seemed to be coming from unions (although in fact it was also from Philip Morris and other tobacco companies as channeled through the Tobacco Institute). Telephone interview with Jay Larson, Everett, WA (July 19, 2007).
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anti-corporate consumer group, about whose tawdry clandestine connection to the most despised corporations in the United States neither the ICAN rank and file nor targeted legislators knew anything at all.\(^\text{13}\)

Junkins was also making progress with the labor wing of the coalition. In August he succeeded in achieving several important objectives: at its annual convention the Iowa Federation of Labor not only passed resolutions on unfair taxes and indoor air quality, but also called for lobbying of federal and state legislators on the matter of unfair taxes at the local level.\(^\text{14}\) (At the following year’s convention Junkins succeeded in insuring that IFL reaffirmed its position on both resolutions.)\(^\text{15}\) The tax resolution, submitted by the Federation’s executive council, simply came out for progressive income taxes on all levels of government and against regressive sales and excise taxes without singling out cigarette taxes, which, within the covert coalition framework, would not have been in the tobacco industry’s interest.\(^\text{16}\) The indoor air quality resolution was

\(^{13}\)When interviewed 17 years later, Donoho (who had reincarnated himself as vice president for government relations at the International Bottled Water Association), without prompting, spontaneously commented that if the tobacco companies had financially supported ICAN to such an extent that it no longer needed to raise its own funds, it would have become a “front organization” rather than the grassroots organization that the Tobacco Institute needed as a coalition partner. Telephone interview with Patrick Donoho, Alexandria, VA (July 19, 2007). Stuntz (who claimed that she had never before agreed to speak to anyone about the Tobacco Institute, which she left in 1993), at first stated that it was the labor members of the Tobacco Industry Labor Management Committee who had objected to Philip Morris funding because they wanted TILMC to fund ICAN the coalition partner. When it was pointed out to her that this objection seemed to be based on a distinction without a difference, since Philip Morris was the largest funder of the Tobacco Institute (which funded TILMC) and thus was funding ICAN indirectly anyway, Stuntz revised her position to argue that the labor members believed that if Philip Morris had given money to ICAN, then ICAN would not have been a labor partner but a Philip Morris partner. Although even this logic seems tenuous, in some not trivial sense it overlaps sufficiently with the argument offered in the text to buttress it. The cigarette manufacturing companies were not directly represented on TILMC because, whereas Philip Morris was unionized and enjoyed close relations with the Tobacco Workers union, R. J. Reynolds Tobacco was unorganized and anti-union. Telephone interview with Susan Stuntz, Annandale, VA (July 17, 2007).

\(^{14}\)Lowell Junkins to David Wilhelm, Susan Stuntz, Jim Savarese, Memorandum Re: Iowa AFL-CIO Resolutions on Unfair Taxes and Indoor Air Quality (Aug. 28, 1990), Bates No. TI23661101.

\(^{15}\)Lowell Junkins to Susan Stuntz Re: August/September report (Sept. 30, 1991), TI28843137.

\(^{16}\)Iowa Federation of Labor, State Convention Resolution No. 19 (Aug. 1990), Bates
more complex. First, it was, incestuously enough, submitted by none other than ICAN executive director Jay Larson, who also happened to be vice president of Local Lodge 2760, International Association of Machinists and Aerospace Workers, a local combining public librarians and ICAN employees.17 The resolution focused on “bad design and inadequate, poorly maintained ventilation systems” as contributing to “polluted indoor air that contained known toxic contaminants, bacteria, viruses and allergy-causing fungi, which have been linked to employee health problems....” The cigarette company-ICAN-IFL resolution then called on workplace health and safety officials to “recognize that identification of pollutants, cleaning or replacement of poor ventilation systems, and building modifications to provide adequate fresh air are essential to assure all workers a safe job site....” The crucial diversionary support that the tobacco industry sought was embodied in the intentionally unspecific declaration that “inasmuch as a number of substances are proven pollutants of the air we breathe, no single one shall be targeted....” The industry’s other desideratum found expression in IFL’s urging the state legislature to require indoor air quality testing to develop clean air standards. Finally, the cigarette companies’ coalition strategy, as developed by its TILMC’s cooptation of the Sheet Metal Workers Union, was furthered by the demand that ventilation systems be “evaluated by qualified unions’ affiliated contractors to assure proper and effective performance.”18

In a legislative analysis prepared some time in the fall of 1990 before the November election, which was predicted to leave Democrats firmly in control of both houses and Republican Branstad as governor, TI noted that it had not been “lost on the legislature” that the sunsetting of three cents of the cigarette tax in 1989 “did not result in any lower cigarette prices to consumers” because

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17The local later merged with local 254. Information provided by IAM office in Des Moines (July 16, 2007).

18Iowa Federation of Labor, State Convention Resolution No. 23 (Aug. 1990), Bates No. TI23661101/2. On the strategy of refocusing attention away from tobacco smoke as the principal indoor air contaminant, see Edith Balbach et al., “Political Coalitions for Mutual Advantage: The Case of the Tobacco Institute’s Labor Management Committee,” *AJPH* 95(6):985-93 at 989 (June 2005). On the Sheet Metal Workers, see Susan Stuntz, Comments on the Tobacco Industry Labor Management Committee at 5 (Aug. 17, 1989), Bates No. 507650812/6. Seventeen years later, when emailed the resolution, Larson remarked: “I don’t remember putting my name on the IFL resolution but obviously I did. The resolution itself looks like a good idea and clearly something that I would have supported, [sic] If I knew that it was part of a tobacco misdirection campaign, I don’t remember it.” Email from Jay Larson to Marc Linder (July 20, 2007).
manufacturers had increased prices. Following the unsuccessful attempt to reinstate the three cents in 1990: “Without a doubt, at least that three cent figure will be back this year in tax proposals.” Pressure in that direction was being generated by a projected budget shortfall of tens of millions of dollars, eliminating part of which both Branstad and his Democratic opponent, outgoing House Speaker Avenson, had endorsed by means of a cigarette tax increase. As far as the cigarette companies’ staff and lobbyists were concerned, a “consensus” prevailed that “keeping the Iowa cigarette tax at 31 cents is the number one priority” and defeating any proposed increase would be more easily achieved in the Senate. Success, TI estimated, would cost approximately $50,000. First, in order to secure the cooperation of “coalition allies,” contributions in the range of $500 would have to be made to three or four associations to cover mailing and other “grassroots programs” costs in connection with efforts by retailers, wholesalers, and cigarette company sales representatives to “demonstrate economic arguments against regressive excise taxation.” Next, $10,000 to $20,000 would be needed to “mobilize a grassroots phonebank targeted at retailers” throughout Iowa but especially in areas bordering Missouri, Nebraska, and South Dakota, where cigarette taxes were lower; this effort was facilitated by previous phone banks, which had created a list of a thousand “pre-qualified” convenience stores, liquor stores, and bars. Finally, “$25,000 plus” was required to finance a campaign organized by the Public Affairs Division—through TILMC and directed by its Iowa labor counsel (Junkins)—in connection with which unions and ICAN traveled around Iowa “advocating progressive tax alternatives.” The purpose here was “not only to elevate the debate” on appropriate taxation methods, “but also to heighten the chance that selected union groups or ICAN reps would testify against regressive excise tax increases.” TI also contemplated a television advertising program in support of ICAN’s efforts. Not included in the cost estimate was activation by R.J. Reynolds and Philip Morris of their “smokers grassroots programs” targeting legislative committee members and leadership as well as swing votes in both houses.  

In addition to the anti-tax campaign:

[T]wo pro-active efforts are being considered and prepared for introduction. First, one city, Iowa City, has taken action to restrict cigarette vending machines. Therefore, staff and lobbyists are making inquiries of representatives of the vending machine industry in order to determine their readiness for state-wide legislation. Second, the lobbying team is working on a hiring discrimination amendment for insertion in another bill late in the

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The reference to Iowa City and vending machines pointed back to an initiative undertaken by several medical students at the University of Iowa, members of Doctors Ought to Care, who in April 1989 and March 1990 drove 15- and 17-year-olds to a large number of stores, including grocery stores, convenience stores, gasoline stations, and vending machines, in Iowa City and Coralville, at 83 to 96 percent which they were able to buy cigarettes unlawfully. Having concluded, based on this experiment, that the state law prohibiting the sale of cigarettes was not being enforced in the area, they appeared at city council meetings in the two towns to request the adoption of ordinances making such purchases more difficult. The proposed ordinances would, inter alia, have banned cigarette vending machines in restaurants, supermarkets, convenience and drug stores, and service stations. Even such a tentative and amateurish effort in a small backwater did not escape the manically attentive and panoptically vigilant Tobacco Institute. Two days after an article on the event had appeared in the Des Moines Register, Midwest regional vice president Daniel Nelson, informing Iowa lobbyist Wasker that “we will have to deal with” this situation, asked him to find out both what action the city councils intended to take and whether—since state permits were required for cigarette vending machines but the law did not deal with locations—state law preempted local ordinances on the machines’ location. One dimension of the tobacco industry’s profits-über-alles approach was captured by Nelson’s closing comment: “I am encouraged that this anti-smoking group from the University is not asking for a total vending machine ban. However, let’s not give these people anything for free.”

To be sure, Iowa City, contrary to TI’s assertion, did not “take action” to restrict cigarette vending machines. In connection with a letter/petition signed by

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21Marge Gasnick, “Study Shows Cigarette Law Has Little Effect,” ICP-C, May 21, 1990 (1B:4-5). In April 1989, 49 or 83 percent of 59 stores sold to the two 17 year-olds and two 15 year-olds. In March 1990, 54 or 96 percent of 56 businesses sold to the four 17 year-olds, while 20 or 83 percent of 24 stores sold to the two 15 year-olds.


23Dan Nelson to Chuck Wasker, Re: Iowa City Vending Machine Ordinance (June 28, 1990), Bates No. TI21010451/2.
98 medical students and physician assistants submitting a proposed ordinance to restrict minors’ access to tobacco, the council at its meeting on June 26, 1990, scheduled a special discussion in the course of which it determined that the recently enacted preemption provision in the clean indoor air act did not apply to ordinances dealing with tobacco sales, and raised, but did not answer, the question as to whether it was permissible for a local ordinance to ban all vending machine sales. Further discussion took place at meetings in October and November 1990, but the council adopted no ordinance. In January 1991, an ordinance was prepared for the city council requiring locks on cigarette vending machines, but soon after vendors had complained about the expense, the council deferred consideration (and then ceased pursuing the matter after the legislature had passed amendments to the cigarettes sales act that included the local preemption provision urged by the tobacco industry).

Regardless of the events in Iowa City, TI was well aware that some local activity had already taken place—not requiring local bans, but confining vending machines to bars—and more was in the offing, necessitating tobacco industry sponsorship of a “state-wide preemptive vending machine restriction bill” that would serve the dual purpose of stopping the proliferation of a “hodge-podge of local ordinances” and “prevent[ing] the State Legislature from enacting a total vending machine ban” (which would render local preemption superfluous, but not to the cigarette companies’ satisfaction), which TI knew with certainty would be on some (probably House) legislator’s agenda. The industry’s strategy was to introduce preemption as a “compromise” amendment to such a ban bill. The

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chief impediment to legislative success was the fragmented nature of the cigarette vending industry in Iowa, its lobbyist’s marginal position at the statehouse, and the tobacco industry’s failure to develop contacts with it. This problem was exacerbated by the “strange relationship” that TI had for some time had with wholesalers, of which many vending machine companies, as in other states, were a part. Here, too, the lobbying campaign would cost considerably more than Charles Wasker’s retainer. Cultivating “coalition allies,” including tobacco wholesalers, vending machine companies, the Iowa Restaurant Association, and other segments of the hospitality industry was a priority: “These groups will be enlisted to lobby the legislature in order to protect vending machines as a service to their customers. Contributions of between $500-$1,000 may be needed to stimulate cooperation on behalf of the aforementioned allies.” TI anticipated that it would cost an additional $10,000-$20,000 to “mobilize hotels, bars and restaurants to call the legislature...to support compromise vending machine legislation” during crucial floor action.30

The other “pro-active” initiative that the tobacco companies contemplated pushing was (as in other states) a hiring discrimination/policy measure to prevent employers from refusing to hire smokers that would “not guarantee smoking in the workplace but does protect smoking away from work.” The reason that tobacco industry lobbyists and TI Government Affairs executives had concluded that “a free-standing bill would create unnecessary problems” was their having “no desire to create a vehicle on which germane anti-tobacco legislation can be added.” Instead, turning the strategic tables on their adversaries, the lobbyists were “confident” that during Senate floor action they would be able to tack on a “ready to go amendment” (drafted and “acceptable to all parties concerned” by December 1, 1990) to some labor or employment conditions bill. The stealthy nature of this Senate floor amendment approach, to be followed by a “contested conference committee with the House,” meant that successful “grassroots mobilization” would be rendered superfluous because the stratagem would be “successful only if the lobbyists are able to complete the task in-house.” Nevertheless, Junkins, TILMC’s Iowa consultant, would still need to “educate” labor groups on the measure’s desirability in order to make them willing to lobby the legislators to whom they had access. Although this quasi-covert approach did

31See below ch. 29.
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not require a supportive media campaign, if news organizations decided to cover the debate, TI could not formulate the appropriate response until the wording of the amendment had been agreed on; but even in the fall of 1990 it was clear that if the amendment addressed not only smoking but other issues as well, the companies might be well advised to “soft-pedal industry involvement.” In the meantime, TI would need to recycle its (false) refutation of the often repeated claim that smokers have higher absenteeism and less productivity” in order to “prepare amendment sponsors and supporters for floor debate.”

Once the predicted Iowa elections returns were in, TI understood that in 1991 the legislature would probably debate measures imposing further restrictions on public smoking and repealing the just enacted local preemption provision, while bills would be introduced to include tobacco use on death certificates and ban billboard advertising.

H.F. 104: Regulating Children’s Access to Tobacco (and Repealing Local Preemption)

At the outset of the 1991 session—the Democrats’ majority had been reduced somewhat, but they still controlled the Senate 28-22 and the House 55-45—Governor Branstad revealed the extent of his commitment to the anti-
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tobacco movement by announcing that he would ask the legislature to raise cigarette taxes again and to increase the age at which tobacco could lawfully be bought to 21, but at the same time refusing health advocates’ call to ban all cigarette vending machines. Immediately R. J. Reynolds Tobacco Company—whose Allied Forces and Morning Team on January 10, the day after Branstad’s announcement, recommended making Iowa the number one priority for the week—began calling smokers in Des Moines to encourage them to protest the governor’s proposal. Two weeks later Senate Ways and Means Committee chairman William Dieleman proposed a study bill increasing the cigarette tax by ten cents to 41 cents. But that same day a closed meeting of the Senate Democratic majority agreed on budget cuts after leadership concluded that the tax increase lacked majority support, though Majority Leader Hutchins acknowledged that such support might be forthcoming later, when the legislature would be forced to deal with a large projected deficit. The next day House Democrats approved a similar approach, while TI’s Midwest regional office met in Des Moines with its lobbyist, Wasker, Philip Morris and R. J. Reynolds Tobacco, and the smokeless tobacco staff and lobbyist, all agreeing that phone banking operations should begin immediately and focus on first-term legislators and retail contacts in the state’s border areas. Nevertheless, TI insisted that phone

35 Although in the account presented here Branstad emerges as a relatively consistent proponent of anti-smoking positions, Rod Halvorson, one of the most militant anti-smokers during his two decades (1979-98) in the House and Senate, which encompassed Branstad’s 16-year gubernatorial career, argued, without contesting the bona fides of the governor’s policies, that his failure to persuade more Republicans to vote for anti-tobacco bills was a function of his failure to prioritize the struggle against smoking sufficiently to trade off other chits to achieve this objective. Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).

36 21 Eyed as Legal Age for Purchase of Tobacco,” DMR, Jan. 10, 1991 (14A) (NewsBank).


39 Senate Study Bill 39 (n.d. [Jan. 23, 1991], by Fraise, Murphy, Dieleman, Hedge, and Taylor).


banks were needed because lobbyists felt that this arrangement might break down in the House.\textsuperscript{42} Branstad tried to overcome legislative opposition to his proposed tax increase to 41 cents per pack—the nation’s highest—by stressing at his weekly news conference in late January that its purpose was not just to raise revenue, but to discourage smoking and finance smoking-related health costs.\textsuperscript{43}

In the midst of these preliminary tax skirmishes, on January 24, six House Republicans and three Democrats, led by Johnie Hammond, filed H.F. 104, which: (1) prohibited persons under the age of 18 from buying or trying to buy any tobacco, tobacco products, or cigarettes; (2) eliminated the provision permitting someone under 18 to buy tobacco products with a note from a parent; (3) empowered the Iowa Department of Public Health, county and city health departments, and cities to enforce the prohibition of selling to minors directly in district court and to file proceedings before permit-issuing authorities (i.e., city councils and county boards of supervisors) against violating permit-holders; (4) struck the higher penalty (serious misdemeanor) for second and further violations of the prohibition on selling to minors/buying by minors, thus establishing a uniform simple misdemeanor for all violations; (5) substituted for the existing mandatory one-year revocation of a retailer’s cigarette sales permit for selling even once to someone under 18 a series of graduated intermediate penalties (which would now also apply to making any vending machine sales or giving away any free samples) beginning with a $300 fine for a first violation (subject to a 14-day permit suspension for failure to pay the penalty), and progressing to a 30-day suspension for a second violation within two years, a 60-day suspension for a third violation within five years, and a one-year revocation for a fourth violation within five years; (6) prohibited all vending machine sales of tobacco (and not merely of cigarettes); (7) prohibited all giving away of free samples; (8) repealed the local preemption provision added to the clean indoor air law in 1990; and (9) coordinated the cigarette sales law and juvenile justice laws so as to assimilate enforcement against juveniles to that against adults for committing a simple misdemeanor, except that a $100 fine or performance of community service could be imposed on the former.\textsuperscript{44}

The reforms embodied in H.F. 104 must be understood in the context of both the existing law in Iowa and the national anti-smoking movement’s proposals and

\textsuperscript{42} Alice O’Connor to Pat Donoho, Action-Trac Iowa SSB39 (Jan. 24, 1991), Bates No. T128711610.


\textsuperscript{44} H.F. 104 (Jan. 24, 1991, by Hammond). The same day David Osterberg filed H.F. 103, which would have prohibited vending machine sales.
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the opposition conceived, mobilized, and organized by the cigarette oligopoly. Beginning in 1921, when the legislature repealed the statewide absolute prohibition of the sale of cigarettes, which had been in effect since 1896, the State of Iowa underscored the merely quasi- and contingently lawful status of cigarettes, the sale of which without a permit remained illegal, by introducing and maintaining (what later might be called) a zero-tolerance policy toward permit-holders’ sales to minors. Thus the 1921 statute provided that the city councils and county boards of supervisors—on which was and continues to be conferred the discretion to issue sales permits—“shall revoke the permit of any person who has violated any of the provisions of this act, and no such permit can again be issued for a period of two years thereafter.”46

To be sure, included among the code amendments passed by the legislature in 1939 (which, inter alia, prohibited vending machine sales of cigarettes) was a revision converting mandatory into discretionary revocation, although the legislature did retain the criminal penalty of a $25 to $100 fine and up to 30 days’ imprisonment for a first violation and a $100 to $500 fine or one to six months’ imprisonment for a second and further violations. This permissive regime lasted from 1939 to 1959, which coincided approximately with the zenith of smoking laissez-faire in the legislature. But when the legislature lowered the legal age for buying tobacco from 21 to 18 in 1959, it also restored the original mandatory revocation provision by converting “may” back to “shall.”50 And the successor provision in the Iowa Code in force in 1991, when the legislature was considering amendments, still provided that the local permit-issuing governmental bodies “shall revoke the retailer’s permits” if the retailer sold to minors and conferred (“may revoke”) discretion on these local governments to revoke “the retailer’s permits” if the retailer violated any other provisions of the “division.” Local bodies were prohibited from issuing a new permit to any such retailer for one year following revocation “unless good cause to the contrary” was shown.51

The reason that H.F. 104 did away with the zero-tolerance regime for sales

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45 See above ch. 15.
46 1921 Iowa Laws ch. 203, § 3, at 213, 214.
47 See above chs. 19 and 22.
48 Iowa Code § 1556.17(2) at 294 (1939). The provision was contained in S.F. 128, § 18(2). H.F. 207 included the same provision.
49 Iowa Code § 1554 at 294 (1939).
51 Iowa Code § 98.22(2) and (3) (1991).
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to minors was, as Representative Mark Haverland, chair of the House Human Resources Committee, to which it was referred, later explained, rooted in the legislative sense that such a “draconian” law was difficult to enforce: on the social-psychological level the police, especially in a small town where everyone knew everyone else, would simply not want to be the agent delivering a “crushing blow” to a store; on the contrary, a policeman would think it was “nuts” to shut down the sales of cigarettes because a clerk inadvertently sold a pack to a 17-year-old who looked 35. And even Haverland, an ardent anti-smoker who was sympathetic to merchants, was able to understand why Hy-Vee would take strong exception to losing its permit because of a clerk’s error. In contrast, he and other legislators regarded H.F. 104’s incremental punishment as a more rational approach.\(^52\) (Ironically, the gradualist law enacted in 1991 was no more enforced than the draconian law that it replaced.)\(^53\) Nor was Haverland alone in his view: former House Speaker Don Avenson agreed that the one-strike-and-you’re-out law was too strict to be enforceable.\(^54\)

The Tobacco Institute and the U.S. Department of Health and Human Services: Dueling Model Bills Regulating Children’s Access to Tobacco

Anti-tobacco initiatives in Congress and federal agencies and cigarette firms’ efforts to thwart them between 1989 and 1991 also shaped legislation in Iowa. The focus on youth access was sharpened by the startling finding, published in the surgeon general’s 1989 report on smoking on the 25th anniversary of the catalytic first report in 1964, that in contrast to “virtually all other tobacco-related public policy measures,” which had been strengthened during the intervening years, fewer restrictions on child tobacco use were in place than in many decades despite what had been learned about the health risks, addictive properties, and early age of initiation. In particular, during the intervening years more states had repealed than reenacted tobacco access laws and more states had lowered the age for tobacco sales to children than raised it; in addition, beginning in the 1970s, law enforcement declined as high schools began setting aside areas for students to smoke even in some states in which it was unlawful for persons of their age to buy or possess tobacco.\(^55\) The need for legal intervention was undergirded by the

\(^{52}\) Telephone interview with Mark Haverland, Polk, IA (June 6, 2008).

\(^{53}\) See below.

\(^{54}\) Telephone interview with Don Avenson, Oelwein (June 13, 2008).

surgeon general report’s further finding that most adolescents were able to buy their own cigarettes directly from retailers or (to a lesser extent) vending machines.\textsuperscript{56} Indeed, the volume of such transactions was so significant—guesstimated at $500 million annually in cigarettes and another $130 million in smokeless tobacco—that “[r]etailers have a strong financial incentive to sell cigarettes to children.” Nevertheless, in the face of hundreds of millions of such sales violations annually, “[l]aw enforcement officials throughout the country ha[d] difficulty recalling instances in which a vendor was charged with violating the law.” Ultimately, then, if adolescent access to cigarettes was to be reduced, “attitudinal barriers” on the part of those officials, who believed that no-sales-to-minors laws could, should, or need not be enforced, had to be overcome\textsuperscript{57} along with the prevailing “‘climate of social acceptability’” that enabled merchants to sell cigarettes to children without internalized shame or public embarrassment.\textsuperscript{58}

At the end of 1989, TI complained that “[u]nder the guise of ‘protecting’ children,” several legislators had introduced bills “that would severely curtail the right to advertise cigarettes.” In particular, the cigarette oligopoly’s PR/lobbying organization singled out Representative Synar’s Children’s Health Protection Act of 1989, Representative Thomas Luken’s “Protect Our Children from Cigarettes Act of 1989, and Senator Frank Lautenberg’s Adolescent Tobacco Prevention Act. The bills, which, inter alia, banned giving away free samples and vending machine sales, were anathema to the manufacturers because portraying such restrictions “as necessary for child protection has become a powerful public relations tool for anti-smoking activists.” The cigarette companies were especially worried about vending machine sales’ vulnerability to “‘child protection’ concerns,” which had intensified with the increasing volume of state and local legislative restrictions since the mid-1980s, in part inspired by a model bill advocated by the American Medical Association.\textsuperscript{59} The fact that none of the three congressional measures came anywhere close to floor debate\textsuperscript{60} did not

\begin{itemize}
  \item[\textsuperscript{58}] Timothy Kirn, “Laws Ban Minors’ Tobacco Purchases, But Enforcement Is Another Matter,” \textit{JAMA} 257(24):3323-24 (June 26, 1987), Bates No. TIMN206811/2 (quoting Dr. Alan Blum, founder of Doctors Ought to Care).
  \item[\textsuperscript{59}] [Tobacco Institute], \textit{Agenda for Discussion: Youth Smoking Issues} (Dec. 1989), Bates No. TIMN0171342/3.
  \item[\textsuperscript{60}] The House took no action on H.R. 1493 (Mar. 20, 1989, by Synar) and the Senate
relieve TI of the need to ask several questions (for internal consumption only) that underscored the industry’s increasingly desperate rhetorical-propaganda and strategic situation:

Can we credibly and effectively demonstrate that our member companies truthfully and fairly market their products to adult smokers, not youth? ...

How do we increase the level of awareness among local, state and federal officials and opinion leaders that smoking is only one of a constellation of adult practices that young people often emulate...?

Anti-smoking groups seek to involve tobacco in the war on drugs calling it a “gateway drug,” and “our number one drug/abuse problem.” What can we do to foster public acceptance of the “monumental difference between Camels and crack,” as the New York Post put it? ...

The anti-smoking agenda calls for protecting so-called vulnerable population groups by reducing their exposure and access to cigarette advertising and sales by banning signs, billboards, and sampling around schools, hospitals, churches and vending machines in many locations. Tobacco is often combined with alcohol in paternalistic efforts designed to “safeguard” minorities as well as young people. Should we develop a more “accommodating” strategy? If so, where do we draw the line?

The manufacturers’ immediate response was to have their lawyers at Covington & Burling draft a Model State Tobacco Product Youth Protection Act of 1990. Already on January 9, 1990, Kurt Malmgren, TI vice president in charge of the State Activities Division, sent a copy of the draft “minors bill” to the division’s policy committee, four of whose nine members represented Philip Morris and R. J. Reynolds. Pointing out that “‘youth’s easy access to tobacco products’ was one of the main arguments that the anti-tobacco forces used in promoting its agenda” in 1989, Malmgren observed that the model bill was written so that it could be used defensively, proactively, or preemptively. In view of the volume of relevant pending proposals in state and local lawmaking bodies, he scheduled a telephonic conference for January 15 in order to reach consensus on the draft’s wording and uses.

Accompanying the model law was a memorandum by David Remes, the Covington & Burling lawyer who presumably drafted it and/or under whose


62Kurt Malmgren, Policy Issue: Draft Model “Minors” Bill (Jan. 9, 1990), Bates No. TIMN0150205.
supervision others did. The law firm’s website advertises Remes as “[r]epresenting such clients as...leading cigarette manufacturers in Commerce Clause, Supremacy Clause, First Amendment, and Takings Clause challenges to state and local laws,” but he was manifestly available for carrying more mundane and intellectually less challenging non-constitutional water for one of the storied law firm’s presumably more lucrative clients (though, interestingly, Covington & Burling did not care to include any of its many tobacco clients on its website list of “representative clients”).

In his memorandum, labeled “Attorney’s Work Product Privileged and Confidential,” Remes emphasized with regard to licensing that the “important point” was to “avoid placing licensing authority in any state agency with an anti-smoking agenda.” To explaining to his client how facilitating the politically maximum feasible proliferation of the world’s most lethal consumer commodity was consistent with Covington & Burling’s self-professed “commitment to public service” he apparently did not bother to devote billable hours. But Remes did call special attention to the draft bill’s specification that tobacco sales would be protected from “local interference” by means of a “preemptive effect....” Finally, he pointed out a provision applying to both types of sales and free samples that prohibited soliciting minors to buy or receive and thus “would prevent private citizens from enlisting minors to generate violations of the law”—thus presumably protecting the industry from nongovernmental sting operations.

Unsurprisingly, to the extent that the draft bill embodied an “accommodating strategy,” the industry accommodated itself. The dual purposes of the draft bill, which dealt with retail licensing, retail sales, vending machine sales, and sampling, were strengthening already existing state laws designed to prevent underage minors from getting access to tobacco products and making the latter’s sale and distribution “subject to a single uniform system of state licensing and

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63 Http://www.cov.com/dremes (visited June 4, 2008). The website also boasts that Remes was Harvard Law School Professor Laurence Tribe’s “first full-time post-graduate assistant.”


65 David Remes, Memorandum: Re: Model “Minors” Bill at 2 (Jan. 9, 1990), Bates No. TIFL0043862/3.


67 David Remes, Memorandum: Re: Model “Minors” Bill at 4 (Jan. 9, 1990), Bates No. TIFL0043862/5

68 David Remes, Memorandum: Re: Model “Minors” Bill at 3 (Jan. 9, 1990), Bates No. TIFL0043862/4.
regulation." This latter purpose dovetailed snugly with the manufacturers’ overarching political-legal strategy of preemption of local control over any aspect of the industry and conferral of exclusive power on state legislatures or, better yet, Congress, whose centralized statutory productions were vastly easier to steer through lobbying. The draft bill prohibited political subdivisions of the state from “impos[ing] any requirement or prohibition” concerning tobacco products’ sale or distribution at retail, through vending machines, or by sampling, beyond those imposed by the state law.

The crucial affirmative defense that Covington & Burling devised for its clients’ retailers was embedded in the proof of age provision, which required a seller to “require proof of age from a prospective purchaser if an ordinary person would conclude on the basis of appearance that the prospective purchaser may be under” the legal age, and then conferred a defense to any action by the municipality for selling to an underage person on any seller who reasonably relied on the buyer’s appearance (or proof of age). If, despite this enormous loophole, the license holder—who was co-liable for employees’ unlawful sales—nevertheless violated the law, he was subject to a fine (the amount of which the lawyers did not specify). Lavishly bathing their clients’ retailers in due process, Remes & Co.’s draft bill delegated power to suspend and cancel licenses exclusively to an (aforementioned non-anti-tobacco) state agency, which, after finding that a licensee had committed (an unspecified number of) “repeated violations,” was required to “notify the licensee that any further violation of this Act may result in administrative action to suspend” the license for retailing (or a vending machine or sampling) for a maximum of 30 days. Even if the agency found that requisite further violation, it was still required, before initiating such action, to “permit the licensee an opportunity to show why suspension of the license is unwarranted and would be unjust.” Cancellation of a license that had been suspended was possible only if within two years of the most recent violation the licensee committed yet another violation. Finally, the state agency was authorized to deny/refuse to renew a license to/of a person only if a court had determined him to have committed “repeated knowing violations,” and even then the applicant was entitled to the same “opportunity to show why.” And all of the

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69 Model State Tobacco Product Youth Protection Act of 1990 § 1 at 1 (Jan. 9, 1990), Bates No. TIFL0043850.

70 Model State Tobacco Product Youth Protection Act of 1990 § 11 at 12 (Jan. 9, 1990), Bates No. TIFL0043850/61.

71 Model State Tobacco Product Youth Protection Act of 1990 §§ 4(c) and (d) at 4 (Jan. 9, 1990), Bates No. TIFL0043850/3.
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The aforementioned adverse administrative actions were subject to judicial review.\footnote{Model State Tobacco Product Youth Protection Act of 1990 § 10(b) at 10-12 (Jan. 9, 1990), Bates No. TIFL0043850/59-61.}

The vending machine sales provisions also accommodated the industry. Vending machine sales and free samples were both prolific sources of minors’ access to tobacco,\footnote{Ronald Davis and Leonard Jason, “The Distribution of Free Cigarette Samples to Minors,” \textit{American Journal of Preventive Medicine} 4(1):21-26 (1988); Institute of Medicine, \textit{Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths} 212, 216-17 (Barbara Lynch and Richard Bonnie eds 1994).} the former bulking so large that that same year the U.S. Department of Health and Human Services in its Model Sale of Tobacco Products to Minors Control Law recommended their outright prohibition.\footnote{U.S. Department of Health and Human Services, \textit{Model Sale of Tobacco Products to Minors Control Law}, sect. 5(b) 4 (May 24, 1990). The Institute of Medicine soon recommended banning both vending machine sales and free sampling. Institute of Medicine, \textit{Growing Up Tobacco Free: Preventing Nicotine Addiction in Children and Youths} 214, 217 (Barbara Lynch and Richard Bonnie eds 1994).} In contrast, TI’s model law was, all too predictably, extraordinarily accommodating. It permitted such machines in places: that were not open to the public such as factories, businesses, and offices; to which underage persons were not permitted access; in which alcoholic beverages were sold; and in which the machine was “within the immediate vicinity and plain view of the owner” or his employees.\footnote{Model State Tobacco Product Youth Protection Act of 1990 §§ 6(d) and (e) at 7 (Jan. 9, 1990), Bates No. TIFL0043850/6-9.}

The same affirmative defense available to retail licensees applied to vending machine licensees,\footnote{Kurt Malmgren, Model “Minors” Bill--Draft #2 (Jan. 17, 1990), Bates No. 507609519; Minutes of the State Activities Policy Committee (Jan. 31, 1990), Bates No. 947143342; Kurt Malmgren, Model Sampling/Vending/Retail Sales Bill (Feb. 16, 1990), Bates No.TIMN342042; Minutes of the State Activities Policy Committee (Feb. 22, 1990), Bates No. 947143253; Kurt Malmgren, Model Bills for Sampling/Vending/Retail} as it did to sampling, to which the draft bill attached only one condition (apart from banning giving samples to minors)—a prohibition within 500 feet of any youth activities center.\footnote{Model State Tobacco Product Youth Protection Act of 1990 § 7-8 at 7-10 (Jan. 9, 1990), Bates No. TIFL0043850/6-9.}

Among the cigarette companies that financed TI the draft was rather contentious, becoming the subject of discussion at several Policy Committee meetings in January, February, and March.\footnote{Kurt Malmgren, Model “Minors” Bill--Draft #2 (Jan. 17, 1990), Bates No. 507609519; Minutes of the State Activities Policy Committee (Jan. 31, 1990), Bates No. 947143342; Kurt Malmgren, Model Sampling/Vending/Retail Sales Bill (Feb. 16, 1990), Bates No.TIMN342042; Minutes of the State Activities Policy Committee (Feb. 22, 1990), Bates No. 947143253; Kurt Malmgren, Model Bills for Sampling/Vending/Retail} At the end of January, Gene
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Ainsworth, an R.J. Reynolds vice president on the committee, sent out a memorandum explaining that the bill had been divided into four separate draft bills on age restrictions, retail licensing, vending machines, and sampling, which the tobacco industry might introduce in state legislatures, but “only as a fall-back position to counteract” anti-tobacco bills seeking to “restrict tobacco product sales and distribution under the guise of preventing youth access to tobacco products” that “may appear to pass.” This legislative tactic, revealing that the bills were purely reactive and that the industry would prefer to leave the state nosales-to-minors laws in their existing ineffective status, gave the lie to the oligopolists’ public pretense that they did not want minors to smoke. Ainsworth emphasized that since the tobacco industry would strongly oppose retail licensing of tobacco products, the model licensing bill would be used “only in extreme circumstances.”

By the end of February, all licensing provisions were in fact removed from all the bills—together with, conveniently enough, those for license suspension or revocation. In mid-March Malmgren was able to send the texts of the three model bills to the TI’s regional vice presidents and directors, underscoring that they were not “‘blueprint’” bills that “could be ‘dropped in’ for introduction verbatim; rather, the language would need to be revised and inserted into specific state statutes and legislation that would best serve the industry’s goals.” And even when regional officials—who, in accordance with “our established procedures,” were kept on a short leash—used them appropriately as “guidelines in the development of proactive, preemptive, or alternative language,” Malmgren reminded his subordinates not to introduce them before having secured both the concurrence of the cigarette companies’ government affairs staff and lobbyists regarding language and strategy and Covington & Burling’s approval of the

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79 Gene Ainsworth, Model Bills on Age Restrictions, Retail Licensing, Vending Machines and Sampling (Jan. 30, 1990), Bates No. 507745121. This version of the drafts does not appear to be among the online industry documents, but the summary of each bill appended by Ainsworth did not indicate any changes; in particular each featured preemption. Summary of Draft Model Bills (Jan. 30, 1990), Bates No. 513253533.

80 Model State Tobacco Product Retail Sales Act of 1990 (Draft 3/2/90), Bates No. TIOK0029667; Model State Tobacco Product Sampling Act of 1990 (Draft 3/2/90), Bates No. TI24610581; Model State Tobacco Product Vending Machine Act of 1990 (Draft 3/2/90), Bates No. TI24610585. See also the handwritten annotation on removal of licensing in Kurt Malmgren, Model Sampling/Vending/Retail Sales Bill (Feb. 16, 1990), Bates No. TIMN342042.
By the time TI forwarded the approved model bill to its field lieutenants, many of the state legislative 1990 sessions were nearing their end. Moreover, almost as soon as Remes et al. had completed their drafting chores, the smoking battle front had shifted, necessitating—since the oligopoly’s strategy in this area was largely reactive—new reactions. In May 1990, the Office of Evaluation and Inspections of the Office of Inspector General of the U.S. Department of Health and Human Services issued a report, *Youth Access to Cigarettes*, in response to a request by Secretary Dr. Louis Sullivan, as part of his smoking initiative, to survey state laws on cigarette sales to minors, particularly with respect to the extent to which they were enforced. The report found that: youth access laws were not being enforced; children were easily able to buy cigarettes; the very few areas of active enforcement were on the local level; and the chief elements of such local enforcement included licensing, fines, stings, and restrictions on vending machines.

More specifically, the inspector general learned from two-thirds of state health department officials that there was virtually no enforcement of their state laws, while another fifth characterized it as minimal. The vast majority of local public health officials, students, adults, and cigarette sellers interviewed did not know of anyone who had ever been caught under youth access laws. In the ten active local enforcement initiatives identified by the report, license suspension/revocation—for which only four state laws provided—was considered to be much more effective in motivating merchants to comply than a fine inasmuch as lost sales could amount to hundreds of dollars a day in addition to the loss of customers. Most of the local efforts favored civil penalties because they were more expeditious than the criminal justice system in

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81Kurt Malmgren to Regional Vice Presidents/Directors, Memorandum: Model Bills for Sampling/vending/Retail Sales (Mar. 16, 1990), Bates No. TIMN342020.
82The “Iowa Draft Minors Tobacco Product Sales Act” found among the Tobacco Institute online documents is unfortunately undated and it is unclear what use was made of it. Bates No. TI24642949.
large part as a result of using “non-traditional” enforcers such as health and licensing inspectors; in addition, the lack of solid public opinion that selling cigarettes to minors qualified as criminal activity and merited jail time militated in favor of using a civil money penalty regime. More than any other enforcement technique, active local enforcers singled out stings—conducted not only in response to complaints, but on a regular basis—as vital. In the words of one enforcer: “Stings are the only way to enforce. Complaints are not enough; no one complains. There is no alternative to stings.” The urgent need for such a method had been made abundantly clear by dozens of stings organized by researchers and press reporters in addition to police and health departments demonstrating that minors had been able to buy cigarettes in defiance of statutory prohibitions about 80 percent of the time. With vending machines accounting for an estimated 16 percent of illegal cigarette sales to minors and younger children even more likely to buy from machines, enforcement experts also agreed that any set of effective youth access regulations had to deal with vending machines. The divergence between the handful of active enforcement communities and the states was palpable: whereas a majority of the former banned the machines totally, required locking devices, or limited their placement to locations where children were not allowed to be, more than half of states had no policy, while another third merely required posting a warning sign. Because experience with locking devices had revealed that clerks and other employees often activated them without checking buyers’ ages, a large proportion of state health department officials stated that “total bans are the only way to prevent teens from using vending machines.” Finally, active enforcers of local ordinances urged that state laws not preempt stronger local regulations. At a U.S. Senate Finance Committee hearing on Health Impact, Costs of Smoking on May 24, 1990, HHS Secretary Sullivan—as the president of the TI,

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87 Office of Inspector General, Department of Health and Human Services, Youth Access to Cigarettes 7 (OEI-02-90-02310, May 1990), Bates No. 2046627300/11.
88 Office of Inspector General, Department of Health and Human Services, Youth Access to Cigarettes 8 (OEI-02-90-02310, May 1990), Bates No. 2046627300/12.
90 Office of Inspector General, Department of Health and Human Services, Youth Access to Cigarettes 8-9 (OEI-02-90-02310, May 1990), Bates No. 2046627300/12-13 (quote at 9).
92 Health Impact, Costs of Smoking: Hearing Before the Committee on Finance United
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which was clearly worried about the possible ramifications of the proceedings, at which its representatives also testified, explained in a memorandum to his executive committee—“took center stage,” using the hearing as a forum for releasing the Inspector General’s report together with a Model Sale of Tobacco Products to Minors Control Act. Sullivan set the tone by declaring that it was “a moral and medical outrage that our society permits such ready access to our children by tobacco companies” and that “[w]e must put an end to the time when any child with a handful of change can commence slow-motion suicide.”


93One of its witnesses was Robert Tollison, an economist, who headed a “stable” of “very well rewarded,” largely supply-side, economists whom Philip Morris enlisted “to gain intellectual respectability for the industry....” Richard Kluger, Ashes to Ashes 626-27 (1996). Based entirely on an unproven and empirically and theoretically untenable assumption—“Suppose that consumers make well informed choices”—he asserted that since there was “no compulsion forcing the worker into the risky occupation or into motorcycling...or into smoking,” that “individual confronts the risks embodied in these activities and makes his choices accordingly.” Tollison pretended to dismantle the reality of the social costs of smoking by claiming that to call actuarially early deaths from engaging in such activities as parachuting, swimming, and boating “premature” was “completely arbitrary” because such a view assumed that “the risk of dying while engaging in one’s favorite activity was not freely chosen.” As to who bore the loss of premature death, Tollison claimed that it could only be the “individual who chooses to engage in these activities” because “to argue otherwise would imply that the worker is the property of society.” Consequently, imputing social “costs” of premature death attributed to such activities as smoking is meaningless. Individuals choose their lifestyles in such a way as to promote their general well-being as they construe it. Some will find smoking preferable, and some not. Some will die young, and some will die old. The consequences of early death are thus internalized into individual choices in the economy, and it is meaningless to count the value of these consequences as a social cost of consumption activity.” Health Impact, Costs of Smoking: Hearing Before the Committee on Finance United States Senate 126, 127 (101st Cong., 2d Sess., S. Hrg. 101-1117, May 24, 1999) (prepared statement of Robert Tollison). For the manuscript, see Bates No. 508086978/82.

94Samuel Chilcote, Jr. to Members of the Executive Committee (untitled memorandum) (May 24, 1990), Bates No. TI12250525.

95Health Impact, Costs of Smoking: Hearing Before the Committee on Finance United States Senate 6-10, 103-106 (101st Cong., 2d Sess., S. Hrg. 101-1117, May 24, 1999) (Sullivan’s testimony and prepared statement).

96Philip Hilts, “Health Secretary Proposes State Licensing to Keep Cigarettes Away from Children,” NYT, May 25, 1990 (A16:1).


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The model statute that Sullivan unveiled was accompanied by an explanatory introduction, which emphasized that merchants’ disregard of no-sales-to-minors laws was a function of virtually nonexistent enforcement as well as of sheer ignorance. The circumscribed scope of HHS’s anti-tobacco commitment was suggested by its goal of greatly reducing teenage smoking “without disruption...to sales to adults.” Expressed slightly differently, a merchant’s license would be held hostage to compliance with the minors law: “a store may sell tobacco to adults only if it avoids making sales to minors”; those unwilling or unable to comply either “may elect to stop carrying tobacco products” or would lose their license. But Sullivan was also willing to be accommodating to the final link in the great chain of corporate profit from the manufacture and sale of lethal commodities: in order to “minimize burdens on retail outlets,” they would have to require “identification only for those...not clearly above the age of 21,” would receive a merely “nominal penalty for the first violation,” and would be excused one “accidental violation” every two years if “effective controls” were in place.98

The preamble to the Model Act—and in this respect it differed radically from contemporaneous Iowa law—cited facts and figures about smoking-caused deaths (390,000 annually), addictiveness, numbers of minors beginning to smoke daily (3,000), the proportion of smokers initiating smoking before 18 (50 percent) and before 21 (90 percent), and the amount spent annually by minors on cigarettes and other tobacco products ($ 1 billion).99 Within a mandatory license system,100 which was to be overseen by an Office of Tobacco Control,101 the law imposed a two-tier license fee of only $50 on stores whose tobacco sales were below $5,000 annually and $300 on those whose sales exceeded that threshold.102 These sums were designed to generate enough revenue to finance enforcement while
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sparing small businesses onerous costs in relation to sales. Sullivan’s model law set the minimum age of the buyer to whom a license holder could legally sell at 19. The point in setting the age at 19 was to postpone the time at which teenagers lawfully “experiment with ‘adult’ behaviors” until an age when “mature judgment has a better chance of overcoming the intense pressure” to do so; the higher age would mean that most high school students would “not have ready access to tobacco.” The 19-year-old limit was implemented in a manner that, again, accommodated merchants by prohibiting license holders and their employees from selling tobacco products to anyone they knew was under 19 or to anyone (other than a person who appeared “without reasonable doubt” to be over 19) who did not present a driver’s license or similar photographic identification. HHS decided to ban vending machines altogether because the lack of human intervention by a clerk defeated the whole plan of preventing over-the-counter sales. The department left it to states’ discretion to determine whether to permit vending machines either in places that minors were not permitted to enter by law or controlled by electronic disabling devices requiring human intervention, but HHS stressed that Utah had found such devices to be ineffectual. The Model Act conferred yet another accommodation on retailers by exempting them from liability for more than one violation per day.


104 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 5(a) (May 24, 1990), Bates No. TIMN0171222/32.


106 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 5(a)(1) and (2) (May 24, 1990), Bates No. TIMN0171222/32-3.

107 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 5(b) (May 24, 1990), Bates No. TIMN0171222/33.


109 U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 5(c) (May 24, 1990), Bates No. TIMN0171222/33. Sullivan offered neither explanation nor justification for this bizarre exemption for multiple daily
Although HHS viewed civil money penalties assessed by administrative law judges as a more effective means of enforcement, the Model Act also authorized criminal fines to provide greater flexibility. License holders and employees selling to minors—the latter’s violations were attributed to the former\textsuperscript{110}—or maintaining a vending machine were subject to a fine or civil money penalty of $100 for a first violation, $250 for a second violation within two years, $500 for a third violation within two years, and $1,000 for any additional violation within two years. A license holder was not subject to liability for an employee’s sales to minors if he affirmatively demonstrated that he had in place an “effective system...to prevent” sales to minors, but he could avail himself of this exception only once within a two-year period.\textsuperscript{111} The Model Act subjected employees to penalties “both to emphasize their responsibility under the law and to protect employers against the carelessness of employees.” Similarly solicitous of employers was the mitigation of progressive penalties for repeated violations “over wide periods of time,” which were deemed to be “truly isolated lapses...”\textsuperscript{112} On top of these progressive monetary penalties/fines, the Model Act also imposed, on a per outlet basis, a set of progressive suspensions/revocations/non-renewals: of seven days for a second violation within two years, of one to six months for a third violation within two years, and of nine to 18 months for any further violation within two years. HHS imparted some severity to the penalty for chain stores by suspending, revoking, and not renewing for nine to 18 months all the licenses for outlets under common ownership or control if fines or civil money penalties had been assessed for three or more violations at three or more outlets within two years.\textsuperscript{113} The provision was calculated to create a “strong incentive for retail chains to ensure compliance by all of their outlets.”\textsuperscript{114}

\textsuperscript{110}\textsuperscript{110} U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 8(c) (May 24, 1990), Bates No. TIMN0171222/36.

\textsuperscript{111}\textsuperscript{111} U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 7 (May 24, 1990), Bates No. TIMN0171222/34-5.

\textsuperscript{112}\textsuperscript{112} U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act: A Model Law Recommended for Adoption by States or Localities to Prevent the Sale of Tobacco Products to Minors” at 5 (May 24, 1990), Bates No. TIMN0171222/7.

\textsuperscript{113}\textsuperscript{113} U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 8 (May 24, 1990), Bates No. TIMN0171222/35-6

\textsuperscript{114}\textsuperscript{114} U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act: A Model Law Recommended for Adoption by States or Localities to Prevent the Sale of Tobacco Products to Minors” at 6 (May 24, 1990), Bates No.
Although the Model Act did not address several important issues, including
penalties for minors’ possession of tobacco, the preemption of local ordinances
stronger than statewide laws, and the use of sting operations, their omission was
not a signal to the states to ignore them. HHS left out a penalty for possession
because it would be “far harder to enforce” and less relevant to “preventing
widespread availability” than banning sales. The department did not explain
why it did not deem the other two matters “necessary or appropriate” within the
framework of the Model Act, but it did stress that stings were “the most
powerful technique for both investigation and enforcement...in most
circumstances,” and that “[t]he worst possible outcome would be to enact a state
statute which failed to establish an effective and workable enforcement system
while preempting local governments from filling this void.”

The Bush administration’s initiative may have secured “enthusiastic support”
from the chair of the National Governors Association, Iowa Governor Terry
Branstad—who a few days later published an op-ed in USA Today supporting
Sullivan’s ban (or restrictions) on vending machines and loss of license—but
it did not satisfy anti-smoking groups or some congressional Democrats, who
criticized it as a “half-hearted gesture....” In particular, Senator Edward

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119Philip Hilts, “Health Secretary Proposes State Licensing to Keep Cigarettes Away from Children,” NYT, May 25, 1990 (A16:1-3 at 1).


Kennedy lambasted as “‘irresponsible’” the “‘White House tactic of paying lip service to important national goals while rejecting Federal action.... We cannot simply dump our major national problems on the states. This Articles of Confederation approach did not work 200 years ago, and it will not work today.’”122 The triangular dispute involving Sullivan, Kennedy, and the Tobacco Institute as representative public figures can be traced back at least to November 1989, when Kennedy filed the Tobacco Product Education and Health Protection Act which, inter alia, would have created a Center for Tobacco Products within the Centers for Disease Control to make grants to entities to develop anti-tobacco information campaigns and to a limited number of states to enforce a ban on tobacco sales to minors.123 In February 1990 Sullivan testified at a Senate Labor and Human Resources Committee hearing on Kennedy’s bill that cigarette companies were “‘trading death for corporate profits,’”124 but he nevertheless opposed creating “another Federal bureaucracy to carry out enforcement in the states and cities.”125 In contrast, the cigarette companies, through their Tobacco Institute, acknowledged that it opposed Kennedy’s bill on the substantive grounds that it would give $50 million to anti-tobacco groups to produce anti-tobacco advertising, “even though Americans are already universally aware of the claimed risks of smoking” and the “funds could be used for ‘attack’ ads vilifying the tobacco companies themselves,” and $25 million to states to enforce no-sales-to-minors laws, even though “[t]he states already are acting aggressively in these areas and further Federal support is unwarranted.”126

The advent of Sullivan’s Model Act prompted TI to deal with this much more authoritative competitor. Malmgren immediately informed the policy committee that “[n]o doubt we will see the model in the states,” adding that State Activities would have to take “another look at our model bills in the ‘youth area.’”127

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125Philip Hilts, “Health Secretary Proposes State Licensing to Keep Cigarettes Away from Children,” NYT, May 25, 1990 (A16:1-3 at 3).
126The Tobacco Institute Statement Kennedy Bill (S. 1883) Mark Up (May 6, 1990), Bates No. 87705847. With some changes the committee reported Kennedy’s bill out as S. 2795 (May 16, 1990).
127Memorandum from Kurt Malmgren to John Nelson et al. (May 31, 1990), Bates No. 0171220.
June 11, Remes, at the State Activities Division’s request, had prepared a draft Model State Tobacco Product Sales Act “for internal discussion purposes only.” It modified his earlier draft minors law “for possible use as a counter to” Sullivan’s model law. In an accompanying memorandum Remes pointed out that his work product, unlike HHS’s model law, would not require a license to sell tobacco, establish a special state bureaucracy, or ban vending machines, but would prohibit youths (defined as under 18 rather than 19) from possessing tobacco products.\textsuperscript{128} What he did not mention was the most important change effected by his new draft—namely, that the owner was no longer co-liable for employees’ sales or distribution of samples to minors; indeed, the owner was not even liable for vending machine sales to minors if he made the employee responsible for supervising the machine.\textsuperscript{129}

Revealingly, TI’s “Side-by-Side Analysis” of its model law and Sullivan’s failed even to make it clear that unlike the latter, the oligopoly’s scheme did not make owners jointly liable with employees. However, embarrassment over this gift to allied retailers—whose expendable low-wage employees were not envisioned as fit for membership in the industry’s grand coalition—could not have been the reason for this distortion: after all, TI did not shy away from counterposing its mandatory but feckless sign (“By law, tobacco products may be sold only to persons 18 and older”) to the clear warning Sullivan required (“It is a violation of the law for cigarettes or other tobacco products to be sold to any person under the age of 19”).\textsuperscript{130} The cigarette manufacturers’ lack of bona fides was impressively on display in their failure to mention (let alone to include in their proposal) Sullivan’s requirement that the sign both be in red letters at least one-half inch high on a white background and “include a depiction of a pack of cigarettes at least two inches high defaced by a red diagonal diameter of a surrounding red circle.”\textsuperscript{131}

On the same day Malmgren distributed to the policy committee the outline of

\textsuperscript{128}David Remes, Memorandum (June 11, 1990), Bates No. 507635833.

\textsuperscript{129}Model State Tobacco Product Sales Act § 5(b)(1)(B) (Draft June 11, 1990), Bates No. T110481640/3-4. The new draft also introduced a fine/civil money penalty for a third violation, but the amount was not specified. Id. § 5(b)(1)(A).

\textsuperscript{130}[Tobacco Institute], Side-by-Side Analysis Tobacco Retail Sales/Youth Model Legislation” (June 13, 1990), Bates No. 507635827; [Tobacco Institute], Side-by-Side Analysis Tobacco Retail Sales/Youth Model Legislation” (June 15, 1990), Bates No. 507635824.

\textsuperscript{131}U.S. Department of Health and Human Services, “Model Sale of Tobacco Products to Minors Control Act” § 3(d)(1) and (2) (May 24, 1990), Bates No. TIMN0171222/32.
a project to “defeat the passage of HHS Model Vending Law”\textsuperscript{132} and scheduled a conference call for two days later to discuss it. Like Malmgren, the committee members were already aware that on June 11 HHS staff had met with “representatives of major state public interest organizations and Governors’ offices in Washington in an effort to solicit support for HHS Secretary Sullivan’s “model Sale of Tobacco Products to Minors Control Act.”\textsuperscript{133} Malmgren’s laundry list of problems to be dealt with by the cigarette oligopoly’s vast resources for its never-ending war against yet another ‘anti’ included:

1. Sullivan has become Bush’s Koop. No high marks for anything before this anti-tobacco campaign and therefore, likely to keep looking for the next Dakota.\textsuperscript{134} Timing of June 11 meeting suggests serious effort to build toward 1991 sessions.
2. Proposal is so multi-faceted, it could withstand lots of amendments and still be a problem.
3. Campaign must attack proposal, without being pro-tobacco to the general audience.
4. Proposal may appeal to traditional tobacco-rights supporters, because of focus on youth.
5. Must move quickly in order to have funds for 1991 effort incorporated into association and corporation budgets.\textsuperscript{135}

Optimistically, Malmgren perceived the following “opportunities” in the form of potential allies spawned by the impact of Sullivan’s approach:

1. Proposal represents more federal interference in state policy, despite growing antagonisms in state capitals.
2. Bill opens up many revenue impact and direct cost questions at a time when states are least able to afford new expenditures or revenue losses.

\textsuperscript{132}[Tobacco Institute], Project Outline (June 11, 1990), Bates No. 507635844.
\textsuperscript{133}Memorandum from Kurt Malmgren to John Nelson et al. (June 12, 1990), Bates No. 507635829.
\textsuperscript{134}In 1989-90 R. J. Reynolds began developing Dakota, a cigarette brand to compete with Marlboro among 18-to-20-year-old white “virile females” with no post-high school education. After an anonymous source had leaked the plans to the Women vs. Smoking Network, its director appeared on television with Sullivan, who condemned Reynolds’ planned targeting of women. The cigarettes were withdrawn in 1992, but it was unclear whether market or anti-smoking forces were the prime cause of their demise. Department of Health and Human Services, U.S. Public Health Service, \textit{Reducing Tobacco Use: A Report of the Surgeon General} 402-403 (2000); Department of Health and Human Services, U.S. Public Health Service, Office of the Attorney General, \textit{Women and Smoking: A Report of the Surgeon General} 512-13, 603 (2001).
\textsuperscript{135}[Tobacco Institute], Project Outline (June 11, 1990), Bates No. 507635844.
3. There is no solid evidence that sale of cigarettes/tobacco products to minors is a problem of any proportion, let alone to justify this approach.
4. Impact is spread well among non-tobacco interests, providing good opportunity for coalition.\(^{136}\)

The possible participants in this ad hoc coalition included a number of trade organizations whose members sold tobacco such as the National Restaurant Association, National Association of Convenience Stores, National Association of Truck Stop Operators, National Association of Tobacco Distributors, National Federation of Independent Business, Independent Gas Stations, National Automatic Merchandising Association, and fraternal organizations. In addition, the cigarette companies’ coalition would have to engage various government associations such as the National Governors Association and the National Conference of State Legislatures, in whose magazines the tobacco firms would place ads. And finally, the puppeteers would “[b]uild editorial opposition,” and recycle such editorials (and op-eds) into packets for further redistribution.\(^{137}\)

The version of the revised model bill to which the State Activities Division Policy Committee agreed on June 13 and which would be used in response to state and local legislation based on Sullivan’s model measure\(^{138}\) was virtually the same as Remes’s draft except that it deleted from the definition of “sampling” the distribution of coupons or other vouchers.\(^{139}\)

The Struggle over and Enactment of H.F. 232: Kindosortof Regulating Tobacco’s Access to Children and Preempting Local Control of Cigarette Sales

After having thwarted the legislative attack on vending machine sales for Iowa in 1990, the industry was prepared for yet another assault. In the mode of sham indignation in which cigarette company representatives had been taught to luxuriate, Kurt Malmgren, the Tobacco Institute’s senior vice president for State Activities, had instructed the Iowa Association of Candy and Tobacco

\(^{136}\)Tobacco Institute, Project Outline (June 11, 1990), Bates No. 507635844.

\(^{137}\)Tobacco Institute, Project Outline (June 11, 1990), Bates No. 507635844/5/6.

\(^{138}\)Kurt Malmgren to John Nelson et al., Re: Model Vending/Youth Bill (June 15, 1990), Bates No. 507635818.

\(^{139}\)Model State Tobacco Product Sales Act § 2 (Draft June 11, 1990), Bates No. TI10481640/1; Model State Tobacco Product Sales Act § 2 (June 15, 1990), Bates No. TI17320441/2.
Distributors at their annual convention back in September 1990 that laws “prohibiting access by adult smokers to vending machines are flagrant encroachments on the public’s freedom to choose and the right of merchants to sell or vend a lawful product.” The easy access to cigarettes that vending machines created for children was of no concern to profit-maximizing tobacco companies, which fiercely resisted any detraction from the social acceptability generated by the ubiquity of availability to which vending machines contributed.

By January 1991, R. J. Reynolds’ public issues department had “completed a mailing to more than 57,000 smokers across the state to generate opposition to the tax.” On January 30, the Reynolds Tobacco Company public issues department began a telephone bank, targeting 45 friendly or neutral senators, House leadership, and newly elected House members; it also asked smokers to call their legislators and send them a letter protesting the proposed tax increase. The campaign was designed to last three weeks until debate on H.F. 104 began. A few days later, Tom Ogburn, Jr., RJR’s vice president of public issues, informed Tom Griscom, the executive vice president of external relations, that the phone bank was already targeting 45 senators and 25 representatives.

On February 11, the House Human Resources Committee, after Jane Teaford, the subcommittee chair, had explained H.F. 104 and the full committee’s anti-smoking chairman, Democrat Mark Haverland—a Navy pilot during the

144 Tom L. Ogburn, Jr. to Tom Griscom, Subject: Public Issues Weekly Update February 4 - February 8, 1991 (Feb. 8, 1991), Bates No. 507655694.
146 Despite being the subcommittee chair and bill floor manager, Teaford had merely been “given the bill,” had not been involved in drafting it, and did not know anything about its origins. Telephone interview with Jane Teaford, Cedar Falls (June 1, 2008).
147 Telephone interview with Mark Haverland, Polk, IA (June 6, 2008). Four years earlier Haverland had sponsored a bill that, in addition to banning vending machine sales, would have raised the legal age for selling cigarettes back to 21 (albeit subject to a counterproductive “not knowingly” condition). H.F. 235 (Feb. 11, 1987, by Haverland),
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Vietnam war as well as an ordained Methodist minister with masters degrees in divinity and public administration from Harvard University148—had showed the committee petitions from more than 700 Iowans favoring the bill, passed the bill by a vote of 19 to 0. Before adopting it, the committee, on a voice vote, failed to pass a so-called sense amendment offered by Republican Lee Plasier, which would have limited to one per year the number of times that the Iowa Department of Public Health, the county or city health department, or the city was authorized to inspect retail permit holders for the purpose of enforcing the no-sales-to-minors provisions.149 The rationale for Plasier’s opposition to (what were presumably) sting operations was his fear of “harassment of businesses.” Had he been a tad more imaginative (or merely waited about a decade until cities began enforcing the law), he probably would not have expressed an inability to “‘understand how inspections are going to be effective in apprehending a person either selling or buying cigarettes....’”150

In the event, Plasier received a prompt and revealing response from the bill’s chief sponsor, Hammond, who, in arguing that the opposite of harassment was the probable outcome, suggested that she had no expectation that her bill’s radical provisions would be enforced: “Overworked police forces...aren’t very likely to devote substantial time to a smoking crackdown.”151 The chief purpose of the Adolescent Smoking Prevention Act was to deter tobacco use by the 35,000 Iowans under 18 who smoked, half of whom were 11 to 15 years old. Haverland conceded that floor passage would not be easy, despite the decision not to include a provision—recommended by Branstad—increasing the age for legal purchase from 18 to 21, in part because it would have been too difficult to gain sufficient support for such restrictions with so many soldiers aged 18 to 21 fighting (and presumably smoking) in the Persian Gulf or to enforce it if enacted.152

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149*House* Committee Minutes for Human Resources (Feb. 11, 1991) (copy furnished by SHSI DM). The committee passed on a voice vote a subcommittee amendment having to do with vending machines and gifts the exact contents of which the minutes did not make clear. Oddly, the *Index* to the House *Journal* failed to list this meeting (HBH-37).


principal object in raising the legal was, as Teaford pointed out, increasing the number of people who never started smoking and therefore were, as many surveys demonstrated, unlikely ever to start if they refrained until the age of 21. The resistance to raising the legal age to 21 represented a deviation from the bill’s objective of making the penalties similar to those for buying alcohol by and selling alcohol to minors. The press, by and large, focused on the bill’s ban on vending machines, which, Teaford acknowledged, would “probably be a stumbling block to passage” because “business interests” would lobby against it.

Two days later the House Human Resources Committee filed H.F. 232 as the successor to H.F. 104, which retained all the major provisions of the earlier bill, with which it was, with several minor exceptions not relevant here, identical. Two weeks later Republican Senator Richard Vande Hoef filed a bill, “based,” as handwritten internal R. J. Reynolds Tobacco Company notes stated, “on Governor’s anti-tobacco proposal” : an increase to 21 in the legal age for purchase of tobacco products, prohibition of sampling, and repeal of local preemption under the clean indoor air act, but, as someone at Wasker’s law firm handwrote on the copy that was faxed from there to the Tobacco Institute, no ban on cigarette vending machine sales. The Senate, however, took no action on the bill, thus leaving H.F. 232 as the exclusive vehicle of legislative change in 1991, though it did not reach the House floor until the end of March.

In the meantime, the tobacco companies were engaged in seemingly cooperative extra-parliamentary activity. TI, as Patrick Donoho, the head of the northern sector later reported to Malmgren, head of State Activities, “developed
a strategy to amend the legislation with sampling and vending restrictions, preemption, and reduced retail penalties. Because of the interest in the issue of sampling by STC [Smokeless Tobacco Council], they drafted language for the amendment. It was circulated to the member companies in Iowa.\textsuperscript{160} STC’s substitute amendment, which applied to H.F. 104 and was drafted on February 12, before that bill was superseded by H.F. 232, deleted the total ban on sampling, replacing it with a ban merely on giving away tobacco products to anyone under 18 or within 500 feet of any school or playground.\textsuperscript{161} (The language of this section and of the other three sections of the STC’s amendment was ultimately enacted word for word.) This amendment was faxed on February 21 by the R. J. Reynolds Government Relations department apparently to Roger Mozingo. Faxed at the same time was Philip Morris’s proposal (which, referred to H.F. 232 and was drafted on February 20), which merely tacked on to the STC amendment wording to conform the existing tax liability to the proposed sampling.\textsuperscript{162} (The subsequent conflict between the STC and the Tobacco Institute over the amendment is taken up below in its chronological order.)

Philip Morris developed its internal position on H.F. 232 in a February 21 memorandum on “Youth Initiatives” that Karen Daragan, the company’s administrator of media programs, drafted for Sheila Banks, the director of media affairs. Her “[b]asic message” for Banks was that as much as Philip Morris and the entire tobacco industry agreed that “cigarettes are not for children,” bans on cigarette vending machines and cigarette sampling were “not the answer.” The oligopolist’s stance was rooted in its opposition to “any laws that unnecessarily limit our ability to provide our cigarette brands to our legitimate customers—adults who have already made the informed decision to smoke.” This position was supposedly all the more necessitated by the firm’s (risible) claim that it was “already imposing severe restrictions upon its own marketing practices....”\textsuperscript{163} (As an example of such restrictions the company’s president and CEO swore that “[w]e will manufacture tobacco branded clothing items in large adult sizes only....”)\textsuperscript{164} Daragan’s efforts were directed toward the production of

\textsuperscript{160}Patrick Donoho to Kurt Malmgren, Subject: STC Conflicts with TI (June 21, 1991), Bates No. 508121169.

\textsuperscript{161}Substitute Language for Iowa House Bill 104, Sec. 7 (faxed Feb. 21, 1991), Bates No. 507628142.

\textsuperscript{162}PM Proposal: Amend House File 232 as follows (faxed Feb. 21, 1991), Bates No. 507628143.

\textsuperscript{163}Karen Daragan to Shannon Toole, Subject: Youth Initiatives (Feb. 21, 1991), Bates No. 2025895042.

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a youth initiative propaganda video for Iowa in which Banks starred. Five days after Daragan had sent her memo, the PR firm Burson-Marsteller faxed the first draft of the video’s opening and closing segments. After claiming that Philip Morris “has been taking steps to keep cigarettes out of the hands of minors right here in Iowa,” the text misleadingly asserted that the company was “currently supporting amendments in the state legislature that would restrict access to vending machines and sampling of cigarette brands,” thus suppressing the fact that it opposed the bill’s much more efficacious bans. The video apparently served as a come-on to interest “talk shows” in Iowa in inviting Banks to disseminate Philip Morris’ propaganda in connection with the legislative debate. A letter, designed to be used in various states with modifications, drafted by Daragan in March asserted, without explanation, that restricting and limiting vending machines and sampling were superior to outright bans as means of preventing minors from smoking, which was an “adult choice,” in which the company did not want minors to engage.

The battle over the proposed cigarette tax increase, which was complicated by the mutual paralysis of forces between the governor and Democratic legislature and the Republicans’ knee-jerk opposition to any tax increases, continued throughout the session: “Democrats don’t like Branstad’s tax increases—like the cigarette tax. He doesn’t like their idea of raising income taxes on those earning more than $100,000. They don’t want him to cut their programs. He can’t cut theirs.” Regardless of legislators’ resistance, the rest of the state’s population broadly supported the governor’s proposed 10-cent increase. Eighty-five percent of smokers may have opposed it, but they accounted for only 21 percent of those surveyed by the Iowa Poll; with 81 percent of nonsmokers favoring it, 68 percent of all Iowans supported Branstad’s position.

2025895044/5.

165 Burson Marsteller, Draft # 1--Intro and wrap-up for Youth Initiative Video (Feb. 26, 1991), Bates No. 2025895028 (part of the quoted text was a handwritten substitute for typed text that was struck out). Also handwritten on the sheet of paper was a note to “Wait to mid next wk debate calendar” apparently because “sponsor doesn’t have enough votes now.”


167 Many years later Branstad still complained of Republicans’ unreflecting intransigence on cigarette taxes. Telephone interview with Terry Branstad, Des Moines (July 2, 2007).


169 Thomas Fogarty, “Iowans Favor Proposed Higher Cigarette Tax, Poll Shows,”
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Three days after the *Register* published the results of the poll, House Democrats decided to deal with the looming state deficit by adopting Branstad’s cigarette tax increase after all (as well as most of his budget proposals)\(^{170}\) because, blocked from raising other taxes, they now needed all the revenue they could secure.\(^{171}\)

At this juncture in early March, Reynolds Tobacco, whose government relations department just a week earlier had boasted that the Democratic leadership had shelved Branstad’s cigarette tax increase after many members had reported having received calls and letters from “our smokers,”\(^{172}\) informed its division managers in Iowa that “Governor Branstad is pushing through the State Legislature a broad range of anti-smoking bills which would have a big, direct impact on your customers.” Knowing that the managers “share our enthusiasm to work for smokers’ rights in Iowa,” the company put it to them that if their sales representatives made their customers aware of “these unfair proposals,” they “could be effective in helping defeat them by spreading the word to other business owners.”\(^{173}\)

In mid-March the House voted 76 to 23 for an amendment deleting the cigarette tax increase, with Democratic leaders able to secure only 17 votes in opposition from their own party ranks.\(^{174}\) The amendment’s chief sponsor, Republican David Millage, justified the deletion by reference to regressivity: this “bad tax...takes money from the family budget and...hits the poorest the hardest.”\(^{175}\) One of the Democrats who voted to jettison the tax increase,

*DMR*, Feb. 25, 1991 (2) (NewsBank). Interestingly, 24 percent of Democrats, but only 14 percent of Republicans smoked; whether this skew was a function of education, occupation, and/or income is not clear. In 1991, 22 percent of male and 20 percent of female adults in Iowa smoked; as elsewhere in the United States, smoking prevalence was highly negatively correlated with educational and income level. Iowa Department of Public Health, *Healthy Iowans 2000: Health Promotion and Disease Prevention Goals and Steps* 20 (n.d. [1993?]).


R. J. Reynolds Tobacco Company to Our Division Managers in Iowa, Governor’s Anti-Smoking Bills Introduced in Iowa (Mar.-8, 1991), Bates No. 507682738.


Representative John Connors (to whom the Tobacco Institute had given a $500 honorarium in 1984), claiming that the problem was everybody’s—and “not just the poor, the working class, the elderly who smoke cigarettes”—welcomed Millage’s amendment as saying that “we are not willing to take the coward’s way out and put the burden on just one segment of our population.”

Having failed to mobilize enough Democrats for the cigarette tax increase, leadership instead secured passage, on an almost perfect 55-43 party-line vote, of an increase in taxes on richer Iowans by reducing the deductibility of federal tax payments. Basing himself on a fourth-hand account of legislators’ overheard talk about the “avalanche of mail they had received,” Ogburn of R. J. Reynolds Tobacco boasted to his boss Griscom that phone banks, direct mail, and smokers’ rights group activity had helped defeat the excise tax increase.

While Senate action on the cigarette tax was pending, the House debated H.F. 232 on March 27. Two days earlier, TI’s Midwest regional director, Alice O’Connor, informed Patrick Donoho, State Activities vice president for the northern sector, that “[t]he TI amendment” permitting sampling, which had been filed several weeks earlier, would be introduced on the floor. She added: “Floor sponsors include legislators who had been supporting the smokeless amendment unaware that cigarette sampling would be prohibited.” Oddly, O’Connor failed to mention that another TI amendment had also been filed even earlier, both deleting the committee bill’s repeal of the local preemption provision that had been grafted onto the clean indoor air act in 1990 and inserting the same provision into the cigarette sales act. Both amendments were filed by ninth
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(and last)-term Democrat Emil Pavich, a nonsmoker and former Millers union member from Council Bluffs. As to why he would have been so industrious on behalf of the cigarette companies, a very knowledgeable contemporary of his in the legislature speculated that he was a very lonely man without family whose support a tobacco lobbyist cultivated simply by spending time talking to him.\footnote{Telephone interview with a former legislator who demanded anonymity (2007).}

The cigarette companies’ aggressive push for more permissive sampling represented a sharp turn in policy that was all the more remarkable in light of the pronounced absolute and relative deemphasis of sampling as an advertising and promotional practice since the mid-1980s: whereas expenditures on sampling rose from $11.8 million and 3.3 percent of total advertising and promotional expenditures in 1970 to $141.2 million and 7.9 percent in 1982, and $148.0 million (while falling to 7.1 percent) in 1984, by 1989, the figures had dropped to $57.8 million and 1.6 percent, before plunging to only $49.3 and 0.9 percent by 1992.\footnote{Federal Trade Commission, Cigarette Report for 2003, tab. 2 and 2A (2005). Since the dollar amounts are unadjusted for inflation, the drop in real terms was even greater.} Inter-company competitive conflicts had caused the manufacturers in 1990 to suspend their lobbying to authorize sampling packs of six or more cigarettes. A January 1990 TI State Activities memo revealed that Hurst Marshall, an ex-TI employee who by then was working for R. J. Reynolds, had recounted to Bill Cannell, a TI vice president, the substance of his conversation with Pat Wilson, Philip Morris’s Midwest regional director for government affairs on the subject. Reynolds, which sampled in full packs of 20, had, according to Marshall, “no real interest in resuming sampling in Iowa.” Moreover, “RJR did not really want to open up all the old wounds with the wholesalers which is where this all started some years ago.” Finally, and most importantly, Marshall observed that “it was considerably more important that the industry spend its chits on the local preemption bill” (that is, the effort to insert such preemption into H.F. 209’s amendments to the clean indoor air act of 1990). Although Marshall did not directly oppose TI’s efforts on sampling, Cannell...
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“could tell that he didn’t want us to be working on a measure that only their biggest competitor wanted.” 185 Two months later an internal Reynolds document disclosed that the “[p]roject” to amend the law to permit sample packages of six or more cigarettes was “not feasible at this time—Unable to reach company consensus on the size of sampling packages.” 186

A few hours before the House took up H.F. 232 on March 27, HHS Secretary Sullivan, whom Branstad had invited to Iowa—and who characterized the package sent by the governor to the legislature as based on HHS’s model law 187—spoke to the tax writing and human services committees to promote the governor’s anti-smoking proposals, including the 10-cent cigarette tax increase. The ranking Republican on the House Ways and Means Committee, ten-term Representative Wayne Bennett, did not explain by what logic Sullivan’s having “‘provided a lot of ammunition for those who say cigarettes aren’t paying their fair share of the costs now’” had failed to “‘change[ ] any minds.’” 188

During the debate—which, according to the Associated Press, “generally broke down between smokers and non-smokers” 189—the House adopted a number of crucial amendments. First, Democrat C. Arthur Ollie, a middle school social studies teacher from Clinton and chair of the House Education Committee, 190 offered an amendment to make it illegal for anyone under 18 to smoke or use tobacco 191—a type of statute that had largely gone out of style in the states where, in recent years, the “general pattern” had been “to continue letting youngsters decide for themselves whether to smoke, regardless of law.” 192

Strictly speaking, Iowa had not had on the books a statute banning smoking cigarettes by those under a certain age since absolute prohibition on cigarette

185 Bill Cannell to George/Dan Nelson, Kurt Malmgren, Re: Iowa proactive sampling bill (Jan. 18, 1990), Bates No. TIMN0341996.
186 RJR, 1990 Proactive Legislative Opportunities by Category (Mar. 19, 1990), Bates No. 507595166/74.
192 States Found Lax on Smoking Curbs,” NYT, Jan. 21, 1964, Bates No. 2025028637.
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sales was repealed in 1921; that law also replaced the ban on smoking by those under 21 that the legislature had enacted in 1909 providing that anyone caught in possession of a cigarette anywhere but on his or her parents’ premises was guilty of a misdemeanor if he or she refused to give information as to the source of the cigarette. The successor to this provision was finally repealed in 1987, when, after Senator Beverly Hannon had filed S.F. 222, which would merely have made it illegal both to furnish smokeless tobacco to anyone under 18 and for those underaged persons to refuse to identify the source of smokeless tobacco they were found in possession of, the House passed an amendment repealing the latter provision and the Senate concurred in it. According to the National Interagency Council on Smoking and Health, in 1969 five states made it illegal for minors to smoke, while seven others provided that minors found smoking were subject to arrest and a fine, but that their sentences could be suspended if they revealed who had sold or given them the cigarette. Ollie’s amendment, which was adopted on a non-recorded vote, does not appear to have been tainted by the fact that he had introduced it “at the urging of a lobbyist for the

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193 See above chs. 13 and 15.
tobacco industry, which he said has taken a position against youth smoking, but which in fact favored deflecting attention from its own overwhelming responsibility by focusing on statutory punishment for children who bought and smoked its commodities.

On another non-record vote the House then adopted an amendment offered by the bill’s floor manager, Jane Teaford, to delete a provision empowering the Public Health Department, county and city health departments, and cities to inspect the premises of retail cigarette permit holders for purposes of enforcing the prohibition on selling to persons under 18. Next, the chamber adopted in a similar manner another amendment offered by Teaford to substitute for the bill’s blanket ban on vending machine sales of tobacco the requirement of a lock-out device, controlled by someone over the age of 18, subject to exemptions for: commercial establishments (not also licensed as food service establishments) with a liquor license or beer permit; private facilities not open to the public; and workplaces not open to the public. This very significant dilution of the bill—lock-out devices did not adequately prevent youth access—undercut Teaford’s own floor statement that “keeping cigarettes out of the hands of teenagers is one of the best strategies to reduce tobacco use among the population as a whole, because most users acquire the habit early in life.”

Many years later Teaford, while certain that she had not filed the amendment out of “conviction,” conjectured that since her two co-sponsors were anti-smoking Republicans, that party’s caucus must have concluded that it would not be able to guarantee enough votes for passage without this weakening amendment, and that she had agreed

197 Tom Carney, “Juvenile Smoking Law Is Apparently Ignored by Iowa’s Law Enforcers,” DMR, Aug. 1, 1991 (4M) (NewsBank). Whether Ollie actually identified the impetus for the amendment and rehearsed the industry’s preposterously mendacious claim is unclear. Unfortunately, 17 years later Ollie had no recollection at all of the amendment; he conjectured that he had filed it as a favor for a tobacco lobbyist, but assumed that he also supported the amendment. In any event, he was certain that he had not offered it based on moral outrage over having seen students smoke in school (though he had in fact seen them). Telephone interview with Arthur Ollie, Clinton (May 30, 2008).


201 Jonathan Roos, “Bill Curbs Cigarette Sales to Kids,” DMR, Mar. 28, 1991 (2) (NewsBank). Unfortunately, the Register offered virtually no account of the debate on this important bill.
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to it in order to secure those votes.202

Democrat Mark Haverland, the House Human Resources Committee chair, describing the lock-out device as a “‘Rube Goldberg’ method of selling cigarettes,” pleaded with his colleagues: “‘If we can’t at the very least ban the sale in vending machines, we ought to be embarrassed with ourselves.’” As far as Haverland was concerned, the amended bill was a “‘compromise with the devil.... We’re giving in to the merchants of death here. These folks are selling a product that is killing us.”203 Years later, Haverland, who pointed out that there had been enough legislators who sympathized with vendors’ complaints that they could not watch the machines all day, characterized the setback as simply an example of how “sometimes the good guys just lose.”204 Although the adoption of Teaford’s amendment had already deleted the prohibition of all cigarette vending machine sales, the House resumed consideration of an amendment to delete the prohibition. On a non-party-line roll-call vote the amendment was defeated 36 to 59 (though the prohibition remained repealed).205 This puzzling procedure may have been designed to undo the lock-out requirement as well as the total ban on vending machine sales, though it would have been a very unorthodox way of achieving that end.206 To be sure, since the amendment’s

202Telephone interview with Jane Teaford, Cedar Falls (July 22, 2007). The amendment, which was not filed from the floor, was cosponsored by Dorothy Carpenter and Lee Plasier. State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth Regular Session 1:881 (Mar. 26) (H-3342). To be sure, they had filed a virtually identical amendment four days earlier, which they withdrew before offering H-3342. State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth Regular Session 1:791 (Mar. 22) (H-3300). One possible source of opposition to Teaford’s bill bringing about its eventual dilution was an amendment filed by Bisignano and four other representatives that would have declared the ban on cigarette vending machine sales a taking and required compensation and that Bisignano did not withdraw until after both of Pavich’s amendments had been passed. State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth Regular Session 1:407, 905 (Feb. 20, Mar. 27) (H-3076).


204Telephone interview with Mark Haverland, Polk, IA (June 6, 2008).


206Former House Speaker Avenson agreed that the amendment should have been declared out of order after Teaford’s had been adopted and that if its purpose was to eliminate the lock-out provision, it should have been an amendment to the amendment and
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Sponsor, David Schrader, had operated a (cigarette) vending machine business before entering the legislature, such an objective seems plausible, even though it could not have been Schrader’s purpose when he originally filed the amendment at a time when the bill contained no lock-out requirement. Schrader argued that a ban would merely injure the vending machine industry without reducing the number of underage smokers, in part because most machines were in out-of-the-way places where minors seldom went.

At this point Pavich offered TI’s amendment that removed the restriction on sampling to cigarette packages of no more than four cigarettes, substituting for it a ban on giving away cigarettes or tobacco products to anyone under 18 or within 500 feet of a playground, school, or other facility when it was being used by people under 18. It narrowly passed 51 to 45 on a non-party-line vote, though three-fifths of Democrats voted for the pro-tobacco position, while fewer than half of Republicans did.

Next, Pavich offered his other amendment, deleting the language in the bill repealing the local preemption provision from the 1990 amendments to the clean indoor air act and inserting the identically same preemption into the cigarette sales act. It passed by a larger margin, 58 to 35; this time, a bare majority of Democrats voted (25 to 22) for preemption, whereas almost three-fourths of Democrats voted limits on cigarette vending machine sales,” CRG, Mar. 28, 1991 (8B:1-2).

Republicans voted (33 to 13) for it. The campaign contributions that RJR PAC made to House incumbents in 1991-92 aligned predominantly, but not perfectly with their votes on preemption: Bisignano, Roger Halvorson, Krebsbach, Hahn, Lundby, Iverson, Knapp, Kremer, and Wise voted Aye, but Bartz, Brand, Dvorsky, and McKinney voted Nay. (Dvorsky, a strong anti-smoking advocate, remembered years later that he had never understood why he had been a recipient or what the company might have thought it was getting in return, but his election committee treasurer had immediately cashed the check.)

The replicated language read:

Enforcement of this chapter shall be implemented in an equitable manner throughout the state. For the purpose of equitable and uniform implementation, application, and enforcement of state and local laws and regulations, the provisions of this chapter shall supersede any local law or regulation which is inconsistent with or conflicts with the provisions of this chapter.

In mechanically grafting this language from the anti-smoking law onto the cigarette sales and licensing law the cigarette companies’ battalion of high-priced lawyers overlooked one overriding historical-structural-contextual fact: whereas local preemption made some sense in the former statute, which was statewide in its scope, it was nonsensical and incoherent as applied to the latter’s permit provisions, which, from the statute’s origins in 1921, conferred complete discretion on local governments to grant or deny sales permits. Since these permit provisions lacked a uniform statewide dimension, it would be literally impossible for local governments to identify any uniform content with which local permit decisions could be inconsistent or conflict. Since the statute, as authoritatively interpreted by the Iowa Supreme Court, conferred power on city councils and county boards of supervisors, for example, to deny all permits, to grant some and deny others, or to impose limits on the number of permits outstanding at any one time, local permit policies could vary widely—indeed, that very local control and potential heterogeneity was part and parcel of the

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211 Data provided by the Iowa Ethics and Campaign Disclosure Board (Apr. 4, 2008).
212 Telephone interview with Robert Dvorsky, Coralville or Des Moines (Apr. 6, 2008).
214 See above ch. 21.
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compromise that made abolition of statewide prohibition possible in 1921. Consequently, there was (and is) no uniform statewide model for local governments to take as their framework or reference point. In order to implement their intent coherently, the cigarette oligopolies would have had to lobby to revamp the entire structure of the permit provisions so as to eliminate local control and centralize all permit authority in the state. The consequence of their failure (even to imagine the need) to reconfigure the statute is that until the present day the preemption provision cannot be plausibly interpreted to prohibit the hundreds of local governments in Iowa from adopting what would aggregate to a checkerboard of permit policies (although in fact city councils, in addition to being unaware of having this freedom, have become so beholden to commerce über alles that they would no longer, as some did in the 1920s and 1930s, even consider issuing permits other than automatically).

HHS Secretary Sullivan had told legislators earlier on the day of the

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215 See above ch. 15.

216 See above ch. 20. In what was presumably an extraordinarily rare instance, in 1993 a physician in Grundy Center, animated by cigarette displays in front of cash register counters that enticed youths to steal, requested that the city council insure that all cigarettes be displayed behind counters, but added that ultimately he wanted the council to place a ban on cigarette sales altogether, which he hoped to see extended to the whole county and state. Although the council was purportedly “sympathetic” to the request, its vision of public health was encumbered by its understanding for commerce: “The council...said they could not tell the businesses where to display cigarettes and in fact understood the tobacco companies pay the stores to display them in certain areas.” Helen Brandl, “Grundy Center Hears Plea About Sale of Cigarettes,” Times Republican (Marshalltown), May 6, 1993, Bates No. TI28922767. See also “Doctor Voices Objection to Council on Cigarette Sales,” Spokesman (Grundy Center), May 6, 1993, Bates No. TI28922767.

217 Nevertheless, the Iowa League of Cities, which “kn[e]w of no city that has attempted to deny a permit on local discretionary items pursuant to local ordinance,” takes the position that “cities do not have the authority to deny issuing a permit on any grounds unrelated to the specific statutory authority.... Our inclination is that cities are pre-empted from defining other grounds for denying permits.” Email from Tom Bredeweg, Executive Director, Iowa League of Cities, to Marc Linder (Feb. 1, 2006). Similarly, the Iowa Alcoholic Beverages Division, which administers and oversees enforcement of the state’s tobacco laws, when asked whether cities and councils could establish their own criteria for issuing or revoking permits, took the position that “State law currently pre-empts local ordinances,” citing the irrelevant Iowa Supreme Court decision interpreting the anti-smoking statute. In the same vein, it opined that a “city cannot enact an ordinance limiting the number of tobacco permits issued with the city’s jurisdiction. A city could not legally start denying applications for new permits.” Email from Nicole Gehl, Operations Manager, ABD, to Marc Linder (Jan. 19, 2006).
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preemption vote that although he believed that tobacco had “no redeeming value,” he nevertheless acknowledged that “it would be virtually impossible to ban the product because it has been part of the U.S. culture for centuries.” Despite his admission that such a ban would result in a black market, critics of the bill tried to paint its supporters into an absolutist corner, insisting that anti-smokers “should outlaw smoking directly” rather than indirectly by means of bans on sampling or vending machines. Speaking perhaps for some other legislators, but definitely for the cigarette manufacturers, Democrat Dan Jay argued: “‘If you want to ban cigarettes, ban cigarettes and be upfront about it,’” His fellow Democrat, Tony Bisignano, a smoker, was unable to refrain from availing himself of the ignorant taunt: “‘If it’s so bad for public health, why aren’t we striking the death blow?’”

The House then voted 72 to 25 to pass H.F. 232. Among the 18 Democrats and 7 Republicans opposing the bill were both strong advocates of regulation of smoking and tobacco such as Democrats Philip Brammer and Mary Neuhauser and vehement opponents such as Republican Stewart Iverson and Democrat Tony Bisignano as well as Pavich himself; on the other hand, the House’s two most prominent anti-smoking advocates, Democrats Hammond and Osterberg, voted for the deeply flawed bill, while Republican Mary Lundby, a traditional opponent, nevertheless supported it. Such seeming anomalies in voting patterns suggest that the several compromises comprising the core of the bill may have stripped voting decisions of principle and rendered judgments inconsistent and therefore unpredictable as to whether the measure was still worth passing. Teaford’s motion to reconsider having failed by an overwhelming vote of 8 to 68, the bill was transmitted to the Senate. In a post-mortem analysis, Branstad and Sullivan blamed the tobacco industry’s intense lobbying, which had “inundated the legislature,” for watering down the bill. Teaford agreed with

their charges, but none of them explained exactly how that lobbying motivated legislators to vote in conformity with the cigarette industry’s interests.

In the interim attention shifted back to the tax bill. In support of it ICAN issued an “Action Update” dealing with regressive taxes in Iowa generally, but presenting graphs focusing on the impact on various income classes of an increase in tobacco taxes. Although in fact the proportion of income paid in the lowest income quintile (with a ceiling of $12,000) would rise only from 1 percent to 1.33 percent if the cigarette tax were increased from 31 to 41 cents, even at the lower (current) tax, the regressivity was clearly on display: once the 80th to 95th percentile (with a ceiling of $74,700) was reached, the proportion of income paid in tobacco taxes was no longer even captured by the graph. To be sure, ICAN failed to point out that this monotonic drop was in part a function of the perfect negative correlation between income level and smoking prevalence.

ICAN requested and TI provided assistance for production and distribution of two newsletters on the state budget. Lowell Junkins, TILMC’s Iowa labor counsel, underscored “ICAN’s commitment to our cause. They have been at the forefront on this issue and have already begun lobbying key senators.” The amount of money that ICAN was getting from the cigarette companies at this time was considerable and increasing. In 1990, TILMC paid ICAN $11,000. In 1991, TILMC’s funding of ICAN jumped to $46,500, which consisted of $3,000 a month plus an additional $10,500 in April. The rubric under which TI categorized these disbursements provides a profoundly (albeit inadvertently) ironic insight into the self-degradation by which ICAN’s leaders had warped this anti-corporate, populist, consumerist organization: “Grassroots Lobbying by Vendor.” That ICAN’s leaders had agreed to turn this progressive movement

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229 Tobacco Industry Labor Management Committee Receipts and Disbursements December 31, 1991 (Feb. 6, 1992), Bates No. TI14920991/1015, on tobaccodocuments.org.
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behind its members’ backs into a seller of grassroots lobbying services to the likes of Philip Morris and R.J. Reynolds Tobacco sheds fascinating light on how the tobacco industry was able to use its huge profits covertly to buy the kind of legitimacy that the creation of a front group that could have been traced back to the cigarette companies would never have furnished. That without exception the leading Iowa government officials and legislative leaders and rank and file of the period, when informed, almost two decades later, of the discovery of this connection in the industry’s internal documents, were all shocked and astounded suggests how well the secret was kept.\footnote{Under these circumstances the protestation in 2007 by Jay Larson, ICAN’s executive director from 1988 to 1992, that he did not know whether ICAN’s members had known that ICAN was taking money from the tobacco industry seems highly implausible. Telephone interview with Jay Larson, Everett, WA (July 19, 2007). Jan Laue, an IFL vice president who was an ICAN board member from 1993 to 2006, stated that with the exception of a $10,000 check that she helped secure in 1998 from TILMC through the Tobacco Workers Union, she had been unaware of any subsidies that ICAN had been getting from the tobacco industry. Telephone interview with Jan Laue, Des Moines (July 24, 2007).} With total revenue estimated at only about $1.1 million 1991,\footnote{This figure was extrapolated from total telephone canvassing income of $573,670, which was estimated to have been about one-half of total revenue. Email from Amy Logsdon, ICAN, Iowa City, to Marc Linder (Aug. 10, 2007). Earlier the same source had estimated ICAN’s annual gross revenues at about $800,000 in the early 1990s. Email from Amy Logsdon, ICAN, Iowa City, to Marc Linder (July 24, 2007).} the money from the cigarette manufacturers represented a significant proportion of ICAN’s budget—significant enough that when the $3,000 a month subsidy stopped it was definitely noticeable.\footnote{Telephone interview with Amy Logsdon, ICAN, Iowa City (July 20, 2007). Logsdon, ICAN political director, who had been with ICAN since the early 1990s, reported that the staff had been told that the money came from the Bakery, Confectionary, and Tobacco Workers Union; when ICAN finally decided to stop taking this money in the late 1990s, the union representative on the ICAN board was very insulted on the grounds that this funding had been collectively bargained for. \textit{Id}. Assuming that this monthly $3,000 was the same money discussed in the text, the attribution of the source to the union was incorrect: TILMC’s funds came overwhelmingly from the Tobacco Institute—which was, in turn, fully funded by tobacco companies, including R.J. Reynolds, which was nonunion and antunion—the rest coming from individual tobacco companies. Michele Radell to Susan Stuntz, Memorandum: Subject: Tobacco Industry Labor Management Committee [Receipts and Disbursements December 31, 1992] (Jan. 8, 1993), Bates No. TI14920961/62-63.} The funding of ICAN was also significant to TILMC: although the $46,500 amounted to only 2 percent of the almost two million dollars that TILMC dispensed under
the heading “grassroots lobbying,” not only was it the thirteenth largest sum, but ICAN in fact received more than any other grassroots organizing group in the country.\textsuperscript{233} The occasion for the additional $10,500 “grant” that ICAN received in April 1991 was a special nationwide “fair tax campaign”\textsuperscript{234} that Citizens for Tax Justice (a union affiliated research group to which TILMC gave even more funding) had launched of which ICAN was a prominent co-sponsor.\textsuperscript{235} Its executive director, Jay Larson, held one of numerous nationally coordinated press conferences in Des Moines on CTJ’s “A Far Cry from Fair” on April 22.\textsuperscript{236} TILMC President Chilcote, in a report the following day to his executive committee, singled out ICAN’s mention of the recent Iowa Senate vote to raise excise taxes.\textsuperscript{237} The additional funding that ICAN received in April may have been used for the following lobbying and canvassing activities:

In April with the release of A Far Cry from Fair, ICAN mailed excerpts from the report and the Iowa analysis to all Iowa legislators. The entire report was sent to legislative leaders and key committee members. As you will recall, by late April the Iowa legislature was in the final throes of its budgeting process, for this reason ICAN chose to hold off on sending full copies of the report to legislators until their undivided attention could be focused on it and until they were more accessible to their constituents.

Next month we plan to send the report to all Iowa representatives and senators. Upon that mailing we will do the first round of legislative targeting for the 1992 session. The mailing will then be followed up with a phone call to targeted house and senate members requesting a meeting in the legislator’s district. Supporters and allies from each targeted district and ICAN staff will attend these lobby visits.\textsuperscript{238}

At least through 1993, TILMC continued the $3,000 monthly payment to ICAN

\textsuperscript{233}Tobacco Industry Labor Management Committee Receipts and Disbursements December 31, 1991 (Feb. 6, 1992), Bates No. T14920991/1015/1017, on tobacco documents.org. Those receiving more money were largely profit-making entities; the only two advocacy organizations (Citizens for Tax Justice and Coalition on Human Needs) that got more money were not involved in organizing as ICAN was.

\textsuperscript{234}Labor Management Committee Coalitions (no date), Bates No. TNWL0050258/71.

\textsuperscript{235}State Co-sponsors of Citizens for Tax Justice Tax Study (April 22, 1991), Bates No. TIOK0011525.

\textsuperscript{236}Opening Statement for CTJ Study--Des Moines Iowa (Apr. 21, 1991), Bates No. TITX0037520.

\textsuperscript{237}Samuel D. Chilcote, Jr. to Executive Committee (Apr. 23, 1991), Bates No. TIOK0011522.

\textsuperscript{238}Preview of ICAN’s Upcoming Tax Work (Aug. 15, 1991), Bates No. TCAL0067719.
as a vendor of grassroots lobbying.\textsuperscript{239}

The end of the protracted controversy over the shape of taxes and the budget began to emerge by April 12, when Democratic and Republican senators agreed that a five-cent increase in cigarette taxes would be part of the deal.\textsuperscript{240} Junkins had boasted to his TI handler as recently as April 5 that Hutchins, his successor as Senate Majority Leader, was “on our side” and the chances of Branstad’s “gaining ground” on his proposed cigarette tax increase were “slim...given the friends we have made.”\textsuperscript{241} Nevertheless, the dim prospects for government revenues had “forced” senators to reconsider their opposition to raising the cigarette tax. Hutchins simply said that “[w]e need some additional revenue,” while Republican Minority Leader Rife intoned: “It’s not an easy tax to raise, but we pretty much have to.”\textsuperscript{242} The import of the Iowa tax to the cigarette manufacturers can be gauged by the fact that four days later the R. J. Reynolds executives in charge of government affairs conveyed to the company’s CEO, president, and chairman, James Johnston, the tobacco firm’s Midwest regional director’s intelligence that “[d]espite a well coordinated industry effort, it now

\textsuperscript{239} Michele Radell to Susan Stuntz, Memorandum: Subject: Tobacco Industry Labor Management Committee [Receipts and Disbursements December 31, 1992] (Jan. 8, 1993), Bates No. TI14920961/83; Michele Radell to Walter Woodson, Subject: Tobacco Industry Labor Management Committee (Jan. 13, 1994), Bates No. TI16360860/84, on tobbacodocuments.org (annual total of $46,000 including an additional $10,000 in April). In 1997 TILMC paid ICAN $15,000. Larry Schmitt to Bill Adams, Summary of Vendor Payments TI LMC - 1997 (Jan. 16, 1997 [should be 1998]), Bates No. TI14920829/30. As late as 1998 ICAN accepted a $10,000 donation from TILMC. Letter from Jan Laue (IFL executive vice president and ICAN board member) to Frank Hurt (president, Bakery, Confectionary, and Tobacco Workers) (Dec. 22, 1998), in Iowa Labor Collection, Iowa Federation of Labor, AFL-CIO, Records, 1894-2000, Z61, Box 24, Folder: Iowa Citizen Action Network-Correspondence and Survey, 1984, 1987, 1998, SHSI IC. Despite having been an ICAN board member from 1993 to 2006, Laue insisted that this donation, which she solicited at a time when ICAN was especially in need of funds, was the only money she was aware of that ICAN had ever received from the tobacco industry. Telephone interview with Janice Laue, Des Moines (July 24, 2007). TILMC issued the check on Sept. 16, 1998 for the purpose of “support contribution” as requested by Jim Savarese. TILMC, Check Request (Sept. 9, 1998), Bates No. TCAL0097877/8; Iowa Citizen Action Network 1998 (LMC-111) (Sept. 16, 1998), Bates No. TCAL0097875/6.


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appears there will be a 3-5¢ per pack increase” in Iowa.243 The Senate did quickly fall in line with leadership’s decision on the five-cent increase,244 but the House continued to reject the cigarette tax provision while its Democratic members fended off Republicans’ efforts to drop the limit on federal tax deductibility.245 In the end, however, 12-hour “private negotiations among Democratic leaders” produced an agreement to raise the cigarette tax by five cents but to delete the reduction in deductibility, thus letting richer Iowans off the hook.246

H.F. 232 began making its way through the Senate on April 11, when, by a vote of 8 to 2, Hannon’s Human Resources Committee recommended the bill’s passage.247 The meeting minutes contain no information concerning the committee’s discussion of H.F. 232,248 but TI lobbyist Wasker reported that although an attempt to remove “tobacco products” from the tax stamping of the sampling provision had failed, he had “converted committee opponents to become sponsors of a floor amendment” and did not “anticipate any problems on the floor.” Moreover, before the bill went back to the House for concurrence on this amendment, “Wasker sa[id] he will be sure House Leadership doesn’t open the bill up for any other amendments. Wasker feels confident at this point that we are in very good shape. The smokeless problem will be taken care of on the Senate floor.”249 A few days later Democrat Elaine Szymoniak filed an amendment adding court costs to the penalty section of the clean indoor air act and, more importantly, modifying that statute’s preemption provision to permit cities to

243M. B. Oglesby, Jr. (executive vice president government relations) and Roger Mozingo (vice president state government relations) to J. W. Johnston (Apr. 16, 1991), Bates No. 507628075.


248Email from Meaghan McCarthy, Archivist, SHSI DM, to Marc Linder (July 11, 2007).

enact ordinances “for which a violation is a civil or criminal penalty in an amount not exceeding the amount specified in section 364.3, subsection 2, or section 364.22”—$100/30 days for a first offense and $200 for repeat offenses.\footnote{State of Iowa: 1991: Journal of the Senate: 1991: Regular Session Seventy-Fourth General Assembly 1:1233, 2:2382-83 (Apr. 15) (S-3411).}

Wasker faxed this amendment to TI, prophetically adding that it “may not be germane, and he’s working on it.”\footnote{Alice O’Connon to Pat Donoho, Action-Trac: Iowa HF232 (Apr. 16, 1991), Bates No. TI28711385.}

After deferring consideration of the bill on April 19,\footnote{State of Iowa: 1991: Journal of the Senate: 1991: Regular Session Seventy-Fourth General Assembly 1:1364 (Apr. 19).} the Senate finally debated H.F. 232 on May 1, when, as Wasker had predicted, Szymoniak’s weak anti-preemption amendment, challenged by Assistant Minority Leader John Jensen as being not germane, was ruled out of order.\footnote{State of Iowa: 1991: Journal of the Senate: 1991: Regular Session Seventy-Fourth General Assembly 1:1575 (May 1).} In a last-ditch effort to delete local preemption entirely from the cigarette sales act, Jean Lloyd-Jones filed a floor amendment, which failed by the very narrow margin of 23 to 24. Although the vote was not at all strictly along party lines, 15 of 26 voting Democrats but only 8 of 21 Republicans favored the amendment. What did bridge the gap between the parties, however, was the fact that of the 10 leaders and assistant leaders, only one (Republican Maggie Tinsman) supported Lloyd-Jones’s initiative. And, as always, most of the prominent heavy smokers—who included Majority Leader Hutchins and Minority Leader Rife—voted as the tobacco industry wished.\footnote{State of Iowa: 1991: Journal of the Senate: 1991: Regular Session Seventy-Fourth General Assembly 1:1577-78 (May 1).}

As was the case with House members, RJR PAC’s 1991-92 campaign contributions to senators matched up predominantly but not completely with their votes on preemption: whereas Hutchins, Fraise, McLaren, Hagerla, Horn, and Rife, voted against deleting preemption, Democrats Boswell, Gronstal, and Kibbie voted to delete.\footnote{Data provided by the Iowa Ethics and Campaign Disclosure Board (Apr. 4, 2008).} Presumably having concluded from that vote that nothing more could be done to remove other pro-tobacco provisions, Sturgeon moved for a final vote, the near unanimity of which (45 to 2) seemed to express anti-smokers’ exhaustion.\footnote{State of Iowa: 1991: Journal of the Senate: 1991: Regular Session Seventy-Fourth General Assembly 1:1577-78 (May 1).} Lloyd-Jones nevertheless filed a motion to reconsider, which, despite securing 25 votes to its opponents’ 22, failed because
it lacked the 26th vote required by the constitution for passage.257

Several days before the end of the session, the House concurred in the Senate amendment and went on to pass the bill by a vote of 79 to 16. Presumably as a protest against a bill that did more to protect tobacco companies than public health, several of the chamber’s most ardent anti-smoking Democrats, including the entire greater Iowa City delegation (Minnette Doderer, Robert Dvorsky, Mary Neuhauser, and David Osterberg) as well as Rod Halvorson (but not Johnie Hammond), voted Nay. Also among the Nay-sayers were, oddly, two of tobacco’s most faithful legislators: Emil Pavich and David Schrader.258

Once H.F. 232 had been revamped to delete the bans on sampling and vending machines as well as the repeal of preemption, it became “industry endorsed.” Branstad, on the other hand, was, as Reynolds’ Midwest regional director reported, “very unhappy with the measure, but [wa]s expected to sign it.”259 And although the governor’s spokesman termed the bill “‘a half-step in the right direction,’” in part because “[t]obacco still does not pay its own way in terms of health costs,”260 he nevertheless signed it.261 During the four weeks between legislative passage and gubernatorial approval, TI was maintaining a low profile because its Midwest regional staff had “worked out with TI lobbyist, Chuck Wasker, a provision that is in the bill which we do not want publicized at this point because the Governor has not yet signed the bill. The provision makes it illegal to conduct sting operations.”262


259[R. J. Reynolds Tobacco Co.], Governor Branstad’s Anti-Tobacco Proposals (May, 8, 1991), Bates No. 507628838.


2611991 Iowa Laws ch. 240, at 493.

As enacted, H.F. 232 included a number of notable provisions. (1) Persons under 18 were prohibited from buying, smoking, or using cigarettes or tobacco products; violations were punishable by a maximum fine of $100 or the performance of court-ordered community service. Supporters did not specify how strict local enforcement would be, but Ollie, who had offered the amendment, argued that the provision would give school officials “a strong leg to stand on by saying, “You may not do that here”.... They’re not going to call the police into [sic] sweep the bathrooms, but this will give strong moral authority for school district policies....” In the event, enforcement, was, for almost a decade, virtually nonexistent. Legislators were not only aware of this failure, but, according to Haverland, realizing that the 1991 amendments merely represented a “baby step,” had not even expected a high level of enforcement in the short term. This minimalism resulted, on the one hand, from a desire not to close down stores and, on the other, from a very long-term incrementalist perspective of the struggle against smoking. (2) A minor was no longer permitted to buy cigarettes with a parent’s written order. (3) Instead of banning vending machine sales altogether, as the bill’s sponsors had originally intended, the law now authorized such sales subject to the lock-out mechanism, which the legislature then unanimously repealed just six years later. (4) Instead of a

264 1991 Iowa Laws ch. 240, § 10, at 493, 495.
266 See below ch. 31.
267 Telephone interview with Mark Haverland, Polk, IA (June 6, 2008). In 2008 Haverland mentioned that as a legislator he had spoken of a 25-year incrementalist plan to ban smoking outright. Such a plan appears to have left no trace in the written record and if it was ever publicly articulated, it seems unlikely that it attracted any significant number of legislative adherents.
269 1991 Iowa Laws ch. 240, § 6, at 493, 494. Despite the watered down and ineffective version that Iowa enacted, a National Public Radio reporter, when told by the IDPH government relations chief of this provision, absurdly declared: “Good heavens! You sound like sort of an armed tobacco camp to me.” Radio TV Reports, Inc., Teenage Smoking Ban in Iowa at 2, Weekend Edition (July 13, 1991), Bates No. TIMN219964/5 (Susan Stamberg interviewing Michael Coverdale).
270 In 1997, after studies had revealed that underage teenagers were able to buy cigarettes from vending machines 94 percent of the time in 1994 and 79 percent of the time in 1996, both houses unanimously passed a bill (sponsored by Stewart Iverson, the legislature’s most prominent smoker, and supported by Attorney General Tom Miller),
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total de jure ban on sampling—which for years cigarette companies had complained was “already illegal de facto [sic] in Iowa” because the law permitted sampling only in packages of four or fewer cigarettes, which “nobody makes” as the bill’s sponsors had originally intended, the law now authorized sampling, provided that it took place more than 500 feet away from a school or playground and was not directed at minors. And (5), instead of repealing—as the bill’s sponsors had intended—the preemption of local ordinances that the tobacco companies had succeeded in having inserted into the clean indoor air act in 1990, the legislature inserted the identically same preemption language into the cigarette sales law. Finally, the new law, like H.F. 232 itself, did not, as the governor had proposed, raise the age for buying tobacco from 18 to 21. Overall, then, the tobacco companies benefited considerably more from the amendments than the anti-smoking movement. No wonder that National Public Radio reported that the “Tobacco Institute...supports the anti-tobacco law in Iowa.”

The close of the 1990 session marked the end point of legislative progress on the regulation and restriction of public smoking until 2008. The foregoing account of efforts to repeal local preemption in 1991 is illustrative of repeated failures over the next 17 years to achieve this elusive and important goal in a state with an increasingly anachronistically weak statewide law.

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272 1991 Iowa Laws ch. 240, § 7, at 493, 494-95. In the wake of the Master Settlement Agreement, the Iowa legislature in 2000 enacted the Tobacco Use Prevention and Control Partnership law, which repealed the partial sampling law and instead prohibited manufacturers, distributors, wholesalers, and retailers from giving away cigarettes or tobacco products. See below ch. 31.
274 Radio TV Reports, Inc., Teenage Smoking Ban in Iowa at 4, Weekend Edition (July 13, 1991), Bates No. TIMN219964/7. Michael Coverdale, the IDPH government relations chief, stated that the only reason for the support was the tobacco lobby’s success in “defeating another part of the legislation which would have restricted smoking in public places.”
275 See below ch. 35 on the 2008 session. Even the relatively strong statewide public smoking law enacted in 2008, which struck the preemption provision, was still subject to
The Cigarette Oligopolists Celebrate Their Victory and Their Helpers

In his post-session summary, R.J. Reynolds Tobacco’s Midwest regional director, Hurst Marshall, boasted to his boss, Roger Mozingo, of all the anti-tobacco bills that had been defeated, including one to eliminate the deductibility of cigarette advertising for state tax purposes. As for the five-cent cigarette tax increase, Marshall self-congratulatedly declared: “The effort put forth by RJRT, PM and TI lobbying teams was exceptional. The RJRT grassroots program utilizing phone banks and letters had a tremendous impact leading to the defeat of a 10¢ and 5¢ increase in the House. We are disappointed in the final result but not the effort.”

That the tobacco industry lobbying juggernaut was less monolithic than some imagined was in the process of being revealed—at least to its operators. Between the time the House committee had reported the bill without amendments and the House floor vote, TI held a meeting in Des Moines that reviewed STC’s sampling amendment. Although, according to Donoho, representatives of STC and of the largest smokeless tobacco producer, United States Tobacco Company, who were present agreed to TI’s aforementioned broader amendatory strategy, the next day he “was notified that STC was pursuing an independent strategy to have their amendment adopted. They had already secured sponsors and votes for a floor fight. On a conference call, they indicated[d] that they had the necessary votes.” Nevertheless, on the floor, TI’s amendment was adopted, whereas STC’s was not considered. This legislative conflict—one of only several that had arisen with constitutional and statutorily codified limitations of home rule because the legislature did not, in the new statute, expressly confer power on local governments to pass stronger ordinances.

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277 Donoho’s assertion was misleading in the sense that, as noted above, the legislature adopted STC’s proposal on sampling, as far as it went, verbatim; TI’s more far-reaching amendments included STC’s. On Feb. 27, 13 House members filed an amendment to H.F. 232 that would have subjected only “tobacco products” to the aforementioned 500 foot rule, leaving cigarette sampling completely banned. State of Iowa: 1991: Journal of the House: 1991: Regular Session Seventy-Fourth Regular Session 1:486 (Feb. 27), 2:2478 (H-3111, by Brown et al.). Brown, the chief sponsor withdrew the amendment after the adoption of Pavich’s sampling amendment, for which Brown and all the other 12 cosponsors voted (except one who was absent or did not vote). State of Iowa: 1991:
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STC in various states—prompted Donoho, after the close of the session, to inform Malmgren in anticipation of a policy committee meeting at which R. J. Reynolds was expected to raise the issue, that it had become “very difficult to work with STC as a tobacco partner” because it failed to share its objectives and strategies and was reluctant to “operate within the TI structure.”

TI itself singled out Democratic Representatives Dan Jay and Steve Hansen as having “worked very hard on our behalf to preserve preemption. We can anticipate their help again” in 1992 if Governor Branstad pushed to remove preemption; although at the end of 1991 it had no reason to believe that he would, lobbyists would be “very alert to covert attempts which may be made.”

What exactly Jay and Hansen, who were close friends, running buddies, and nonsmokers, did on behalf of preemption is not clear, though Jay’s pro-tobacco voting record was solid, and their then Democratic House colleague Rod Halvorson later distinctly identified them both as prominent advocates of the tobacco industry’s positions.

In 1987, Jay had questioned whether the pending amendments (H. F. 79) to the anti-public smoking law constituted a “legitimate role of government in light of the fact that we have restrictions already on smoking in public places. I also question whether we should dictate to business to allow or not allow smoking in their establishments.” He also asked constituents whether it would be “better to let public pressure influence the business owner to designate these areas.”

In the event, Jay was absent or did not vote on passage of H.F. 79, but Hansen voted for it. Similarly, both had voted for a cigarette tax increase in 1987 when the House reconsidered its first vote, Hansen doing so despite being listed in an alert to businesses as one of nine House members it was especially important to contact immediately. In 1990, Jay voted for H.F. 209, while Hansen voted against it, and on its return from the
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Senate, Hansen voted for it, while Jay, again, either was absent or did not vote. In 1991, both Jay and Hansen voted for preemption (as well as for the pro-cigarette company sampling provision), and Jay even voted against passage of H.F. 232. Sixteen years later, Hansen, who stated that he had always been anti-smoking, had no recollection of having worked for preemption; at best he could explain his vote by reference to requests by the hospitality industry of his Sioux City constituency and/or of individual working-class constituents (though the latter in fact would presumably have been indifferent to preemption as applied to the cigarette sales act as contradistinguished from the clean indoor air act). Jay, who was chairman of the House Judiciary Committee for ten years, might have been influenced by his close relationship to Bill Wimmer, Wasker’s partner and a TI lobbyist, but 16 years later he denied any such influence. Although he was unable to recall having worked on behalf of preemption in 1991, Jay—who observed in 2007 that, being more a “libertarian” than a Democrat in this regard, he still held the same view he had expressed in the aforementioned 1987 newspaper column to the effect that the government should not interfere with restaurant owners’ decisions as to whether to permit smoking—conceded that it was possible that he had spoken to other legislators about voting for preemption.

In preparation for issue awards at TI’s lobbyist meeting the next month, in August, Cathey Yoe, the legislative information director, nominated Wasker and his associate Bill Wimmer for having enacted “reasonable limits on sampling near schools and youth facilities” and “getting local preemption.” At a post-legislative session meeting at the ultra-posh Greenbrier resort in White Sulphur Springs, West Virginia, in September 1991, Kurt Malmgren, the head of TI’s State Activities Division, in the course of a guided tour of “outstanding jobs done,” could hardly help calling attention to the feat pulled off by lobbyists (and former Democratic Farmer-Labor Party operatives Tom and Doug Kelm), who in the “major bellwether anti-tobacco state” of Minnesota “saw to it that the

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286 Telephone interview with Steve Hansen, Sioux City (July 22, 2007).
287 Information provided by two of Jay’s ex-House Democratic colleagues, who did not want to be identified.
288 Telephone interview with Dan Jay, Centerville/Moulton IA (July 23, 2007).
governor vetoed a 7-cent cigarette tax that...was earmarked to subsidize uninsured health care...a mom and apple pie issue if there ever was one." Manifestly unembarrassed by the disease and death that he, his regional employees, and lobbyists were facilitating, Malmgren proceeded to bemoan that during the previous year it had been—and presumably would in the foreseeable future remain—almost impossible to avoid reading about young people and tobacco, tobacco vending, advertising, and sampling. (The most intriguing event involving young people and tobacco sales in 1991 was the settling out of court of an unprecedented suit against a convenience store chain by two teenagers who claimed that as a result of the illegal sales they became addicted to nicotine.) Malmgren went on to congratulate those who had “found ways to turn the issue to our advantage”:

On sampling, Iowa’s Chuck Wasker and his associate Bill Wimmer worked to change existing law which...had the effect of banning sampling. They managed this by working for the enactment of reasonable limits on sampling near schools and centers of youth activities.

At the same time, Chuck was able to get pre-emption of local sampling bans in Iowa. As most of you know, when we can shut down the localities, we’ve won a major victory. Finally, he did this while successfully minimizing a nasty tax increase.

**Tobacco Industry Money in the Iowa Legislature**

International tobacco companies have taken an interest in the relatively small stakes of Iowa politics.

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292 Alix Freedman, “Chain to Enforce Ban on Minors Buying Tobacco,” *WSJ*, June 18, 1991 (B1, B7), Bates No. TITX0035846; Advocacy Institute, Smoking Control Advocacy Resource Center (SCARC), *Action Alert*, “Issue: Kyte Liability Case Settled Out of Court” (July 1, 1991), Bates No. TIMN374680.
293 [Kurt Malmgren], Greenbrier Meeting KLM Notes: Summary of Key Legislation in 1991 and Outstanding Jobs Done at 7-8 (Sept. 15, 1991), Bates No. T125400640/6-7.
In his very influential (but scantily documented) book on the cigarette industry, Richard Kluger advanced the thesis that nationally the corporations’ political power rested centrally on money. He linked this unexceptionable argument, however, to the further claim that Philip Morris, by far the largest producer, had displaced the Tobacco Institute as the motor and brain determining the “shape, pace, and locus of the industry’s lobbying operations”; indeed, Kluger asserted that its lobbying operations were “almost certainly far larger than the Tobacco Institute’s....” Whatever the accuracy of these contentions elsewhere, they do not fit the industry’s efforts to influence the legislative process in Iowa, where Philip Morris did not even employ a lobbyist until Republican Senate Minority Leader Calvin Hultman retired in 1990 and the Tobacco Institute clearly orchestrated lobbying overall. More relevant to Iowa was Kluger’s information that PAC contributions to individual legislators’ campaigns “were only the most visible ploys,” with entertainment, consulting fees, honoraria for talks, and “gifts to charities designated by targeted lawmakers” representing other methods of gaining access. Applicable as well to Iowa was Kluger’s finding that “[t]he key to purchasing influence at the state level was personal friendships.”

Whatever successes tobacco companies achieved during the 1991-92 legislative sessions do not appear to have hinged crucially on large amounts of money given directly, publicly, and lawfully to legislators. For example, data no longer extant revealed that for 1991 no tobacco industry political action committee was even among the top 59 according to amounts given to legislators. Similarly, at an event held on March 12, 1991 for the Truman Fund of the Democratic Party that raised more than $29,000 to be distributed to Democratic candidates, Philip Morris PAC contributed only $500 (earmarked for the Senate, which had always been the easier house for the industry to control). Neither the RJR Tobacco-PAC nor the Tobacco Institute-PAC was listed as donating any money. Interestingly, George Wilson, the lobbyist for the Iowa Association of Tobacco Distributors contributed the same amount (also earmarked for the Senate).

The answer to the seeming conundrum may simply be as Don Avenson, the powerful Democratic House Speaker during the 1980s, put it tersely when asked whether tobacco companies handed out money to secure votes in Iowa: “They

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299Truman Fund Event (March 12, 1991), in Beverly Hannon Papers, Box 7, Folder: Campaign, 1992: Finances: Contributions (folder 1), IWA.
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didn’t. We all smoked.”300 Although this answer was always something of an exaggeration (though much less so in the Senate than in the House) and became more so as smoking prevalence declined even among legislators, it may well go a long way toward explaining why paying off members to vote for the tobacco industry was, for a time at least, about as necessary as carrying coals to Newcastle. In addition, although the connection was not understood at the time, it became an (unsubstantiated) commonplace among Democratic lobbyists and legislators that Iowans for Tax Relief, a right-wing anti-tax organization founded in the 1970s by former legislator David Stanley, was funded in part by the tobacco industry—which always and everywhere opposed excise taxes on cigarettes—in whose interest the organization’s Taxpayers United PAC then disbursed contributions to appropriate legislators.301 Perhaps even more importantly, Iowans for Tax Relief devoted funds to polling and staffing on behalf of Republican candidates that was not reported as linked to particular candidates.302 In fact, although no online tobacco industry documents were identified for earlier years, in 1995 the Tobacco Institute donated $20,000 to Iowans for Tax Relief303 and in 1999 Philip Morris contributed $40,000 under its “public policy program” to Iowans for Tax Relief (Tax Education Foundation).304 Whether much of the organization in fact directly supported pro-tobacco legislators is less clear. In 1991, one year for which data from now destroyed documents are extant, Taxpayers United was the leading giver in Iowa,305 but none of the $6,500 it contributed that year went to prominent tobacco industry supporters.306 The previous year, however, Taxpayers United made nine contributions totaling $3,000 to Jack Rife, the heavy-smoking opponent of smoking regulation,307 and in 1992 he received $9,000 from Taxpayers United to

300Telephone interview with Don Avenson, Oelwein (July 12, 2007).
301Telephone interviews in 2007 and 2008 with two former Democratic legislators who did not wish to be identified. When told about these payments, ex-Democratic House Minority Leader Richard Myers said of the Truman Fund: “We were performing a money laundering function.” Telephone interview with Richard Myers, Iowa City (May 8, 2008).
302Email from a former Democratic legislator who demanded anonymity (2007).
304[Philip Morris], 1999 Public Policy Contributions, Check No. 21073, Bates No. 2065282083/6.
305“Political Contributions,” DMR, Apr. 5, 1992 (8A:5). The only (marginally) larger giver was a PAC formed by two legislators.
307Beverly Hannon Papers, Box 8, Folder: Campaign, 1992, Rife, Jack (Opponent), General, IWA.
help defeat anti-smoking militant Beverly Hannon.308

Other Iowa legislators argue that money per se was not the fulcrum for leveraging votes.309 Rather, “relationships” with lobbyists, carefully cultivated over a long period of time, were the crucial element, though, to be sure, often those relationships were sustained over large numbers of lavish meals paid for lobbyists or their principals. For example, TI’s lobbyists Charles Wasker and William Wimmer were well known as good entertainers.310 The “favors” that lobbyists requested from legislators (who had either no views on the matters in question or no principles) in the form of votes could be treated as a quid pro quo for their friendship in general or, more specifically, for the mentorship that very experienced tobacco lobbyists like Wilson, Wasker, and Wimmer could offer to legislators, most of whom knew less about the intricacies and tricks of the trade of passing bills than they did.311

By 1991-92 public opinion was becoming increasingly critical of the unbridled lobbying system. A long piece in the Des Moines Register during the 1992 session gave expression to this repugnance:

It seems to be working well, at least for the participants. Legislators get fat donations and lobbyists get pretty much what they want.

“There’s been a strong feeling in the last few years that lobbyists have called the shots on what the Legislature will debate or won’t debate,” says George Kinley, D-Des Moines, a 22-year veteran of the General Assembly.

Speaking of the tens of thousands of dollars PACs and lobbyists inject into the campaign accounts of key legislators such as Bill Hutchins, the Senate democratic leader, Kinley says: “You can’t raise that kind of money unless they’re getting something in return.”312

308Email from Beverly Hannon to Marc Linder (July 14, 2007). Although Hannon stated in her papers that Rife received $9,000 from one PAC, she did not identify it.
309Telephone interviews with John Patchett (Feb. 2007).
310Telephone interview with Rod Halvorson, St. Paul (Aug. 7 and 8, 2007). Wasker’s firm’s contract with TI specified that the retainer covered all entertainment expenses. Samuel Chilcote, Jr. to Charles Wasker, Letter Agreement (Dec. 10, 1993), Bates No. TI15811209-10, on tobaccodocuments.org. According to a former legislator and lobbyist who demanded anonymity, $44,000 was “pretty good money” in 1992; since Wasker had many clients, if he spent some of his fee from each client on entertainment “he still did well.” Email to Marc Linder (Aug. 15, 2007).
311Telephone interview with former legislator/lobbyist who demanded anonymity (2007).
A few days later, former state senator Steve Sovern called PAC money—amounting to almost $128,000, $41,000 of which was given to only 10 leaders—‘‘unconscionable legal bribery....’’

The 1992 Session:
The Cigarette Companies’ Lobbying Juggernaut Fails to Pass a Bill Prohibiting Employers from Discriminating Against Smokers

Oppose a “smoker’s rights bill” or “smokers discrimination bill” introduced by the tobacco lobby. In 1990, the Tobacco Institute introduced legislation in several states designed to prevent employers from making hiring, promotion or firing decisions based on whether an applicant or employee smokes. Indications are that similar legislation will be introduced in other states in 1991.¹

Preliminary Skirmishes at the 1992 Session

The 1992 Iowa legislative session, as the Tobacco Institute predicted, did not witness an attempt by Governor Branstad to push for repeal of local preemption.² The only preemption-related bill, filed by Senator Szymoniak and six other Democrats, would, without repealing the 1990 preemption provision, have permitted cities to pass ordinances concerning smoking in public places, violation of which would have been a civil or criminal penalty not exceeding 25 dollars.³ The Senate Local Government Committee recommended passage, by a vote of six to four, but only after having severely diluted it to authorize enactment of local ordinances merely “concerning smoking in airport facilities, skywalks, or both”—a marginalization that apparently still constituted too much local intrusion for the four dissenters (three Republicans and heavy-smoking Democrat Florence Buhr).⁴ Szymoniak presented the weakening amendment, which presumably was

¹Carol Sipfle, American Lung Association of Iowa, to Tobacco Free Coalition, Subject: Legislative Priorities - 1991 (July 30, 1990) (copy in Folder: “Tobacco 1999 -”, Johnson County Department of Public Health, Iowa City.
⁴State of Iowa: 1992: Journal of the Senate: 1992: Regular Session Seventy-Fourth General Assembly 1:609, 2:1992 (Mar. 4) (S-5132). In 1993, the Des Moines City Council passed an ordinance prohibiting anyone from engaging in activities at the airport in disregard of signs promulgated by the airport director or from refusing to comply with a lawful order of the police at the airport. City of Des Moines City Council, Ordinance No. 11,958, §§ 4-6.01 and 4-6.02 (Mar. 22, 1993), Bates No. T128922797. TI lobbyist Charles Wasker opined that whereas the city council was in compliance with state
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

supported by a clarification by Des Moines City Attorney Roger Nowadzky, who had had experience with enforcing the nosmoking ban in the capital’s skywalks. Even in this watered-down version, Majority Leader Bill Hutchins secured unanimous consent to rerefer the bill to committee, which reassigned it to Szymoniak’s subcommittee, which once again recommended passage; after re-rereferral to the committee, the measure expired.

In a rare manifestation of bad conscience, the Tobacco Institute worried as the new session loomed about “[a]nother potential challenge that faces us,” which “depends on the personal agenda of Rep. Minnette Doderer (D-Iowa City). She is very bitter about the recent death of her husband who died of cancer. Industry lobbyists all agree she is very tough, hardworking and highly regarded. If she launches a crusade against us, she will be a formidable opponent.” The cigarette companies’ analysts neglected to specify that a fund for the prevention of smoking had been established in the name of Doderer’s husband, a former Iowa City mayor, a smoker who had died of lung cancer at 71. But Doderer, a self-

preemption, the airport authority had violated the statute by banning smoking by changing the signs. Wasker and his partner Wimmer, according to the head of TI’s Midwest region, Al Shofe, were requesting permission to seek an injunction or writ of mandamus to compel compliance. Shofe observed that the “ordinance is very interesting since they have figured out a way to get around preemption. It would be interesting to see if similar work is surfacing in states where we have preemption.” Al Shofe to Pat Donoho, Subject: City of Des Moines, Iowa (July 6, 1993), Bates No. TI28922796. Shofe was apparently unaware that the city had used the same procedure in the skywalks in 1990; presumably the intent of the second effort, like that of the first, was to enable the city to enforce the ban more effectively than the statewide law permitted. See above ch. 27. The airport announced in May 1993 that it would become nosmoking as soon as the signs were put up. “News and Notes,” DMR, May 2, 1993, Bates No. TI28922798. According to the city attorney who represented the airport, no such suit was filed. Telephone interview with Kathleen Vanderpool, Des Moines (Aug. 3, 2007). The two ordinance provisions are still in effect. Municipal Code of the City of Des Moines, Iowa, §§ 22-7 and 22-8 (2000), on http://www.municode.com/resources/gateway.asp?pid=13242&sid=15.


See above ch. 27.


Charles Bullard, “Former Iowa City Mayor Fred Doderer, 71, Dies,” DMR, July 6, 1991 (9) (NewsBank). In 1994 Doderer decided to close the account for her husband’s
professed sometime smoker, who had never in her long career been one of the legislature’s most militant’s antismokers,\(^\text{10}\) found many other important social and economic issues on behalf of which to advocate in the House in 1992. Although she was indeed very angry about her husband’s death, according to her daughter, she never “took on” the tobacco industry because her own heavy (albeit intermittent) smoking meant that she lacked the “clean hands” necessary for such a battle.\(^\text{11}\)

Even in the absence of a threat by Doderer, Lowell Junkins, styling himself and his associates “Public Affairs Consultants,” reported to his Tobacco Institute handler, Susan Stuntz, as early as September 1991, that “we have no reason to doubt’ that Governor Branstad would “look[ ] to the cigarette tax as a funding vehicle....” Indeed, “[k]nowing” that an increase was a “likely outcome” of the deliberations of the governor’s task force on spending, Junkins had been meeting regularly during the summer with ICAN, the new House Speaker Bob Arnould, and the industry’s ever reliable Senate Majority Leader Hutchins “to solidify our coalition in the General Assembly on the progressive tax message,” to which leadership had “reiterated its commitment....”\(^\text{12}\) Later that fall, with Branstad “still angry” that the legislature had conceded him only half of the 10-cent cigarette tax increase he had called for in 1991, TI foresaw the ongoing need to deal with this perennial issue: its analysis regarded it as “not...unreasonable” for the governor to request a 25-cent increase and settle for something less. In the event, the tobacco industry was confident that it could continue to rely on the “[e]fforts by the Iowa Citizens [sic] Action Network (ICAN) and other labor groups [which] during the non-session months have been very helpful in laying the ground work for grassroots activity against any new regressive taxes.” And, again, as always, with pro-tobacco legislators in leadership: “Our best defense will be to defeat tax measure in the Senate.” If the legislature debated the issue, TI’s Midwest regional staff reminded headquarters that “[d]uring the 1991 tax battle, TI spent about $25,000 on phone banks,” but added that: “We may be able to just as effectively reach targeted areas by subsidizing retail associations and

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\(^{\text{10}}\) Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).

\(^{\text{11}}\) Telephone interview with Kay Doderer, Dania, FL (Aug. 13, 2007).

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wholesaler organizations for specific efforts. Region IV believes this may be...considerably cheaper."[13] Once the session was underway, the head of Region IV informed her boss that in the welter of ethics scandals roiling the legislature, the “Governor still wants a dime,”[14] and a bill was filed in the House to raise the tax by 10 cents to 46 cents, but the chamber took no action on it.[15] Efforts were also made in both houses in February to amend the budget bill (S.F. 2116) to include a cigarette tax increase, but they failed by large margins.[16] And the initiative was similarly unsuccessful during the special session.[17]

The Tobacco Industry’s Nationwide Drive to Outlaw Employment

“‘[d]iscrimination against our customers’”[18]

“‘While these measures may have an intuitive grasp of fairness, in practice it’s a respiratory apartheid.’”[19]

The second session of the biennium was, however, the scene of a major, but unsuccessful, effort by the cigarette companies to replicate their success in other states by securing enactment of a law prohibiting employers from discriminating against employees who smoked. Nationally the tobacco industry, “in a series of titanic lobbying struggles,”[20] had, with the help of labor unions and civil

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Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination


liberties groups, secured enactment of such laws in about half of the states just since 1989. The cigarette manufacturers’ counter-campaign was a response to the fact that during a period of less than 10 years thousands of companies had begun to act on the available economic data—showing, for example, that smokers could cost firms as much as $5,000 more in insurance premiums annually—by prohibiting employees from smoking on or off the job. In addition to reducing the annual direct cost of more than $20 billion for providing health care to those with smoking-related diseases, not hiring smokers improved workplace safety conditions, reduced absenteeism, and “minimize[d] the need to train new employees to replace those who retire early because of lung cancer, emphysema and other diseases related to smoking.” Illustratively, in announcing that it would no longer hire people who smoked cigarettes, management of the Lockheed Aeronautical Systems Company plant in Marietta, Georgia stressed that almost 77 percent of the workers there with cardiac problems smoked.

In 1992 the Tobacco Institute in detail described its profit-preserving strategy as a veritable human and labor rights initiative:

Since the late 1980’s, the tobacco industry has gone beyond simply opposing legislation hostile to the rights of smokers, to promoting affirmative legislation to protect its consumers from anti-tobacco attacks. Depending on the language, employment discrimination legislation provides protection in the workplace from hiring, firing or promotion discrimination because of smoking, drinking or other legal activities engaged in outside the workplace.

Employment privacy legislation responds to the recent increase in discriminatory workplace policies directed against employees and prospective employees who smoke. These actions include refusal to hire smokers, and disciplining or discharging those who smoke during off duty hours. A growing number of states and localities have adopted legislation or enacted policies discriminating against public safety employees who smoke. Some employers have gone so far as to subject employees to polygraph tests and urinalysis to ensure that they do not smoke on their own time.

To counteract these public and private policies, legislation has been proposed to protect smokers from employment discrimination. In some states, the issue has expanded beyond the protection of the smoker’s right to smoke off the job. Anti-discrimination legislation can also protect an employee’s right to have an occasional drink after work, to engage in risky sporting events, to participate in unions, or to publicly advocate political
stances. In broad terms, anti-discrimination language can protect an individual’s right to make private lifestyle choices.

The first employment privacy bill was adopted by Virginia in 1989. The law prohibits local governments from requiring an applicant or employee “to abstain from smoking or using tobacco products outside the course of his employment.” Police and firefighters are exempt from the provision.

By mid-1992, privacy laws had been adopted in more than half the states. While the laws differ in language, their intent is similar—to protect against employment discrimination. The Oregon law prohibits employers from requiring employees to refrain from smoking off the job except when the restriction relates to “a bona fide occupational requirement” or if off-duty smoking is prohibited by collective bargaining agreement. Colorado, however, enacted a law that prohibits unfair employment practices due to an employee’s “engaging in any lawful activity off the premises of the employer during nonworking hours.” The Illinois law protects an employee’s right to use lawful products off the job.

Legislation commonly includes language similar to Oregon’s exemption for bona fide occupational requirements. Occasionally, legislation has included an allowance for employers to offer health or life insurance policies which make distinctions in coverage or cost based on an employee’s off the job use of tobacco, or other lawful products or activities.

Advocates who support equal rights in employment practices include the American Civil Liberties Union (ACLU), various organized labor unions, tobacco distributors, manufacturers and wholesalers and many government and private sector employers. Privacy has become a bipartisan issue, with Democratic and Republican Governors approving an almost equal number of laws, as well as one Independent Governor.

Those who oppose such legislation include Action on Smoking and Health (ASH), Americans for Nonsmokers Rights, Coalition on Smoking OR Health and Group Against Smokers’ Pollution (GASP). In some cases, business employers may object to legislation that they consider to be written too broadly.

The industry has served as the catalyst for this type of legislation, aiding other proponents in supporting adoption of legislation. The industry will continue to work diligently to see that all states adopt employment discrimination legislation, as well as other legislation to protect the legal rights of its customers.

Legislation to end these unfair and discriminatory practices is warranted. First, discriminating against smokers disproportionately harms the employment opportunities of minorities, who smoke in larger numbers. Second, discrimination—particularly when the result of unilateral action by an employer—can undermine employee collective bargaining rights. Third, such discrimination is inconsistent with the fundamental values of equal protection.23

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23The Tobacco Institute, State Activities Division, Issue Briefs (Aug. 1992), Bates No. 2023959421/33-4.
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The Early Twentieth-Century Movement Among Employers to Refuse to Hire Cigarette Smokers

Again the cigaret is given a black eye. The Dutch Superior Traction company has issued a manifesto that it does not employ users of the coffin stick and 25 employes have been discharged for smoking them. This is a lesson more valuable than half a hundred legislative enactments against the pestilent habit.24

WANTED—Intelligent, well dressed single man to travel on road as collector. Permanent position. Chance for advancement. No drinkers or cigarette smokers need apply.25

Expert repair man wanted. Good pay and steady work. Cigarette smokers need not apply.26

The end of the twentieth century was by no means witnessing the first effort by cigarette manufacturers to deter employers from discriminating against consumers of their commodities (and other kinds of tobacco). The later drive was directed at passing legislation prohibiting discriminatory employment decisions, whereas at the turn of the century the Cigarette Trust had turned its attention directly to nipping in the bud the burgeoning trend in the work world to fire/refuse to hire cigarette smokers. In this sense, the earlier opposition resembled late-twentieth-century attempts by cigarette companies to use and threaten boycotts to force companies that had banned smoking among their employees and customers or even to sell nicotine-containing gum to aid would-be quitters to drop those practices.27 In both instances, to be sure, the later cigarette manufacturers undertook incomparably more concerted, widespread, and better-financed operations.

Employers’ initiatives to prohibit cigarette smoking by their employees began gaining momentum at the very end of 1899 when, as The New York Times reported, the Southern Railway issued a general order and “ironclad rule”

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26DMDN, Oct. 24, 1917 (9:1).
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applying only to its South Carolina division that all employees had to stop using cigarettes or resign and that in the future the company would not employ anyone smoking them.28 Although the newspaper published a correction to the effect that a special ban on cigarettes was unnecessary because a general rule prohibited all smoking while on duty,29 a flurry of press reports at the outset of the new century revealed that workplace-related anti-cigarette policies were a reality, proliferating especially in Chicago business offices. In addition to prohibiting cigarettes during working hours, some also suggested that it “would be better for employees not to be seen smoking cigarettes out of hours.” While Montgomery Ward “refused to employ boys addicted to cigarette smoking,” Marshall Field gave employees bimonthly lectures on the subject. Whereas the Board of Education based its ban on odor, other employers argued that cigarettes destroyed discipline in addition to wasting time. Significantly, downtown business in Chicago not only admitted Anti-Cigaret League lecturers, but sent their “boys” to the League’s monthly meetings.30 The salient point from employers’ perspective was that cigarette smoking was so “incompatible with efficient service”31 that users were “only useful in standing at the foot of the stairs.”32

This “growing conviction among business-men and employers that the inhaling of cigarette smoke is physically and intellectually injurious,” which was prompting many in Chicago toward the end of March and beginning of April 1900 to discourage or prohibit their employees from smoking cigarettes,33 should be viewed in the context of a decision issued by the Illinois Supreme Court on April 9 sustaining the constitutionality of a Chicago ordinance imposing a $100 license fee on all cigarette dealers.34 The ruling thwarted a multi-year legal challenge by the Tobacco Trust, which regarded the ordinance as causing “a falling off in its income and a precedent which they [sic] they feared other cities

28“An Anti-Cigarette Order,” NYT, Dec. 13, 1899 (5). See also [Untitled], WNC, Dec. 16, 1899 (4:3) (expressing puzzlement over the railway’s “sudden moral spasm”).
30“Shut Out the Cigaret,” CT, Mar. 27, 1900 (16).
31“Put a Ban on Cigaret,” CT, Apr. 9, 1900 (2).
32Boone Standard (Iowa), Mar. 31, 1900 (3:4) (untitled).
33“Cigare Ordinance Valid,” CT, Apr. 11, 1900 (12) (edit.).
34Gundling v Chicago, 177 US 183 (1900).
By April 1900, prohibitions at Chicago firms, including the Chicago, Burlington, and Quincy Railroad, affected 1,100 employees, 80 percent of whom were boys under 18, 600 of whom had previously smoked. In addition to the aforementioned lowered efficiency, demoralization, nervousness, and stunted mental acuity, the reasons for the ban assigned by employers included the annoyance for customers and non-using employees of the nicotine smell on employees’ breath. Montgomery Ward, which impressed upon the boys that the ban was prompted by their own and not the company’s interest, did not shy away from special efforts required to see to it that the ban was observed outside of working hours.36

A turning point in the movement toward the imposition of bans was the decision in mid-1900 of the Rock Island Railroad to implement the policy, which intrigued other Chicago-based railroads that did not permit smoking in their offices, and impelled the Anti-Cigaret League to induce other roads to adopt it.37 Denying that “any puritanical motives” were involved, the Rock Island management in refusing to hire anyone “who is addicted to cigarettes,” which were “thus placed on a par with whisky,”38 gave employees the choice between quitting cigarettes and their employment; cigarette smokers’ applications would be “consigned to the waste basket” and the applicants, no matter how proficient they might be in railroading, would not be able to “break into the Rock Island’s service with a crowbar.”39 The railroad’s president, Warren G. Purdy,40 charged that cigarette smoking was a “‘vicious habit’” that tended to “‘befog the mind and make one listless and careless...sleepy and of no account...irresponsible and lazy.’” The initiative in this matter had been taken by the general superintendent, A. J. Hitt, who allegedly had devised it “after a long study of the effect of the weed upon the human system, augmented, of course, by the judgment of the most eminent physicians in declaring the cigaret to be injurious.” This story, however, was incompatible with the further account that some weeks earlier, while Hitt had been investigating an worker’s actions in an unidentified matter, he overheard two other employees censuring the worker as a “confirmed cigaret fiend,” whose smoking had been “the fault of the whole business....” Astonishingly, based, apparently, on this one case, Hitt and two superintendents, after discussing the

35.“To Combat Cigaret Tax,” CT, Oct. 21, 1897 (12). See also above ch. 6.
36.“Put a Ban on Cigaretts,” CT, Apr. 9, 1900 (2).
37.“Asks Ban from All Roads,” CT, July 4, 1900 (8).
38.“The Cigarette Is Banned,” CREG, July 4, 1900 (6:4).
39.“Cigaretts Put Under a Ban,” CT, July 8, 1900 (43).
issue for a week, ordered the embargo. Convinced, based on his own observations and the aforementioned doctors’ opinions, that without any doubt the cigarette “unfits a man in a measure for work”—after all, a “person addicted to the habit always has a languid feeling that is markedly evidenced in the drooping eye and the nervous body”—Hitt ventured the prediction that if all the railroads in North America followed the Rock Island, “‘the cigaret habit will no doubt receive a death blow.’”

A confirmation of this death sentence appeared in an editorial in the Chicago Tribune on August 3, the day after the paper had reported that, pushed by Lucy Page Gaston’s Anti-Cigaret League, which had been holding meetings in the Stock-Yards district, August Swift & Company had announced that it too would no longer employ cigarette smokers. Bracketing the whole health issue, the editorial explained that cigarette smokers’ severe handicap in business could no longer be overlooked. And regardless of whether it was well founded or not, many businessmen had come to feel that a cigarette smoker was not a desirable person to “have around the shop” or the office. Many of the largest firms in the city make it a fixed and immovable rule not to employ cigaret smokers in any capacity. On...almost every day another business house falls into line with this policy. ... Other things being equal it is almost universally true that of two men, one of whom uses cigarettes while the other does not, the latter will be preferred in a business house or even in a factory.

The wise cigaret smoker will face the facts as they exist and not waste his time...trying to persuade people that cigarets are harmless. He will make up his mind whether his ruling ambition is to succeed in business or to smoke cigarets.... Business-men have apparently made up their minds that they do not want cigaret smokers in responsible positions and business-men are too busy...to listen to arguments on the subject. It is a condition and not a theory which confronts the man who is wedded to the cigaret.

Heady with success and confident of an avalanche of large businesses following suit, Gaston took the remarkable step of interviewing the heads of Bradstreet’s and R. G. Dun to induce them to add to the questions (about their habits) they posed to businessmen seeking commercial ratings whether they used cigarets.

On August 7, 1900, shortly after the Rock Island had implemented its ban and

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41 “Cigaretts Put Under a Ban,” CT, July 8, 1900 (43).
43 “The Cigaret Smoker’s Handicap,” CT, Aug. 3, 1900 (6) (edit.).
44 “Anti-Cigaret League Pushing Its Crusade Among Chicago Firms,” CT, Aug. 5, 1900 (13).
the snowballing impact in the business world was becoming so undeniable that
the Cigarette Trust seemed on the verge of monopolizing a commodity for which
solvent demand capable of valorizing its capital would soon disappear, J. B. Duke
himself, the president of the American Tobacco Company, wrote a letter to Purdy,
appealing to a sense of intercapitalist solidarity while urging him to back off:

Through the kindness of Mr. A. R. Flower,45 and Mr. Anthony N. Brady, one of our
directors,46 I have been shown a letter written by you on the 28th ultimo to Mr. Flower,
relative to the order recently made by your road, forbidding the use by your employees of
cigarettes.

I realize that the newspapers have made more of this order than was intended by its
own scope, and I realize further that the executive officers of your road have the right to
make such regulations as they see fit for their employees, without having their motives or
judgment questioned by any one.

But the Company with which I am connected is engaged very largely in the
manufacture of cigarettes; a very substantial portion of its profits comes from the sale of
cigarettes, and a very substantial portion of its investment is in plants for the manufacture
of cigarettes. In this company is invested the means of a great many individuals...who are
identified with your road, and perhaps otherwise with you in business. These investments
would be made less profitable, and less secure, by the diminution of the cigarette business.

On account of these things, and on account of my decided and earnest, and I believe,
intelligent conviction that cigarette smoking is no more injurious than smoking in any other
form, I am taking the liberty of writing to you...and am sending you...a pamphlet...“The
Truth about Cigarettes,” which contains the result of scientific investigation, which
Pamphlet I respectfully ask you to read. The statements of these scientific authorities are
undoubtedly genuine, and the character of those quoted is as such to make impossible the
belief that these statements have been secured by any improper method.

45Anson R. Flower, brother of ex-New York Governor Roswell Flower—who was also
a financier and leader of the New York Stock Exchange who had invested heavily in the
Rock Island Railroad—became a director after his brother’s death. Anson Flower was
linked to Anthony N. Brady through their investments in the Brooklyn Rapid Transit
Company. “Roswell P. Flower Dies Suddenly, NYT, May 13, 1899 (1); “Sensational Drop
in Flower Stocks,” NYT, May 14, 1899 (1); “Rock Island RR Directors,” NYT, June 8,
1899 (8); “Brooklyn Rapid Transit,” NYT, Jan. 27, 1900 (5). In 1900 Flower & Co. also
owned 1,950 shares of common stock in the American Tobacco Co. United States v

46Brady, an immensely wealthy capitalist, was by 1906 the largest shareholder of the
American Tobacco Company and, qua director, a defendant in the antitrust suit that led to
the trust’s break-up. Report of the Commissioner of Corporations on the Tobacco
Industry, Part 1, tab. 18 at 202 (1909); “Anthony N. Brady Dead,” NYT, July 23, 1913 (1);
“A. N. Brady as a Financier,” NYT, July 24, 1913 (7); “Brady’s Fortune May Be
$100,000,000,” NYT, Aug. 6, 1913 (7).
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Now this Company has no disposition to take notice of the attacks made on cigarettes made by irresponsible agitators, or professional so-called reformers, but we are concerned when an attack is made on the products of our Company by a prominent and large business corporation, such as yours. We feel, and I personally feel, that to discriminate against cigarettes as opposed to other forms of tobacco is entirely unjust, and would not have been made if you had the information which I hope you will derive from the pamphlet.... Just as a manufacturer of cream of tartar baking powder would have ground for complaint if you issued an order condemning its use, and leaving your employees free to use alum baking powder; or just as a producer of coffee, if you permitted the use of tea and forbade the use of coffee, so, and in the same way, and to the same extent, I think we, manufacturers of cigarettes, are authorized to ask you to consider the facts in favor of, as well as against, cigarettes, before putting them under a ban, under which other tobacco products are not put.

I will esteem it a favor if you will...conclude...whether it is wise and just for your Company to thus attack the business of another company.

I will appreciate a reply to this letter, and if you think that a conference with some representatives of our Company would probably lead to a clarification of the order which you have made, or if you desire additional information, I will arrange such.37

37Letter from J. B. Duke to W. C. [sic] Purdy (Aug. 7, 1900), in JBDP, Box 5, Correspondence, Letterbook (1894, July 31-1904, Oct. 10), RBMSCL (the text was transcribed by Rodney Clare from a handwritten copy too faint to photocopy). The tenor of the pamphlet that Duke sent can be gauged by the opening salvo by W. H. Garrison, Esq., who launched the discussion before the Medico-Legal Society that resulted in the pamphlet. He alleged that a petition to Congress in 1892 to impose a tax on cigarettes designed to encourage manufacturers to abandon production as well as statutes in Iowa and Tennessee banning their sale were based on “‘popular prejudice.’ Absolutely that and nothing more.” A petition to tax tomatoes was “nearly analogous [sic] to that of the cigarette.” W. H. Garrison, “A Brief for the Cigarette,” Medico-Legal Journal 15:280-91 at 281 (Dec. 1897). Garrison also claimed that the “inhalation question was disposed of” by an 1882 (unidentified) article in Lancet stating that “the inhaled smoke rarely passes beyond the bronchi,” and if any did enter air vesicles, it “must be a very small quantity” because it would be “nearly immediately expelled,” leaving no time for diffusion. Id. at 288. A response to another lawyer’s request for comments on Garrison’s paper by Dr. Harold Moyer, a professor at Rush Medical College in Chicago, provided what was perhaps the only comment that would withstand scientific scrutiny more than a century later; attacking Garrison’s claim that smoke at most reached only the larynx and larger bronchi, he observed that “the very mildness of the cigarette brings about one of its chiefest dangers.... The majority of cigarette smokers...inhale deeply, and consequently there may be a much greater absorption of nicotine....” Clark Bell, “The Cigarette: Does It Contain Any Ingredient Other Than Tobacco and Paper? Does It Cause Insanity?” Medico-Legal Journal 15:443-85 at 457 (Mar. 1898). These quotations and the rest of the two articles were republished in The Truth About Cigarettes: Papers Read and Discussed by the Medico-Legal Society of N.Y. (n.d.), which is unpaginated. See also above ch. 2.
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In spite of Duke’s intervention, employment-based cigarette bans continued to proliferate, taking root on the New York Central and Pennsylvania Railroads as well as at Macy’s, Wanamaker’s, and other big department stores and smaller institutions in New York. By 1906, the Iowa Board of Health reported that alone in Detroit 69 merchants had agreed not to employ cigarette smokers, while numerous railroads, including the New York, New Haven, and Hartford, had ordered employees not to smoke while on duty. Emblematic of an increasingly widespread attitude was the statement by E. H. Harriman, the head of the Union Pacific Railroad, that his company “might as well go to a lunatic asylum for their employees as to hire cigarette smokers.” When the Brotherhood of Engineers and Firemen in 1906 opposed an order by the Norfolk & Western Railroad prohibiting employees from smoking cigarettes on the grounds that it affected their “personal liberty,” one newspaper deemed the argument as inapt as one resisting a ban on entrusting a railroad engine to a man who drank. As late as 1910 the Atchison, Topeka, & Santa Fe Railroad joined the ranks of those refusing to employ cigarette smokers. (It is a desideratum of research to trace where, when, how, and why such workplace (cigarette) smoking bans later fell into desuetude or were abolished before being reimplemented in the late twentieth century as a result of scientific discoveries concerning the health impacts of secondhand tobacco smoke exposure and of an ever more militant anti-smoking movement.) Yet in spite of these disruptions by employers, which expressed,
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codified, and solidified a growing societal denormalization and condemnation of cigarettes by means of a withdrawal of physical and social space from cigarette smoking and of a livelihood from cigarette smokers, production and consumption nevertheless raced forward. Thus, after the 35.7 percent drop in the Trust’s domestic cigarette sales from 1896 to 1901 associated with the first wave of state anti-cigarette sales enactments, the number of cigarettes it sold in the United States between 1901 and 1910 rose 248 percent from 1,990,911,000 to 6,930,986,000, while profits increased 236 percent from $2,056,553 to $6,904,304.  

The City Government of Clinton, Iowa Tries to Prohibit Its Newly Hired Employees from Using Tobacco At or Away from Work

Three-quarters of a century later, the cigarette firms had been monitoring the situation in Iowa ever since the City of Clinton adopted a resolution on December 30, 1986, requiring all of its employees hired after January 1, 1987, to “agree in writing as a condition of employment not to smoke, chew or use tobacco products on or off duty during the tenure of their employment with the City of Clinton,” violation of which agreement subjected employees to dismissal for cause. The proposal had originated in September as a means of reducing disability retirement benefits of firefighters’ and police—whose heart or lung illnesses were, by a new state law, deemed job-related. Councilman Darrell Smith, the proponent, alleged that additional costs of pensions, early retirements,
and two-thirds disability payments would cost Clinton $900,000; of five city employees recently awarded heart- or lung-illness based disability payments, most, he claimed, were moderate to heavy smokers. Charles Boldt of the American Federation of State, County and Municipal Employees took the position that barring the hire of smokers was “unreasonable”: “Until they outlaw tobacco, they cannot make that a condition of employment.” Interestingly, the chairman of the Clinton Police Department bargaining unit, Charles Klaes, did not object to the proposal, so long as it was confined to job applicants. But he did tell the council that the rule would be impossible to enforce—in part because the police did not want to be used as the enforcers: “We don’t want to be peeking around to see if employees are smoking.” Smith was unfazed because he envisioned an “honor system”: “If someone is going to smoke off duty, there isn’t much we can do.... We are not going to run around with search warrants to see if employees are smoking at home.”

As adopted by the city council by a 5 to 4 vote, the resolution encompassed all newly hired employees. The majority argued that an employer was entitled to prohibit smoking on a worker’s own time “if the employer is footing the worker’s health insurance and disability retirement benefits,” although the council recognized that the ban would not affect a majority of the city’s employees for 25 years. The resolution recited that “the smoking, chewing or use of tobacco products has an adverse effect on the health of the employee that directly affects the ability of the employee to perform his job while increasing the health care costs that are borne by the City....” Clinton’s mayor stressed that although the city could fire new employees who violated the agreement not to smoke, enforcement would be on an honor system.

Boldt immediately charged that the ordinance was “absolutely unenforceable and patently illegal....” AFSCME Council 61 challenged the ban to the Iowa

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60 American Federation of State, County & Municipal Employees, Council 61 (AFSCME) v. City of Clinton at 2 (Iowa Public Employment Relations Board, June 17, 1987), Bates No. TI0600003/4 (reprinting resolution).
62 Tom Alex, “Clinton Council Ban on Smoking Angers Union,” DMR, Jan. 1, 1987

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Public Employment Relations Board; both the hearing officer and the board itself ruled that the city had violated the Public Employment Relations Act by unilaterally implementing a policy subject to mandatory bargaining (namely, health and safety) without having given the union an opportunity to bargain over it and secured AFSCME’s consent. PERB was able to reach this conclusion by rejecting the city’s contention that its no-tobacco-use policy was merely the establishment of a job qualification, which was not subject to its duty to bargain collectively and which, therefore, the City of Clinton was free to implement unilaterally. Although the Board agreed that employers were not required to bargain over job qualifications, duties, content, or responsibilities, it ruled that the policy did not implicate any of these dimensions; and although determining whether an applicant was physically fit and able to perform a job was part of setting a job qualification, PERB asserted that the record did “not demonstrate that employee abstinence from tobacco products is required for the successful completion of specified job duties and responsibilities.” At the same time, the Board did make it clear that public employee bargaining rights did not trump the statewide mandates of the anti-public smoking law and consequently did not “provide[] opportunities to smoke in areas where Chapter 98A would otherwise prohibit smoking.” The city enforced the ordinance against police, firefighters, and nonunion employees, adhering to the board ruling only with regard to AFSCME members, who had numbered 70 to 80 in 1987.

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63 American Federation of State, County & Municipal Employees, Council 61 (AFSCME) v. City of Clinton (Iowa Public Employment Relations Board, June 17, 1987), Bates No. T10600003/4.

64 American Federation of State, County & Municipal Employees, Council 61 v. City of Clinton at 10 (Iowa Public Employment Relations Board, Aug. 9, 1988), Bates No. T128922676/86.

65 American Federation of State, County & Municipal Employees, Council 61 v. City of Clinton at 7-8 (Iowa Public Employment Relations Board, Aug. 9, 1988), Bates No. T128922676/82-83.

66 American Federation of State, County & Municipal Employees, Council 61 v. City of Clinton at 9 (Iowa Public Employment Relations Board, Aug. 9, 1988), Bates No. T128922676/84. To be sure, PERB then erroneously claimed that: “Chapter 98A clearly delineates, as a public policy consideration, the areas where smoking is not permitted and requires that those areas be designated as no-smoking areas.” Id. at 9-10. In fact, the statute confers almost complete discretion on those in charge of covered buildings to designate such areas, thus raising the question of whether the employer is required to bargain over and secure the union’s consent to these designations.

67 “Clinton Union Exempted from Smoker Ban,” DMR, June 20, 1987 (3A:3).
Such a ruling applied only to Iowa state employees subject to the Public Employment Relations Act, under which, if an employer and union reach impasse, an arbitrator must resolve the disputed issue. Such a requirement would not have operated as an obstacle for an employer in the private sector covered by the National Labor Relations Act, under which an employer is privileged to implement a contract proposal if the parties reach impasse; and, a fortiori, in the majority of nonunion private workplaces in Iowa in which no collective bargaining took place, employers would, under the capacious at-will rule of employment, have faced no legal impediments to establishing a rule that they would hire no smokers. Thus, despite the outcome, the narrow scope of applicability of the PERB ruling presumably strengthened the cigarette companies’ resolve to seek a statewide law to prevent Clinton’s smokers-need-not-apply policy from spreading and potentially discouraging large numbers of their customers from jeopardizing their employability by giving up tobacco.

In the aftermath of the ruling the City of Clinton decided to pursue its antismoking policy by negotiating with AFSCME, while the union insisted that it would agree only to a policy that accommodated both smokers and nonsmokers. In the words of the Council 61’s associate director, Jan Corderman: “‘They can’t tell someone not to smoke at home.’” The city did bargain with the union, which, raising the issue to a matter of principle, refused to cede ground; seeing that the union was immovable, the City of Clinton did not press the point by declaring impasse or requesting arbitration. In fact, the surviving records of contract negotiations reveal that the city never even raised the question and that no such provision ever appeared in the City of Clinton-AFSCME contract. While the police and firefighters unions voluntarily agreed to the nosmokers rule, in part because the members did not want to work with smokers, and the Board

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70. Telephone interview with Bruce Johansen, Clinton (Aug. 1, 2007) (City of Clinton attorney during the events in question).


72. Telephone interview with Bruce Johansen, Clinton (Aug. 1, 2007) (City of Clinton attorney during the events in question).
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ruling did not apply to non-AFSCME-unit employees, it appears that despite the failure (then or later) to include a provision dealing with off-the-job smoking in the collective bargaining agreement, the city nevertheless continued to apply the rule to all job applicants, including nonuse of tobacco as a job requirement in advertisements and requiring newly hired employees to sign the aforementioned agreement, violation of which gave the city the right to terminate an employee, although in fact compliance was never monitored.\textsuperscript{73}

\textbf{Iowa’s Turn: The Cigarette Manufacturers Try But Fail to Pass a Law Prohibiting Employers from Discriminating Against Smokers}

In August 1990, Region IV staff was able to report to Tobacco Institute headquarters that member company lobbyists had agreed to try to pass a measure in Iowa to prevent employers from refusing to hire smokers. Staff and lobbyists were already cobbled together elements from bills passed in other states “to produce an acceptable amendment for use in Iowa,” on which they anticipated achieving agreement by December 1. On a tactical level, a meeting of industry lobbyists and Government Affairs executives had decided that “introduction of a free standing bill would create unnecessary problems for the industry. There is no desire to create a vehicle on which germane anti-tobacco legislation can be added. The lobbyists are confident that if they have in hand a ready to go amendment, they will be able to add it on during Senate floor action to a bill dealing with labor issues or conditions of employment.” This last point prompted the further tactical insight that TILMC’s Iowa labor consultant would be working with “labor groups to educate them about the desirability of this legislation” in order to “enduce [sic]” them to lobby legislators to whom they had access.

\textsuperscript{73}Telephone interviews with Deborah Neels, City of Clinton finance department director (began work in 1989) and Brenda Lies, financial accounting and human resources (began work in 1999) (Aug. 1, 2007). Announcements posted on the City of Clinton website for a job in sewer maintenance in the public works department and part-time bus driver, which were both covered by the AFSCME agreement, included as a job requirement: “Non-user of tobacco products”/“Not a user of any tobacco product(s).” http://www.ci.clinton.ia.us (visited Aug. 1 and 7, 2007). Surprised by this requirement, the former city attorney speculated that someone in city government had either inadvertently copied the provision from the non-AFSCME job announcements or “slipped it in” and AFSCME had not caught it. Telephone interview with Bruce Johansen, Clinton (Aug. 1, 2007). AFSCME official Ty Cutkomp confirmed that he had been unaware of such a requirement. Telephone interview with Ty Cutkomp, Des Moines (Aug. 7, 2007).
Unlike some issues, such as excise taxes, on which TI could never get too much press coverage, the legislative strategy on anti-smoker discrimination measures was distinctly covert: “Only if and when this effort on the part of the industry is detected by the media, some thought will have to be given to the appropriate industry response. If the agreed upon amendment addressed more issues than smoking, then perhaps media spokespeople could soft peddle [sic] industry involvement.” The reason for this approach was not difficult to uncover: “The practice of passing smokers’ rights laws without mentioning smoking or tobacco in them is an attempt to deceive the public about the main purpose of the law.”

During the 1991 session, TI and TILMC drafted language of an amendment and waited for an opportunity to insert it into pending legislation. But it soon became apparent that, because of the “tax situation,” it was not feasible to pursue the measure before adjournment. In late summer, Junkins met with IFL board members, confirmed that labor was still “supportive of some type or privacy legislation,” and therefore planned to prepare for the 1992 session. TI geared up during the closing months of 1991 to return the issue to the legislative agenda in 1992, the documents for which were conveniently collected in a file folder labeled, “Iowa 92 Proactive Plans.” In November, TI’s Midwest regional staff reported that labor was “very interested in pursuing this issue,” but that while the tobacco industry could “seek support for labors [sic] position covertly...at no time should we directly or publicly indicate support for this legislation.” Fissures within the industry were on display in the intelligence that Philip Morris might be “interested in doing a separate bill instead of pursuing an amendment,” and that if it actually did so, it would be “important that TI step back and let PM be fully responsible for the very real possibility that we will have to fight to kill our own bill in the Senate.” Moreover, the tactical question still had to be answered as to whether “we want to use up a chit on this particular bill when we might need

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76Kurt Malmgren to Samuel Chilcote, Memorandum at 1, 3 (Apr. 17, 1991), Bates No. TIOK0029427/30.
771991 Proactive Legislative Plans at 7 (June 18, 1991), Bates No. TIOK0024936/42.
79[Tobacco Institute], Iowa 92 Proactive Plans (Dec. 11, 1991), Bates No. TI28843109, on tobaccodocuments.org.
leadership to help us defeat a tax bill.”

On December 5, 1991, Region IV’s vice president, Alice O’Connor (requesting that the information not be widely publicized), reported to her boss Pat Donoho that TI’s lobbyist, Bill Wimmer—Wasker’s partner, who was responsible for lobbying Democrats—had met with AFSCME and IFL, which had agreed to “push the privacy bill.” Although they preferred to try to amend a different labor bill, they appreciated the tobacco industry’s “desire to push a separate bill as well.” They would, moreover, meet privately with “the two main anti-tobacco legislators,” Hammond and Lloyd-Jones, to ask them not to attach any amendments to the separate bill, if that vehicle were pursued. Why either or both of them would be willing to do this service for the cigarette companies, O’Connor did not explain. Finally, she faxed Donoho the “suggested privacy language for Iowa that Labor groups will push once the companies have signed off.” Since labor wanted to line up sponsors before year’s end, she needed headquarters’ approval “ASAP.”

The “language” that O’Connor faxed to headquarters in Washington turned out to be a full-fledged bill that amended Iowa’s Employer-Employee Offenses statute without ever mentioning smoking. Headed “Employees [sic] Use of Lawful Products During Nonworking Hours” and inserted directly after a provision on drug testing, the measure made it “unlawful for an employer to refuse to hire or to discharge any person, or otherwise disadvantage any person, with respect to compensation, terms, conditions or privileges of employment because the person uses lawful products off the premises of the employer during nonworking hours.” It exempted from this prohibition the use of lawful products “which impair an employee’s ability to perform the employee’s duties” as well as any nonprofit employer “that, as one of its primary purposes or objectives, discourages the use of one or more lawful products by the general public.” In addition, the proposal permitted an employer to provide health, disability, or life


81Alice O’Connor to Pat Donoho, Action-Trac (Dec. 5, 1991), Bates No. TI28922691. O’Connor claimed that “Wayne Cox from IA Citizens for Tax Justice has agreed that he will work closely with labor.” Cox was with Minnesota Citizens for Tax Justice and there was no such Iowa organization. Close attention to detail does not appear to have been O’Connor’s strong point: a week earlier she had sent Donoho a copy of an alleged PERB decision of Nov. 25, 1991 concerning AFSCME and Clinton, but Cathey Yoe of the D.C. office had to call to her attention that they had received the decision more than three years earlier. Alice O’Connor to Pat Donoho, Action-Trac (Nov. 27, 1991), Bates No. TI28922697.

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insurance policies with coverage and price differentials based on an employee’s use of lawful products if the differentials reflected cost differentials to the employer. Violations (which were simple misdemeanors) triggered an entitlement to affirmative relief including reinstatement, hiring, and backpay.82

Four days later O’Connor also faxed the proposed bill to Hurst Marshall, the head of R. J. Reynolds Tobacco’s Midwest region, who faxed it back with the notation: “This is fine with me!”83

A week later, the TI’s Midwest regional office reported to headquarters that labor was being recontacted to “reaffirm their commitment to push a separate bill as a labor issue.” At the same time, staff made it clear that numerous disparate obstacles to passage of an acceptable bill had been identified but not yet overcome, including the eventual need to address the possibility that the whole campaign might yet be outed as a “tobacco issue”84.

Tobacco lobbyists behind the scenes will work with legislative leadership to finesse procedural moves. Separately, an amendment is ready to go if an appropriate separate labor bill or one dealing with conditions of employment surfaces.

On the separate bill, if hostile language ends up being attached, we face the very real possibility of fighting to kill our own bill, probably in the Senate.

In the Senate, it takes only a simple majority to suspend the rules in which case with a lot of additional terms added to our bill ruled germane, [they] could leave us with a bill we do not like very much. Noone [sic] wants to use any chits on the privacy bill which TI lobbyists feel is a very real possibility. PM staff and lobbyists say this is an unfounded concern and won’t happen.

We need to recognize when Branstad chaired the National Governor’s Conference, his top platform was on health care and non-smoking issues. If a separate bill passes both houses identified even remotely as a tobacco bill, we stand a possible gubernatorial veto.85

Region IV also stressed the need to use labor management contacts with “national ACLU activists...to educate and motivate local unions, media and key legislators.” In light of AFSCME’s key role in the Clinton dispute, it was self-explanatory that this union was singled out for special mention as an important

82 A Bill for an Act prohibiting the refusal to hire (faxed Dec. 5, 1991), Bates No. TI28922689-70.
83 A Bill for an Act prohibiting the refusal to hire (faxed Dec. 9, 1991), Bates No. TI28922693-94.
Iowa ally. The regional office also shared the insight that since “[t]he feeling among Iowans” was the Clarence Thomas “ought never have been put through the ordeal,” “the issue of privacy may play very well in Iowa.”

Region IV did not explain its cryptic statement that “[b]usiness support will depend on whether we opt for legal products or legal activities,” but it presumably meant that the employers whose support the tobacco industry sought to secure might acquiesce in the former, but not in the latter, which, as events revealed, could encompass dating co-workers.

Already on January 13, 1992, the day the legislative session convened, Conservative Democrat Dennis Renaud, chair of the House Labor and Industrial Relations Committee, who, as previously discussed, had been an active and outspoken opponent on the House floor of anti-smoking bills in the latter half of the 1980s and was known to have been “in the pocket of the tobacco lobby,” submitted TI’s “lawful products” draft bill with a request for drafting to the Legislative Service Bureau. Renaud was listed as the sponsor, but the request form identified Ted Anderson, a multi-client lobbyist, as the person from whom the request had been received. While not unprecedented, naming a lobbyist as the requester was uncommon. A former John Deere Company worker and UAW member, Anderson had been a one-term Democratic state senator from Waterloo (1981-84), who then lobbied for 16 years until his death in 2000. Anderson’s clients in 1992—including the National Cattle Congress, Iowa Independent Bankers Association, and Iowa Library Association, as well as

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88 See above ch. 26.
89 Email from Rod Halvorson to Marc Linder (Aug. 9, 2007). Years later Renaud stated that he was unable to recall the study bill’s provenience, though he heatedly denied that the “lawful products” bill was about tobacco; when told that the Tobacco Institute had in fact supplied the text of the study bill, he immediately demanded to know where this line of questioning was going, although he admitted that he would have passed the study bill onto the Legislative Services Bureau even if it had come from used car dealers. He also refused to confirm or deny that he smoked in the early 1990s, but did inadvertently mention that he was unable to recall whether he still smoked at that time. Telephone interview with Dennis Renaud, Altoona, IA (Aug. 12, 2007).
90 Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB# 5557HC (Jan. 13, 1992) (copy furnished by SHSI DM).
91 Email from Don Avenson to Marc Linder (Aug. 21, 2007).
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numerous health-related entities—may not have been plausible advocates of pro-smoking legislation, but AFSCME Local Council 61 could have been. Since the real requester in this case was the Tobacco Institute, whose lobbyists were Wasker and Wimmer, a question arises as to why the latter, a Democrat, did not hand the draft directly to Renaud instead of using an intermediary. Perhaps Anderson’s union background and contacts made him a more credible conduit, especially since he famously “loved cigars.” In addition, as former legislator Linda Beatty speculated years later, tobacco lobbyists might have used him because “Teddy” was a “big Democrat” whom “everyone” in the legislature liked and who was very popular, especially with older Democrats. Another possible explanation for Anderson’s role as a front may be linked to Renaud’s not having opted for confidentiality for the request: since a nonconfidential request meant that “the Legislative Services Agency will list the request in the index of bill or research requests, and will release the name of the requester, a working title for the bill draft or research request, and the general subject matter classification of the request,”77 had Renaud listed Wasker/Wimmer or the Tobacco Institute as the requester, other lobbyists would have been able to discover that the measure’s veiled reference to “lawful products” was code for tobacco; with a non-tobacco lobbyist as the purported requester, anti-smoking legislators and groups might have been thrown off the trail and misled to believe (as may have been the case in the Senate) that the bill, requested by AFSCME’s lobbyist, vindicated a new right for workers rather than protecting tobacco company profits.88

94Wimmer stated in 2007 that he had absolutely no recollection of the bill, but speculated that he might have given it to Anderson because of the latter’s labor connection. Telephone interview with William Wimmer, Des Moines (Sept. 5, 2007). Although Wasker had revealed a vivid memory of events surrounding his success in achieving local preemption in 1990, when asked why the anti-smoker discrimination bill failed in 1992, he protested that it was too long ago to remember. Telephone interview with Charles Wasker, Des Moines (Aug. 30, 2007).
98Whereas ex-House members Halvorson and Beatty found this speculation plausible, former House Speaker Avenson archly observed that no one except law professors 15 years after the fact pays attention to bill draft requests, although he conceded that some lobbyists do. Email from Rod Halvorson to Marc Linder (Aug. 22, 2007); telephone
In any event, neither Renaud ("OK for Com Study Bill for Labor") nor Anderson was apparently embarrassed that the draft submitted to the Legislative Service Bureau still bore the Tobacco Institute’s computer document identifier code (including the “smoker.doc” extension).99 The next day the same study bill was submitted as a companion by the chair of the Senate Business and Labor Relations Committee, Richard Running,100 a pro-union, former executive board member and organizational representative of United Food and Commercial Workers Local 3-P,101 who had filed the amendment to excluded restaurants from the clean indoor air act in 1990,102 and was known to accommodate tobacco lobbyists Wasker and Wimmer.103

On January 20, 1992, liberal Democrat Jane Teaford filed a short bill that would have amended the unfair employment practices section of the Iowa Civil Rights Act to prohibit an employer from firing an employee for his or her “participation in a lawful activity off the premises of the employer during nonworking hours” unless the restriction was (1) related to a bona fide occupational requirement or was reasonably related to the employment activities and responsibilities of a particular employee or group of employees as opposed to all of the employer’s employees, or (2) necessary to avoid (the appearance of) a conflict of interest with any responsibilities owed by the employee to the employer.104 The bill was referred to the Judiciary and Law Enforcement Committee, chaired by the tobacco industry’s reliable representative, Daniel Jay;105 Philip Brammer, the House’s most outspoken anti-smoking advocate, was appointed to the three-member subcommittee, chaired by liberal Democrat Linda Beatty, assigned to vet the bill.106 Significantly in this context, Beatty, just a few months earlier, had told a historian that she viewed her role in the legislature as

99 Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB# 5557HC (Jan. 13, 1992) (copy furnished by SHSI DM).
100 Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB# 5557SC (Jan. 14, 1992).
102 See above ch. 27.
103 Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).
105 See above ch. 28.
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...protecting civil rights and individual rights.\textsuperscript{107} In 1991 she had voted with the tobacco industry on vending machines and sampling, and in February 1992 she voted against the cigarette tax increase. Even as late as 2007, Beatty took the position that so long as cigarettes were a “legal product,” she not only would support prohibiting employment discrimination against smokers, but believed that smokers should be given some place to smoke at work.\textsuperscript{108}

During the six weeks before the committee acted on Teaford’s H.F. 2058, several other bills pertaining to the same subject were filed. On January 30, House Study Bill\textsuperscript{109} 584 was assigned to the Labor and Industrial Relations Committee, which assigned it to a five-member subcommittee, which was also chaired by Beatty and of which Brammer was also a member.\textsuperscript{110} H.S.B. 584 was largely identical to TI’s proposal—that tobacco industry lobbyists wrote the Iowa bill was not unique: Philip Morris lobbyists had written the law that New Jersey passed in 1991\textsuperscript{111}—the substantive provisions differing only in several insignificant formal respects; the enforcement provisions were also materially the same, differing only with respect to minor rearrangements. Even the “Explanation” furnished by the Tobacco Institute was retained.\textsuperscript{112} This bill, TI observed, was being “pushed by labor.”\textsuperscript{113} The next day O’Connor shared her “Assessment about Iowa” with Donoho, reporting under the heading, “Privacy Bill,” that “PM lobbyist...Cal Hultman and TI Labor Consultant...Lowell Junkins and Bill Wimmer have both House and Senate bills set to be introduced by Labor

\begin{thebibliography}{99}
\bibitem{107} A Political Dialogue: Iowa Women Legislators, Box 1: Transcripts: Beatty, Linda at 21-22 (Sept. 26, 1991), IWA.
\bibitem{108} Telephone interview with Linda Beatty, Indianola (Aug. 22, 2007).
\bibitem{111} Richard Kluger, \textit{Ashes to Ashes} 682 (1996).
\bibitem{112} H.S.B. 584 (n.d.). The Legislative Service Bureau’s bill request file includes the drafter’s handwritten marginal changes including her question/comment to her supervisor: “‘Legal’ rather than ‘Lawful’? Lawful OK I guess—breaking new ground!” Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB# 5557HC (Jan. 13, 1992) (copy furnished by SHSI DM).
\bibitem{113} Alice O’Connor to Pat Donoho, Action-Trac: Iowa HF (Feb. 7, 1992), Bates No. TI23670050/2.
\end{thebibliography}
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and referred to Labor Committees.”

The ease with which the study bills could be referred to these committees was a function of the study bill system and of the political orientation of their chairmen. Although Iowa’s apparently unique study bills are primarily the venue by which the governor, executive agencies, and the judiciary can place bills before committees, committee chairs also have the prerogative to request the Legislative Services Agency (formerly Legislative Service Bureau) to draft bills, which may have been handed to them by lobbyists, but of which the chairs will appear as the sponsors. Some committee chairs, at one extreme, may adopt a laissez-faire policy with regard to lobbyists’ requests to insert their proposals into the study bill system, whereas at the other extreme others may refuse to process any such requests unless they substantively approve of them. In 1992, the tobacco industry would not have encountered any access problems with the aforementioned House and Senate labor committee chairmen, Dennis Renaud and Richard Running. One reason for lobbyists’ tendency to use study bills is that by securing a committee chair’s approval of the bill they get over one major hurdle; moreover, chair-backed study bills enable lobbyists to avoid association with the possible negatives attached to the name or party of an individual sponsor—which include losing votes.

Although it was crucial to the tobacco industry’s strategy that the real purpose of the bill (to prevent employers from discouraging employees from smoking) be hidden behind vague talk about privacy, the unofficial but authoritative Iowa Legislative News Service Bulletin pierced this veil by calling H.S.B. 584 the day it was assigned to a subcommittee “Off-Duty Smoking/Drinking.” By February 7, TI reported that H.S.B. 584 was “the priority bill for labor and likely to be pushed out of committee in the next two weeks. Even though a similar bill HF 2058 (legal activities) is also likely to move. This is the bill of choice for Labor.” O’Connor—who was herself registered as a Tobacco Institute lobbyist

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114 Alice O’Connor to Pat Donoho, Subject: Assessment about Iowa (Jan. 31, 1992), T128710967/8. She also mentioned that Philip Morris was doing a separate privacy poll but not through ICAN.

115 Telephone interview with John Pollak, Legislative Services Agency, Des Moines (Aug. 9, 2007). Interim committees also produce study bills.


117 Email from Don Avenson to Marc Linder (Aug. 15, 2007).


119 Alice O’Connor to Pat Donoho, Action-Trac: Iowa HSB584 (Feb. 7, 1992), Bates No. T123670050/1.
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in the Iowa legislature—added that TI’s lobbyists Junkins and Wimmer were “working very closely with labor behind the scenes coordinating this effort.” On February 26, the House Labor and Industry Committee voted it out as a committee bill, recommending that it pass as amended. During the 45-minute meeting, which was also devoted to discussing three other bills, the committee took up an amendment, the most important provision of which expanded the exemption beyond nonprofit employers, but also narrowed it by tacking on qualifications. It now applied to an “employer which has previously manifested as its primary purpose its discouragement of the use of one or more lawful products by the general public in its legal charter, by-laws, or established organizational or business plan, and which has provided written notification of this purpose to its employees and applicants for employment.” It is not intuitively obvious what for-profit employers could have satisfied this primary purpose criterion, but whichever nonprofits or for-profits met it would have had to surmount the other obstacles created by the amendment as well. HSB 584.504 also imposed tighter limits on employers’ privilege to charge lawful product-using employees higher insurance premium rates by requiring state insurance agency approval of such rates. And finally, the amendment would have empowered

121Alice O’Connon to Pat Donoho, Action-Trac: Iowa HSB584 (Feb. 7, 1992), Bates No. TI23670050/1.
123Some confusion attends the author of this amendment. According to the committee meeting minutes, Beatty, the subcommittee chair, asked for unanimous consent to reconsider amendment 584.502, to which there was no objection; then Rep. Steve Hansen—whose pro-tobacco stances were mentioned in ch. 28—asked for unanimous consent to reconsider his amendment, to which there was also no objection. At that point Amendment HSB 584.504 was distributed and debated. Amendment 584.504, which was appended to the minutes, was presumably Hansen’s amendment (rather than Beatty’s 584.502); although it bore the Legislative Services Bureau designation HSB 584.504 74, it was labeled “Proposed Committee Amendment by Beatty of Warren.” The fact that Beatty and Hansen asked the committee to “reconsider” their amendments suggests that the committee had already considered them at an earlier meeting as does the statement that after the committee had adopted HSB 584.504, “the previous amendments adopted were out of order.” Committee Minutes for Labor & Industrial Relations (Feb. 26, 1992) (copy furnished by SHSI DM). According to the Iowa State Archives, no committee meeting minutes for February contained any discussion of HSB 584. Email from Meaghan McCarthy to Marc Linder (Aug. 23, 2007).
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courts to order liquidated damages of up to $5,000 for wilful violations and deleted the provision in the original study bill making a violation a simple misdemeanor.\textsuperscript{124} After the committee had adopted the first two changes by a voice vote and the latter two by a vote of 10 to 8, it adopted the whole bill by a vote of 12 to 8.\textsuperscript{125} Two days later, on February 28, the committee’s bill was introduced and placed on the House calendar as H.F. 2329, but it never reached the floor, and died after having been rereferred to committee.\textsuperscript{126}

What later became House Study Bill 653 was submitted to the Legislative Service Bureau for drafting at the request of Linda Beatty on February 12. As submitted, it was styled as an amendment of H.S.B. 584, striking everything after the enacting clause and inserting instead an amalgam of H.S.B. 584 and H.F. 2058, using the latter’s “lawful activity”\textsuperscript{127} instead of the former’s “lawful products.” Chairman Renaud handwrote on the draft to the LSB drafter: “O.K. draft study bill as directed by Rep. Beatty.”\textsuperscript{128} The LSB’s more polished product, now H.S.B. 653, was assigned on February 18 to the same Labor and Industry five-member subcommittee chaired by Beatty,\textsuperscript{129} but it too died in committee by virtue of having failed to meet the March 6 cross-over (funnel) deadline.\textsuperscript{130}

H.F. 2058 was being held up in the Judiciary Committee, TI reported on February 7, because it was tied to the state civil rights statute, but it was beginning to gain “additional interest” and to be called a “‘Walmart Bill,’” because Walmart fired two employees who work in their store for dating. Walmart has a policy against that during work hours and Teaford’s bill addresses legal

\textsuperscript{124}House Study Bill 584, appended to Committee Minutes for Labor & Industrial Relations (Feb. 26, 1992) (copy furnished by SHSI DM).

\textsuperscript{125}Committee Minutes for Labor & Industrial Relations (Feb. 26, 1992) (copy furnished by SHSI DM). Although the vote was by roll call, the names were not recorded in the minutes. Since 12 Democrats and 8 Republicans were present and voting and several other committee and floor votes on these bills were along party lines, possibly this vote was too.


\textsuperscript{127}H.S.B. 653 (Labor and Industrial Relations) (n.d.).

\textsuperscript{128}Legislative Service Bureau, Request for Bill or Amendment Drafting, LSB # 6137HC (Feb. 2 [1992]) (copy furnished by SHSI DM).


\textsuperscript{130}Alice O’Connor to Pat Donoho, Action-Trac: Iowa HSB653 (Mar. 23, 1992), Bates No. TI23670053.
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activities.” In fact, the Iowa Court of Appeals, ruling in August 1990 in a case that had arisen in 1985 involving two nonsupervisory employees who had allegedly violated the company’s “fraternization” policy that “Wal-Mart had legitimate reasons for banning relationships at work,” had held that there was “no public policy preventing the regulation of relationships at the work place.” Popular and legislative reaction to this decision that the at-will rule of employment developed by the Iowa Supreme Court did not prohibit an employer from firing an employee for dating a co-worker was about to interact with the tobacco industry’s efforts to pass its own bill. On February 26, the House Judiciary Committee discussed amendments to H.F. 2058, the content of which even TI’s lobbyist Wasker had been unable to determine, but he assured his client that there would not be “any quick action [on] it, because all attention” was focused on the budget. Nevertheless, Region IV reported to headquarters its belief that “one of the amendments include [sic] language which says that business can put in their by-laws proper employment language that could discriminate against smokers.” If such an amendment ratifying employers’ powers at the expense of the cigarette companies’ sales and profits was actually adopted, O’Connor confided to Donoho: “This absolutely will have to be taken out.” After Beatty’s subcommittee had recommended the bill’s passage, on

131 Alice O’Connor to Pat Donoho, Action-Trac: Iowa HF 2058 (Feb. 7, 1992), Bates No. T123670050/2.


133 Alice O’Connor to Pat Donoho, Action-Trac: Iowa HF 2058 (Feb. 27, 1992), Bates No. T123670050/2. Neither the House Journal, the Index to the Journals, the Iowa Legislative News Service Bulletin, nor the Des Moines Register mentioned any such committee meeting. The State Archives also has no record of any such meeting. Email from Meaghan McCarthy to Marc Linder (Aug. 6, 2007). Perhaps O’Connor conflated this bill and meeting with the House Labor and Industry Committee meeting of that date on H.S.B. 584; see below. It is not clear what amendment O’Connor had in mind, but after the House had defeated H.F. 2058, Beatty filed an amendment that attached a third condition to the permissibility of employers’ restrictions on employees’ off-premises lawful activities: “The employer has notified the employee in writing of the restriction at the time of hire or at a time sufficiently in advance of the employee’s activity so that the employee can modify the employee’s participation if the employee so wishes.” S.F. 2271, H-5393 (Mar. 19, 1992, by Beatty), House Clip Sheet at 1 (Mar. 20, 1992).

134 Record of Committee Action on Bills & Resolutions and Subcommittee Members, H.F. 2058, Judiciary & Law Enforcement, Subcommittee Report (n.d.) (copy furnished by SHSI DM). The undated subcommittee report was signed by Beatty and Brammer.
March 3, the House Judiciary Committee finally recommended passage of H.F. 2058. The 11 to 7 vote perfectly tracked party affiliation with one exception: Democrat Rod Halvorson, who prioritized the struggle against smoking above formal workplace democracy, joined six Republicans in the minority. The bill, according to subcommittee chair (and bill floor manager) Linda Beatty, had been “prompted” by the aforementioned Wal-Mart decision, which she called “an example of how businesses sometimes try to regulate the private lives of their workers. ‘We can’t stop dating in business. That’s where people make their social contact.’” Moreover: “‘If an employee does the job, why would an employer want to butt into your personal life. I don’t understand that.’” Beatty later confirmed that she supported the bill because it was good for employees.

When the House (controlled by Democrats 55 to 45) took up H.F. 2058 on March 17, opponents argued that the bill went too far because there were “situations where employees engage in types of behavior that, while legal, reflect poorly on the business.” Republicans’ unabashed pro-employer opposition was led by first-term member Charles Hurley, a lawyer in private practice and member of the Christian Legal Society, who, without explaining how his guideline related to the Wal-Mart case, claimed: “‘When an employer is forced to retain an employee who is basically destroying his business, we’ve gone too far.... We can’t delve into free enterprise and expect it to flourish. We only shoot ourselves in the foot when we tie employers’ hands.’” Jane Svoboda, one of the very few Democrats aligning themselves with the model of the autocratic workplace, drifted even farther from the dating question by insisting that “government should not try to ‘micromanage’ business. ‘You’ve got to give the employer some opportunity to maintain law and order in the workplace.’” Other critics of the bill insisted that it would deter businesses from locating in Iowa.

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In contrast, Beatty insisted that if employers were to make rules about workers’ personal lives, “‘they’d better relate to the job.’”\textsuperscript{143} Hurley, a very conservative representative who was not even close to his fellow Republicans,\textsuperscript{144} gave his colleagues the chance to determine how central the Wal-Mart question was to the bill by offering an amendment that struck the entire bill, replacing it with a prohibition exclusively of employers’ firing an employee for “dating another employee.” Its defeat by a vote of 47 to 50 was almost perfectly along party lines: not a single Republican joined the 50 Democrats in opposition, while only four conservative\textsuperscript{145} Democrats (all of them farmers) voted with 43 Republicans to dilute the intrusion into employers’ exercise of unfettered power to fire workers for any or no reason.\textsuperscript{146} After having been thwarted in their effort to narrow the bill’s scope, the Republicans turned around and voted against passage of H.F. 2058 in a solid block of 44, not a single one joining the 47 Democrats who supported the original bill; the bill’s 47 to 51 defeat resulted from four new Democratic Nays’ being added to three of the four who had voted with the Republicans on the Wal-Mart amendment.\textsuperscript{147} (One of the Nays was cast by Rod Halvorson, perhaps the chamber’s most consistently militant anti-smoker, who believed that employers should be entitled not to hire smokers for health reasons—a position that prompted some objections from labor unions in his Fort Dodge district, though his otherwise strong support for unions muted the criticism.)\textsuperscript{148} In the end, then, the cigarette companies’ strategy ran aground on Iowa Republicans’ ineradicable support for perpetuating employers’ longtime rule of the workplace “with an iron-hand by reason of the prevailing common-law


\textsuperscript{144}Telephone interview with former Representative Rod Halvorson, St. Paul (Aug. 7, 2007).

\textsuperscript{145}Telephone interview with Linda Beatty, Indianola (Aug. 22, 2007).

\textsuperscript{146}\textit{State of Iowa: 1992: Journal of the House: 1992: Regular Session Seventy-Fourth General Assembly} 1:650-51 (Mar. 17). Fogarty, Koenigs, Mertz, and Svoboda were farmers, two of whom (Fogarty and Mertz) had cosponsored the amendment. Although her entry in the \textit{Iowa Official Register} failed to mention that Svoboda farmed, she discussed her multigenerational farming at length in her oral history. A Political Dialogue: Iowa’s Women Legislators Box 4, Folder: Transcripts: Svoboda, Jane (Oct. 29, 1991), IWA.


\textsuperscript{148}Telephone interview with Rod Halvorson, St. Paul (Aug. 7, 2007).
rule” that an employment contract for an indefinite period “is presumed to be at will...”\textsuperscript{149} The cigarette companies had also been boxed in by their ill-chosen statutory terms: although the losing anti-Wal-Mart bill’s use of “lawful activity” would literally encompass smoking, their preference for “lawful products” was not capacious enough to include dating bans.

With the defeat of the last House bill, attention turned to the Senate, where Senate Study Bill 2120, proposed by the Business and Labor Relations Committee, was identical to H.S.B. 584, TI’s “lawful products” measure.\textsuperscript{150} Referred to committee on February 4, it was assigned the next day to a three-member subcommittee chaired by William Palmer,\textsuperscript{151} a heavy-smoking insurance businessman highly protective of smoking in the Senate itself.\textsuperscript{152} After the committee had unanimously approved it (now S.F. 2271) on March 4,\textsuperscript{153} the full Senate took it up on March 16, adopting by a voice vote amendments by three senators from Des Moines, Republican Mary Kramer and Democrats Elaine Szymoniak and Palmer, which exempted any employer policies or labor contracts in existence before March 1, 1992.\textsuperscript{154} The following day—the same day that the House defeated H.F. 2058—the Senate overwhelmingly passed S.F. 2271 by a vote of 44 to 2, even Hannon, one of the chamber’s most reliable anti-smoking stalwarts voting Aye.\textsuperscript{155} Indeed, despite her quasi-outsider status, the reasoning that Hannon later offered to justify her vote may well have been typical for many of her colleagues: “If the bill said that workers could use lawful products where not prohibited, I would have voted for it, whether it was alcohol, tea...Tylenol...or

\textsuperscript{149}Monge v. Beebe Rubber Co., 316 A.2d 549, 551 (N.H. 1974). Linda Beatty confirmed that the Republicans’ votes were based on their pro-employer position. Telephone interview with Linda Beatty, Indianola (Aug. 22, 2007).

\textsuperscript{150}S.S.B. 2120 (Proposed Business and Labor Relations Committee by chairperson Running).


\textsuperscript{152}Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).


\textsuperscript{155}State of Iowa: 1992: Journal of the Senate: 1992: Regular Session Seventy-Fourth General Assembly 1:818 (Mar. 17). Representative Rod Halvorson, who a month later lambasted the bill in the House as the tobacco industry’s creature, speculated that lack of opposition in the Senate might have resulted from lack of knowledge at that time about the bill’s real origins and purposes. Telephone interview with Rod Halvorson, St. Paul (Aug. 8, 2007).
Cigarette Firms Fail to Pass Bill Prohibiting Employer Anti-Smoker Discrimination

tobacco. ... If it’s ‘legal’ it’s legal.” Although she did not recall whether she had been aware of the bill’s origins in the Tobacco Institute, she stated that even if she had known, “it wouldn’t have changed my vote.” That even an anti-smoker of Hannon’s stature favored such a legalistic approach—by whose logic smoking would not be prohibited in public places—in 1992 and still clung to it in 2007 helps explain why until that time the Iowa legislature, unlike 20 other states, still had not passed a rigorous and comprehensive anti-smoking law. (Linda Beatty, too, still adhered to this position in 2007). Whatever the senators knew at the time of voting, the Register’s one-line summary of the bill in its list of bills passed that day let the cat out of the bag, albeit ungrammatically, as to what the bill was really about: “Outlaws policies by most employers that prohibits [sic] smoking and alcohol consumption away from work.”

When the Register editorialized under the title, “Does the Boss Own You?” on April 6 that the House had recently defeated a bill that would have made illegal firings based on whether employees engaged in lawful activity such as smoking cigarettes, watching x-rated movies, or riding in a motorcycle group, it failed to point out that the “lawful products” approach that the Senate had passed would definitely cover cigarettes and movies, though it would not have applied to dating. The newspaper did, however, mention that Teaford was seeking to “include language preventing employees from being hired or fired based on their lawful use of products.” This confused and confusing claim actually referred to the fact that Teaford had filed on March 30 an amendment not to her own defeated H.F. 2058, but to S.F. 2271 (which the Senate had passed) that was apparently designed to give the House another opportunity to vote on H.F. 2058: Teaford’s amendment struck “use of lawful products” from the heading of the bill’s proposed new section of the Employer-Employee Offenses statute and replaced it with “lawful activity,” but did not insert such a substitution into the body of the main prohibition, which continued to speak only of “lawful products.” The amendment did, however, import from H.F. 2058 the exceptions to the prohibition of discharging an employee for participating in off-premises lawful activity, thus giving S.F. 2271 a disjointed hybrid character. In the event, however, Teaford’s amendment was placed out of order and never voted on when

156Email from Beverly Hannon to Marc Linder (Aug. 10, 2007).
the House took up the bill later in April.\textsuperscript{161}

After the House Labor and Industrial Relations Committee had recommended passage of S.F. 2271 on March 25,\textsuperscript{162} TI’s Region IV learned that its faithful advocate, Representative Daniel Jay, had filed an amendment that would have exempted from the bill’s prohibitions employer programs “establishing and enforcing blood content levels for alcohol, prescription drugs, or other medications while the employee is on duty, on the employer’s premises, or using the employer’s equipment.”\textsuperscript{163} The Midwest regional office informed headquarters that: “Labor does not like this amendment. The sponsor will be asked to withdraw his amendment.”\textsuperscript{164} In fact, it was placed out of order during floor debate and never considered.\textsuperscript{165}

When the House took up S.F. 2271 on April 15, the bill’s opponents called it a “‘paper tiger’ concealing a tobacco industry drive.”\textsuperscript{166} In particular Democrat Rod Halvorson, a longtime antismoking militant, turned a bright light on the cigarette companies’ camouflaged machinations by explaining that “the tobacco industry is pushing such legislation throughout the country because of public health efforts to discourage tobacco use. ‘This is a direct assault of the tobacco industry to bring this issue before us,’” adding that some employers had prohibited smoking by employees on account of the increased illness and medical costs linked to smoking.\textsuperscript{167}

Democrat Patrick Gill, a construction businessman and nonsmoker who had chaired the Labor and Industrial Relations subcommittee that had vetted the bill\textsuperscript{168} and argued that “businesses should not be allowed to meddle in the private lives of workers,”\textsuperscript{169} offered an amendment striking the entire bill, but then readopting the Senate-passed bill with the same amendments to H.S.B. 584 that

\textsuperscript{163}S.F. 2271, H-5661 (Apr. 2, 1992, by Jay), House Clip Sheet.
\textsuperscript{164}Alice O’Connor to Pat Donoho, Action-Trac: Iowa SF 2271 (Apr. 8, 1992), Bates No. TI28711514, on tobaccodocuments.org.
\textsuperscript{166}“Smoking Bill Fails,” Gazette (Cedar Rapids), Apr. 16, 1992 (4B:1).
\textsuperscript{167}“Statehouse Notes,” DMR, Apr. 16, 1992 (4) (NewsBank).
\textsuperscript{169}“Smoking Bill Fails,” Gazette (Cedar Rapids), Apr. 16, 1992 (4B:1).
Beatty had proposed and the House Labor and Industrial Relations Committee had adopted on February 26. The most relevant change reproduced verbatim the requirement for exemption introduced in H.S.B. 584/H.F. 2329 that employers (and not just nonprofits) have solemnly manifested their purpose to discourage use of a lawful product in a legal or business organization document and given employees and applicants written notification of it. What proved to be a deal-breaker, however, was a floor amendment offered by Gill that simply struck the language added by the Senate exempting “employer policies” (but not labor contracts) in existence on March 1, 1992. On a roll-call vote this amendment passed by the narrowest of margins—50 to 49. All 50 Ayes were cast by Democrats, while only 4 Democrats, including the chamber’s leading anti-smokers Hammond and Rod Halvorson, voted with all 45 Republicans in opposition. This voting pattern is difficult to reconcile with TI’s intelligence that labor and business “said they would have the bill vetoed if ‘policies’ were not included. Attempts to put ‘policies’ back into the bill failed.” If Labor wanted that language restored, Democrats could have been expected to accommodate that preference rather than vote solidly against it. (Halvorson later interpreted this amendment as possibly designed to stick it to non-union employers, whose non-collectively bargained employer practices would not be exempted.) Gill’s overall amendment was adopted on a voice vote, but the bill (which now consisted of Gill’s amendments) was narrowly defeated 51 to 48. Again, the vote was along party lines: 47 Democrats voted for the pro-tobacco industry bill joined by a lone Republican, Mary Lundby, an ardent smoker and loyal cigarette industry legislator. The bill was defeated because the other 44 Republicans

See above this ch.

State of Iowa: 1992: Journal of the House: 1992: Regular Session Seventy-Fourth General Assembly 2:1479 (Apr. 15) (H-5858). By amendment of the amendment H.F. 2329’s requirement that the employer have “previously” manifested its purpose was deleted. Id. at 1480 (H-5914). The amendment also conditioned employers’ imposition of higher insurance premium rates for users’ of lawful products on approval by the commerce department insurance division. Id.


Alice O’Connor to Pat Donoho, Action-Trac: Iowa SF 2271 (Apr. 8, 1992), Bates No. T28711514, on tobaccodocuments.org.


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(who were presumably representing businesses’ opposition to any diminution of their power to hire and fire) were joined by seven Democrats, including Gill himself, three anti-smokers (Halvorson, Hammond, and Teaford), and Svoboda and Koenigs, who were presumably pro-business. Gill, however, may have voted Nay simply in order to be on the prevailing side in order to be eligible to file a motion to reconsider, which he did the next day, but it failed by a vote of 42 to 49.

Despite the tobacco industry’s best efforts to conceal the real purpose of the bill, the press was not misled. Even the headline of the AP article in the Cedar Rapids Gazette read “Smoking Bill Fails,” while the text observed that the House had rejected a bill prohibiting employers from firing employees “for smoking off the job.” After the motion to reconsider the vote had failed, TI realized that success had probably eluded it: although its lobbyist was still seeking a “vehicle bill to attach privacy provisions to,” the looming end of session left a conference committee report as the only possibility, which never materialized. In contrast to Wasker’s failure in Iowa, TI’s lobbying resulted in the passage of anti-discrimination laws in neighboring Minnesota, Missouri, and Wisconsin, as well as in other states, though tobacco industry initiatives failed in even more states.

In spite of this defeat, TI increased lobbyist Wasker’s annual retainer from $44,000 for 1992 to $50,000 for 1993—thus perhaps inadvertently substantiating the boilerplate recitation in TI’s standard lobbyist retainer agreement that it was the parties’ intention that payments for services rendered

General Assembly 2:1481-82 (Apr. 15).


179 “Smoking Bill Fails,” Gazette (Cedar Rapids), Apr. 16, 1992 (4B:1).

180 Alice O’Connor to Pat Donoho, Action-Trac: Iowa SF 2271 (Apr. 17, 1992), Bates No. TI28711514, on tobaccodocuments.org.

181 State Activities Division, Coordinating Committee Meeting (July 20, 1992), TI24360512/7-8, on tobaccodocuments.org. In Minnesota and Wisconsin the bills were keyed to “lawful activities,” whereas the Missouri bill hinged on tobacco or alcohol use. Id. at TI24360529/30/34.

182 State Activities Division 1993 Budget [Confidential] at 3-9 (Dec. 23, 1992), Bates No. TI35952338/60. Wasker’s retainer in 1992 was, considering Iowa’s size and the difficulties associated with blocking anti-tobacco bills, definitely not outlandish compared with the retainers that TI paid lobbyists elsewhere—for example, $100,000 to the well-known Democratic political operative Tom Kelm in Minnesota. Id. at 3-8 to 3-12, Bates No. TI35253559-63.
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were “not in any way contingent upon the defeat or enactment of any legislative...proposal.”\textsuperscript{183}

Failure in 1992 did not cause the cigarette companies to abandon their effort to dismantle this particular interference with smoking in Iowa. Nevertheless, although in 1993, the Senate, still controlled by Democrats (27 to 23), passed by a vote of 36 to 11 a bill identical to S.F. 2271, which it had passed in 1992, it died in committee in the narrowly Republican House.\textsuperscript{184} Never in the years thereafter did the tobacco industry succeed in securing enactment of a statute in Iowa barring employers from firing or refusing to hire smokers.


Cigarette Manufacturers Thwart All Anti-Smoking Legislation During the Years of Divided Party Control of the Legislature: 1993-1996

The [Iowa Restaurant] association’s executive director said most restaurants are not likely to totally ban smoking unless forced to by law for fear of losing customers.¹

Yes, Branstad was a strong tobacco control advocate. It was about the only thing he and I agreed on!²

When the 75th General Assembly convened in January 1993, Democrats, for the first time since 1982, were no longer in control of both houses of the legislature: in addition to having narrowly lost the House majority to Republicans (51-49), they saw their control of the Senate slip to 27-23 (from 29-21). And although they hung on to that Senate majority in the 76th General Assembly (1995-96),³ the fact that Republicans secured an overwhelming 64-36 majority in the House should have made it obvious to anti-tobacco forces that they would, for the time being, be unable to overcome the cigarette oligopoly’s capacity to defeat any legislation designed to subvert its interests.

For the 1993 legislative session the Tobacco Free Coalition in Iowa formulated an extensive lobbying agenda, including a ban on smoking in indoor work sites, restaurants, and other public places, an increase in the cigarette tax, and repeal of the pre-emption provision in the indoor clean air act that prevented local governments from passing ordinances stricter than the (weak) state law.⁴ In addition to a bill to prohibit possession (beyond purchase or smoking) of tobacco by minors,⁵ advocates filed a whole raft of proposals, including a ban on the sale

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²Email from Johnie Hammond to Marc Linder (Feb. 19, 2006). Democrat Hammond was an anti-smoking militant.
⁴“Group Moves to Ban Smoking Areas in Restaurants, Offices,” AP (Jan. 7, 1993), Bates No. 2021174557. See below on the bills.
of candy resembling cigarettes,\(^6\) a ban on advertising tobacco products,\(^7\) tobacco stock divestment,\(^8\) and denial of deductibility of tobacco advertising expenses for corporate income taxes,\(^9\) but none saw any action beyond initial assignment to a subcommittee, where they all died, and the legislature ultimately failed to enact any of the Tobacco Free Coalition’s measures.

On March 16, the House Human Resources Committee approved a public health bill (H.F. 542) that included several provisions strengthening Iowa’s weak clean indoor air law that would have been inconsistent with continued smoking in the capitol rotunda. The bill removed both the 250 square foot limit on coverage of public places and the 50-seat limit on coverage of restaurants, but its most important innovations were the repeal of local preemption and confining the designation of smoking areas to situations in which the “transmission of environmental tobacco smoke to adjacent areas can be completely eliminated.”

Representative Brammer, a member of the committee, stated that the bill’s practical effect would be to eliminate smoking in public places because not many restaurants would be willing to install the expensive equipment required to remove the smoke. Opponents agreed with this assessment, but asserted that the result would be the loss of business.\(^11\) Little wonder that news of the committee’s recommendation to pass prompted the director of legislative information of the Tobacco Institute’s State Activities Division to exclaim “[t]his is very bad!” and to instruct the Midwest regional office to revise its bill-tracking summary to say that it would toughen the current smoking restriction law by requiring any smoking areas to be enclosed and separately ventilated, and that it would repeal preemption of local

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smoking, sales and sampling restriction ordinances, and give enforcement authority to Dept. of Public Health. Or something like that! ...

This bill is on the House calendar now. I’m sure that Chuck [Wasker] is going to kill it, but losing preemption in Iowa would be a lot worse than gaining it in North Dakota, I’d think!  

A few weeks later the full House, after narrowly rejecting (51 to 47) a motion to strip out the antismoking provisions, passed the whole public health bill by a vote of 68 to 32. Republican Stewart Iverson—soon to become the legislature’s highest-profile smoker and anti-anti-smoker—could devise no more telling critique than the rhetorical question as to “[h]ow far we should go in controlling people’s lives,” whereas his fellow party member, David Millage, was more worried about the alleged loss of business in Iowa’s border cities to restaurants in other, less public health-minded states. Some restaurants in one such border city (Council Bluffs) echoed such doomsday forecasts, but at least one manager, 40 percent of whose customers smoked, begged to differ: “‘I honestly don’t think the law would hurt our business that much.... People will still go out to eat, even if they can’t smoke. They can go for an hour or so without a cigarette.’” But general anti-public smoking legislation died in the Senate “at the hands of a senator who smokes”—Des Moines Democrat Florence Buhr, who chaired the Senate Health and Human Rights budget subcommittee and to whom committee chair Elaine Szymoniak generally assigned health issues. The legislation died, according to the Register, because Buhr failed to “push” it for consideration. Elevating profits over people’s health, Buhr claimed that the proposals were “too restrictive to pass muster in the Senate. ‘They could present economic hardship on small restaurants if they have to put in equipment so people don’t smell smoke.’” (Not until a year later did the Senate Appropriations Committee act,

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12Cathey Yoe to V Brown, Subject: Iowa HF542 (Mar. 19, 1993), Bates No. TI28923050.
14See below ch. 32.
removing the anti-smoking provisions, as committee chair Larry Murphy put it, “to avoid entangling a contentious budget fight with the smoking issue.” The next day the Senate adopted an amendment that struck Brammer’s amendment, the provisions of which were never enacted.20

Reviewing the 1993 session, Hurst Marshall, the R. J. Reynolds Tobacco Company’s regional director of government relations for the region including Iowa, informed Roger Mozingo, the company’s vice president for state government relations, that no legislation had been enacted “having an [sic] major impact on RJRT or the tobacco industry,” adding—incongruously—that: “Iowa is a very difficult state for the tobacco industry. The Legislature continues to be anti-tobacco and liberal.” More ominously, he observed that “1994 will be a real test for the industry. The ‘floods of 1993’ have weakened the economy and additional revenues will be needed to offset the losses which have occurred.”22

That the cigarette manufacturers passed the test to their self-satisfaction—“an excellent year for the tobacco industry”—was in no small part due to Democratic Senate Majority Leader Wally Horn, a former Cedar Rapids high school teacher and coach, who in 1986 had opposed a weak clean indoor air bill.

21Before starting at Reynolds in 1988, Mozingo had been employed at TI, being senior vice president of the State Activities Division from 1983 to 1988; before being a vice president of Tobacco Associates (1970-74), where he developed foreign markets for U.S. flue-cured leaf, he had been an assistant agricultural extension agent/tobacco market specialist for the North Carolina Department of Agriculture. R. J. Reynolds Tobacco Co., IV. Staff and Structure. D. Staff Bios (1980), Bates No. 507639363/4.
22Letter from Hurst Marshall to Roger Mozingo (Aug. 16, 1993), Bates No. 513336236. Marshall incorrectly reported that H.C.R. 22 prohibiting smoking in the state capitol building had been enacted. RJR Tobacco did not even have its own lobbyist in Iowa, relying instead, on industry lobbyists.
because “‘I just don’t think we should be approving this kind of legislation,’” and now chose to kill yet another bill to strengthen the state’s clean indoor air law. At the outset of the 1993 session, Tobacco Industry Labor Management Committee26 consultant Lowell Junkins,27 one of Horn’s predecessors as Iowa Senate Democratic Majority Leader in the mid-1980s, “met several times with leadership,” including Horn.28 Surely Marshall did not mean Horn when he repeated in 1994 that “Iowa continues to be a very difficult state due to an anti-tobacco and liberal legislature.”29 After all: “Horn, a non-smoker, said he decided against allowing a smoking debate this year in deference to smokers, who are finding their habit increasingly restricted. ‘You have to take into consideration that smokers are addicted...’ There’s a certain amount of tolerance you have to have, and I think we’re moving as fast as we can’ in controlling secondhand smoke.”30 The Des Moines Register saw absolutely no need for tolerance: vis-a-vis “downright deadly” secondhand smoke “non-smokers needn’t jeopardize their health to cater to the self-inflicted addiction of the few.” Although even the editors were unable to shed all of their market-knows-best biases (the “bill went too far in dictating to restaurateurs policies that should be

26TILMC’s purpose was allegedly to “contribute to greater cooperation among the various segments of the tobacco industry” by educating the public about problems facing the tobacco industry including unwarranted restrictions on the sale, advertising, and promotion of cigarettes. In 1985, its members included the Tobacco Institute and the Bakery, Confectionery, & Tobacco Workers International Union, United Brotherhood of Carpenters & Joiners, International Brotherhood of Firemen & Oilers, and Sheet Metal Workers International Association. “Tobacco Industry Companies, Committees and Organizations (as of 9/16/88)” at 8-9, on http://tobaccodocuments.org/ness/15.html.
27In 1990 Junkins was TI’s labor consultant. Pat Wilson to Jack Nelson at 2 (Philip Morris USA Interoffice Correspondence, Gov. Affairs, June 11, 1990), Bates No. 20246722792. By 1991, when he had formed Junkins-Hultman and Associates with former Republican Senate Majority and Minority Leader Calvin Hultman, Junkins wrote a memorandum to TI about his “educating House members on the regressive mature [sic] of sin taxes,” mentioning that Senate Majority Leader Bill Hutchins “is on our side....” Lowell Junkins to Susan Struntz (Apr. 5, 1991), Bates No. TNWL0051551.
private business decisions”), it did hail the bill’s proposed repeal of local preemption (“[t]hat’s called home rule, one of the hallmarks of participatory democracy”) and assail the “cancer-pushers” whose “expensive array of lobbyists” it hoped would “not prevail over the well-being of the three-fourths of Iowa adults who do not smoke.”

Horn’s Democratic colleague, Senator James Riordan, who had been named floor manager of the stillborn clean indoor air bill S.F. 2298, appeared to harbor some skepticism as to the real object of Horn’s deference when he admitted that he had “never been confident that it had enough support to pass because of opposition from ‘the big hitters in the rotunda,’ the pro-tobacco lobbyists.” That session’s anti-smoking bill, observed the Register, had “drawn the attention of a small army of lobbyists, many of whom [we]re certain to be prominent in financing lawmakers’ re-election campaigns this year.” Chief among them was Calvin Hultman, Philip Morris, USA Inc.’s registered lobbyist, who had shown boundless tolerance for smoking as Republican Senate Majority and Minority Leader from 1979 to 1990, and became Philip Morris’s counsel as soon as he retired. For Brammer, these well-paid lobbyists—for example, Hultman received $27,500 from Philip Morris in 1995, while TILMC paid Junkins $18,000— were “the unholy friends of the tobacco holocaust.”

That cigarette companies were paying such amounts to former Senate leaders so that they could “avoid scrutiny by discreetly currying favor with former colleagues” may have seemed only commonsensical, but former Senate Majority Leader and later R. J. Reynolds Tobacco lobbyist Hutchins nevertheless hurled a counterintuitive “’I think that’s bullshit’” at the notion. Indeed, since most of the tobacco industry’s legislative payments were made not in the form of direct campaign contributions to individual legislators, but in “soft money” channeled through parties, financing junkets, and making donations to legislators’ favorite charities, they were able to make their exercise of influence less conspicuous.

Horn made no effort to hide his acquiescence in the cigarette industry’s anti-regulatory, market-knows-best agenda, which, according to Senator Beverly Hannon, one of his most outspoken adversaries, was rooted in his principled

32 See below this ch.
34 Pat Wilson to Jack Nelson (Philip Morris USA Interoffice Correspondence, Gov. Affairs, June 11, 1990), Bates No. 20246722792.
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opposition to government regulation and restriction of individual behavior.\textsuperscript{36} Seeking to justify his refusal to permit debate on the bill that would have increased restrictions on smoking in restaurants—an effort that Lester Davis, head of the state restaurant association, dismissed on the grounds that there was no need to “‘try to fix what doesn’t seem to be broken’”\textsuperscript{37}—he claimed that “restaurants are banning smoking on their own, and that government interference is not needed. He also said that smokers’ rights need to be considered. ‘I think it’s consideration of the smokers....’” Horn’s defense of involuntary smoke exposure in restaurants was continuous with his refusal to protect his Senate colleagues and employees. Horn was, as the press also noted, keeping “the Senate a bastion of smokers’ rights at the Capitol. The only cigarette vending machine in a state building in Iowa is located behind the Senate chamber, where smoking is allowed in an open area alongside the space where Senate clerks work at typewriters and computer terminals.” Using his own rearguard inaction as an excuse, Horn declared: “‘We’ve got our own problems in the Senate. How can we push faster on the outside?’” And, completing the self-executing vicious circle, when asked whether there was “any other workplace in Iowa where workers are subjected to such a smoky environment,” he replied—apparently without the slightest tinge of self-consciousness or self-irony—“‘I’d say every restaurant and bar.’”\textsuperscript{38} Years later, Horn sought to explain his opposition to restrictions on smoking as rooted in the fact that the “group” he “represented” consisted of heavy smokers such as Rife.\textsuperscript{39} Though it might seem odd that the Democratic majority leader represented the Republican minority leader, presumably he meant that he needed to accommodate Rife on this issue in order to secure his cooperation on some other matters.\textsuperscript{40}

In 1994, the counter-democratic character of Horn’s refusal to permit debate on the strengthening amendments to the clean indoor air bill (S.F. 2298) was grotesquely underscored by Horn’s own public admission that the bill had been gaining Senate support: “‘It would be real close, and I almost assume that it would pass.’”\textsuperscript{41} The bill, which the Human Resources Committee had approved

\textsuperscript{36}Telephone interview with Beverly Hannon, Anamosa, IA (Feb. 28, 2007).


\textsuperscript{39}Telephone interview with Wally Horn, Cedar Rapids (May 6, 2007).

\textsuperscript{40}Email from Beverly Hannon (May 7, 2007).

by a vote of 9 to 2 on March 3, would have amended the clean indoor air law to cover public places with fewer than 250 square feet of floor space and restaurants with 50 or fewer seats (but nevertheless permitted such small restaurants to be designated as smoking areas in their entirety, provided that they “issue a written health warning to prospective and current employees which states that due to the environment of the restaurant, the employee may be working in a hazardous environment”); permit designation of smoking areas “only...if transmission of environmental tobacco smoke to adjacent areas can be eliminated”; and repeal local government preemption. Despite the “reprieve” that the committee granted small restaurants, Democrat Jim Riordan called the bill “‘another major step moving us toward a smoke-free environment’ in public places.” Since the bill would have repealed the preemption language that the tobacco industry, as part of a nationwide strategy to undermine state anti-smoking laws, had had inserted as an amendment in 1990 designed to prevent local governments from passing ordinances stricter than the weak state law, it was hardly surprising that one of Horn’s predecessors as Majority Leader, Hultman, was closely monitoring the bill’s progress for Philip Morris as its lobbyist. Hultman immediately faxed to the company a copy of the Senate Human Resources Committee’s proposed amendment with his handwritten comments on the positions adopted by various members on an amendment to strike preemption. Republican Mary Kramer had observed that “local situations require local decisions. Take preemption off.” Republican Maggie Tinsman, referring to a controversy over another local preemption issue, had said: “Home Rule, not like fertilizer where preemption is needed.” Democrat Florence Buhr (a heavy smoker), had opined, “Good,” but for a different reason: “if we do away w/preemption then we don’t need the amendment we just adopted” (namely, the aforementioned deregulation of smaller restaurants). For Riordan the proposed amendment was “Very Good - If we

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43S.F. 2298, §§ 1-3, 5 (Mar. 4, 1994). Bars declared to be smoking areas in their entirety were also required to issue health warnings. The study bill from which it derived did not permit restaurants with 50 or fewer seats to be declared entirely smoking. S.S.B. 2005 (1994). It is unclear why Lloyd-Jones, one of the Senate’s strongest supporters of smoking regulation, presented amendment SSB 2005.701 embodying this backdoor restoration of the exemption for smaller restaurants. No Nay votes were registered in committee. [Senate] Committee Minutes for Human Resources (Mar. 3, 1994) (copy furnished by SHSI DM).


45See above ch. 27.
eliminate preemption a local entity could disregard the 50 seat law and make smaller rest. comply w/larger rest. requirements.” And finally Democrat Elaine Szymoniak also held local control to be good because it was a minimum and “local could go stronger.”

By this point the restaurant industry had already begun “gearing up to block a legislative effort to protect diners from cigarette smoke.” Davis, the executive director of the Iowa Restaurant and Beverage Association, opined that these proposed rules “simply go too far in trying to balance the interests of non-smokers.” Reciting the cigarette oligopoly’s accommodationist nonsense, he insisted that the existing system was “working well” by virtue of members’ doing “their best to make allowances for all their patrons, regardless of whether they smoke or not.”

Davis may have grasped the ultimate point of the new anti-smoking initiative when he charged that more than half of his organization’s members would have to prohibit smoking because they would not be able to afford the installation of separate ventilation for smoking rooms. A membership survey revealed that 55 percent guessed that they would lose 20 percent or more of business if they totally banned smoking. Interestingly, while only 8 percent of members stated that they at the time accommodated smokers’ and non-smokers’ interests by not allowing smoking at all, 29 percent responded that banning smoking altogether was “the most reasonable policy towards accommodating the wishes of smokers and non-smokers in your establishment.”

On March 28, 1994, S.F. 2298 was referred to the Human Resources Committee, where it died. (The cigarette “industry plan,” following the bill’s passage by the Human Resources Committee on March 4, had been to have it “referred to second committee where legislation will die,” but killing it proved to be even easier.) After Horn had “refused to allow that bill to be debated by the
full Senate, the irrepresible and ubiquitous Representative Brammer offered it in the House as an amendment to the appropriations bill for various public health programs, stressing that the “danger of second-hand smoke is well known.” The House adopted the amendment by a close 51 to 47 roll call vote, and then passed the whole bill 79 to 19. However, the Senate Appropriations Committee rewrote the bill, which then no longer included Brammer’s amendment, and the full Senate adopted the committee amendment 29 to 21, showing yet again, as the press put it, the “strength of smokers in the Senate, where cigarettes are sold alongside candy in a vending machine.” Although senators agreed that that vote did not constitute a “true reflection of the Senate’s sentiment on tougher smoking restrictions,” some were seeking a “middle ground,” and Riordan declared that “[w]e’re going to get something done this year,” the initiative remained dead. Two days later the House concurred in the

54State of Iowa: 1994: Journal of the House: 1994: Regular Session Seventy-Fifth General Assembly 1:830 (Mar. 23). Republicans Stewart Iverson, Christopher Rants, and Mary Lundby, future legislative leaders, and past, present, and future opponents of tobacco control, voted against the amendment. Lundby had offered an amendment in 1990 to impose preemption on the already weak state clean indoor air law. See above ch. 27.
56State of Iowa: 1994: Journal of the Senate: 1994: Regular Session Seventy-Fifth General Assembly 2:2043-44 (Amendment S-5463). Unfortunately, the surviving committee minutes shed little light on the proceedings other than to reveal that Buhr, a smoker, was the moving force behind the amendment. [Senate] Appropriations Committee Minutes (Apr. 5, 1994) (copy furnished by SHSI DM).
Cigarette Manufacturers Thwart All Anti-Smoking Legislation: 1993-1996

Senate version of the bill by a vote of 78 to 19,\textsuperscript{60} putting an end to yet another attempt to reduce secondhand smoke exposure in Iowa. As the R.J. Reynolds regional official in charge of the Midwest proudly reported at the end of the biennium in 1994: “All legislation having an adverse impact on RJRT and the tobacco industry was defeated.”\textsuperscript{61}

As the 76th General Assembly was getting underway, the Human Resources Committee in February 1995 filed and approved by a vote of 6 to 2 another bill (S.F. 203) that authorized designated smoking areas only “if transmission of environmental tobacco smoke to adjacent areas can be eliminated.”\textsuperscript{62} Although such attempts to apply statewide anti-smoking laws to the Senate were never successful before, the Capitol, according to the Register, was “one of the main targets” of the bill because the statehouse’s smoking area was “at the back of the staff room behind the Senate, but smokes drifts into the chamber and into other areas.”\textsuperscript{63} The bill, however, was then referred to the Small Business, Economic Development, and Tourism Committee, where, unsurprisingly, it died.\textsuperscript{64}

That the bill was so easily killed may in large part have been a function of the early and massive organized resistance that Philip Morris directed at it. Looking back in September 1995, one member of the company’s huge public relations staff informed two company writers that: “Last year we generated pre-season letters to several legislators in Iowa and want to do so again because we got a lot of positive feedback.” The technique involved letters to identified Iowa


\textsuperscript{61}Hurst Marshall to Roger Mozingo, Subject: 1994 Completed Session - State of Iowa (May 3, 1994), Bates No. 518241793.


\textsuperscript{63}S.F. 203, § 1 (Feb. 23, 1995, by Human Resources Committee).

\textsuperscript{64}“Statehouse Notes,” DMR, Feb. 24, 1995 (6) (NewsBank).

\textsuperscript{65}State of Iowa: 1995: Journal of the Senate: 1995 Regular Session Seventy-Sixth General Assembly 1:904 (Mar. 28). Ex-Senator Beverly Hannon surmised that Majority Leader Horn had not favored the bill and therefore assigned it to a hostile committee. Email from Beverly Hannon (Mar. 15, 2007). The committee chairman, Steve Hansen, had been hailed by the Tobacco Institute in 1991 for helping preserve preemption. State of Iowa: 1995: Journal of the Senate: 1995 Regular Session Seventy-Sixth General Assembly 1:24; above ch. 28. At the outset of the next session the new executive director of the Iowa Hospitality Association made sure to urge Hansen to make no changes in current smoking laws, which were “working well....” Doni DeNucci to Steven Hansen (Jan. 8, 1996), Bates No. 2061860066.
consumers of Philip Morris’s cigarettes who would then write letters to their state legislators.66 Then on January 12, 1995, at the outset of state legislative sessions across the country, a young public relations employee at corporate headquarters engaged in this interoffice email banter with the midwestern regional office: “I feel like it’s the official start of mob[ilization] season, and no better way to start it then [sic] with a mob for you guys & Cal [Hultman] in IA...(Really, I don’t say that to all the RD’s).”67

On January 19, 1995, more than a month before S.F. 203 had even been filed, Philip Morris, through a consulting entity (Optima Direct, Inc.), was finalizing its targeted propagandizing of voters by telephone on the “Issue: Oppose Any Anti-Smoking Legislation.” One script, targeting the constituents of Representative Horace Daggett, a twelfth-term Republican chairing the House Human Resources Committee,68 instructed callers to ask contactees, on behalf of Philip Morris, whether they were aware that in a few weeks the Iowa legislature might be considering “legislation that restricts the rights of smokers....” Regardless of whether they did or not, constituents next heard: “Despite paying more than their fair share of taxes, smokers in Iowa often have to comply with strict governmental regulations. It is simply unfair for politicians to continue to single out adults who choose to smoke for such restrictive and punitive legislation. Do you agree?” Those who did agree were told that their “state representative needs to hear that!” The caller then asked whether they would be willing to call Daggett “to let him know you oppose any more legislation restricting the rights of smokers such as increasing the cigarette excise tax or banning smoking in more public and private areas....” Those who were willing received Daggett’s phone number, but only if they “understand the issue, are articulate, and polite, and...adamantly oppose anti-smoking legislation.” In contrast, callers were to say good-bye to those who would not call, were undecided, not interested in the issue, or preferred another action. “I am sorry to have disturbed you” was the script for those who became “irate or hostile.”69 After the script had been finalized on January 23, surviving

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66Celeste Victoria to Randall Eiger and Mike Folie (Sept. 5, 1995), Bates No. 2046761659. At the age of 41, Victoria was killed in the World Trade Center on September 11, 2001. “Portraits of Grief,” NYT, June 16, 2002 (29:1-5 and 4-5).


68In 1977 Daggett had filed H.F. 154 mandating the teaching of creationism in schools.

reports of 154 calls made (of a universe of 480 planned calls) during the next five days stated that 58 people said they “will call” Daggett, while 53 were undecided or not interested and 9 hung up early or refused. 70

On January 27, Junkins-Hultman faxed a copy of Senate Study Bill 61, which, as proposed by Senate Human Resources Committee Democratic chairperson Elaine Szymoniak, was identical with what was filed later as S.F. 2174. Its most prominent innovations were the deletion of local preemption and conditioning of designated smoking areas on the ability to eliminate the “transmission of environmental tobacco smoke to adjacent areas....” 71 In faxing SSB 61 to corporate headquarters on February 14, 1995 to give an “Iowa Heads Up,” Philip Morris’s Chicago office called attention to these features by stressing that “Cal [Hultman] called this afternoon saying we may have to prepare a phone bank to the full Senate as early as next week.” 72 (A phone bank, ex-Senator Hannon explained, involves hiring people or getting volunteers “to man the phones from a central location (multiple phones). They’d probably call tobacco supporters they knew of in each senator’s district and urge them to call their senators against Hammond’s bill.”) 73 Already the next day Philip Morris and Optima Direct were exchanging drafts of a telephone script directed at motivating smokers to call their state senators in opposition to SSB 61. Though the “issue” was labeled “pre-emption,” in fact it was not even mentioned in the script; instead, those calling on behalf of Philip Morris were instructed to ask whether the smokers were aware that the bill “would virtually ban smoking in all public places such as restaurants and bars.” Whether they were or not, they were next told that if SSB 61 passed, “smokers in Iowa would no longer be able to enjoy a cigarette in restaurants and other public places in the state.” If they agreed that “the total smoking ban in all

70State: Iowa, Issue: Oppose Anti-Smoking Legislation, ODI Code: PM702, Targets: Rep. Horrace [sic] Daggett, Jan. 24-30, 1990, Bates No. 2046761695/9. In addition, 26 calls were bad numbers or disconnects, while 8 were “deceased.” At the same time Philip Morris was also making calls to the constituents of at least seven other legislators, including Tony Bisignano, Nancy Boettger, Donna Hammitt, Steven Hansen, Neil Harrison, Gene Maddox, and Richard Vande Hoef. June 5, 1995, Bates No. 2046761588/93, and Aug. 30, 1985, 2046761684/8.

71SSB-61, §§ 2, 1 (Jan. 27, 1995), Bates No. 2046761585/87. The addressee of the fax was not stated, but presumably it was Philip Morris’s Chicago office.

72Sherree Niepomnik to Joan Cryan (Feb. 14, 1995), Bates No. 2046761522. In the further remark that “Cal would like people to tell the Senate to leave the bill as is; do not amend it,” the writer presumably meant “law” rather than “bill.” It seems implausible that Hultman wanted the Senate to vote on this bill as it was.

73Email from Beverly Hannon to Marc Linder (Mar. 16, 2007).
restaurants is unfair and unnecessary,” which “a small but vocal group of anti-smokers” was trying to impose along with their beliefs on smokers, the caller urged them to tell their senator that the current system of smoking and nonsmoking sections “works fine.” The script even suggested a script for smokers to use in their calls to senators focusing on Philip Morris’s buzzword “accommodation.” On March 30, two days after S.F. 203 had been referred to the Senate Small Business Committee, Philip Morris was already drafting a telephone script directed at smokers who were asked to call one of four key members of the Senate Finance Committee with the same message that had been drafted for SSB 61. Apparently believing that smokers needed such other-directed psychological support to weigh in on the side of further exposure of non-smokers to secondhand smoke, Philip Morris had one script assert that “[a]ccording to recent public opinion polls, most Americans believe that smokers and non-smokers should be accommodated in restaurants and public places.”

(One group of smokers whom Philip Morris sought to avoid were those who declared: “My spouse/relative just died from lung cancer....” The company’s “cue sheet” instructed callers to terminate such calls with: “I am very sorry. Thank you for your time.”)

Nor did Philip Morris’s mobilization end with the end of the session and the death of the bills it had opposed. On May 23, Philip Morris’s Chicago regional office emailed the public relations headquarters in New York asking it to draft “letters for a mobilization to select Iowa members.” The “message points” for the five to six letters for each of eight legislators (including Sen. Bisignano and Rep. Daggett) included: “Understand that legislative efforts to ban smoking or severely restrict smoking in restaurants and public places failed to get passed...during the last legislative session.” “The legislation is advanced by a few
zealots to limit the rights of individuals to enjoy themselves while out in public.”
“We believe in accommodating the preferences of nonsmokers and smokers alike through establishing smoking and non-smoking areas is [sic] the best policy.” 78
Within a few minutes headquarters emailed back indicating that it had initiated the process for drafting a letter “which would be mailed to our smokers who took part in IA in opposition to repeal of preemption to generate letters thanking the legislators who voted in our favor on the issue.” 79

The drafts of the “Iowa Mobe/Thanks for Preemption” letters told smokers that thanks to their efforts and those of their state representative, Iowa “still has a reasonable state-wide smoking law...that prevents the imposition of harsher local restrictions.” Without identifying the defects of grassroots local democracy, Philip Morris commented that preemption “means that anti-smoking zealots cannot use their influence at the local level to ban restaurant or other public smoking in Iowa’s cities, towns, villages and counties.” In offering “talking points” that smokers could use in writing letters to legislators, Philip Morris stressed that: “Anti-smoking bans are not supported by the public. They are proposed by a handful of zealots determined to limit the freedom of individuals to enjoy themselves in public.” The company did not explain how such a tiny minority, bereft of public backing, could possibly secure the requisite majority in any political subdivision to pass any ordinance. The only sense that could be teased out of Philip Morris’s accusation that anti-smoking zealots were “determined to limit the freedom of individuals to enjoy themselves in public” was that they were puritans; yet the company’s talking point that smokers “believe in smoking policies that accommodate the preferences of both non-smokers and smokers in restaurants and other public places” made no sense: if nonsmokers’ objective was to prevent smokers from enjoying themselves by smoking, how could nonsmokers’ preferences be accommodated by permitting smokers to smoke in restaurants? And if Philip Morris had been forced to admit that nonsmokers’ real goal was not to be exposed to secondhand smoke, then it would have had to deal with the public health issue, which its propaganda never mentioned. Instead, it suggested that smokers praise their legislators for having “stood firm in support of individual liberty and smokers’ rights” and “letting businesses decide how best to serve their own customers,” which was “the best

78 Sherree Niepomnik to Joan Cryan, Subject: Iowa Thank You’s (May 23, 1995), Bates No. 2046761574A. The other legislators were Senators Hansen, Boettger, and Maddox, and Representatives Hammitt, Harrison, and Vande Hoef.
79 Joan Cryan to Sherree Niepomnik, Subject: Iowa Thank You’s (May 23, 1995), Bates No. 2046761574.
policy.” In another draft, Philip Morris offered as a talking point for smokers to use with legislators that “most Iowans support the concepts of personal liberty, individual choice and personal responsibility”—without indicating who was to take responsibility for the thousands of deaths caused annually by exposure to secondhand smoke.

Already by the end of August 1995, the lobbying firm of the former Democratic and Republican Senate Majority Leaders Junkins-Hultman sent Philip Morris’s public relations department a “mob list” of Iowa legislators to whom the company should urge consumer-smokers to send letters of continued support. The lobbyists suggested that this “pre-session mob,” which included seven of the eight legislators on the previous list as well as Democratic Senate Majority Leader Wally Horn and Republican House Majority Leader Brent Siegrist, stress “accommodation.” A few days later the corporate public relations department was offering to drafters as “message points” the expression of appreciation to legislators for acknowledging “the rights of smokers and non-smokers” as well as “for not tampering with laws that are already in place that...allow business owners the right to decide whether or not to accommodate [sic] people, employees or customers who choose to smoke.” Philip Morris’s PR department did not explain how leaving in place a law that empowered building owners to designate virtually all of the public space as smoking areas constituted acknowledgment of nonsmokers’ rights. A sample finished letter from Lance Pressl, a Philip Morris regional director of Government Affairs, to a Des Moines smoker requested that he write his state senator, Tony Bisignano, and encourage him by telling him that “[i]t takes political courage to stand up for freedom.” In particular, Bisignano was to be praised for having helped keep on the books a law under which businesses “can still use common sense, and their own judgment, when deciding whether to provide accommodation for their customers who choose to smoke.” What “common sense” meant and what its relationship was to scientific knowledge about the health consequences of secondhand smoke exposure were, once again, left unexplained.

On January 4, 1996, a few days before the second session of the 76th General Assembly convened, Governor Branstad announced a year-long Campaign for the Family, supported by a melange of “strong families” legislative recommendations,

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80Draft Iowa Mode/Thanks for Preemption (May 1995), Bates No. 2046761572/3.
82Junkins-Hultman to Joan Cryan (Aug. 29, 1995), Bates No. 2046761651.
83Celeste Victoria to Randall Eiger and Mike Folie (Sept. 5, 1995), Bates No. 2046761659.
84Lance Pressl to John Q. Sample (Oct. 10, 1995), Bates No., 2046749017.
ranging from a tightening of the state’s no-fault divorce law to denying benefits increases to welfare mothers who had additional children. Branstad’s use of his “bully pulpit” to “engage people in a positive and constructive way of how we can reinforce and support families” embraced among his “healthy families” recommendations an array of repeatedly defeated anti-smoking initiatives, including a ban on distributing free tobacco samples and on outdoor advertising within a thousand feet of schools and playgrounds and a smoking ban in public places regardless of size (without, however, repealing the exemptions for bars and small restaurants). Of especial importance to the governor was conferring on cities the power to adopt smoking restrictions stricter than the state law’s. As Branstad explained to reporters: “‘We believe that as a matter of home rule, this pre-emption ought to be eliminated and local government be given the authority to do that.... It was one of the things that the tobacco lobby got stuck in the law that I think was not good public policy.’”

In an immediate reaction the very next day, Jack Lenzi, the Philip Morris regional director for governmental affairs in Chicago, informed the PR department in New York that in Iowa “we also face a Gov. who is supporting a public place smoking ban, excluding restaurants/taverns [sic] under 50 persons.... That message is simple, no new smoking restrictions are needed in Iowa, current law is sufficient. The Iowa Hospitality Assoc. is already engaged on this later issue.” Lenzi’s sense of certainty was not misplaced: three days later the IHA’s new executive director, Doni DeNucci, gave him the we-know-which-side-our-bread-is-buttered-on assurances that Philip Morris had come to expect—but did not always receive—from such entities in exchange for its “generous membership investment.” Noting that the Association’s “effective legislative platforms...would not have been possible without the continued loyal support of corporate members, like Philip Morris,” DeNucci assured Lenzi that she was “looking forward to our partnership in 1996 and into the future.”

At the same time Lenzi jotted down an eleven-point campaign for mobilizing support from various targeted groups and tobacco-allied industries/companies to which he assigned Philip Morris, R. J. Reynolds Tobacco, and UST Inc. (a large smokeless tobacco producer) and/or their lobbyists. For example, under the very first heading “Grass Roots,” he wrote: “Retailers - PM, RJR[.] Consumers - PM

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56Jack Lenzi to Joan Cryan; Victoria Celeste (Jan. 5, 1996), Bates No. 2048394132B.


2874
Cigarette Manufacturers Thwart All Anti-Smoking Legislation: 1993-1996

UST. Hospitality - Doni.” To the largest cigarette sellers in Iowa, “High V” [sic; should be Hy-Vee], Casey’s, and “Come & Go” [sic; should be Kum & Go] he delegated lobbyists Charles Wasker and Cal Hultman/Kim Haus, who were also designated as the agents to approach the Iowa Association of Business and Industry; Wasker’s partner, William Wimmer, would be charged with securing the cooperation of river (gambling) boats and race tracks. Reynolds was tasked with involving the chambers of commerce, while each of the three tobacco companies was to organize its own sales force.88

In launching his Campaign for the Family during his Condition of the State address to the legislature on January 9, Branstad, who traced many national and state problems to “the decay of the family,” also proposed making communities safer by enacting the death penalty, a move that, together with his call for a tougher divorce law and parental notification for minors’ abortions, prompted Democratic leaders to opine that his (conservative) program might not be crowned with success.89

Within a few days Philip Morris was bulking up its armory of anti-preemption-repeal arguments by asserting, without any supporting evidence, that local control “would unreasonably burden...adult customers,” who “should be able to purchase tobacco products, like other age restricted products, on the same terms and conditions from jurisdiction to jurisdiction. Adult smokers would be able to find the products they are seeking on the shelves, comparably displayed and promoted, regardless of whether the retail outlet is located in Sioux City, Des Moines or Iowa City.”90 Why its addicted consumers would be unreasonably burdened by having to ask a store employee for their preferred trademarked delivery device of their next “nice jolt of nicotine,”91 Philip Morris did not
explain.

Later in January, Ally Milder, an R. J. Reynolds Midwest regional field employee, attended a meeting in Des Moines about a proposal that Branstad would be introducing to repeal preemption, raise fees for local enforcement, “enact a smoking ban,” and restrict billboard advertising. In what, against the foregoing account of the 1995 session, must be viewed as a vast exaggeration, Reynolds’ “Public Issues Update” for the latter half of January, which was sent to Tom Griscom, the executive vice president for external relations, asserted: “The industry barely hung onto preemption last session when Branstad was not leading the charge for repeal. With his involvement now it is a much more dangerous situation.” In order to vanquish this perceived threat a coalition was formed composed of Philip Morris, the Tobacco Institute, R. J. Reynolds, tobacco wholesalers, the smokeless tobacco industry, TILMC, and IHA. In addition, the industry immediately began a program to contact House members.92

On January 23, 1996, Hammond introduced S.F. 2069, which would, beginning July 1, 1999, have eliminated the designated smoking area exception to the prohibition on smoking in a public place (except in factories, warehouses, and similar workplaces that the general public did not usually frequent) or a public meeting. It would also have eliminated preemption by causing more restrictive local ordinances to “supersede any inconsistent or conflicting provision” of the statewide smoking law. S.F. 2069 would also have amended the cigarette sales law by: banning all vending machine sales; banning all tobacco advertising within 1000 feet of any playground or school used primarily by persons under 18; limiting tobacco advertising to black and white text; and eliminating local preemption in the same way as in the public smoking law.93 The bill did not even make it out of subcommittee.94

Two weeks later Hammond’s Senate Human Resources Committee filed a weaker bill (S.F. 2174), which would have extended smoking restrictions marginally by eliminating the exemption for public places of fewer than 250 square feet, covering licensed child care centers, and repealing local preemption; it would also amended the cigarette sales law by including the 1000 foot advertising ban and preemption repeal of S.F. 2069.95 The same day, February 9,

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95 S.F. 2174, §§ 1, 2, 5, 6 (Feb. 9, 1996, by Human Resources Committee). It was formerly S.S.B. 2074 (by Hammond, Dvorsky, and Kramer), which Hammond had
it passed Hammond’s Human Resources Committee (by a vote of 8 to 0). At the same time the committee passed by a vote of 8 to 1 a bill prohibiting cigarette vending machine sales except in bars, for which Senator (and soon to be Governor) Tom Vilsack voted while criticizing it as unlikely to do much good because instead of discouraging underage smoking, it would only encourage formation of a black market. Two weeks later R. J. Reynolds was working on a program “to get smokers and retailers to contact their state senators about the bill, which appears to be stalled for the moment.” By mid-March the Philip Morris telephone mobilization machine was again in full swing. The “troops” this time were retailers, who were supposed to be directed to “senate targets” on the issue of “repeal of uniformity.” The crucial trigger for launching retailers was the claim that they “may no longer be able to compete on a level playing field. Your business may be at a significant disadvantage compared to those in neighboring communities who are not subjected to any new restrictions.” A week later the bill died before the full Senate took it up. It was presumably this bill that Lenzi, the Philip Morris Midwest governmental relations director, meant

successfully amended to include the preemption repeal language. SSB 2074.501 76, Bates No. 2061860085 (undated). The account by Holli Hartman, “Committee Passes Smoking Bills,” DMR, Feb. 9, 1996, Bates No. 2061860153, drastically distorted the bill by misreporting that under it the only indoor places for smoking would be “bars, restaurants, tobacco stores, or their own homes. Or they would have to restrict their nicotine habit to tightly controlled designated areas.”

101It was referred back to the Human Resources Committee. State of Iowa: 1996: Journal of the Senate: 1996 Regular Session Seventy-Sixth General Assembly 1:985 (Mar. 25). Presumably R. J. Reynolds’ legislative agents meant S.F. 2174 when they erroneously predicted that the senate would “soon vote on a bill by Governor Terry Branstad that is a mini-version of the FDA’s proposed regulations complete with advertising, self-service, coupon and promotion bans. Retailers in 18 key senate districts are being notified and will call to urge opposition to the bill.” Tim Hyde to Tom Griscom, Public Issues Update Mar. 18-22, 1995 [sic; must be 1996], (Feb. 24, 2002 [sic]), Bates No. 530289574/5.
when, on February 28, supremely and justifiably confident in the majority leader’s commitment to Philip Morris’s cause, he handwrote himself a note: “Sen - Wally will hold, no re-referral.”

In one of his last anti-tobacco initiatives before he left the legislature, became a named plaintiff in a class-action lawsuit against cigarette manufacturers, and died of emphysema caused by 40 years of cigarette smoking, Representative Philip Brammer on April 1, 1996, filed an amendment to the appropriations bill for the Public Health Department and other related agencies that, based on the declaration of “the use of cigarettes and other tobacco products to be an immediate health emergency of epidemic proportions and a menace as an entry-level drug in the youth population,” would, inter alia, have repealed the local preemption provisions in the public smoking and cigarette laws, prohibited vending machine and self-serve display sales, and instructed the attorney general to file a civil action against cigarette manufacturers to recover the full amount of the sums that the state had paid for medical services for Iowa residents attributable to the use of cigarettes or other tobacco products (for which expenses the companies would be held strictly liable). After Brammer had raised the point of order that his own amendment was not germane and finally secured a roll call vote on suspending the rules to consider his amendment, the 35 to 59 defeat was almost perfectly along party lines: only one Republican and one Democrat defected. The Republican was Rosemary Thomson, a self-characterized conservative, who had previously worked for drug-free schools for the U.S. Department of Education, and attributed the generally unsuccessful efforts to strengthen the anti-tobacco laws during her years in the legislature to the powerful tobacco company lobby. The lone Democrat was Michael Cataldo, a cigarette smoker, who four years later resigned from the House after he had been convicted of having repeatedly made obscene telephone calls to a woman he called at random.

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102Jack Lenzi (Feb. 28, 1996), Bates No. 2061860139/40.
106Telephone interview with Rosemary Thomson, Marion, IA (Apr. 3, 2008).
108Lindsey Henry, “Cataldo Convicted, Leaves Race,” DMR, Aug 2, 2000 (1A)
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Although none of the opponents of Brammer’s amendments had spoken against them, when Governor Branstad later that day insisted that the state should consider a lawsuit, legislative leaders commented that his position would not change the outcome. At the end of November Democratic Attorney General Tom Miller, backed by Branstad, did finally file the suit—financed in part by Blue Cross and Blue Shield of Iowa—against the cigarette manufacturers, which would eventually lead to the Master Settlement Agreement.

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110 Mark Couch, “Iowa to Join States Suing Big Tobacco Companies,” DMR, Nov. 27, 1996 (1) (NewsBank). On the further course of the litigation, see below ch. 31.
Democrats’ Decade in the Desert: Stalemate and Stagnation in the General Assembly, 1997-2006

“At some point this Legislature is going to have to stand up to the tobacco industry,” said [Senator] Dvorsky. “Nationwide, the industry is on the run. I don’t know why it’s not on the run in Iowa.”

If Iowa Democrats were able to achieve only modest legislative advances in the fight to suppress secondhand smoke exposure from 1983 to 1992, when they controlled both the House and Senate and Republican Governor Terry Branstad’s positions were more consistently anti-smoking than either party’s, the chances for further progress grew even dimmer with Democrats’ loss of their House majority in 1993 and plummeted to nil when, by a hefty margin, Republicans gained control of the Senate as well in 1997, giving them mastery of the legislature for the first (and last) time during Branstad’s 16-year incumbency and an opportunity to devote their attention to their favored subjects such as facilitating employer-administered drug tests, reducing taxes, and reintroducing capital punishment.

The Republican Party’s and Senate Majority Leader Iverson’s Ascendancy

The fate of bills committed is generally not uncertain. As a rule, a bill committed is a bill doomed. When it goes from the clerk’s desk to a committee-room it crosses a parliamentary bridge of sighs to dim dungeons of silence whence it will never return. The means and time of its death are unknown, but its friends never see it again.

Party composition of the Iowa House and Senate for the quarter-century between 1983 and 2008 is set out in Table 12.

2See above chs. 26-29.
4Woodrow Wilson, Congressional Government: A Study in American Politics 69 (1901 [1885]).
5Sources: http://www.state.legis.ia.us/Archives.html; “Members of Iowa General
Democrats’ Decade in the Desert: 1997-2006

Table 12
Party Control of the Iowa Legislature, 1983-2008 (Majority in Bold Numbers)

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<th>Senate Republicans</th>
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The 1997-98 biennium marked the first time since 1981-82 that Democrats failed to control either house, but they would have ten consecutive years in which to re-accustom themselves to a status that had once seemed their permanent fate in the nineteenth and earlier in the twentieth century. The sharp reversal suffered

Assemblies 1981-2002,” at iv-v, on http://www.legis.state.ia.us/Pubinfo/Library/Members 19812002.pdf. After Republican Senator Jim Lind, purportedly frustrated over differences with the party over tax policy, had resigned in March 1997 during the session, a Democrat won the seat at a special election in April, reducing the Republicans’ majority to 28 to 22. Thomas Fogarty, “April Election Will Replace Lind, Who Quit,” DMR, Mar. 22, 1997 (1M) (NewsBank); “Voters: Harper to Replace Lind,” DMR, Apr. 9, 1997 (4M) (NewsBank). The Democrats’ House majority in 2007 was reduced from 54-46 to 53-47 when Dawn Pettengill switched parties at the end of April. See below ch. 34.
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by Senate Democrats left them “a bit disheartened,” whereas their colleagues in the House, having cut the gap between themselves and Republicans from 18 to 8, were “in an insurgent mood.” In fact, however, at least in terms of anti-smoking legislation, House Democrats were neither more active nor more successful than their Senate counterparts.

Despite the Democratic party’s minority position in 1997, several of its leading anti-smoking members filed bills to accomplish what was becoming a perennial effort to repeal the preemption of local regulation, which the cigarette companies had succeeded in inserting into both the clean indoor air law and the cigarette sales law in 1990 and 1991, respectively. The label on the file folder that Philip Morris was maintaining on the issue captured both sides’ attitude: “Iowa—Pre Emption Battle ‘97.”

To be sure, the victor in that battle should not have been difficult to predict in a legislature under Republican control, especially that of Senate Majority Leader Stewart Iverson, a “strong conservative” and heavy smoker who strenuously opposed anti-smoking legislation, in particular as it might have applied to him personally in the Senate. Already by the time of his second term in the House (1991-1992), he had been one of only four Iowa state legislators to whom the RJR PAC gave its highest campaign contribution of $200. Iverson was, in the words of his fiercest anti-smoking opponent, Democrat Michael Connolly, “very close to the tobacco lobby throughout his leadership years.”

A more telling description of Iverson’s position on smoking and cigarettes would be difficult to imagine than the fact that in 1996, midway through his first term in the Senate and two months before the November elections and the caucus’s choice of him as majority leader, he applied for the job of regional vice president of the Tobacco Institute’s Region III (Midwest). On September 5 he was interviewed in St. Paul by Patrick Donoho, the senior vice president of the State Activities Division. As Donoho later told Institute President Samuel Chilcote...

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7Iowa Code sects. 142B.6 and 453A.56. See above chs. 27-28.
8Bates No. 2061860270.
10Senate Leaders Short on Tenure,” DMR, Dec. 30, 1996 (1A:1, at 8A:5); below ch. 32.
11Data provided by Iowa Ethics & Campaign Disclosure Board (Apr. 4, 2008).
12Email from Mike Connolly to Marc Linder (Apr. 24, 2008).
13Patrick Donoho Time & Expense Report, (n.d. [1996]), Bates No. TI16020508/45. Iverson later claimed that he had not initiated the process: someone had contacted him and asked whether he might be interested in the job. Telephone interview with Stewart.
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in connection with arranging Iverson’s interview with Chilcote: “Stewart Iverson...was referred to me by Chuck Wasker [TI’s Iowa lobbyist]. He is currently a farmer and also a Republican State Senator with two years left in his term. He is looking for a career change from both a successful farm and elective politics. He is willing to move to St. Paul.” 14 (One Democratic legislator, devoid, to be sure, of fly-on-the-wall knowledge, described the tight relationship between Iverson and Wasker as symbolized by the lobbyist’s sitting and smoking in the majority leader’s office—in which alone smoking was still permitted—telling him what to do on bills.) 15 Iverson was not Donoho’s first choice, but even after that person (who worked for the Minnesota Chamber of Commerce) withdrew, Donoho asked TI’s chief lobbyist in Minnesota, Tom Kelm, to suggest other candidates. 16

Although the Tobacco Institute never offered him the job (“I came in second place”), Iverson later claimed that even had he received the nod before the election, he would have turned it down because he had been convinced both that the Republicans would gain control of the Senate and that he would become majority leader. 17 Indeed, the Republicans did win a majority of seats in the Iowa Senate (even while Democrats gained 10 seats in the Iowa House and President Clinton carried Iowa), in large part because of Iverson’s efforts on behalf of half a dozen Republican challengers who ousted incumbent Democrats

15 Telephone interview with legislator who wished not to be identified (May 5, 2008). Christopher Rants, who was Republican House Majority Leader/Speaker from 1999 to 2006, characterized the smoke in Iverson’s office as awful, but not godawful. Telephone interview with Christopher Rants, Des Moines (May 12, 2008).
17 Telephone interview with Stewart Iverson, Clarion, IA (Apr. 6, 2008). Iverson apparently did make it to an interview with TI President Chilcote in Washington, D.C., on Oct. 9, 1996. Bates No. T111721156/9 (file folder), on http://tobaccodocuments.org. Ironically, Iverson’s career might have suffered had he been offered and taken the job since TI was dissolved pursuant to section III(o) of the Master Settlement Agreement of 1998. For example, it apparently ceased its lobbying activities in Iowa by the beginning of 1999. Ginny Brown to Beth Percynski, Re Termination of Lobbying Within Region III (Jan. 11, 1999), Bates No. T116610043; Iowa Ethics and Campaign Disclosure Board (no payments made by client Tobacco Industry Labor Management Committee to lobbyist Lowell Junkins during first half of 1999) (Sept. 21, 1999), Bates No. T114929381.
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and then played a “deciding role” in electing him majority leader over the outgoing minority floor leader,18 Jack Rife, another heavy smoker. When asked, a dozen years later, whether his having been interviewed for the Tobacco Institute job had been publicly known in 1996, Iverson fudgingly suggested that it had.19 However, the implausibility of this claim was impressively underscored by Senator Maggie Tinsman, who was a Republican assistant minority leader in 1995-96 (at a time when Iverson had not yet climbed into leadership). When told in 2008 of Iverson’s job interview, a shocked Tinsman spontaneously declared that, had the information been public in 1996, Iverson would have lost all credibility.20 Another veteran Republican and anti-smoker, Andy McKean, also later expressed the opinion that, despite the fact that it had been common knowledge at the time that Iverson was looking for another job, his political career would have been harmed, if not fatally embarrassed, had Iowans known that he had sought that particular job.21

Iverson may not have been the Tobacco Institute’s first choice for or become Midwest regional vice president, but the cigarette oligopoly continued to value all that he was doing for it in the Iowa Senate.22 One token of its esteem was that he was, apart from the Institute’s chief Iowa lobbyist, Charles Wasker, the only person from Iowa invited to its “cigar reception” at the August 1998 meeting in

18Paul Cohan, “Senator Stewart Iverson Jr. of Iowa,” Stateline Midwest, Sept. 1997, at 11, Bates No. T1141131866/76. State Republican leaders had pushed aside Rife, who had been floor leader from 1990 to 1996, as the centerpiece of the party’s efforts to gain control of the Senate in part, apparently, because Rife had supported Branstad’s primary opponent in 1994. Thomas Fogarty, “Senators Pick New GOP Leaders,” DMR, Nov. 8, 1996 (1M:2-6, 2M:3). Another reason the Republican caucus did not choose Rife, according to Republican Senator Andy McKean, was that many perceived him as an absolutist loose cannon, who was unable to compromise. Telephone interview with Andy McKean, Anamosa, IA (Apr. 16, 2008).
19Telephone interview with Maggie Tinsman, Davenport (Apr. 13, 2008).
20Telephone interview with Andy McKean, Anamosa, IA (Apr. 16, 2008).
21According to the Iowa Ethics and Campaign Disclosure Board, Iverson received no campaign contributions from any out-of-state tobacco PAC in 1997 or 1998. After the official in charge of state candidate documents had mentioned that the Board had a file for every such PAC and was asked to determine whether tobacco PACs had made contributions to any candidates, she observed that the Board had “purged” (i.e. “destroyed”) them when it moved two years earlier; a computer file for R. J. Reynolds PAC existed, but, oddly, contained no data. Telephone interview with Linda Andersen, Des Moines (Apr. 3, 2008).
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Chicago of the American Legislative Exchange Council\(^{21}\)—a “bipartisan membership association for conservative state lawmakers who shared a common belief in limited government, free markets, federalism, and individual liberty.”\(^{24}\)

The Preemption Battle of 1997

Given the legislative balance of votes, Democrats’ strategy on anti-smoking legislation was simply to keep the “discussion alive until we can act.”\(^{25}\) Or, as Richard Myers, the House Minority Leader starting in 2001, put it when asked whether it was a foregone conclusion that no anti-smoking legislation could be enacted once Republicans regained control over both chamber in 1997: “I couldn’t have gone to work” operating under that assumption—“I was there to fight.”\(^{26}\) Although Iverson—and therefore presumptively the cigarette companies—knew that as long as he was majority leader there was no chance that preemption would be repealed,\(^{27}\) and even Democrats realized that repeal under Republican majorities in both houses “probably was impossible,”\(^{28}\) the industry was not taking any chances. In early December 1996 Philip Morris began the process of internal approval by various high-ranking corporate officials in state government affairs and other departments of two mass mailings: one to tobacco retailers to prompt them to write to their legislators “in opposition to any upcoming attempts to repeal the current statewide law”—that is, to repeal the local preemption in the cigarette sales law—and a second to consumers urging them to write to their legislators opposing “any attempts to enact a statewide smoking ban.”\(^{29}\) The letter to retailers (1,500 copies of which cost Philip Morris

\(^{21}\)Beth Percynski to Pat Dougherty, Subject: ALEC Cigar Reception (Aug. 11, 1998), Bates No. TI16531394.

\(^{24}\)Http://www.alec.org.

\(^{25}\)Email from Representative Mary Mascher (Dem. Iowa City) to Marc Linder (Mar. 25, 2008). Mascher has been a House member since 1995.

\(^{26}\)Telephone interview with Richard Myers, Iowa City (May 8, 2008).

\(^{27}\)Telephone interview with Stewart Iverson, Clarion, IA (Apr. 6, 2008).

\(^{28}\)Email from Joe Bolkcom to Marc Linder (Mar. 31, 2008). Bolkcom, by 2008 a Senate assistant majority leader, was elected to the Senate in 1998, but before then had worked on youth access to tobacco issues for the Johnson County Health Dept. http://www.joebolkcom.org

\(^{29}\)Celeste Victoria to Distribution (Dec. 4, 1996), Bates No. 2061860179. The drafts went, inter alia, to senior vice president Ellen Merlo, vice president for state government affairs Tina Walls (who approved them the same day), and state government affairs official

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$8,300), stressed that the governor and “several members of the state legislature” who had failed to repeal Iowa’s “reasonable” cigarette sales law in 1996 would “be back in ’97,” wanting to permit cities and counties to pass their own regulations, which “would result in a confusing patchwork of local laws that could adversely affect many businesses.” The first and only entrant to cross the finish line in Philip Morris’s parade of horribles was that: “You could even lose merchandising allowances if certain sales restrictions were imposed.”

With similar language, the other letter reminded Iowa consumers, i.e., smokers, that if the previous year’s proposal to ban smoking totally in public places supported by the governor and “several state legislators” had been enacted, “designated smoking areas would have been eliminated and you would have been unable to enjoy a cigarette in restaurants and other public places.” But because these supporters would “be back in 1997,” the megabillion-dollar cigarette manufacturing behemoth “need[ed] your help to stop them.” The status quo was preferable because it allowed “businesses serving the public to accommodate both non-smokers and smokers in designated areas. It is a reasonable law that gives business owners the flexibility to tailor their smoking policies to the preferences of their customers.” In contrast, under a statewide ban, “owners would be forced to ban smoking in their own place of business regardless of what they or their customers wanted.” Philip Morris urged smokers to tell their state legislators that they “oppose any attempts to change Iowa’s smoking law. The last thing we need is more state regulations.” The “talking points” that the company offered for inclusion in smokers’ letters and calls to legislators stressed that current law was “working fine” and was “fair to all concerned” without explaining how toxic and carcinogenic smoke drifting throughout a room in any way “accommodated” nonsmokers. Celebrating the infallibility of the free market and millions of individual capitalists’ self-regarding exegeses thereof, Philip Morris suggested enlightening legislators to the effect that: “If there were significant customer demand for a ‘smoke free’ environment in restaurants and other public places,

Jack Lenzi (in whose name the letters were eventually sent).

Faithful to the role as an “anti” that the cigarette firms had imputed to him, Governor Branstad stated in a year-end survey of his legislative plans for 1997 that he would push for repeal of preemption of local governments’ adoption of anti-smoking ordinances targeting minors stricter than the statewide laws. To be sure, the governor rigidly cabined this one anti-corporate stance: he delightedly interpreted voters’ ousting of the Democrats from their Senate majority as meaning that he would “no longer have to ‘fight off anti-business legislation that would have hurt our competitive situation. You’re not going to have to worry about that, because those things are not going to be coming out of committee.’”

A week later, on the last day of 1996, Democratic Attorney General Tom Miller—who, about 15 years earlier, at his wife’s urging, had finally “kicked the smoking habit,” which for reasons he could no longer recall, he had initiated in college and continued into his 30’s—announced that he was joining the efforts to enable local governments to “tackle the problem of youth and tobacco with all the enthusiasm and creativity they can muster.” Thus both officials were supporting the Tobacco-Free Coalition of Iowa (led by the American Cancer Society, American Heart Association, and American Lung Association), which appeared to be concentrating on the cigarette sales law. One of Miller’s assistants, Bob Brammer, viewed the new campaign as much more focused than previous ones, but the attorney general nevertheless did not shy away from expressing self-doubts: “As far as we know, pre-emption has never been repealed anywhere.... It will be tough, but I think we can get the job done in Iowa if we all work together.”

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32 Philip Morris, [Ltr to Iowa Consumers re: Smoking Ban] (est. 1996), Bates No. 2061860182. For an earlier version with handwritten comments, see Draft Iowa Consumer Ltr2 EFI [Ltr to Iowa Consumers re: Smoking Ban] (est. 1996), Bates No. 2070321524. On the 1996 bill, see above ch. 30.  
The Tobacco-Free Coalition of Iowa’s anti-preemption program for 1997 was set forth in a pamphlet that it mailed out on January 3, a copy of which was contained in a Philip Morris file folder labeled, “Iowa—Anti Activity 1997.” This particular copy was addressed to Susan Cameron, who was presumably fronting on the Coalition’s mailing list for her father, former Senate Majority Leader Bill Hutchins, who was R. J. Reynolds’ lobbyist in Iowa. (In 1997 Cameron joined her father’s lobbying firm and in 2001 became its president; until 1997 she had been head of public relations and spokesperson of Buena Vista University in Storm Lake, Iowa, to which town the pamphlet had been mailed.)

The copy was faxed to Philip Morris on January 8 by its Iowa lobbying firm operated by former Senate Majority Leaders Lowell Junkins and Cal Hultman, which, in return, had received it from RJR. In the pamphlet the American Cancer Society, and the American Heart and Lung Associations expressed the belief that “those laws which are closest to the people in individual Iowa communities better represent the desires of those individual communities.” Calling the preemption clauses “rare” provisions limiting cities’ and counties’ ability to protect and improve their citizens’ safety, health, and welfare,” the pamphlet argued that restoration of local control would enable communities to develop regulations that would “work in their unique settings....” In addition to a Communities for Tobacco-Free Kids Advocacy Day at the State Capitol on February 6, the Coalition also announced a briefing for advocates on local control and tobacco issues on the evening of January 21 at 28 different sites linked by the fiber-optic Iowa Communications Network. Keeping close tabs on their main adversaries in the 1997 Iowa preemption battle, Philip Morris’s
lobbyists, Hultman and Kimberly Haus, told Jack Lenzi, the company’s director of strategic planning for tobacco in State Government Affairs, that “we are working on notifying our allies to get attendance at some of these sites.”

By mid-January 1997 the Cancer, Heart and Lung organizations were laying the groundwork for the attack. Under the title, “Effect of Repealing Tobacco Preemptions,” the coalition analyzed the provisions—which, it correctly pointed out, had been written by the tobacco industry—in the context of the home rule grants of the Iowa Constitution. The constitutional amendment in question, added in 1968, provided that: “Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly.” The legislature codified this constitutional grant by providing that “[t]he enumeration of a specific power of a city does not limit or restrict the general grant of home rule conferred by the Constitution” and specifying that an “exercise of city power is not inconsistent with the state law unless it is irreconcilable with the state law.” After pointing out that the cigarette companies’ preemption sections were “modeled after” the home rule provisions, the anti-smoking alliance critically observed that the “use of the word ‘supersede’ in the preemptions has had the effect of making people believe that local government cannot legislate any tobacco laws. While this is not true, preemptions have effectively detoured cities and counties from taking any action to regulate smoking even when the local legislation would be consistent with the state law.”

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45Philip Morris [State Government Affairs organizational chart] (Nov. 14, 1997), Bates No. 2072634065.
46Fax from Cal Hultman & Kim Hultman to Jack Lenzi (Jan. 8, 1997), Bates No. 2061860172.
47ACS, AHA, ALA, “Effect of Repealing Tobacco Preemptions” (Jan. 1997), Bates No. 2061860300/1. It is unclear how Philip Morris, in whose collection the document was found, came into possession of this paper, which bore a fax date of Jan. 15, 1997, from a state government telephone number in Des Moines.
48Iowa Constitution, Art. III, sect. 38A.
51ACS, AHA, ALA, “Effect of Repealing Tobacco Preemptions” (Jan. 1997), Bates
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preemptions were repealed, the general constitutional/statutory limitations on home rule would still not permit local governments to pass ordinances inconsistent or irreconcilable with state law. For example, even after repeal city councils and county boards of supervisors could not lawfully institute regulations irreconcilable with section 142B’s mandates regarding designated smoking areas. (Three years later, when the Ames city council initiated consideration of just such an ordinance, the health groups might have come to regret their earlier stance, but they were too preoccupied with denouncing the substance of the halfhearted measure to focus on it.) Becoming more concrete with respect to the cigarette sales law, the coalition conjectured that after repeal of preemption, local governments might “better define what constitutes ‘control’ of vending machines,...regulate more strictly the sale of smokeless tobacco because state law does not provide many guidelines, and...better provide control of tobacco products and...access by youth.”

Although the alliance members seemed frustrated by their apparent inability to persuade cities and counties that they continued to possess some home rule powers even after preemption, the memo chose to focus instead on the “effective “shield” that the tobacco companies had acquired that allowed them to “concentrate their efforts at the state level without being concerned about local programs.” The argument that statutory preemption had “effectively prevented local governments from addressing unique concerns of interest to specific localities” was in part misleading: banning smoking in restaurants, for example, was not some kind of “unique” local concern, but a widespread (national and international) objective that some city councils were interested in implementing if they could get around the (apparent) barrier that the cigarette oligopoly had managed to erect in the statewide law. Although the campaign for local control of anti-smoking regulation undeniably embodied a highly valuable dimension of democratic debate and public health education, at the same time it was also an opportunistic approach in the sense that the health organizations were not

No. 2061860300.


53See below ch. 33.

54ACS, AHA, ALA, “Effect of Repealing Tobacco Preemptions” (Jan. 1997), Bates No. 2061860300/1. The memo did not deal with the question of whether the preemption provision had any effect whatsoever on local governments’ discretionary power to deny permits. See above Pt. III.

championing the political principle of the general superiority of home rule over laws of statewide applicability; rather, operating under very unfavorable party alignments in the state legislature, they were simply formulating the most effective strategy for achieving their underlying tobacco control goals. Had they been in a position to pass a statewide law without exemptions, they would surely never have eschewed it in favor of trying to mobilize support for passing broad ordinances in a thousand city councils and county boards of supervisors.

On January 23, Democratic Attorney General Miller urged the legislature to increase the cigarette tax from 36 to 40 cents in order to generate funds for anti-tobacco education, but Republican House Majority Leader Brent Siegrist declared that legislators would not increase that or any other tax. Acknowledging the difficulties involved, Miller nevertheless ventured that there was a better than 50 percent chance that the legislature would “do something substantial in this area,” including, apparently, repeal of preemption as well as a ban on cigarette vending machines in youth-accessible locations (made necessary by the failure of lock-out devices).  

A few days later Philip Morris counterattacked. In what Pat McGoldrick, the former national board chairman of the American Heart Association, called “a prime example of why” Miller and Branstad were “justified in suing the tobacco industry for consumer fraud” and “a blatant attempt to stop” their proposal to repeal local preemption, Philip Morris on January 27 ran a full-page color ad in the Business Record, the state’s leading business magazine. Titled, “Iowa: A Great State to Be In,” the ad, throwing together the activities of the cigarette company and wholly owned Kraft Foods Inc., trumpeted their 2,727 employees, $133 million in taxes paid or generated, and $555 million of purchases. Assuring readers that they were “very much at home in Iowa,” Philip Morris, under the slogan, “We work for Iowa,” claimed that: “We are committed not only to making high-quality food, beverage and tobacco products, but also to improving the quality of life in the communities where we live and work.” McGoldrick deconstructed the ad’s oxymoronic character by asking how “high-quality killers” improved the quality of life and pointing out that tobacco killed more people yearly in Iowa than Philip Morris employed there and that the taxes devoted to


58 Business Record, Jan. 27, 1997 (copy supplied by Jim Pollock, editor, Business Record).
recovering the health costs of tobacco by far exceeded those paid by Philip Morris.⁵⁹

Even before any anti-preemption bills had been filed at the 1997 session, the cigarette companies had prepared additional propaganda material alerting “supporters of statewide preemption...to be ready” for the filing of a bill by the anti-smokers, who “are committed to repealing this law, and were disappointed that they were unable to do so last year”⁶⁰ and urging tobacco retailers and smokers to inform legislators and Governor Branstad “to leave well enough alone.”⁶¹ The oligopolist predicted that if anti-smokers got their way and gave municipalities “the freedom to enact their own restrictions,” they “would likely try and persuade local officials to enact extreme restrictions—if not outright bans—on the sale of tobacco products.” How the antis could possibly achieve this result, however, remained a mystery in Philip Morris’s propaganda universe since there was, “in fact...no widespread public outcry to increase towns’ and localities’ authority to enact restrictions on the sale of tobacco products” and “[v]irtually the only people supporting this effort are the state’s anti-smoking extremists, who are only interested in furthering their crusade against cigarettes and smoking.”⁶²

On February 5, the Cancer-Heart-Lung coalition sought to bring pressure to bear on the legislature in support of Miller’s proposal⁶³ by highlighting the results of a survey finding that 70 percent of those polled favored authorizing local governments to pass “their own tough restrictions on smoking....”⁶⁴ Not by coincidence, the next day, semi-stalwart, semi-smoking Representative Minnette Doderer from Iowa City introduced a streamlined bill (H.F. 172) embodying the coalition’s anti-preemption program. It repealed the provisions in both laws, but

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⁶⁰[Philip Morris], Anti-Smokers Seek Repeal of State Tobacco Uniformity Law (est. 1997), Bates No. 2061860293.

⁶¹[Philip Morris], Gov. Branstad Asks Legislature for Tough New Cigarette Sales Restrictions (Feb. 1997), Bates No. 2061860258. Although the Legacy website estimates the document date as Feb. 1997, this material was recycled from previous campaigns and made reference to bill numbers that did not correspond to relevant ones in 1997.

⁶²[Philip Morris], Anti-Smokers Seek Repeal of State Tobacco Uniformity Law (est. 1997), Bates No. 2061860293.


⁶⁴Anti-Smoking Group Points to Survey,” DMR, Feb. 6, 1997 (5M:1), Bates No. 2061860259.
tacked on to the cigarette sales law a grant of discretionary power to cities and counties to adopt regulations “specifically targeted to reduce or eliminate access to, sale to, or use of cigarettes or tobacco products by persons under eighteen...which shall supersede any inconsistent or conflicting provision” of the law. However, H.F. 172’s referral to the Local Government Committee was the only action that the House took on it. Twelve days later Iowa City Senator Mary Neuhauser introduced the almost identical S.F. 156, which got as far as a Human Resources subcommittee before expiring. The same day 10 senators, headed by Republican Maggie Tinsman and including four other Republicans as well as Democrats Johnie Hammond, Robert Dvorsky, and future governor Tom Vilsack, filed an even cleaner bill, S.F. 157, which repealed both preemptions and added nothing, but it, too, went no further than a Human Resources subcommittee. Its House companion bill, which was filed by a Republican and co-sponsored by three Republicans and three Democrats, did not even get that far. However, S.F. 157 was, through legislative metempsychosis, about to experience rebirth.

One vehicle for support of preemption repeal was a bill (S.F. 163) filed on February 19 by, of all people, Majority Leader Iverson together with Republican Senator Nancy Boettger, which would merely have amended the cigarettes sales law by repealing the lock-out device provision of the section on vending machine sales and substituting for it a ban on the sale of any cigarettes or tobacco products through vending machines unless they were “located in a place where the retailer ensures that” no one younger than 18 was “present or permitted to enter at any time.” On February 27 the Senate Human Resources Committee, chaired by Boettger, recommended passage of S.F. 163 with several amendments, three of which are pertinent here. First, Senator Robert Dvorsky, a consistently anti-
smoking Democrat, presented the aforementioned S. F. 157, which repealed both preemptions; it passed 7 to 6, with all five Democrats being joined by two Republicans, Tinsman, the chief sponsor of S.F. 157, and John Redwine, an osteopath, who as a physician always took a principled stance against smoking, which did not stand him in good stead with Republican party leaders, whose position on smoking and tobacco legislation was in large part determined by the fact that they smoked: “It was as simple as that.” Then Senator Hammond, one of the legislature’s leading anti-smoking militants, presented an amendment, which, going beyond preemption repeal, would have specifically empowered local governments to recothe the cigarette sales permit fee with the deterrence it originally was designed to have in 1921 by using economic means to reduce the number of cigarette sellers: “A city or county may establish a local retail permit fee in addition to the annual state retail permit fee. A local retail permit fee shall be retained by the city or county imposing the fee and shall be used by the city or county exclusively for the purpose of enforcing section 453A.2,” which prohibits the sale of cigarettes to persons under 18. This language was taken verbatim from Senate Study Bill 68, “An Act relating to the local regulation of cigarettes and tobacco products including a provision for the establishment of a local fee,” which the Human Resources Committee received on February 3. In addition to the aforementioned provision, the study bill declared that notwithstanding the “uniform application” (or preemption section) of the cigarette sales law, “any local laws and regulations specifically targeted to reduce or eliminate access to, sale to, or use of cigarettes or tobacco products by persons under eighteen years of age shall supersede any inconsistent or conflicting provision of this chapter.” The study bill would, as a Philip Morris report

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71[Iowa Senate] Committee Minutes for Human Resources at 1 (Feb. 27, 1997) (copy furnished by SHSI DM).
73Telephone interview with John Redwine, Fayetteville, AR (Mar. 30, 2008). In addition to Iverson, Redwine mentioned such leaders as Daryl McLaren and Jack Rife. In contrast, neither Boettger, nor Rensink, nor Schuerer smoked; neither Senate President Mary Kramer nor four of the five assistant majority leaders smoked (the one exception being Mary Lou Freeman).
74163 Amend 3 by Hammond, attached to [Iowa Senate] Committee Minutes for Human Resources at 1 (Feb. 27, 1997) (copy furnished by SHSI DM).
75It was assigned to a subcommittee composed of Schuerer, Tinsman, and Dearden. Senate Journal 1997 at 189, 191 (Feb. 3).
observed, “eliminate smoking and marketing uniformity.”

Hammond’s amendment prevailed by a vote of 10 to 3, with five Republicans joining all five Democrats; the three Republicans who cast Nays included Neal Schuerer, a restaurant owner, who, oddly, had been the chief sponsor of S.S.B. 68. In the end, the committee voted out the bill, including all proposed amendments, with a recommendation to amend and pass, by a vote of 9 to 4, with Republicans Boettger, Redwine, Rensink, and Tinsman joining the five Democrats.

Although neither the Des Moines Register nor the Cedar Rapids Gazette, both of which reported other Senate Human Resources Committee meetings, covered this one, the following Sunday’s Register editorially lauded the committee and urged the legislature to adopt the same position as the three health groups and to end local preemption “[f]or the sake of both home rule and health....” The newspaper was inspired by Food and Drug Administration rules, scheduled to go into effect in August, prohibiting some cigarette vending machine sales, enforcement of which, according to “[c]ancer fighters,” would be greatly enhanced if local ordinances fleshed them out.

The same day that the committee met, Majority Leader Iverson demonstrated his control of the Senate’s tobacco control agenda by filing a second bill (cosponsored by eight other Republicans, including Senate President Mary Kramer), this time altering the penalties for under-18-year-olds who bought or tried to buy or smoked cigarettes or other kinds of tobacco. The Republicans’ solid Senate majority insured passage of Iverson’s bill in approximately the same measure as Iverson’s endorsement guaranteed that the legislation would not harm the cigarette oligopoly’s interests. S.F. 237 substituted the following gradations for the existing scheduled $25 fine: for a first offense the civil penalty was $100; a second offense subjected the person to a 60-day suspension of his or her motor vehicle license or, if the person had none, 50 hours of community service; a third offense triggered a one-year suspension or 100 hours of community service for

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78Senate Journal 1997 at 49.
anyone without a license. The chain-smoking Iverson asserted: “We need to send the toughest message possible to Iowa teen-agers that underage smoking is wrong. There is no better way to send that message than to take away that person’s driver’s license.” Though self-irony appears not to have been his strong suit, Iverson, whose addiction dated back to his teenage years, but who was only 13 years old when the Surgeon General’s epochmaking report on smoking was released in 1964, did allow as: “If the law was there when I was a teenager, who knows?” It is unclear whether Tobacco Institute applicant Iverson realized that the best way to send a message to teenagers that the ban on underage smoking was just a joke was to have it delivered by the state’s most powerful legislator in the same newspaper article that pointed out that he was a “chain-smoker.” Despite the bill’s lack of a local control provision, Branstad stated that he would be able to support it.

The Senate Human Resources Committee’s recommendations presumably gave rise to the confident tone adopted by the anti-tobacco coalition at the press conference it held on March 3 to insist on the “growing grassroots support for new restrictions on cigarettes.” In particular, at least 20 local governments (including Des Moines, Cedar Rapids, Sioux City, Dubuque, Iowa City, Davenport, and Bettendorf) sought the power to impose such restrictions as limiting the public places where smoking was permitted and increasing the cigarette sales permit fees. Attorney General Miller’s seemingly unbounded public optimism prompted him to express his “sense that there’s enormous support in both houses of Legislature.” Remarkably, Miller’s claim seemed not wholly implausible.

81 S.F. 237 (Feb. 27, 1997, by Iverson et al.).
82 1991 Iowa Laws ch. 240, § 10, at 493, 495 (amending Iowa Code § 903.1(3)).
88 “Cities and Cigarettes,” DMR, Mar. 9, 1997 (1C:4) (edit.).
On March 6 the Senate Human Resources Committee amended and approved S.F. 237 as a committee bill, which then became S. F. 377, which, inter alia, differed from its predecessor by virtue of creating alternative penalties for a second offense of a 60-day motor vehicle license suspension, 50-hour community service, or a $200 civil penalty, and for a third offense of a one-year suspension, 100-hour community service, or a $300 civil penalty. The committee voted 7 to 4 in favor of these changes, Democrats Szymoniak, Dvorsky, and Hammond being joined by Rensink in opposition, while all the remaining Republicans favored them. Boettger, the committee chair, insisted on the measure’s functionality: “We’ll make kids who consider it cool...think twice before smoking because there are severe consequences.” Dvorsky, who declared that the approach would not work “because many fines already go uncollected,” analyzed the bill as intended “to divert attention from” the effort to repeal local preemption: “It’s a sidetrack. This is diversion, clearly. We seem unwilling to stand up to the tobacco lobbyists, so we’re taking it out on teen-agers.”

Opponents—including Hammond, who, referring to a 1995 law that imposed a license suspension for minors found with small amounts of alcohol in their blood, rhetorically wondered “how many times we can take driver’s licenses away from those kids”—contended both that the penalties were excessive and that the bill’s whole underlying strategy was “bound to fail.” That Iverson and Senate President Mary Kramer were co-sponsors boded well for the bill’s passage, which, according to the Des Moines Register, would bestow some public relations benefit on Republicans:

Its passage also would give lawmakers some claim to anti-tobacco legislation in a year when they’re expected to ignore a more controversial proposal that would permit local governments to enact anti-tobacco ordinances that are more stringent than state laws.

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90 State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1: 537-38 (Mar. 6). The history of S.F. 237 in the Index to the House and Senate Journals lists no such action, the last two being appointment of a subcommittee on Mar. 3 and filing of an amendment on Mar. 4. Index at SBH-97.


Gov. Terry Branstad, with support from health associations, asked lawmakers to repeal the legal barrier against tougher local tobacco ordinances. But lobbyists for tobacco companies and retailers have fought that proposal bitterly.\textsuperscript{95}

In a weekly report for the period ending March 13, R. J. Reynolds’ field agent for Iowa, Ally Milder, noted that the “repeal of preemption is our big issue in Iowa. So far the consensus among our coalition partners is that no substantial grassroots activity is called for at this time. I have discussed doing a few grassroots letters to the subcommittee chairman with our lobbyist and David Horazdovsky of TI. I am going to meet with Horszdovsky [sic] next week to discuss this further.”\textsuperscript{96} By the following week, Milder was able to report that my fears about preemption in Iowa are somewhat allayed. The Speaker of the Iowa House who was pushing a repeal (in Iowa it is total preemption i.e. display bans, public facilities) of the current preemption law has not been able to muster much enthusiasm [sic] with it. We have reached an accomidation [sic] with the Senate Leadership which will ban vending machines in establishments where minors have access. In addition, A [sic] minor would face a $100 fine for his first violation. On the second violation he would lose his drivers license. We were involved with our coalition partners including the wholesalers and retailers in coming up with this position.\textsuperscript{97}

House Speaker Ron Corbett later confirmed that he had in fact favored repeal as part of his overall strategy of working for compromise on the issue of smoking. Although he agreed with others’ judgment that under Iverson’s leadership in the Senate there was no chance of repeal, he argued that some room for movement still survived in the House. One reason for his failure to generate more support for repeal was, in his view, tobacco lobbyists’ having effectively convinced rural representatives that there was a slippery slope from repeal of smoking preemption to local regulation of livestock confinement based, in part, on an analogy between the odors of manure and tobacco smoke.\textsuperscript{98}


\textsuperscript{96}Ally Milder to C. Read deButts et al., Weekly Report (Mar. 13, 1997), Bates No. 530971047/8.

\textsuperscript{97}Ally Milder to Jim Ellis et al., Weekly Report (Mar. 20, 1997), Bates No. 531890806/7.

\textsuperscript{98}Telephone interview with Ron Corbett, Cedar Rapids (Apr. 7, 2008). In a parallel universe, anti-smoking Representative Mary Mascher, who was in the House in 1997, commented that “Corbett was definitely not anti-tobacco, in fact, over the years he probably collected more money from big tobacco than [Rep. Christopher] Rants ever did.”
Whatever momentum had seemingly built up for repeal of preemption in the public smoking and sales laws soon dissipated. First, on March 26, Dvorsky and Hammond offered it in the form of floor amendment to an olio of a criminal justice bill (S.F. 503), but the chair ruled well taken a point of order by Republican Larry McKibben that it was not germane. A week later, Dvorsky and Hammond’s successful committee gambit attaching repeal to S.F. 163, Iverson’s cigarette vending machine bill, came to naught on the Senate floor. As soon as Human Resources Committee chair Boettger had offered committee amendment S-3102, Republican Wilmer Rensink, who had voted for it in committee, raised the point of order that the amendment was not germane, which the chair ruled well taken, thus ruling it out of order and killing that initiative.

In the meantime, on March 17, Iverson, now acting as sole sponsor, introduced S.F. 499 as a substitute for S.F. 377, with which it was textually identical. After the Judiciary Committee had unanimously recommended passage with an amendment striking the suspension of drivers licenses and imposing community service, while lowering the three-tiered monetary penalties to $25, $50, and $100, Senate Democrats passed up the opportunity to attach their preemption repeal amendments on the floor to Iverson’s bill, which passed in the committee’s stripped-down version by a vote of 47 to 0. While Hammond, who had criticized an earlier version as too drastic, now belittled the result as “a pretty weak sister,” Boettger continued to insist that it would deter

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Email from Mary Mascher to Marc Linder (Apr. 2, 2008).

99 State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1: 823 (Mar. 26) (S-3259). In 2008 McKibben would become one of the most strident and incoherent critics of the statewide anti-smoking bill, which was finally enacted. See below ch. 35.


101 State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1: 934-35 (Apr. 2). The Senate then passed the bill 45 to 0. Id. at 942. The law as enacted was identical to Iverson’s original bill. 1997 Iowa Laws ch. 136, at 281.


103 TMA, Legislative Bulletin, Leg 97-14, at 3 (Apr. 23, 1997), Bates No. 158103681/3.

104 State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1: 918 (Apr. 2) (10-0 vote). This structure was ultimately enacted. 1996 Iowa Laws ch. 74, § 4, at 116, 117.

some teenagers by sending them the smoking is “‘not cool’” message. Anti-smoking Democratic Senator Michael Connolly took a different tack, charging that whatever deterrent the bill embodied was undercut by senators’ hypocritical refusal to “abide by state laws prohibiting smoking in public buildings.” Finding irony in the Senate’s flexing its muscles with teenagers, Connolly predicted that they would “look at what lawmakers do rather than what they say.”

Making up for the senators’ omission, House Democrats sought to achieve preemption repeal. On April 7, Representative Richard Myers, a third-term Democrat from Iowa City, the owner of a truck stop—where he sold cigarettes—whose long governmental career, including two decades as city councilman and mayor of Coralville and Johnson County supervisor, was coupled with membership on the board of directors of the Mid-Eastern Council on Chemical Abuse, filed an amendment (H-1566), identical to Neuhauser’s S.F. 156, which embodied repeal of both laws’ preemption provision and authorized local governments to adopt regulations to reduce minors’ access to or use of cigarettes. When the bill came up for debate on April 14, a Republican raised a point of order that the amendment was not germane, which the chair ruled well taken. After Myers’ request for unanimous consent to suspend the rules to

109 Telephone interview with Richard Myers, Iowa City (May 8, 2008). At the end of 1999, when Myers, attending an American Cancer Society forum, heard that 3,000,000 packs of cigarettes were sold illegally to children in Iowa annually, called “those numbers...outrageous and wonder[ed] if he should continue selling cigarettes in his store. ‘I’m almost to a point where I’m going to take them out.’” James McCurtis, “Anti-Smoking Plan Gets Support,” ICP-C, Dec. 9, 1999 (3A) (NewsBank).
110 Iowa Official Register: 1997-1998, at 83. A one-time Republican, when he became the House Minority Leader in 2000, Myers was praised by the Register’s political commentator as a “small-business owner and...one Democrat who isn’t afraid of someone making a profit” (by this time he was selling Harley-Davidson motorcycles). David Yepsen, “Democrats’ New Leader Leans Toward Compromising with GOP,” DMR, Nov. 14, 2000 (9A) (NewsBank).
consider his amendment had run into a fatal objection, he moved to suspend the rules to consider H-1566. The result of the roll call vote revealed the weakness of the anti-smokers’ position: the 40 to 57 defeat exceeded the Republicans’ majority in the House because more Democrats (11) opposed the amendment than Republicans (6) crossed over to support it. R. J. Reynolds’ legislative intelligence apparently knew whereof it spoke: the Republican Speaker of the House, Ron Corbett, was indeed one of the six voting to suspend the rules.\textsuperscript{112} In the House S.F. 499 was unable to duplicate the Senate’s unanimity: 19 representatives (all Democrats) balked.\textsuperscript{113} Critics who favored stronger provisions argued that “the bill would have only a limited impact on teen smoking and represented a victory of tobacco lobbyists.” Myers himself berated the House for its unwillingness to “face up to some of the real causes” of smoking.\textsuperscript{114}

Later in 1997, Iverson claimed in an interview that he believed in general that local control over environmental regulation—the issue at hand was large hog lot operations—“and other standards would undermine Iowa’s basic approach to government.” Iverson, a “family farmer” in whose district more large livestock facilities were located than any other in Iowa, thought “‘this is much bigger than just the livestock issue.... I think it would be a dramatic turn in Iowa—because we do not allow local governments to have any laws that are more stringent than state laws. That’s a debate that we’ll have again this year. But I’m a firm believer in statewide regulation.’”\textsuperscript{115} The cigarette oligopolists (and other large corporations) may have been delighted to know that the Senate Majority Leader had so opined, but it was, nevertheless, astonishing that the state’s most powerful legislator was unaware that the Iowa Code provided (and provides) that: “A city may not set standards and requirements which are lower or less stringent than those imposed by state law, but may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.”\textsuperscript{116}


\textsuperscript{116}Iowa Code, sect. 364.3(3) (1997). When interviewed more than a decade later, Iverson repeated virtually verbatim the erroneous “we don’t allow local governments” assertion. Telephone interview with Stewart Iverson, Clarion, IA (Apr. 6, 2008).
Democrats’ Decade in the Desert: 1997-2006

Ironically, the 1997 forecast attached in the Tobacco Institute’s regional budget for 1997—which included $60,000 for lobbyist Charles Wasker in addition to $1,000 in support of the Iowa Restaurant Association and $500 for the Iowa Retail Merchants Association117—had not even bothered to mention defensive action on behalf of the preemption provisions, although repeal of smoking restrictions was the sole item under the “Proactive” rubric.118

The Iowa Attorney General’s Medicaid Reimbursement Lawsuit
Against the Cigarette Oligopoly: 1997-1998

This Was a Good Week in Iowa for BIG TOBACCO.119

The latter part of 1997 witnessed a controversy over whether a special session of the legislature would be called to accommodate Attorney General Tom Miller’s request for additional legal tools to prosecute the state’s lawsuit against the cigarette companies for the recovery of Medicaid expenses for tobacco-related disease. On November 27, 1996, months after the legislature had taken no action on a bill to provide such a cause of action,120 Governor Branstad and Miller announced that the state had filed suit against the tobacco companies to recover millions of dollars in restitution for the state’s costs in providing health care to state citizens and employees to deal with the tobacco-related diseases resulting from the companies’ wrongful conduct and unlawful activities as well to seek restitution and civil penalties for violations of the Iowa Consumer Fraud Act committed by the defendants in systematically misleading the public about the health consequences of smoking and failing to disclose that nicotine was

118Tobacco Institute, 1997 Budget, State Activities Division, Region III (Nov. 1, 1996), Bates No. TI16551698/700. Defensive measures included “excise tax threat.” See also Tobacco Institute, 1997 Draft Forecast Smoking Restrictions at 1, Bates No. TI02581247. For a list of the various tobacco industry lobbyists in Iowa in 1997, see Tobacco Institute, State Activities Division (Jan. 1997), Bates No. 83678016/27.
119Iowa Healthy Kids Project, “This Was a Good Week in Iowa for Big Tobacco” (n.d.) (faxed from Hultman & Haus to Jack Lenzi, Sept. 30, 1997), Bates No. 2061860317.
120H.F. 2482 (Mar. 21, 1996, by Brammer).
On August 26, 1997, Polk County District Court Judge Linda Reade denied the defendants’ motion to dismiss the Consumer Fraud Act claim, but did sustain their motion to dismiss the Medicaid indemnity claim. Because Iowa, unlike Florida, had not enacted legislation specifically empowering the state to proceed directly against tobacco companies for recovery of medical expenses incurred by the state on its citizens’ behalf, the judge ruled that the common law tort theories pleaded by the state did not justify recovery of Medicaid costs, thus remitting the state to a statutory claim that it characterized as procedurally impractical and inconvenient. Robert Levy, a cigarette company apologist at the Cato Institute whom Philip Morris called on to write op-eds, promptly weighed in with one in the *Des Moines Register* hallucinatorily admonishing the Iowa legislature that if it “permits this outrageous, retroactive application of the law, it will have tapped the deep pockets of a feckless and friendless defendant.” Then training his sermon on Iowans in general, he warned them that they might wind up bequeathing their children “a message even more perfidious than cigarettes”—namely, that they “can engage in risky behavior, then force someone else to pay the bills.” Conveniently, Levy did not pass judgment on the message that millions of people, whom cigarette manufacturers, withholding the knowledge that morbidity and mortality would result from using their commodities, urged to smoke, would not be able to force someone else to die their deaths for them.

Although House Speaker Corbett, who purported to support Miller’s efforts, initially favored a special (one day) session, it very soon became clear that he and other Republicans were eager to accommodate the Iowa Association of Business and Industry’s demand that any law not expose “‘manufacturers of other legal products to future liability concerns.’” What a

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121Office of the Governor of Iowa [and] Iowa Department of Justice, Iowa Files Lawsuit Against Tobacco Companies (Nov. 27, 1996).
123Email from Jack Lenzi to Joanne Mendes et al. (Jan. 19, 1998), Bates No. 2071794891.
125Telephone interview with Ron Corbett, Cedar Rapids (Apr. 7, 2008).
127David Yepsen, “Business Group Wary of Tobacco Bill,” *DMR*, Sept. 12, 1997 (4A) (NewsBank). Nevertheless, half a year later the Register recharacterized the earlier situation as one in which Republicans had walked away from Corbett’s call for a special
Democrats’ Decade in the Desert: 1997-2006

member of his caucus may have meant a decade later in calling the nonsmoking
Corbett a “practical” politician was illustrated by his plan to impose such far-reaching restrictions on the suit as excluding damages from secondhand smoke exposure and, especially, limiting claims to future medical expenses, which would have reduced the state’s potential recovery. Miller estimated, by 300-500 million dollars. By mid-September the Republican legislative leaders made it clear that Miller would not get all that he had requested. House Majority Leader Brent Siegrist, for example, acknowledged that the legislature would try to strengthen the attorney general’s hand, but would not “give him a lead-pipe cinch victory because that could have some impact on other businesses....” And Corbett, responding to some legislators’ reluctance to convene a special session unless the millions of dollars in fees that private lawyers, to whom the state had contracted out the prosecution, stood to gain were reduced, added that any law enacted might lower them. The improbability of legislative intervention, including provision for retroactivity enabling the state to recover for past damages, increased once the defendants, and especially Philip Morris—given the influence that the cigarette companies had long wielded in the Iowa legislature—announced that they would vigorously attack such a law as well as the convening of a special session. Republican legislative leaders’ decision not to give Miller anything more than the right to sue the tobacco firms for damages to poor people covered by Medicaid prompted the attorney general to call it “an enormous missed opportunity.” Corbett dropped Miller’s proposal to assign damages based on each tobacco firm’s market share because “introducing a new idea like that into Iowa’s liability laws made Iowa businesses [sic] leaders nervous.” Also rejected was the proposed right to calculate damages by statistical formulas. Corbett defended that decision on the grounds that that approach “would really take away the right of tobacco companies to face their accusers.... As bad as the tobacco companies are, in America everybody deserves to have their day in court.” The coup de grace appeared to be administered by a letter to members of the legislature from the American Legislative Exchange Council, an

128 Telephone interview with Rosemary Thomson, Marion, IA (Apr. 3, 2008).

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organization of conservative legislators—whose involvement Philip Morris apparently managed—which opposed the lawsuit altogether, calling it possibly “‘misguided, hasty, unconstitutional....’” The group’s sway was great enough, according to Corbett, to prompt some members to “‘second-guess their decision to support this,’” thus “deal[ing] a blow to Iowa’s plans.” More straightforwardly, the Register pointed out that “[p]olitically, it also has become difficult for GOP members to differ with the business community, which bankrolls many Republican campaigns.”

The Iowa Healthy Kids Project put it more pithily: “Big Tobacco and their friends went to work on Republicans. Within a week, they managed to get republicans [sic] to do their bidding and the special session was off.”

The credibility of the Republican leadership’s denials that “members had succumbed to pressure orchestrated by tobacco interests”—Siegrist implausibly claimed that “I don’t know if it’s big tobacco so much as hard-working Iowans out there saying, ‘Let’s look at this longer’”—suffered from the fact that Representative Jeffrey Lamberti, whose father was the founder of Casey’s General Stores, Inc., one of Iowa’s biggest cigarette sellers, aggressively declared that “[w]e’re addressing that court case and we’re not going any farther than that....” On September 18, the Republican legislative leadership decided not to meet in special session, provoking Democratic House Minority Leader David Schrader into charging that: “‘They’re obviously working hard to give the tobacco industry every advantage in the process.’”

At 8:54 p.m., scarcely two hours after the special session had been nixed, Jack

133Email from Jack Lenzi to Joanne Mendes et al. (Jan. 19, 1998), Bates No. 2071794891.
136Iowa Healthy Kids Project, “This Was a Good Week in Iowa for Big Tobacco” (n.d.) (faxed from Hultman & Haus to Jack Lenzi, Sept. 30, 1997), Bates No. 2061860317.
Lenzi triumphantly informed 13 of his co-conspirators in an “***URGENT***” communication:

Though it looked at times like defeat would be snatched from the jaws of victory, in the end Senate Republican leaders, particularly Stu Iverson, would not give the AG what he wanted. They stood on legal principle and good policy.

In the end the business community, lead [sic] by ABI, proved to be absolutely critical. They would not give their blessing to statistical evidence, market share liability, or strict product liability, even limited to tobacco, period.

There is much to learn from this experience, and we will put those lessons into a plan for use in future debates.\(^{140}\)

While the recipients of the message also earned his praise, Lenzi emphasized that ultimately Philip Morris lobbyists Hultman and Haus had “made it happen.”\(^{141}\)

Governor Branstad may still not have given up on the possibility of salvaging a special session,\(^ {142}\) but Majority Leader Iverson’s and Attorney General Miller’s dueling op-eds in the Register made the unbridgeability of the gap between the parties transparent. Ever the loyal cigarette industry propagandist, the would-be Tobacco Institute vice president sought to reduce the entire anti-tobacco campaign to the one issue for which the cigarette manufacturers’ feigned support—“reducing teen smoking.” Iverson rebuffed Miller’s plan to “tilt the law in his favor by using statistical analysis to show that smoking caused illnesses” without proving that smoking had caused the illnesses of identified individuals.

Asserting that such an approach “could result in fraud” and even preclude a defendant from proving that a medicaid recipient had never used its product, Iverson bridled at setting “a precedent that might be used against all manner of job-creating businesses in our state.” IVerson concluded with the cigarette firms’ tried and true tactic of pretending that their unique legal battles to spare them liability for producing and selling commodities that killed millions of their customers and to insure their future for-profit lethality were really being fought selflessly on behalf of average Americans: “I am not willing to sacrifice Iowans’ constitutional protections that guarantee due process under the law for a pot of gold, no matter how large it is.”\(^ {143}\)

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\(^{140}\)Jack Lenzi to Mary Carnovale et al. (Sept. 18, 1997), Bates No. 2078311510.

\(^{141}\)Jack Lenzi to Mary Carnovale et al. (Sept. 18, 1997), Bates No. 2078311510. Lenzi also singled out Greg Little, who was a Philip Morris lawyer.


By mentioning House Speaker Corbett and Senate President Mary Kramer as moving in the direction of his and Branstad’s goal of making “tobacco a bipartisan issue in Iowa” while “some Republicans still have a way to go,” Miller took an inferential dig at Iverson. But he also dispassionately explained how the state’s lawsuit would have proceeded if Republicans had not blocked enactment of the statute he had requested:

We would have to prove that tobacco use caused lung cancer, emphysema and heart disease. Then, by a statistical model, we would show the total cost to the state for the treatment of tobacco-caused disease for Medicaid recipients.

The tobacco companies then could defend by proving what they have steadfastly told Americans for 50 years—that tobacco doesn’t cause lung cancer, emphysema or heart disease. They could attack our model, the concept of a model or anything else to disprove our case. An Iowa jury would decide whether we proved our case and, if so, determine the amount of the state’s damages.

Some of the Republican leadership wanted the state to prove in court for each and every one of tens of thousands of Medicaid recipients whether tobacco caused their disease, what percentage of fault to assign to the tobacco companies, and what percentage of each company’s cigarettes each recipient smoked. This is impossible and caused the breakdown of negotiations over the special session.

Some say my concept is revolutionary and without precedent. They are wrong. The concept is similar to strict liability covering explosives, flammables and even dog bites. It also has some similarities to the way hazardous waste is covered in Superfund cases.

Some say it is unconstitutional and unfair to single out tobacco companies. It is not. We would argue that tobacco is unique—no other product, when used for its ordinary purposes, kills 420,000 Americans each year and is highly addictive for virtually every user. No Iowa company should think that its product is similar to tobacco.

Some say that it’s unfair to change the rules in the middle of the “game.” It may be a “game” for tobacco companies, but there is a lot more at stake for the rest of us. In any event, our revised proposal would apply only to the future and would not be retroactive. In the event, no special session was called.

In mid-September 1997 the attorney general’s office was also engaged in another aspect of the cigarette wars. In response to a request by Senator Johnie Hammond and Representative Minnette Doderer, who were presumably gearing up for yet another assault on preemption, for an opinion as to whether sections 142B.6 and 453A.56 of the Iowa Code “preempt all local ordinances relating to


smoking or tobacco or whether these statutes merely prohibit those local regulations which are inconsistent with chapters 142B and 453A.,” Solicitor General Elizabeth Osenbaugh wrote that the attorney general had “concluded as a matter of policy that this office will support local regulation of smoking to the extent not inconsistent with state law. We also believe this is the meaning of the two Code sections.... However, because of our strong public statements on this issue during the legislative debate, we believe it would be inappropriate to issue an official Attorney General’s position on the question.” Nevertheless, Osenbaugh proceeded to present a brief outline of the logic leading to her office’s conclusion. Based on the home rule provisions of the Iowa Constitution (Art. III §§ 38 A and 39A) and their codification in the Iowa Code (chapters 364 and 331), which empowered local governments to enact legislation “not inconsistent with” state law, “inconsistent” being defined as “irreconcilable,” she cited case law holding that “[o]rdinances that are irreconcilable, impossible to make consistent or harmonious, incongruous, or incompatible will be deemed inconsistent and preempted.” And more precisely, an ordinance was inconsistent when it “prohibits an act permitted by a statute, or permits an act prohibited by a statute.” Although the legislature could also reserve an area of the law to the state by “occupying the field,” “extensive legislation within a particular area of the law does not by itself establish preemption” because local governments were permitted to create “standards more stringent than those imposed by state law unless state law provides otherwise.” Because the last sentence of the two statutory provisions preempted only an ordinance that was “inconsistent with or conflicts with” the statutes, Osenbaugh concluded not only that it did not demonstrate a legislative intent to “occupy the field,” but that the legislature’s

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146 Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 1 (Sept. 16, 1997), in Minnette Doderer’s Papers, Topical Files-Last Accession, Folder: Tobacco, IWA. It is unclear whether Osenbaugh was implying that the attorney general would have supported non-inconsistent ordinances even if he did not believe that “this is the meaning of the two Code sections....”

147 Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 2 (Sept. 16, 1997) (citing Green v City of Cascade 231 NW2d 882, 890 (Iowa 1975)).

148 Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 2 (Sept. 16, 1997) (quoting Decatur County v PERB, 564 NW2d 394, 397 (Iowa 1997)).

149 Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 2 (Sept. 16, 1997) (citing City of Council Bluffs v Cain, 342 NW2d 810, 812 (Iowa 1983), and City of Clinton v Sheridan, 530 NW2d 690, 695 (Iowa 1995)).

150 Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 2 (Sept. 16, 1997) (quoting City of Des Moines v Gruen, 457 NW2d 340, 343 (Iowa 1990)).
“more general statement of purpose (‘equitable and uniform implementation, application, and enforcement’)” also had to be interpreted “in context with the specific prohibition of ‘inconsistent’ regulations.” Finally, the solicitor pointed out that in cases in which the Iowa Supreme Court had held that a statute did preempt a local ordinance, “the statutory language more explicitly preempted local action” than did the smoking and cigarette laws. As an example of a clear legislative intent to occupy the field, she instanced that “no municipality, county or other governmental unit within this state shall make any law, ordinance, or regulation relating to obscenity.”

With even greater certitude and capaciousness, in November, Assistant Attorney General Steve St. Clair of the Consumer Protection Division told the annual meeting of the Iowa Municipal Attorneys Association under the suggestive heading, “Non-preemption of local ordinances,” that although the two provisions “could be claimed to preempt local regulation,” their “thorough analysis...in light of the home rules principles” in the state constitution and the code “strongly supports the conclusion that there is no preemptive effect.”

Miller’s efforts to bolster the state’s lawsuit against the tobacco companies became the latter’s highest Iowa intelligence priority from the end of 1997 into 1998. Already at the beginning of December, Kevin Narko, one of Philip Morris’s lawyers at the Chicago-based law firm of Winston & Strawn, informed one of the firm’s on-the-payroll lawyers that Miller’s proposed bill was scheduled to be introduced in the Iowa legislature more than five weeks later. On Christmas eve Narko emailed the same Philip Morris lawyer and Jack Lenzi, one of the company’s top regional officials, a copy of the minutes of a recent meeting of the Board of Directors of the Iowa Defense Counsel Association at which an attorney whose firm represented the Council for Tobacco Research (which was controlled by industry lawyers, inter alia, to prepare scientific witnesses for trials and legislative testimony) moved that the board oppose Miller’s proposed

151 Elizabeth Osenbaugh to Johnie Hammond and Minnette Doderer at 3 (Sept. 16, 1997) (quoting Chelsea Theater Corp. v City of Burlington, 258 NW2d 372, 373 (Iowa 1977)).


153 Kevin Narko to Steve Rissman, Subject: Iowa Special Legislation (Dec. 5, 1997), Bates No. 2077024635. This terse factual statement of fact was none the less headed: “Confidential Attorney-Client Communications Containing Opinion Work Product of Retained Outside Counsel.”
legislation, arguing that it “tilted the scale against industry”; the board, the firm of one of whose members represented the State of Iowa in tobacco matters, unanimously approved the motion.\footnote{Minutes of the Meeting of the Board of Directors of the Iowa Defense Counsel Association 1, 3, 4 (Dec. 12, 1997), Bates No. 2077024641/3/4.} Manifestly aware of the extent to which Philip Morris demanded complete control of its legal environment and thus foreseeing the possibility that his client might not be satisfied with this (hardly surprising) victory, Narko pointed out that his firm had been given no advance notice of this vote and wondered whether the client wanted the law firm to look into better coordination for the future.\footnote{Email from Jack Lenzi to Betsy Giles et al. (Dec. 24, 1997), Bates No. 2077024639.}

On New Year’s Eve Lenzi recommended to the staff dealing with Iowa “strong consideration of early/preemptive activity” including mobilizations.\footnote{Email from Brendan McCormick to Betsy Giles et al. (Jan. 6, 1998), Bates No. 2077024636A.} On January 6, 1998, Philip Morris operatives paid to counteract anti-tobacco initiatives were speculating through email about what Miller at his news conferences the next day would be including on his annual legislative tobacco agenda. They assumed that product liability would be on his list, but were not so sure about tax increases. Having learned from an Iowa AP wire story that Republicans, including Branstad, considered tax questions “D.O.A.,” they wondered whether it would be best to let them attack tax increases of any kind in the media, while Philip Morris focused its allies’ efforts on Miller’s other proposals.\footnote{Email from Jack Lenzi to Betsy Giles et al. (Dec. 31, 1997), Bates No. 2077024636C/7.} Lenzi quickly replied that he had spoken to Greg Little and Steve Rissman (two of the company’s high-ranking lawyers) and taken the “liberty of calling Cal Hultman for the local scoop.” Hultman, a one-time Republican Iowa Senate Majority Leader and company lobbyist in the 1990s, informed him that “last year’s failed FL\text{orida}-style legislation” (which would have given the state a statutory action for recovering Medicaid expenditures), was on Miller’s agenda. Lenzi also reported that “Business community is galvanized and opposed, as are some key leaders in Capitol.” One of Philip Morris’s lawyers was supposed to stand by “as a possible spokesperson,” but it was “best if it occurs locally” and an Iowa lawyer was prepared to speak on behalf of the Iowa Association of
Business and Industry.  

On January 7, 1998, the day of—but before a report reached Philip Morris of the content of—Miller’s news conferences, Lenzi and the staff discussed on a conference call how to deal with the presumed elements of the attorney general’s proposals and assigned preemptive, reactive, and other roles to various staff members. The importance that the company accorded the campaign was signaled by the fact that corporate affairs and issues management personnel were “in the loop” as were two lawyers, one of whom was tasked with speaking about the “Fl-style” legislation to the Iowa House Judiciary Committee chair, Jeffrey Lamberti, whose sympathies the leading cigarette manufacturer could count on inasmuch as his family’s Casey’s General Stores was one of Iowa’s biggest sellers.

At his news conferences on January 7, Miller urged the legislature to enact a law creating a clear and direct cause of action enabling the state to sue tobacco companies to recover the Medicaid funds that it paid to treat Iowans for tobacco-related diseases. The attorney general expressly declared that the cause of action he was requesting would apply to future Medicaid costs only and would not be retroactive. Among Miller’s other proposals was a 25-cent increase in cigarette taxes from 36 cents to 61 cents, of which five cents (about $12 million annually) would be used for a media campaign and other activities aiming at a reduction in smoking among teenagers beyond what the tax increase itself would prompt. Teenagers’ access to tobacco would be further reduced by five additional legislative proposals: (1) a ban on self-service displays of tobacco products; (2) a doubling of the annual retail permit fees—which had not been increased since their initial establishment in 1921—the revenue from which would be reserved for local tobacco law enforcement; (3) providing judges with the flexibility to impose community service in addition to or instead of a monetary fine for underage tobacco use on the grounds that “[t]ime is often a more valuable commodity to teenagers than money and community service may be a greater punishment than fines”; (4) an increase in fines for retail sales to underaged

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158Email from Jack Lenzi to Joan Cryan et al. (Jan. 6, 1998), Bates No. 2077024636. Hultman purported to have a “[g]ood relationship” with Iowa Attorney General Tom Miller and a “solid working relationship” with the director of the Iowa Alcoholic Beverages Division, Lynn Walding. [Philip Morris,] AAA 2000 Plan - State Outreach at 4 (Oct. 2, 2000), Bates No. 2083650722/5.

159Email from Shuanise Washington to Jack Lenzi et al. (Jan. 7, 1998), Bates No. 2074181028A. Lamberti’s name was misspelled “Lomberdi.”

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buyers; and (5) a ban on tobacco advertising within 1000 feet of schools. Finally, the attorney general requested that the legislature ban smoking in day-care centers.\textsuperscript{161}

In spite of widespread press coverage of the attorney general’s public statements, the cigarette companies’ army of lawyers was carefully shadowing Miller at his press conferences. For example, on the day of his appearance in Des Moines, Debra Rectenbaugh Pettit, a first-year associate at the corporate law firm Davis, Brown, dutifully sent a two-page outline to Kevin Narko at Winston, Strawn in Chicago, which ended with a single answer that Miller gave to a question: “Believes can work with Senator Stu Iverson; otherwise Iverson will isolate himself.”\textsuperscript{162} The lack of commentary in the report leaves it unclear whether the wire-pullers at Philip Morris viewed Miller’s dream of an alliance with their faithful agent Iverson as risible or alarming. For his part, Iverson insisted that he had not changed his position that he preferred waiting for a national settlement with the tobacco companies to changing Iowa’s laws. Otherwise, he (like Philip Morris)\textsuperscript{163} could support several of Miller’s proposals such as raising fines for selling to youths, requiring community service, and banning smoking in day-care centers.\textsuperscript{164} That Miller at least was articulating a consistent political analysis emerged from the memo that an attorney at Lane & Waterman prepared on the attorney general’s press conference at the Davenport airport, which was attended by three of Miller’s associates, three cameramen, three TV news reporters, several local anti-smoking organizations’

\textsuperscript{161}“Attorney General Tom Miller: Proposed Tobacco Legislation” at 5-7 (quote at 6) (Jan 7, 1998), Bates No. 2077024662/6-8.

\textsuperscript{162}Debra Rectenbaugh Pettit to Kevin Narko, Re: Tom Miller Press Conference, at 2 (Jan. 7, 1998), Bates No. 2077024650/1. Interviewed a decade later, Pettit not only had no recollection of ever having attended that or any other press conference, but denied any knowledge of the matter. Telephone interview with Debra Rectenbaugh Pettit, Des Moines (Apr. 15, 2008). After having been emailed her report, she replied: “I have no present recollection of the memorandum dated ten years ago.” Email from Debra Rectenbaugh Pettit to Marc Linder (Apr. 15, 2008).

\textsuperscript{163}Philip Morris claimed to “support enactment of reasonable state legislation” including reasonable fines, license suspension or revocation for repeated violations, proof of age requirements, unannounced inspections of retailers, and restrictions on vending machines. P. Desel [Philip Morris], “Q & A Concerning Proposed Resolution and State Issues” at 4 (Discussion Draft, Feb. 11, 1998), Bates No. 2074532291/4. On the cigarette manufacturers’ agreement later in 1998 not to lobby against such measures, see below.

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representatives, “and me.” Again, the report concluded with the only question that a reporter posed and Miller’s response, which, if accurate, would have been deeply troubling to Philip Morris (which, to be sure, presumably knew better than Miller whether it had recently been encountering difficulties unloading some of its addiction-aided superprofits as a quid pro quo on Iowa legislators):

The reporter wanted to know how tough the potential fight would be due to the strong lobby that the tobacco industry has. The Attorney General stated there has been a shift in the balance of power; tobacco no longer has a very strong lobby. The Attorney General stated that politicians are embarrassed to admit they take money from tobacco companies, and because they no longer take tobacco money, these politicians now have no reason to support the tobacco companies’ agenda.166

To Miller’s proposed cigarette tax House Speaker Corbett initially reacted favorably—provided that any resulting revenue were used to lower other taxes.167 Majority Leader Iverson, however, perceived no support in the Senate for raising “any kind of tax,” even if some of the increase went to cutting some other tax; instead, he preferred “‘real relief’” to a “‘tax shift.’”168 Although the differences between Corbett and Iverson on taxes in general were somewhat fuzzier,169 before the end of January the House leadership acquiesced in the Senate leadership’s

165Lane & Waterman, RBM to TOMW, Re: Iowa Attorney General Tom Miller’s Press Conference, at 1 (Jan. 12, 1998), Bates No. 2077024655. RBM was Robert B. McMonagle and TOMW was Tom Waterman. McMonagle, who had been at Lane & Waterman only about two years, was sent to the press conference because of his low status; he did not otherwise work on the case and this occasion was the only time he ever “billed” Philip Morris, which was one of the firm’s biggest clients. A paralegal or secretary with stenographic or shorthand skills, he observed, could have done a better job (but could not have billed as much). Telephone interview with Robert McMonagle, Davenport (Apr. 10, 2008).


167Tom Carney, “Miller Seeks Higher Cigarette Tax,” DMR, Jan. 8, 1998 (5M) (NewsBank). Corbett later confirmed that he had not been opposed to a tax increase, but would not have pushed it. Telephone interview with Ron Corbett, Cedar Rapids (Apr. 7, 2008).


refusal to increase the tax cigarette tax.\textsuperscript{170} As of January 13, however, Philip Morris assessed at 60 percent the risk of the passage of an increase in the Iowa excise tax, which, together with a ban on self-service, it deemed to be “[t]he anti’s priorities this session.” Its own objective was to defeat the tax increase and the Florida-type Medicaid legislation. The company’s “Tactical Plan” focused on securing passage by the Iowa legislature of a resolution urging Congress to pass a federal resolution (approving the national tobacco settlement of June 20, 1997) in order to “offset any legislation by the anti’s, Attorney General and excise taxes.” During the plan’s “Phase I” the goal was to “[i]ntroduce the resolution within the first few weeks of the session.”\textsuperscript{171} On February 11, Philip Morris assistant general counsel Paula Desel apparently began drafting “Q & A Concerning Proposed Resolution and State Issues,” which were “paraphrases of questions that may be asked by reporters covering state capitals.” The nub of the company’s position was to “encourage state legislators who want to make an immediate difference on the issue of youth smoking to work with their federal representatives to seek enactment of the federal Resolution into law.” The objective of distracting state legislatures from enacting measures that would injure Philip Morris’s interests was paired with the goal of not “infringe[ing] on the rights of adult smokers,” also stated as not “needlessly burdening retailers and adult consumers.” Openly the company joined retailers in rejecting state and local self-service display bans as putting them at a competitive disadvantage vis-a-vis retailers in other jurisdictions. An even more transparent formulation (as applied to increases in state excise taxes) asserted that it was “grossly unfair to penalize 50 [? 45?] million adults to attempt to influence the behavior of a relatively small number of children when more precisely tailored approaches are available that do not disproportionately burden adults.”\textsuperscript{172} Anticipating a bluntly incisive question—“Are you going to keep trying to frustrate local tobacco control measures by seeking State preemption?”—Philip Morris declared its continuing belief that “a level playing field is best....” This same evasion underlay its opposition to Florida-style tobacco liability bills: “Laws that don’t treat all parties equally are bad laws.”\textsuperscript{172}

The very next day, February 12, Senator Boettger, who by this time had


\textsuperscript{172}P. Desel [Philip Morris], “Q & A Concerning Proposed Resolution and State Issues” at 1, 2, 4, 5, 6, 7 (Discussion Draft, Feb. 11, 1998), Bates No. 2074532291/2/4/5/6/7. The number in square brackets was handwritten in the margin.
proven to be a reliable agent of the cigarette oligopoly, executed Philip Morris’s plan by filing Senate Concurrent Resolution 105—whose “Whereas” clauses focused on minors—which expressed the Iowa legislature’s intent that Congress enact legislation based on the aforementioned national agreement, which allocated to the states, including Iowa, a “fair share of the tobacco industry’s payments....” The resolution was referred to Boettger’s Human Resources Committee, which on February 23, by a vote of 9 to 2, recommended passage. Although perennial anti-smoking militant Johnie Hammond voted for it, her anti-smoking colleague Robert Dvorsky voted against it, and a week later, perhaps to make amends, Hammond filed a radical amendment that would have been anathema to the cigarette firms and therefore to their legislative executors. In addition to detailing tobacco’s annual death toll, Hammond’s “Whereas” clauses urged Iowa to lead the nation in providing freedom from environmental tobacco smoke, declared that “the tobacco industry has lied to the public and policy makers..., quashed relevant scientific data..., and improperly utilized industry attorneys to claim such information as privileged,” and culminated in the judgment that “the most significant and effective deterrent to tobacco industry misconduct is to hold tobacco companies fully accountable for the industry, misery, and death caused by use of industry products.” Unlike the Philip Morris-Boettger resolution, Hammond’s amendment urged the President and Congress to “accept national tobacco control legislation that would protect Iowa’s ability to protect the public health from tobacco products....” In a final direct assault on cigarette companies, Hammond urged disclosure of all documents bearing on tobacco industry misconduct, “including those claimed to be privileged....”

Once the resolution had been introduced, Phase II of Philip Morris’s Tactical Plan called for “mobiliz[ing] phone banks of consumers for a stand-by position (timing is everything).” The phone message, which was to be coordinated with

173 S.C.R. No. 105, at 4 (Feb. 11, 1998, by Boettger). A decade later Boettger stated that she had been “asked” to file the resolution, but when given the foregoing background about Philip Morris’s plan to have it filed in Iowa, she was unable to remember who had asked her and then purported not even to recall having filed the resolution, but in any event did not believe that any tobacco lobbyist such as Cal Hultman or Charles Wasker had asked her to do so. Telephone interview with Sen. Nancy Boettger, Harlan, IA (Apr. 12, 2008). The day after the filing the resolution was faxed to Philip Morris. Bates No. 2077024626.


“Our allies” the Hospitality, Lodging, Grocers, and Business and Industry Associations as well as convenience stores, was to emphasize that “the benefits for Iowans” from the resolution “as opposed to the Attorney General’s bill, efforts to ban self-service and tax increases.” Not content with mobilizing cigarette consumers, Philip Morris also planned to request the (market-knows-best) Cato Institute to “come to Iowa to discuss the effects of an excise tax increase on the productivity of tax cuts with the House leadership.”176 Whether the company ever implemented Phase II is as unclear as whether Hammond’s proposed amendment was the effective coup de grace or not; but in any event, the Senate took no further action on the resolution, which died.

However, that the possibility of passage of a Florida-type Medicaid bill had not died was clear to Philip Morris, whose senior counsel on March 3 received a letter from Narko to which was attached a news report that 81 percent of the constituents surveyed by a Republican House member favored changing the law to permit a direct cause of action against the tobacco companies.177

At the beginning of 1998, House Majority Leader Siegrist, unable to resist game metaphors, rebuked Miller for having “‘entered into that lawsuit knowing he was going to lose and then [having] c[o]me to us for help.... He wanted the bases loaded for himself when he got back in the game. All we would give him is a man on base.’”178 Then, during the 1998 session the legislature, once again, took no action on the Judiciary Committee’s “controversial”179 bill to create a civil cause of action for the state to recover the full amount of its medical assistance payments resulting from tobacco-caused injury disability, or disease.180 Committee approval was meant merely to keep the bill alive for the session while leadership, with no consensus as to how the bill should be structured, was not even certain whether it would be debated at all.181

Two unsuccessful attempts were made to attach the Medicaid recovery bill as an amendment to two other bills. After the Senate had unanimously passed a Human Resources bill (S.F. 2286) to ban smoking in day care centers and tobacco advertising within 1,000 feet of a school or playground,182 two such amendments were filed in the House.183 On March 24, the day after the second one had been filed, Betsy Giles, Philip Morris’s state government affairs director of the midwestern region encompassing Iowa,184 faxed, under the heading, “The bill that will never go away,” a copy of the amendment to company lawyers and regional officials, adding that it might be proposed on the House floor the following day as an amendment to S.F. 2286. Interestingly, in addition to the attorney general and House Democrats, Giles stressed that the “Fl-style Medicaid language is being pushed by the [Republican] Speaker” Corbett.185 However, the bill was not debated the next day or any other day: despite having been passed unanimously in the Senate, S.F. 2286 saw no further House action and died.186

Giles may have been wrong about the vehicle in which Miller’s Medicaid bill would reach the House floor on March 25, but she was right about the date: that morning Senator Tom Vilsack (who was running for the Democratic nomination for governor), arguing that it was “clear that the vast majority of Iowans would like to see that industry held responsible,”187 especially since a billion dollars was potentially at stake,188 filed the bill as an amendment (S-5372) to the spending bill for the Public Health Department and several other agencies (S.F. 2280).189 Vilsack found a hook for attaching his amendment to the agency appropriations bill by including a directive that the Public Health Department use $1,000 of its appropriation regarding the existence, prevalence, and causal linkage between injury, disease, and disability and tobacco use by Medicaid recipients. The amendment also directed the department to “coordinate in assisting the

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185 Betsy Giles to Steve Rissman et al. (Mar. 24, 1998), Bates No. 2077024589.
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attorney general in litigation efforts for state recovery of tobacco-related medical assistance payments pursuant to section 100 of this Act,” section 100 being the main part of the amendment creating the statutory cause of action that Miller sought for the state’s lawsuit.\textsuperscript{190}

That this initiative was doomed was soon signaled by Iverson, who counterfactually claimed that the amendment “created the same problems that prevented lawmakers from coming in for a special session last year”—namely, that “the proposals did not limit lawsuits to tobacco.”\textsuperscript{191} Wiping out his credibility entirely, the wannabe Tobacco Institute vice president then swore (in words that the Register enshrined as “Quote of the Day”): “I’m not protecting the tobacco industry here. This goes way beyond that. It sets a dangerous precedent for other businesses.”\textsuperscript{192} Iverson’s protestations to the contrary notwithstanding, “Republicans were criticized for backing big tobacco....”\textsuperscript{193}

If the public had only known how closely the Republicans were cooperating with the cigarette oligopoly: at 3:57 p.m. Philip Morris’s lobbyist, Kimberly Haus of former Republican Senate Majority and Minority Leader Hultman’s firm, faxed Giles from the State Law Library that Vilsack’s amendment, which was attached, had been “offered on Dept of Public Health bill. We are in the process of dealing with it.”\textsuperscript{194} Haus was virtually communicating in real time: less than an hour later,\textsuperscript{195} Republican Senator and Assistant Majority Leader Merlin Bartz, a farmer\textsuperscript{196} who was a consistently reliable pro-tobacco vote,\textsuperscript{197} offered floor amendment S-5380 to Vilsack’s amendment. Bartz’s subtle amendment merely


\textsuperscript{191} Tobacco, Gambling Center of Health Spending Debate,” Communicator (Des Moines), Mar. 25, 1998, Bates No. 2077024580.


\textsuperscript{194} Kim Haus to Betsy Giles (Mar. 25, 1998), Bates No. 2077024582. For the attached amendment, see Bates No. 2077024583/4.

\textsuperscript{195} Bartz had offered the amendment before Senator McKean took the chair at 4:50 p.m. Senate Journal 1998 at 1:911 (Mar. 25).

\textsuperscript{196} Iowa Official Register: 1997-1998, at 28, 34.

\textsuperscript{197} In 1995 Bartz was one of a small group of Iowa state legislators (including Iverson, Rife, and Lundby) who did the tobacco industry’s bidding by writing letters protesting the FDA’s initiative to assume jurisdiction over tobacco. Tobacco Industry Reports on FDA in the States as Reported to the TI State Activities Division at 11 (Dec. 22, 1995), Bates No. 2046948917/8.

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deleted the last seven words of the first part of S-5372, thus severing the link between the appropriation and the creation of the cause of action. On the roll call vote on S-5380, only two Republicans defected to the Democrats, producing a 25 to 23 majority for Philip Morris. The extent of the Republicans’ beholdenness to the tobacco industry was underscored by the way that Maggie Tinsman, the party’s strongest anti-tobacco advocate, explained her Yes vote: Vilsack’s amendment “went too far.... That’s why the attorney general didn’t get it the first time.” After the victorious Bartz had called for a division of the now amended S-5372 into two parts (his part and Vilsack’s) and Senate Minority Leader Gronstal had received unanimous consent for action on Bartz’s to be deferred, Bartz delivered the coup de grace by raising the point of order that Vilsack’s decapitated S-5372B was not germane, which Republican Senate President Mary Kramer, who had just voted for Bartz’s amendment, ruled was well taken. Conceding that he had been checkmated because S-5372A now “essentially renders the balance of this language moot and meaningless” and “Big tobacco has won again,” Vilsack also withdrew rump S-5372A.

After the Iowa Supreme Court, on an interlocutory appeal in April 1998, had unanimously upheld the trial court ruling dismissing the state’s Medicaid reimbursement count, in October the district court judge also dismissed the state’s deception and criminal conduct counts, leaving intact only its conspiracy and nuisance claims. Despite these pre-trial setbacks, Iowa’s claims were

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199 Senate Journal 1998 at 1:911-12 (Mar. 25). It is unclear why Republican Mary Lundby voted against the amendment and leadership; on Andy McKean’s strong opposition to smoking, see below ch. 32.
nevertheless compromised in the Master Settlement Agreement into which the states and the tobacco companies entered on November 23, 1998. But no sooner had Miller trumpeted Iowa’s $1.7 billion share of the 46-state, $206 billion national settlement (to be paid out over the first 25 years of the agreement in perpetuity), than disagreements erupted over how to spend the money. Remarkably, Republican House Speaker Corbett proposed that it be devoted to Iowa’s children, including child care, health insurance, and smoking reduction. Less surprisingly, his partymate, David Millage, House Appropriations Committee chair—who hurled at Attorney General Miller the taunt that “you know and I know had the case gone to trial, we would have gotten zero”—urged returning it all to taxpayers rather than funnelling it into government programs. In contrast, Miller warned that unless the states met their moral and fiscal obligation to use the money for anti-tobacco and public health programs, Congress might insist on retaining two-thirds of it to reimburse the federal government for its share of the Medicaid costs—especially since the Clinton administration had put the states on notice as early as November 1997 that the federal government’s entitlement to its share of all Medicaid recoveries applied to the tobacco settlement payments.

Cigarette Tax and Cigarette Sales Legislation: 1998

Miller’s lawsuit was hardly the only smoking-related measure the legislature was debating during the 1998 session. No longer a member of the House, Philip Brammer, the chamber’s most militant anti-smoker, was dying of cigarette-smoking-induced emphysema. He nevertheless remained intensely, if not frenetically, engaged. At 4:05 a.m. on January 15, 1998, he emailed Doderer that he had three bills being prepared for her “guidance.” One would have raised the


208 Jeff Zeleny, “Questions over Tobacco Deal,” DMR, Nov. 24, 1998 (5M:1) (NewsBank). Although the stream of payments was discussed in the press as spread over 25 years, in fact the payments were to be made in perpetuity and would exceed the amounts mentioned in the text.


211 See below ch. 32.
tobacco tax by 24 cents, generating $4 million for anti-tobacco programs for children, $11 million for uninsured Iowa children, and $45 million to increase the Iowa income tax standard deduction; the second would have banned smoking in restaurants, bowling alleys, and daycare centers; and the last would have dealt with advertising and “sensible penalties for possession by kids” since the previous year’s bill was unenforceable. Bewailing ever worsening news for tobacco forces, he preached to a member of the choir: “Sidewing smoke has now been PROVEN to cause irreversible arteriosclerosis [sic] in nonsmokers exposed to restaurant smoke. How can the Iowa Legislature NOT act on this public health menace.”

A few days later Brammer and Doderer exchanged emails invidiously comparing their bill with one introduced by Republican Rosemary Thomson, which, Brammer complained, “is kinda crappy but just look how the news grabbed at it. You need to call a press conference as soon as possible to show how your bill is just exactly what the Governor says he will sign.” Disappointed that Thomson’s bill would have raised the tobacco tax by only two cents, which hardly seemed “worth the fight,” Doderer wondered whether Brammer had “any influence with Rosemary.” Brammer’s response has not been preserved, but two days earlier he appeared to believe that he had some with the Republican House Speaker when he excitedly emailed his fellow Cedar Rapidsian Corbett an article from an Omaha newspaper about a bill’s having been filed in Nebraska to raise the cigarette tax by 5 cents to 39 cents. His fervor aglow, Brammer informed Corbett that “this removes the last barrier to Iowa raising tobacco tax. Every border is now higher than us except Missouri which has local option cigarette tax.” Turning ever more instructional, Brammer continued: “Ron, this gives you several answers you should be looking for: (1) Cedar Rapids needs additional revenue for recreational purposes. Add cigarette taxes to the allowable list of local option and you will solve all the local problems.... (2) get in touch with Nebraska and see if they are willing to raise to $0.60 on revenue neutral basis.” The notion that Corbett, who was manifestly unable to persuade either Majority Leader Iverson or even Governor Branstad to raise cigarette taxes, could move another state’s legislature to act indicates the

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212 Email from Phil Brammer to Minnette Doderer (Jan. 15, 1998), in Minnette Doderer Papers, Topical Files (Last Accession): Tobacco, IWA.

213 Email from Phil Brammer to Minnette Doderer (Jan. 20, 1998), in Minnette Doderer Papers, Topical Files (Last Accession): Tobacco, IWA.

214 Email from Minnette Doderer to Phil Brammer (Jan. 20, 1998), in Minnette Doderer Papers, Topical Files (Last Accession): Tobacco, IWA.

215 Email from Phil Brammer to Ron Corbett (Jan. 18, 1998), in Minnette Doderer Papers, Topical Files (Last Accession): Tobacco, IWA.
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flimsiness of the straws Brammer had been reduced to reaching for in his increasingly frantic anti-tobacco campaign.216

Brammer’s belittlement of Thomson’s bill was largely rooted in her call for a mere two-cent cigarette tax increase when Miller was requesting 12 and a half times as much. The press viewed her proposal, which would also have used the $3.2 million generated by the increase to promote teen smoking prevention and crack down on retailers who sold to minors, as significant because both Thomson and her co-sponsor, Robert Brunkhorst, were conservative Republicans, whereas their party opposed cigarette tax increases. Party “strategists” purportedly argued against a cigarette tax increase on the grounds that being able to boast to voters that they had rejected all tax increases would put them in a better position during the next election.217

Thomson, who had been a member of the U.S. Department of Education National Commission on Drug-Free Schools, a school substance abuse prevention specialist, and Linn County American Cancer Society board member, and considered herself a “conservative,” was not speaking merely archly when she commented a decade later that she would have thought that the Republican party would have regarded the anti-tobacco effort as a conservative issue.218 (Her right-wing activist bona fides had been more than adequately documented by virtue of having been Illinois state director of Phyllis Schlafly’s Eagle Forum and her appointment as executive director of National Advisory Council of Women’s Educational Programs during the Reagan administration.)219 But the party did not welcome even her modest reform proposals, stamping her as something of a maverick,220 especially after she proceeded on January 22 to file her aforementioned bill (H.F. 2067), which, in addition to the marginal tax increase, would have effected, inter alia, the following changes: (1) banned smoking in day care centers; (2) banned self-service displays and sales of cigarettes in smaller numbers than a carton; (3) increased the criminal penalty from $100 to $250 for a retailer or its employee who sold tobacco products or cigarettes to anyone under 18; (4) increased the cigarette sales permit fee by $25; (5) banned cigarette


218 Telephone interview with Rosemary Thomson, Marion, IA (Apr. 3, 2008).


220 Telephone interview with Rosemary Thomson, Marion, IA (Apr. 3, 2008).
tobacco advertising within 1000 feet of a school; (6) imposed a flat $100 fine for anyone under 18 smoking, using, possessing, buying, or trying to buy cigarettes or other tobacco; (7) established community service of 25 hours or fewer as an alternative to the civil penalty; and (8) appropriated $150,000 to the Public Health Department for the performance of compliance checks on cigarette retailers. But Thomson’s bill, after referral to Human Resources and rereferral to Ways and Means, died in subcommittee.

Apparently perceiving which way her party’s real conservative winds were blowing, Thomson alone filed a second bill a week later while her first bill’s death rattle could already be heard. H.F. 2120 was a radically stripped-down version, which retained only one element of H.F. 2067—the ban on self-service sales. Otherwise the new bill was distinguished only by virtue of its expression of legislative intent, which, though confined to the question of minors’ access to cigarettes through unsupervised sales and shoplifting, nevertheless embodied the recognition that “a large percentage of adult smokers begin smoking before they can legally purchase tobacco products,” thousands of minors began smoking daily, and smoking killed hundreds of thousands of people annually.

While Thomson’s bill was still in State Government subcommittee, House anti-smoking activists Doderer, Myers, and Mascher on February 9 introduced an omnibus tobacco amendments bill that would have strengthened the cigarette sales law, inter alia, in the following respects: (1) for a third violation of the ban on buying or using cigarettes or tobacco, the motor vehicle license of persons under 18 would have been suspended until they reached 18; (2) the fee for permits would have been increased to $100, $150, and $200, according to city size; (3) local governments would have been empowered to use the revenue from the permit fees to enforce the sales and the public smoking laws; (4) tobacco products would have been prohibited from being advertised within 500 feet of a school or playground; (5) retailers would have been prohibited from selling or offering for sale cigarettes or other tobacco products by means of a self-service display (except a vending machine); and (6) the penalties for underage smoking, use, possession, or buying would have been increased from $25 and $50 to $50 and $75 for a first and second violation, and the option of community service for a third violation would have been added. However, the bill, which was both

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224 H.F. 2180 (Feb. 9, 1998, by Doderer, Myers, and Mascher). Just several days earlier a researcher explained to Iowa legislators that increasing penalties for underaged
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Instead, the legislature passed Thomson’s H.F. 2120 by huge majorities, but not before watering down even her modest bill. The House unanimously passed the bill after amending it to ban, from January 1 to June 30, 1999, self-service displays quantities of less than a carton, and then, from July 1, 1999 forward, of a carton or less. The Senate Human Resources Committee, by a vote of 8 to 4, recommended striking the second phase from the House bill, thus permanently permitting displays of a carton or more as of January 1, 1999. The way this change came about is instructive: Iverson, who was not a committee member, stated that the amendment permitting the continued sale of self-service cartons had been passed “at his behest,” the Register explaining his amendatory power as based on his “authority to kill the legislation by refusing to schedule it for floor debate.” Reminding readers that Iverson was a smoker, the newspaper recounted that he had sought to justify the change on the grounds that cartons were harder to steal and that retailers would face lower compliance costs if they could continue to keep cartons on the shelves. Unsurprisingly, Human Resources Committee chair Boettger, another cigarette business facilitator, “agreed with Iverson’s decision to dilute the House bill.” Nevertheless, she self-congratulatorily insisted that “we’re moving in the right direction…. We got vending machines last year, and (retailers) know that cigarette cartons are around the corner”—a corner that more than a decade later still had not been turned. After rejecting an amendment that would have permitted self-service displays in plain view of a staffed check-out counter, the Senate passed the bill 43 to 4. Acting on the principle that a “baby step is better than standing in place,” the

227 Senate Journal 1998 at 773-74 (Mar. 18); Thomas Fogarty, “Senate Panel Dilutes Bill designed to Stop Theft of Cigarettes,” DMR, Mar 18, 1998 (4M:1), Bates No. 2074030365. After this vote on the amendment, the committee voted 11 to 1 to recommend the bill as amended.
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House then concurred in the Senate’s weakening amendment by a vote of 96 to 2, Doderer and Myers casting the only Nays.\(^2\) So inoffensive was the new law—\(^\text{233}\)—in spite of the catastrophic public health consequences specified in the preamble—that the powerful tobacco retailers’ lobby did not even bother to fight the measure.\(^2\)

Tobacco companies’ defeat of Miller’s bill and their successful fight against “a proposal to move all cigarettes off open store shelves” were precisely the kind of legislative outcomes the Register had in mind when, shortly after the end of the session, the paper observed that “[i]t would be wrong to call the recently completed 1998 session of the Iowa Legislature business as usual. This year it was business more than usual.”\(^2\)

For Philip Morris, however, even more business than in 1998 was needed. According to the final draft of the company’s “Iowa State Plan -1999,” which was completed in September 1998, Philip Morris expected “a whole host of tobacco issues” to be raised during the 1999 legislative session. Its level of concern over prevailing on these issues was heightened because the House was “at risk of losing the Republican control.” But whichever party was governing—and the “current political situation looks good for Republicans”—one of the company’s “proactive” objectives was to “[c]reate a forum to educate Legislators on key issues and to outline Philip Morris companies’ presence in the state....” More specifically: “In Iowa, a vision of success would focus on creating a positive business environment and company image. This objective will surely be greatly enhanced by Kraft’s huge presence in the state; an Oscar Meyer plant in Davenport, a pudding plant in Mason City, and another Oscar Meyer plant in Sigourney. When these plant employees descend on the Capitol for Kraft Day at the Capitol next Spring, all issues will be addressed.” Those that these slaughterhouse and pudding workers would be programmed to emphasize to legislators were (in rank order): (1) no increase in alcohol or tobacco excise taxes; (2) defeat of any “Florida-style legislation”; (3) defeat of any smoking restrictions in public places or workplaces; (4) defeat of tobacco stock divestiture proposals; (5) protection of state preemption; and (6) defeat of proposals to ban tobacco and


\(^{233}\)1998 Iowa Laws ch. 1129, at 286.


alcohol advertising.\footnote{Iowa State Plan - 1999, at 1-3 (Sept. 24 [1998]), Bates No. 2074874333-5.}

**The Struggle over the Use of the Master Settlement Agreement Funds: 1998-2000**

Although the initial payments provided for by the Master Settlement Agreement, which the state attorneys general and cigarette companies reached in November 1998, would not be made until the middle of 2000, the beginning of 1999 already witnessed the emergence of sharp disputes over how that money should be spent between Democratic Governor Tom Vilsack and Attorney General Tom Miller, on one side, and the Republican legislative leadership, on the other. Whereas Vilsack wanted to allocate some funds to health care for the poor and Miller’s focus was an anti-tobacco campaign, House Majority Leader Brent Siegrist made the chasm blindingly visible by opining that he was not sure how much the Republican caucus “would be willing to spend on an anti-tobacco campaign aimed at children: ‘I defy you to find a kid in the state who doesn’t know smoking is bad for you.’”\footnote{“Siegrist Questions Vilsack, Miller Plan,” *DMR*, Feb. 20, 1999 (6M) (NewsBank).} Yet four days later House Republicans outlined a proposal to make a priority of increasing the reimbursements for Medicaid providers and using up to 5 percent (or $85 million over 25 years) of the Agreement money for anti-smoking campaigns and educational programs.\footnote{Iowa House of Representatives Republican Caucus, “House Republicans Release Plan for Tobacco Money” (Feb. 24, 1999), on http://www.daveheaton.net/D-91/News/Tobacco%20Press%20Release.htm (visited Apr. 23, 2008). The Republican House members presenting the plan were Dave Heaton, Bob Brunkhorst, and Bev Nelson.}

This dispute was complicated by the absence in the Agreement itself of any obligation on the part of the states to commit any set proportion of the payments they would be receiving from the cigarette manufacturers to tobacco control programs to reduce smoking and its impact on morbidity and mortality, which had purportedly motivated the attorneys general to sue the industry in the first place. (For example, the Iowa legislature, according to Siegrist, felt no sense of disproportion in voting to spend such a small percentage of the Agreement payments on the tobacco issues that underlay the litigation.)\footnote{Telephone interview with Brent Siegrist, Council Bluffs (May 4, 2008).} Both this policy void and declarations by officials in various states that they planned to allocate no or only minuscule funds to anti-tobacco initiatives prompted the Clinton administration to try to secure enactment of legislation mandating payment of part
of the 206 billion dollar settlement to the federal government—which, based on its financing of at least half of Medicaid expenditures, believed that it was entitled to share in the recovery—in order to insure that at least a significant portion would be dedicated to tobacco control. Not only did the National Governors Association make exclusive state control of the money its highest political priority for 1999, but Democratic Governor Tom Vilsack and Iowa’s liberal Democratic Senator Tom Harkin split over the issue, even though they largely agreed on how the funds should be spent: Harkin would have supported a compromise under which the states would have kept all the money subject to a requirement that they spend a certain proportion on anti-smoking programs, and Vilsack admitted that attaching no conditions to the receipt of the payments would have been counter-productive in some states, whose governors wanted to use them to cut taxes.\(^240\) However, on March 18 Harkin’s amendment to an emergency supplemental appropriations bill that would have required the state to use 20 percent of the Agreement money for smoking reduction programs and 30 percent for public health and enabling tobacco farmers to shift to growing other crops, was decisively defeated (29 to 71).\(^241\) Two months later the emergency appropriations bill was passed freeing states of any tobacco control spending mandates,\(^242\) prompting the Clinton administration, the National Center for Tobacco Free Kids, and Mississippi Attorney General Mike Moore (who had filed the first state suit and signed the first settlement agreement) all to bemoan that states would be free not to allocate any funds at all to deal with the underlying purposes of the litigation.\(^243\)

By the summer of 1999, with the question of complete state control resolved, but the receipt of Iowa’s first installment of $76.6 million still a year away, a “‘feeding frenzy,’” according to Siegrist, the new House Speaker, was already on the horizon.\(^244\) And, as politicians turned “giddy about the prospect of a new cash


\(^{244}\) Lynn Okamoto, “State Debates How to Spend Tobacco Cash,” DMR, July 16, 1999
source that could be sustained for 25 years or more,” the new Republican House Majority Leader, Christopher Rants—an aggressive right-winger whose narrow-gauge intellectual universe was exquisitely captured by his practice of lending “dog-eared copies of Ayn Rand’s ‘Atlas Shrugged’” to legislative clerks: “I tell them if they get it, and like it, they’ll get more out of it than four years of college”—suggested using the money for building a new arena or baseball stadium. The anti-smoking movement, which created much of the political basis for the state lawsuits, was relegated to the status of mere “special-interest groups” by the Register when the American Cancer Society called for funding cessation programs.

On September 10, Attorney General Miller weighed in with a proposal to devote almost $20.5 million or about one-third of the first year’s payment to a variety of anti-smoking projects, including media campaigns, youth and community partnerships, cessation programs, local enforcement of tobacco laws against those selling to children, school programs to reduce tobacco use, and research. Siegrist, who acknowledged that use of the Agreement money would be “one of the biggest debates of the 2000 session,” immediately expressed doubt that the amount that the legislature would appropriate for anti-smoking programs would be “nearly as much as the attorney general wants it to be.”

(1A) (NewsBank).


247 Lynn Okamoto, “State Debates How to Spend Tobacco Cash,” DMR, July 16, 1999 (1A) (NewsBank). Republican Representative Bob Brunkhorst later explained the party’s initial support for such discrete building projects as rooted in its aversion to becoming “addicted to one-time money.” Telephone interview with Bob Brunkhorst, Waverly, IA (Apr. 27, 2008). This account appears to carry little weight since the MSA payments are in perpetuity.

248 “A Thousand Lives: Protecting Iowa Kids from Tobacco Addiction, Disease and Death: Recommendations of Attorney General Tom Miller for a Partnership to Reduce the Damage Inflicted by Tobacco on Iowa’s Health, Economy and Future” at 2, 5 (Sept. 10, 1999); see also Jeff Zeleny, “Tobacco Money Flames Fanned,” DMR, Sept. 11, 1999 (1A) (NewsBank). In a brief section on “Iowa’s History of Leadership” Miller’s report erroneously stated that Iowa had been “one of only three states to have banned” cigarette sales “at the turn of the century.” “At Thousand Lives” at 6. In fact, five states had. See above Parts I-II.

of such programs Miller hoped in five years to reduce Iowa’s adult smoking prevalence from 23 to under 20 percent, and in ten years to lower that among high school students from 37 to 26 percent. In order, presumably, to make it clear to legislators that supporting Miller’s plan in no way involved going out on a political limb, his ally, Tobacco Free Iowa, commissioned a survey of 800 Iowans, 65 percent of whom (including 74 percent of Democrats and 59 percent of Republicans) identified anti-smoking efforts as the highest spending priority for the tobacco settlement payments. In addition, allocating at least one third to those programs was favored by 69 percent, including 37 percent who wanted most or all of the money to be used in that way. Whereas Vilsack shared Miller’s belief in the need to devote significant resources to these types of initiatives, Rants, insistent that the legislature was dealing with taxpayers’ money, conceded that that it made sense to dedicate some funds to tobacco prevention, but $21 million was “‘a lot of education...a lot of billboards.’” At least one member of Rants’s House Republican caucus pooh-poohed any concessions: Bill Dix denied that the public saw any reason to spend any of the money on smoking cessation or prevention; while many were sympathetic to adult smokers’ plight, they were “leery of spending public money on helping them quit.”

As the 2000 legislative session, in which tobacco would play a “key role” and form a “centerpiece of...debate,” was about to get underway, Vilsack presented his plan to use $55 million from the Agreement on expanding health care and reducing tobacco and other drug use. Cutting Miller’s proposal for anti-tobacco spending in half from $20 to $10 million but pairing it with more than $8 million in federal grants met with the attorney general’s approval as a “‘masterful move’” that would make the measure more acceptable to the legislature. And, as if on cue, Speaker Siegrist certified it as “‘not totally out of whack.’” That

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the Republican-led legislature would eventually reach an agreement with the governor became more likely when Rants announced in mid-February that his party’s plan would partly resemble Vilsack’s and be “devoted completely to expanding health care and preventing smoking.” Until this point the “battle over the tobacco settlement ha[d] been waged quietly,” largely in the form of non-public meetings between the governor and the Republican leaders, but when an impasse arose in late February, Siegrist, Rants, Iverson, and Kramer finally announced their proposal, touting their resolve to make Iowa the first state to dedicate all of its Agreement money to health care; in particular, their plan would make health care more accessible to low-income Iowans by allocating $25 million to increasing the state’s payments for Medicaid-covered doctor visits in order to induce more physicians and dentists to treat Medicaid patients; they relegated the $9.3 million for smoking cessation and prevention programs to a fourth-place mention.

In addition to criticizing the Republicans’ plan for devoting only one-fourth as much as his to substance abuse and for setting aside $9 million for an escrow account, Vilsack objected to their exclusion of adults from smoking cessation and similar programs. Republican Representative David Heaton, co-chair of the committee that administered the Agreement money, asserted to his constituents that whereas in the fall of 1999 there had been “talk of using the money for tax cuts or addressing infrastructure needs,” by March 2000 the legislature was “rall[y]ing behind the original intent of the lawsuit—to provide relief in the cost and the future cost...of the damage resulting from the use of tobacco.” To be sure, three weeks later, Rants pronounced the competing plans not “terribly [far]

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261 State Representative Dave Heaton, “Upfront” (Mar. 10, 2000), on http://www.daveheaton.net/D-91/UPFRONT/2000/UPFRONT-209.htm (visited Apr. 23, 2008). When asked, eight years later, why this shift in the Republican legislative leadership’s opinion had taken place, Heaton, stressing that he had been there, heatedly and belligerently denied that there had ever been any talk of using the MSA money for tax reductions or infrastructure—on the contrary, health care was the only use that had ever been considered. Telephone interview with David Heaton, Mt. Pleasant (May 10, 2008).
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263 Jeff Zeleny and Jonathan Roos, “Tobacco Money Agreement Reached,” DMR, Apr. 5, 2000 (1M) (NewsBank). House Speaker Siegrist repeated the boast in a self-congratulatory valedictory to the 78th General Assembly: “We should all take a bow for the fact that we were the first state to dedicate all of our tobacco settlement money to health care.” House Journal 2000, at 2:1932 (Apr. 26). This claim, according to some later legislative critics, was inaccurate because in fact the state was involved in a “shell game”: the sums that went to Medicaid would otherwise have had to have been taken from the general fund, thus eliminating the money for certain capital projects; consequently, the MSA payments could just as well be described as having financed these other budget items. Telephone interview with Tony Leys, Des Moines Register reporter (Apr. 24, 2008). A member of the House Democratic caucus staff described the financing mechanism more diplomatically: “The only problem with paying off the bonds with tobacco revenue is that bond proceeds had to be expended on capital projects to be tax exempt and the Legislature had already had made a commitment to place the tobacco settlement revenue into a separate endowment fund and use it only for health care, substance abuse, and tobacco cessation programs. The solution, primarily embodied in SF 532, involved a sort of double-transfer. Step one was to use the tobacco revenue to pay off the bonds, and then use the bond proceeds to pay for capital expenses (thus earning the tax advantage). Step two involved transferring a reciprocal amount from other accounts—accounts that would otherwise be used to pay for capital expenses—into the separate endowment fund to be allocated for health-related programs.” Email from Ed Conlow to Rep. Mary Mascher forwarded to Marc Linder (Apr. 24-25, 2008).

264 Email from Tom Vilsack to Marc Linder (Apr. 20, 2008). Republican Rosemary Thomson, who purported to have had very few allies in her struggle to secure most of the
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determined by the governor’s stance, but offered some other considerations. Initially, when reacting to the prospect of the payments, the party looked at its Republican “core concepts”—tax reductions. However, in the course of further discussion, the fact that the chairman of the House Human Services Appropriations Subcommittee, Representative David Heaton, had felt strongly about using the funds for health-related matters pushed the party toward perceiving that allocation as ultimately making the budget work better.\textsuperscript{265}

Although the Tobacco Settlement Appropriations Bill (H.F. 2555) ultimately passed the House and Senate by votes of 100 to 0 and 47 to 0, respectively,\textsuperscript{266} Democrats first made two unsuccessful efforts to amend the bill in order to shift funds from the reserve account to anti-tobacco programs. In one instance, Minority Leader Michael Gronstal—who himself after decades of smoking went onto a nicotine replacement regimen—proposed transferring $575,000 to a program for smoking cessation products for Medicaid recipients, but it lost on a nearly party-line vote of 22 to 26.\textsuperscript{267} Gronstal’s second and more significant amendment, which would have shifted $1.5 million to tobacco prevention and control, was defeated even more decisively on a perfect party-line vote of 20 to

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\textsuperscript{265} Telephone interview with Brent Siegrist, Council Bluffs (May 4, 2008).

\textsuperscript{266} House Journal 2000, at 2:1602-1603 (Apr. 18); Senate Journal 2000, at 2:1301 (Apr. 20). A week later the legislature passed S.F. 2452 creating a Tobacco Settlement Endowment Fund, in which all MSA money (after payment of litigation costs) was to be deposited and “shall be used only in accordance with appropriations from the fund for purposes related to health care, substance abuse treatment and enforcement, tobacco use prevention and control, and other purposes related to the needs of children, adults, and families in the state.” 2000 Iowa Laws ch. 1232 § 12(3), at 828, 830. The bill passed the Senate 48 to 0 and the House 90 to 6. Senate Journal 2000, at 2:1434 (Apr. 26); House Journal 2000, at 1:1938 (Apr. 26).

29. In the end, then, the legislature allocated more money from the Agreement to the substance abuse treatment program ($11.9 million) than to tobacco use prevention and control ($9.3 million), about $24 million for various reimbursements to health care providers and expanding health care access in addition to setting aside $3.8 million. Heaton—a former smoker who quit when he got tired of hearing his lungs rattling when he went to bed and was unable to understand why more smokers did not quit—saw no reason to allocate a greater share of the Agreement funds to tobacco because there were just not enough tobacco programs to spend money on that could have further reduced smoking prevalence; advocates, he claimed, simply wanted more money.

In February Vilsack had mocked Republicans’ plan to set aside some of the annual tobacco payments in an escrow account in case declining cigarette sales caused the amounts that Iowa was to receive to drop and thus led to underfunding of the various programs that the legislature was establishing in 2000. The governor ridiculed the notion that Philip Morris was on the road to bankruptcy: “As near as I can tell, just about every product on the grocery shelf is connected in some way, shape or form to Philip Morris.” Seven weeks later, however, Vilsack reconsidered: as lawsuits against cigarette manufacturers were being settled across the country, he was no longer convinced of the industry’s financial solidity. As a result, the governor and legislators began drafting plans to securitize the settlement through the sale of bonds, which quickly became law.

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269 2000 Iowa Laws ch. 1221, at 672. Representative Mary Mascher explained the focus on the reimbursements this way: “Health care needs in Iowa are great but at the time using the money on Medicaid was necessary. Without it, many Iowans, including children and seniors, would have lost their health care coverage and nursing home care. We did not want that to happen, so we put some of the money into Medicaid. Iowa has some of the lowest reimbursement rates for hospitals and other Medicaid providers in the nation. It is getting harder and harder to attract new doctors to Iowa because of this. In addition, some doctors no longer are willing to see Medicaid patients because they claim they are losing money. So, yet it is important to increase provider rates in order to maintain health care for many Iowans, especially those in small communities and rural towns.” Email from Mary Mascher to Marc Linder (Apr. 23, 2008).
270 Telephone interview with David Heaton, Mt. Pleasant (May 10, 2008).
272 Jeff Zeleny and Jonathan Roos, “Tobacco Money Agreement Reached,” DMR, Apr. 5, 2000 (1M) (NewsBank); 2000 Iowa Laws ch. 1208, at 611. For changes made the next year to accommodate securitization and the newly created Health Iowans Tobacco Trust, see S.F. 232 and 2001 Iowa Laws ch. 164, at 406.

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In 2001, Lamberti, the Senate Appropriations Committee chair and Casey’s scion, opined that securitization “takes the risk out of” the Agreement payments’ drying up\(^\text{273}\)—but only at the expense of “collecting $650 million now compared to receiving annual payments over 25 years that would total about $1.8 billion.”\(^\text{274}\)

“Everyone,” according to then-House Majority Leader Christopher Rants, “bought into” the bond program because it enabled the legislature to fund a number of health programs when revenues declined.\(^\text{275}\) Iowa, like some, but not most, other states, thus mortgaged most of its next 25 years of Agreement payments to investors in exchange for up-front payments; consequently, the fact that it must devote 78 percent of annual proceeds to servicing the debt on these securitized funds\(^\text{276}\) means that the funds available for future health care and tobacco use prevention and control programs are diminished.\(^\text{277}\) This

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\(^{274}\)S. Dinnen, “Tobacco Bonds to Produce $650 Million,” *DMR*, Sept. 5, 2001 (1D) (NewsBank). The legislature’s failure to build up the planned $1 billion endowment over 25 years (because it used the accruing money for general fund purposes to balance the state budget) meant that securitization did not become “‘really a prudent idea’” that the state treasurer had prophesied. *Id*; David Yepsen, “Legislature’s Questionable Spending Clouds Future,” *DMR*, May 23, 2005 (9A) (NewsBank). Former Senator Jack Rife stated long after the fact that he had regarded securitization in 2000 as “stupid” because exchanging $500 million for $2 billion did not sound like a good deal. Telephone interview with Jack Rife, Des Moines (Apr. 29, 2008).

\(^{275}\)Telephone interview with Christopher Rants, Des Moines (May 12, 2008).


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development prompted one leading academic anti-tobacco activist to bemoan that: “’Probably the tobacco industry will win in the long run, largely because of the
securitization of the money putting pressure on states to keep tobacco
consumption up to get their bonds paid off.” 278 In any event, if at the end of the
first 25-year period it turns out that the Iowa legislature guessed wrong and
cigarette company sales did not plummet, the state will have received much less
from the bonds than it would have received from relying solely on the Settlement
Agreement payments.279 By 2008, when Iowa had spent nearly all of the $500
million in cash that it had received from the sale in 2002 of the rights to 78
percent of about $1.7 billion in Agreement payments,280 Attorney General Miller,
who, unlike the American Cancer Society, had not opposed securitization,281
admitted that he wished that the state had not sold off the rights because if the
money had flowed in more gradually, “it would have lasted longer and been more
carefully targeted.” The exhaustion of the funds meant that anti-smoking
programs in the following year would have to be completely financed from the
general fund.282

At the same time that the legislature was considering and passing the


278 Steven Schroeder, “Tobacco Control in the Wake of the 1998 Master Settlement
(quoting from an interview with Stanton Glantz). For sharp critiques of securitization
programs, see American Lung Association, “Securitization—Breaking the Promise” (n.d.),
on http://www.lungusa.org (visited Apr. 23, 2008); Campaign for Tobacco-Free Kids,
“Securitizing State Tobacco Settlement Payments: Myths versus Facts” (Dec. 5, 2002), on
But see also Jody Sindelar and Tracy Falba, “Securitization and Tobacco Settlement
(arguing that securitization is not highly positively correlated with a state’s allocating a low
proportion of its MSA payments to tobacco control).

279 Telephone interview with David Reynolds, Iowa Legislative Fiscal Bureau (Apr.
24, 2008).

280 The authorization for the bond sale is found in 2001 Iowa Laws ch. 164, at 406.

281 Later, ACS representative Cathy Callaway stated that the “’tobacco control
community was never in support of the securitization. The idea that tobacco companies
were going to go bankrupt or out of business was preposterous.’” Darwin Danielson, “State
About to Burn Through Tobacco Trust Fund,” Radio Iowa (Dec. 1, 2008), on

282 Tony Leys, “State Using Up Cash from Tobacco Lawsuit,” DMR, Apr. 24, 2008,

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appropriations bill for the tobacco use prevention program, it was also debating
the plan itself (H.F. 2565), which created within the Department of Public Health
a Tobacco Use Prevention and Control Division and a commission, which was to
develop policy and provide direction. The legislature’s anti-tobacco behavioral
and cultural goals were, as the statute’s preamble made transparent, extraor-
dinarily capacious:

1. The purpose of this chapter is to establish a comprehensive partnership among the
general assembly, the executive branch, communities, and the people of Iowa in addressing
the prevalence of tobacco use in the state.

2. It is the intent of the general assembly that the comprehensive tobacco use
prevention and control initiative established in this chapter will specifically address
reduction of tobacco use by youth and pregnant women, promotion of compliance by
minors and retailers with tobacco sales laws and ordinances, and enhancement of the
capacity of youth to make healthy choices. The initiative shall allow extensive
involvement of youth in attaining these results.

3. It is also the intent of the general assembly that the comprehensive tobacco use
prevention and control initiative will foster a social and legal climate in which tobacco use
becomes undesirable and unacceptable, in which role models and those who influence
youth promote healthy social norms and demonstrate behavior that counteracts the
glamorization of tobacco use, and in which tobacco becomes less accessible to youth. The
intention of the general assembly shall be accomplished by engaging all who are affected by
the use of tobacco in the state, including smokers and nonsmokers, youth, and adults.

One of the plan’s most prominent gaps—apart from the deeply flawed
absence of any ban on public smoking, which Senator Michael Connolly
repeatedly but unsuccessfully sought to rectify—was, as Iowa City Democratic
Senator Joe Bolkcom, who cast the only Nay against the bill in either chamber,
put it, that it did “little to help adults smokers kick the habit. ‘I wonder if Big
Tobacco doesn’t like this bill (which) really relies on all these adult smokers to

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284 2000 Iowa Laws ch. 1192, § 3, at 565, 565-66. The phrase “less accessible to
youth” had read simply “less accessible” in H.F. 2565; a floor amendment added the
(H-8890) (Apr. 13).
285 On Connolly’s amendments, which were focused on banning smoking in the
legislature, see below ch. 32.
(Apr. 19) (47-1).
keep the money flowing in.”

The resistance that Bolkecom encountered from Republicans in this respect was exemplified by the reaction prompted by an amendment he filed to add the following underlined language to the bill’s preamble: “The intent of the general assembly shall be accomplished by assisting current tobacco users in terminating use and by engaging all who are affected by the use of tobacco in the state, including smokers and nonsmokers, youth, and adults.” On an almost perfect party-line vote the modest amendment was defeated 19 to 30.

Opponents, such as Republican Senator Tinsman, stressed the importance of concentrating the resources on youth because most smokers started smoking as teenagers. In any event, with only $9 million a year available for the anti-tobacco program, she worried about diluting its impact. (In a separate category was Senator Jack Rife, one of only a handful of still smoking senators, who wondered, with this kind of “‘social engineering,...who we’re going to sue next over what....’”)289

Concretely the results that it was the purpose of the initiative to attain were:

a. Reduction of tobacco use by youth.

b. Strong, active youth involvement in activities to prevent youth tobacco use and to promote cessation of youth tobacco use.

c. Enhanced capacity of youth to make healthy choices.

d. Reduction of tobacco use by pregnant women.

e. Increased compliance by minors and retailers with tobacco sales laws and ordinances. 290

In order to promote the law’s tobacco use prevention and control partnership—as well as to avoid accusations of hypocrisy in “profess[ing] their devotion to curbing smoking while winking an eye at flashy tobacco industry marketing ploys”291—the legislature imposed two marketing prohibitions:

a. A manufacturer, distributor, wholesaler, retailer, or distributing agent or agent thereof shall not give away cigarettes or tobacco products.

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288Senate Journal 2000, at 2:1260 (Apr. 19) (S-5446). Democrat Patricia Harper was the only senator to break ranks.


2902000 Iowa Laws ch. 1192, § 6(2), at 565, 569.

b. A manufacturer, distributor, wholesaler, retailer, or distributing agent or agent thereof shall not provide free articles, products, commodities, gifts, or concessions in any exchange for the purchase of cigarettes or tobacco products.  

Prohibiting the Free Distribution of Cigarettes:  
The Federal Courts Undo the Cigarette Manufacturers’ Rare Defeat in the Iowa Legislature: 2000-2001

Until this time, the Iowa law had merely required that a “manufacturer, distributor, wholesaler, retailer, or distributing agent or agent thereof shall not give away any cigarettes or tobacco products to any person under eighteen years of age, or within five hundred feet of any playground, school, high school, or other facility when such facility is being used primarily by persons under age eighteen for recreational, educational, or other purposes.” The blanket ban on sampling that which was the subject of contentious House floor debate on April 13, 2000, had a prehistory during the 78th General Assembly.

On the last day of 1998, Attorney General Miller included a ban on free samples of tobacco products and on coupon promotions in a package of anti-tobacco proposals that he was going to ask the legislature to enact during the 1999 session. By early February, a bill had been filed by 42 Republican and Democratic members, including such high-profile anti-smokers as Representatives Doderer, Fallon, Foege, and Mascher, which contained a general ban on distributing free cigarettes or tobacco products or other products in an offer for sale of cigarettes or tobacco products in language similar to that just quoted. (Interestingly, a week before the bill was filed, Bill Wimmer, a prominent cigarette industry lobbyist in Des Moines, faxed to the Lorillard general counsel a copy of a very similar, but not exactly identical, bill, which bore official looking stamps and indicated that it had been filed on January 26, although no such bill was filed.)

On March 1, the State Government

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293 2000 Iowa Laws ch. 1192, § 6(6), at 565, 569.
294 On earlier legislative regulation of sampling, see above ch. 28.
297 Fax from Bill Wimmer to Ron Milstein (Jan. 28, 1999), Bates No.83777339-42. The bill, which lacked a House File number, bore a stamp “Legal Counsel’s Copy Drafted
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Committee recommended passage by a vote of 20 to 1. Committee chair Mona Martin underscored that children were very attracted to promotions, mentioning that recently cigarettes were included in a bag of goodies given away at a dance attended by people of all ages. Des Moines Democrat Frank Chiodo may have worried about increases in youth smoking sparked by identification with Joe Camel, but some legislators were “leery” because the measure might prevent “tobacco makers from sponsoring sporting events” such as a rodeo in Fort Madison and auto racing. Although the Register predicted that the full House would also pass the bill, it was rereferred to committee, where it died.

During the same period the Senate Human Resources Committee filed an identical bill as the successor to a study bill presented by Tinsman, Szymoniak, and Dr. Redwine. The same day the bill was approved by the committee by a vote of 10 to 3, the prominent anti-smokers Hammond and Dvorsky voting Aye, but it, too, saw no further action.

The ban on distribution of free tobacco products and promotional items reemerged in March 2000 as an amendment in the House to a Senate Judiciary bill designed to prohibit the re-importation, sale, or possession of so-called gray market cigarettes that had been exported from or manufactured for use outside the United States. (Because U.S. cigarette manufacturers, in the wake of the Master Settlement Agreement, increased prices for domestic markets, they widened the gap between those prices and the prices of exported cigarettes; when such cigarettes were reimported and sold at lower prices, they reduced the market share of the manufacturers participating in the MSA and thus tendentially reduced the payments to the states under that agreement.) Tobacco wholesalers, objecting to the price-cutting competition, had already initiated the introduction of gray market legislation in many other states. In November 1999, R. J. Reynolds Tobacco Company’s State Government Relations regional director for Iowa expressed the firm’s concern with the gray market issue to George Wilson, the

by” followed by the handwritten name of a Legislative Services Bureau bill drafter, Patty Funaro.

299 House Journal 1999, at 1:549, 1051 (Mar. 3 and Apr. 6).
300 S.B. 1073; S.F. 205 (Feb. 23, 1999, by Human Resources).
301 Senate Journal 1999, at 1:369 (Feb. 23).
lobbyist for the Iowa Association of Candy and Tobacco Distributors, stressing the availability of Reynolds’ “legislative counsel in Iowa,” former Democratic Senate Majority Leader Bill Hutchins and (his daughter) Susan Cameron, “to assist in the passage of this legislation.” The quantum of availability and assistance that Hutchins and Cameron were expected to provide can be gauged from the $42,000 and $43,000 that Reynolds paid them for in the second half of 1998 and 2000, respectively. (Reynolds also paid Wilson’s tobacco wholesaler’s association $3,000 in lobbying fees.)

S.F. 2079, a very short bill for suppressing this gray market—whose language was virtually identical with the text proposed by the Iowa Attorney General at the beginning of the session—was unanimously approved in committee and unanimously passed the Senate in February. When the bill reached the House floor on March 23, Representative Donald Shoultz, a ninth-term Democrat and former high school mathematics teacher from Waterloo who had quit smoking almost two decades earlier, offered an amendment prohibiting the giving away of cigarettes or tobacco or providing free products in connection with cigarette or tobacco product sales. Shoultz, who took a strong anti-tobacco stance, filed the same amendment the same day to another Senate bill that, inter alia,
proposed to increase the penalties for underage smoking, though he ultimately withdrew it.\textsuperscript{312} Earlier in the 2000 session Shoultz had also filed a bill that would have amended the public anti-smoking law to exclude from the definition of “bar” (which alone among “public places” could be designated a smoking area in its entirety) any establishment with table and seating capacity, regardless of seating capacity, that served meals.\textsuperscript{313} The House, however, took no action on the bill, and two weeks after it had been filed R. J. Reynolds’ midwest regional state government official dismissively but correctly reported that it was “not a serious threat.”\textsuperscript{314} Much more serious a threat was Shoultz’s amendment to the gray market cigarettes bill, which a Republican tried to eliminate by securing a ruling that it was not germane; after the Speaker had ruled the point well taken, Shoultz asked for unanimous consent to suspend the rules to consider his amendment, but encountering an objection, he moved to suspend the rules and requested a roll-call vote, which produced a 56 to 42 majority (only one Democrat voting Nay). The House then adopted the amendment and unanimously passed the bill with Shoultz’s ban on the free distribution of cigarettes and paraphernalia to adults.\textsuperscript{315} A week later, however, the Senate on a voice vote refused to concur in the House amendment\textsuperscript{316} and the same day the House, on a motion by the bill’s House floor manager, Rosemary Thomson, receded from its amendment on a non-record roll call vote of 53 to 33. The chamber then, by a vote of 93 to 1, Shoultz casting the lone Nay, passed the bill.\textsuperscript{317} The cigarette oligopoly not yet having definitively slain the proposed total ban on free distribution of cigarettes and promotional products, the initiative reappeared on April 13, 2000, when the above-quoted language was filed from the House floor as an amendment to the Tobacco Use Prevention and Control bill (H.F. 2565), first by a group of 10 Republicans led by first-term Representative Scott Raecker and two Democrats (one being Shoultz); after Raecker had withdrawn it as a result of procedural obstacles and anticipated opposition by

\textsuperscript{312}\textit{House Journal 2000}, at 1:937, 1163 (Mar. 22 and 30) (H-8521 to S.F. 2366). On S.F. 2366, see below.
\textsuperscript{313}H.F. 2371 (Feb. 22, 2000, by Shoultz).
\textsuperscript{315}\textit{House Journal 2000}, at 1:974-76 (Mar. 23).
\textsuperscript{316}\textit{Senate Journal 2000}, at 1:1010 (Apr. 5).
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representatives who wished to avoid a confrontation with the Senate, it was offered by the other Democrat, Chiodo, who also withdrew his before finding the proper procedural vehicle for avoiding a non-germaneness ruling. Chiodo, according to Republican Bob Brunkhorst, felt very strongly that distribution of free cigarettes was simply wrong from a public policy standpoint; although Brunkhorst agreed with him (and voted for the amendment), he tried to persuade Chiodo that, since it would not pass or, if it passed the House, the Senate would again strip it out of the bill, it was not worth fighting over. Chiodo took the floor to frame the debate in terms of voting on “whether we’re going to support big tobacco or not.”

Raecker, executive director of the Institute for Character Development at Drake University in Des Moines, urged his colleagues to “break a compromise with the state Senate and the governor” over the $9.3 million dollar tobacco use prevention program: “We won’t give away tobacco.... Are you going to buy into the laws we’re going to pass this year or are you going to become part of our efforts to curb smoking for youths?” He insisted that it was “hypocritical for legislators to tout their devotion to curbing smoking if the tobacco industry is allowed to give away cigarettes and flashy promotional gimmicks.”

318 Senate Journal 2000, at 2:1480 (Apr. 13); Kathie Obradovich, “Ban on Tobacco Freebies OK’d in House, But Has Dim Future,” WC, Apr. 14, 2000 (A3:1-2). H-8894 and H-8897, which were withdrawn, differed from the third and successful amendment, H-8900, by virtue of not having repealed Iowa Code § 453A.39. According to Chiodo, who eight years later appeared to have a virtually total recollection of the proceedings, the first two amendments—the first of which he had asked Raecker to “run”—were found non-germane (although the Journal does not reflect such a ruling). Telephone interview with Frank Chiodo, Des Moines (May 5, 2008).

319 Telephone interview with Bob Brunkhorst, Waverly, IA (Apr. 27, 2008).

320 Kathie Obradovich, “Ban on Tobacco Freebies OK’d in House, But Has Dim Future,” WC, Apr. 14, 2000 (A3:1-2). Chiodo, a smoker, who after graduation from college at the beginning of the 1990s had unsuccessfully applied for a job with the Tobacco Institute as a regional lobbyist, was an improbable tobacco foe: together with his father, a former state legislator and smokeless tobacco lobbyist, he was a dynastic leader of a Des Moines Democratic party club. Telephone interview with Frank Chiodo, Des Moines (May 5, 2008); Adam Nagourney, “Key to Iowa Caucus May Be the Living Room,” NYT, May 27, 2003 (A16); Smokeless Tobacco Council, Inc., State Legislative Consultants (Jan. 1992), Bates No. TI03522699/702. Rep. Shoultz did not associate Chiodo with an anti-smoking stance. Telephone interview with Donald Shoultz, Waterloo (May 6, 2008).


agreement had existed, there may have been some more nebulous deal among party leaders that, for example, tobacco use prevention supporters would get $9.3 million, while Iverson got continued free distribution of cigarettes and paraphernalia. Nevertheless, neither freshman Raecker nor sophomore Chiodo was part of any such leadership deal, which they regarded as bad public policy because it facilitated continued incentivizing of cigarette purchases in contravention of a legislative intent to reduce smoking. 323 Anti-smoking activist Mary Mascher urged adoption on the grounds that “[t]hese companies give away freebies to get our kids hooked.” 324 Democrat William Witt from the college town of Cedar Falls became direct and personal when he urged his colleagues to “send a message to the ‘generalissimo’ of the Senate as well as to Iowans” that the ban was an opportunity to promote tobacco prevention and keep young people “from the poison that is tobacco.” 325 The House then adopted the amendment by a very large majority (83 to 15), all the Nays being cast by Republicans 326—one of whom argued that with children already protected by existing law, “[i]ndividuals have the right to choose whether they are going to smoke a cigarette or accept an offer from a company” 327—and all the prominent anti-smokers such as Doderer, Fallon, Foege, Mascher, and Wise voting Aye. 328 
Adoption of the amendment intensely annoyed Iverson and the tobacco lobbyists, who personally resented the role of those who had pushed it. 329 The Associated Press attributed the split between the House and Senate to representatives’ being “generally younger and less inclined to smoke than

323 Telephone interview with Scott Raecker, driving near Ames, IA (May 6, 2008).
326 House Journal 2000, at 2:1481-82 (Apr. 13) (H-8900). Rosemary Thomson, who professed to be a strong anti-smoking advocate who had suffered marginalization by the Republican leadership for sticking to her party-deviant stance, was the only member to have cosponsored Raecker’s who then voted Nay.
329 Telephone interview with legislator who requested anonymity, Des Moines (May 5, 2008).
senators.” Republican House Majority Leader Rants, who voted for the ban, accurately added that “[t]raditionally this chamber has been far more anti-tobacco than the Senate.” 330 (House Speaker Siegrist, who had voted against the ban, explained their differing votes by reference to Rants’s being more anti-smoking.) 331 And his party colleague Bob Brunkhorst even made the leap from is to ought: “There is too much smoking in this chamber, too much smoking outside.... We need to do better. We are role models.” 332 The House’s “surprise move,” the Register reported, might “throw a kink into how Iowa’s share” of the Master Settlement Agreement money would be spent because the Senate, whose leaders were “reluctant to pass a law that would not allow adults to accept tobacco handouts,” was expected to reject the House action. The cigarette companies’ chief voice in the Iowa legislature, Majority Leader Iverson, promptly weighed in with one of the industry’s beloved platitudes: “Whether we like it or not, tobacco is still a legal product.... We love to spend the tax money it brings in, but it’s still politically correct to pick on this product.” 333 Moving on to a variant of the same cliché that smokers never tire of imagining as debate-ending rhetoric, he continued: “In the 10 years I’ve been here, I keep hearing about all this tobacco stuff, but I still haven’t seen a bill that outlaws the sale of tobacco in Iowa.” 334 Expressing surprise that the House had undone what she thought had been a deal, Senator Tinsman supported the substance of the “ban on tobacco freebies,” but insisted that “the entire $9.3 million plan could be threatened by Senate Republican leaders upset by the House changes.” She opposed giving young people “free things with tobacco advertising on it,...but to hurt a major part of the bill for this small piece, I don’t think is worth it.” 335 She was revealing no secret when she pointedly commented that the House action would cause a problem in the Senate “because the majority leader doesn’t like it.... We’ve had it as part of bills before and he saw that it was removed.” 336 Nevertheless, in the end Tinsman agreed with Raecker—who doubted that the ban

331 Telephone interview with Brent Siegrist, Council Bluffs (May 4, 2008).
would fatally wound the bill because the Senate would simply “not walk away from this session without allocating $9.3 million for prevention”—that with or without the ban, the bill would be approved: “‘It’s that key.’”

Although the cigarette lobby was unable to undermine a majority for the sampling ban in the House, it knew that its most reliable agent for warding off such threats was Senate Majority Leader Iverson. Immediately after House passage, “[i]ndustry personnel,” Hurst Marshall, R. J. Reynolds Tobacco Company’s state government relations regional director in charge of Iowa, recorded in his weekly status report, “discussed the amendment with Senate leadership and they have agreed to delete the provisions in the Senate.” He seemed to be expressing annoyance rather than alarm in adding that “[t]his is the fourth time that the House has attempted to impose a sampling ban.”

Governor Vilsack was not so sanguine that the Senate would go along with the amendment. Four days after House passage of H.F. 2565, on the day the Senate first took up the House bill, Governor Vilsack, urging legislators to work out their differences over the House ban on handing out promotional cigarettes, made it clear that he did not want that controversy to derail the $9.3 million initiative. After he had spoken to Raecker about the need to get the bill through the legislature, the Republican representative “assured fellow legislators and Vilsack that the smoking prevention bill will reach the governor’s desk without delay.” And although Raecker stressed that “[c]ertainly I will not hold up the process based on that,” he nevertheless added that Vilsack had not asked him to “step back from his amendment.” For his part, although the governor stated that he did “not necessarily oppose the sample ban,” his further comments sounded as though he might be counseling the cigarette oligopoly in contemplation of a suit challenging the ban. In distinguishing between marketing to adults and children, he “suggested the state might be treading on the tobacco companies’ rights if it further restricts its [sic; must be “their”] ability to advertise. ’I think, given the nature of the law, it is somewhat difficult to walk the fine line between marketing and commercial speech, which we still value, and

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essentially prohibiting people from doing certain things.”” How physically distributing (addictive and lethal) commodities constituted protected speech, Vilsack did not explain, perhaps because he had “not researched the law so I am not sure whether there would be some legal complications or constitutional questions....”340 If he was not researching the issue, the cigarette oligopolists’ battalion of lawyers were.341

During the first day of Senate debate Boettger, acting for Iverson and the cigarette oligopoly, filed an amendment to strike the new House provision,342 while Bolkcom filed one to retain it but shift its location within the bill.343 However, when debate on the bill resumed two days later, Boettger and then Bolkcom both asked and received unanimous consent to withdraw their amendments,344 and the Senate passed the bill (against Bolkcom’s lone Nay) with the House ban. (The difference in emphasis emerged in the comment by Boettger, chair of the Senate Human Resources Committee, which on the same day as the House action unanimously recommended passage of S.F. 2449,345 the Senate’s alternative Tobacco Use Prevention and Control bill—for which H.F. 2565 was substituted four days later346—that “[a] lot of statistics have shown that if someone doesn’t start smoking by the time they’re 20, they probably aren’t going to, so we get the main bang for our buck by addressing mainly youth.”347

Given the opposition to the total ban on sampling from such divergent points on the political spectrum and the Senate’s previous success in removing it from a House bill, Brunkhorst and others in the House who had voted for it were more than a little “surprised” that the Senate passed it this time. From his perspective, the explanation for this turn of events was that the Senate leadership, which considered it wrong to prohibit the promotion of “a legal product,” had simply tired of fighting against it and given up.348

Reynolds’ lobbying forces shared Brunkhorst and his colleagues’ surprise, but also appeared to be perplexed in their disappointment. The day after the Senate vote, Roger Mozingo, a company officer in his capacity as vice president

341See below this ch.
348Telephone interview with Bob Brunkhorst, Waverly, IA (Apr. 27, 2008).
for state government relations, noted in his weekly status report to his boss, Tommy J. Payne, the executive president for external relations who reported directly to R.J. Reynolds Tobacco Company’s chairman and CEO,\(^{349}\) that “Senate leadership had assured industry personnel that the House amendment would be removed in the Senate but unfortunately, they agreed with the amendment and the measure passed and has been sent to the governor.” In order, perhaps, self-protectively to allude to his team’s .750 batting average, Mozingo added that the “sampling provision had been defeated on three different occasions during the past month being adopted.”\(^{350}\)

The legislative setback did not mean that the tobacco companies accepted defeat. And whether directly activated by the oligopolists or resentful of the prospective loss of free cigarettes and cigarette company mugs, smoking senators did not give up either. A confluence of interest and self-interest led a tobacco lobbyist to ask Jack Rife, long one of the chamber’s most belligerent and heaviest smokers, to “run” the amendment that would undo the damage done by S.F. 2625,\(^{351}\) which would not be enrolled, signed by the House Speaker and Senate President, and sent to the governor until April 26.\(^{352}\) On April 20, the day after the Senate leadership had let the oligopoly down, the Senate took up debate of H.F. 2555, the bill making appropriations from the Master Settlement Agreement, which the House had passed by a vote of 100 to 0 on April 18\(^{353}\) and passage of which the Senate Appropriations Committee (of which Rife was a member) had

\(^{349}\)R.J. Reynolds Tobacco Company, Revised Organization Charts, chart 1 (Feb. 2001), Bates No. 522047552/7.

\(^{350}\)R. L. Mozingo to T. J. Payne, Weekly Status Report—State Government Relations (Apr. 20, 2000), Bates No. 524116229/30. Mozingo apparently synthesized the reports that he received from his four regional directors; whether he (or even they) had first-hand knowledge is unclear. House Speaker Siegrist later speculated that Iverson may have lost control of his caucus regarding the ban, which the House leadership may have told him was “good policy,” even if it was a deal breaker, and have asked him to consider how bad the result would be if it passed. Telephone interview with Brent Siegrist, Council Bluffs (May 4, 2008).

\(^{351}\)Telephone interview with Jack Rife, Des Moines (Apr. 29, 2008). Rife, who by 2008 had for five years been a political appointee-representative of the U.S. Secretary of Labor monitoring labor legislative developments in Iowa and several other midwestern states, actually let slip that shortly before the events in 2000 he had received such free cigarettes at a fair. Rife recalled the amendment distinctly, but could not remember which tobacco lobbyist had approached him, though he thought it had been either Bill Wimmer or Susan Cameron (the daughter of former Senate Majority Leader Bill Hutchins).


recommended by a vote of 23 to 0 the next day. On April 20, Rife and his fellow heavy smoker, Richard Drake filed an amendment that struck the offending subsection of H.F. 2565, repealed the repeal of Iowa Code § 543A.39(6), and then reenacted the provision if H.F. 2565 was enacted before H.F. 2555. After they had offered their cigarette industry amendment from the floor, Senator Connolly raised the point of order that the amendment was not germane, but withdrew it; in turn Rife withdrew his own amendment and received unanimous consent that action on the bill be deferred. Later that evening, when the Senate resumed debate on H.F. 2555, Rife and Drake again filed and withdrew another amendment with the same text. Finally, they filed a third, slightly different amendment, which this time was ruled out of order after Connolly had once again raised the point of order that it was not germane. The bill then passed by a vote of 47 to 0, Rife and Drake voting Aye.

If in fact Iverson did develop sampling ban fatigue, his cigarette company principals definitely did not. They may have agreed, pursuant to the Master Settlement Agreement, not to lobby against certain kinds of youth-centered legislation, but bans on handing out free samples to adults was not one of them. Three days after Rife and Drake’s gambit had failed, David Remes, a lawyer at Covington & Burling who—on his way to receiving his firm’s “Senior Lawyer Pro Bono award in 2005 and the Human Rights Campaign’s Ally of Justice Award in 2006”—over much of his career had been devoting many of his billable hours to protecting the profits of the individual cigarette oligopolists and

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355Former Senator Andy McKean confirmed that Drake also smoked heavily. Telephone interview with Andy McKean, Anamosa (Apr. 28, 2008).
357Senate Journal 2000, at 2:1293 (Apr. 20). Unfortunately, eight years later Connolly had no recollection of these “maneuvers” or even of the issue of the ban. Telephone interview with Michael Connolly, Dubuque (Apr. 29, 2008).
359Senate Journal 2000, at 2:1300-1301, 2077-78 (S-5661) (Apr. 20). The third version of the amendment differed from the first two by virtue of retaining a provision from Chiodo’s bill that exempted from the ban transactions among businesses not involving consumers and deleting the reenactment of § 543A.39(6).
360Eight years later Iverson purported to recall nothing about the ban. Telephone interview with Stewart Iverson (Apr. 28, 2008).
361See below this ch.
their Tobacco Institute, wrote a memo, which was faxed to and from Wasker’s cigarette industry law and lobbying firm, titled, “House File 2565 Will Hurt Iowa Tobacco Retailers.” Casting doubt on his own competence and the value that the tobacco firms received from their pricey corporate counsel, already in the second sentence Remes erroneously claimed that the provision prohibiting retailers and others from providing free articles in exchange for the purchase of cigarettes had been “added as an amendment (S-5445) at the last minute....” In fact, the provision was added neither by that amendment (which, as just seen, had been withdrawn) nor by the Senate at all: the House, as even semi-diligent lay readers of the legislative journals and press could have told Remes, had debated it intensively and included it in the bill, as tobacco-beholden and other senators who opposed it well knew before it ever arrived in the Senate. His sloppy research notwithstanding, Remes knew an actionable state interference with his clients’ sales to addicted smokers when he saw one: “This provision could be read to prohibit a retailer from selling cigarettes...using two-for-one promotions, which would involve the provision of a free package in exchange for the purchase of a package” as well as from “providing consumers with non-tobacco premium items in redemption of coupons or proof-of-purchase.” Especially since these prohibitions also “constrain manufacturers,” the punch line read: “new § 453.39(2) [sic; should be § 142A.6(6)(b)] should be repealed.” In a new version of the memo two days later Remes added that: “As far as we know, no other state has enacted such restrictive retail legislation.”

363By this time, after the Tobacco Institute had been dissolved pursuant to the Master Settlement Agreement, Wasker was lobbying for Lorillard Tobacco and Brown & Williamson Tobacco. For example, for 1999 and 2000, Lorillard paid his firm $32,500 and $32,600, respectively, and budgeted $65,000 for 2001. [Lorillard Tobacco Co.,] 2001 Budget State Lobbyists (Oct. 29, 2001), Bates No. 99394130; Iowa Ethics and Campaign Disclosure Board, Lobbyist Client Report - Executive Branch (Lorillard Tobacco Company, Jan. 29, 2001) (copy furnished by IECDB). For the first half of 1999, Brown & Williamson paid him $4,062.50 as a retainer; for 2000 his retainer was $8,125. Iowa Ethics and Campaign Disclosure Board, Lobbyist Client Report - Executive Branch (Brown & Williamson Tobacco Corp., Jan. 16, 2001) (copy furnished by IECDB).

364David H. Remes (Covington & Burling), “House File 2565 Will Hurt Iowa Tobacco Retailers” (Apr. 23, 2000), Bates No. 86102282. The document was found in the files of Lorillard Co. § 453A.39 was repealed by H.F. 2565. Why Remes did not mention section (6)(b), which banned giving away free samples to adults, is unclear.

365David H. Remes (Covington & Burling), “House File 2565 Will Hurt Iowa Tobacco Retailers” (Apr. 25, 2000), Bates No. 518979288. In this version Remes excised the
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During the final three or four days of the session (which adjourned on April 26), Hurst Marshall reported (and Mozingo repeated to Payne) that “industry personnel attempted to amend and or delete the provision but all efforts failed.”\(^{366}\) Philip Morris’ State Government Affairs Tobacco Executive Report also recounted that “[o]n 4/26, an amendment to nullify the damaging anti-sampling and promotion provisions of HF 2565 was inserted into an appropriations bill, but was removed by leadership and the legislature adjourned.”\(^{367}\) (For such intelligence and, presumably, more effective lobbying, Philip Morris in 2000 paid Cal Hultman and Kim Haus-Ludwig $15,166.66 and $10,333.34, respectively.)\(^{368}\) Lorillard Tobacco Company had also been trying to mobilize last-minute support for corrective action. At 5:55 p.m. on April 24, Kurt Leib, the firm’s Midwest regional government affairs manager, faxed from a hotel in Des Moines a message to the regional sales manager that the division manager in the Des Moines office had “offered to help out on this issue. The bottom line is we need help from the retail community to correct the situation. We’re late out of the gate, but I am hopeful we will prevail in the end.” The seriousness of the plea was underscored by the re-faxing of the message by the director of sales planning to two associate general counsel, one of whom was also the director of government affairs, asking them to “advise as to the specifics of what our field sales personnel

\(^{366}\)Hurst Marshall to Lynn Hutchens, Weekly Report—Region II (Apr. 27), Bates No. 527843365; R. L. Mozingo to T. J. Payne, Weekly Status Report—State Government Relations (Apr. 28, 2000), Bates No. 524116228. These attempts to amend/delete have not been identified in the legislative journals.

\(^{367}\)[Philip Morris] State Government Affairs Tobacco Executive Report (May 1, 2000), Bates No. 2078174017. No such insertion into an appropriations bill on Apr. 26, 2000 was identified in the legislative journals.

in Iowa can do to help.” Two days after the legislature adjourned, Leib thanked his Des Moines colleague and his staff for having offered assistance: “Your willingness to get involved and spread the word to your retail accounts about the potential impact of this issue certainly gave us a fighting chance at the state capital.” Unfortunately, none of these communications revealed why the cigarette oligopolists failed in their quest to repeal the ban on free samples.

Rather than second-guessing themselves over what they had done wrong or why Iverson had failed them, the companies, even while still lobbying, had already begun preparing plan B—litigation. Although their contents were, unfortunately, not disclosed in the course of discovery or pursuant to the MSA, a flurry of “privileged” “confidential” documents among lawyers during the last week in April make it clear that they were already shaping a lawsuit. Whether Iverson did not press his caucus as hard as he perhaps could have because cigarette industry lobbyists told him that the courts would take care of the matter is unknown. At the same time, taking no chances, Philip Morris was also preparing for the possibility that, at least until it prevailed in any litigation, it would have to stop running promotion programs in Iowa. Whereas R. J. Reynolds drafted a “script” by the end of April announcing that “[u]ntil the legislation can be clarified, we have chosen to stop all promotional activities” in Iowa, and Philip Morris in May drafted a letter to wholesalers in Iowa declaring that “[a]lthough PMUSA does not full [sic] agree with the scope of this law, we

369 Kurt Leib to Rick Redfield and Jim Williams to Haney Bell and Michael Shannon, Apr. 24, 2000, Bates No. 86102284. For the positions held by the officials, see Lorillard Tobacco Company, Table of Organizational Charts (July 2000), Bates No. 98915766.


371 E.g., D.H. Remes to P. Desel, Report from Joint Defense Counsel to Philip Morris In-House Counsel Reflecting Legal Analysis of Iowa Legislation Banning Promotion of Tobacco Products (Apr. 25, 2000), Bates No. 2074105247; B. Giles to H. Turner, Email from Philip Morris Employee to Philip Morris Employee Conveying Legal Analysis of Philip Morris Outside Counsel (Remes) Regarding Iowa Tobacco Control Bill and Its Impact on Philip Morris Promotional Activity (Apr. 27, 2000), Bates No. 2085090164B.

372 Iverson later stated that he had no recollection of the ban. Telephone interview with Stewart Iverson (Apr. 28, 2008).

373 E.g., email from Joe Murillo [Senior Assistant General Counsel] to Amy Rothstein [Senior Counsel Corporate Affairs], Subject: Re: Iowa Anti-Promotion Statute (Apr. 27, 2000), Bates No. 2080811674; email from Thomas Garguilo [Marketing Manager] to Thomas Lauinger [Brand Manager], et al., Subject: Potential Iowa Legislation (May 1, 2000), Bates No. 2079168375.

374 [R. J. Reynolds], “Iowa Restrictions” (Apr. 28, 2008), Bates No. 525170354.
full [sic] intend to abide by the law,” and immediately discontinued its price promotions, Brown & Williamson Tobacco Corporation adopted a commercially and legally belligerent stance. On May 18, 2000, three days after Governor Vilsack signed the bill into law, it informed wholesalers and retailers in Iowa that it considered the “unacceptable” and “offending provisions to be unconstitutional and illegal” and was “confident” that it would “get them overturned” and prevail in a lawsuit that it and “other members of the tobacco industry” were filing in federal court on the grounds that the Iowa law violated federal cigarette laws. “Thus, we intend to continue in a ‘Business As Usual’ manner in Iowa to avoid any harm to our business or to our customers while we seek the injunction.” To be sure, Brown & Williamson cautiously added that “[w]e cannot give you legal advice as to whether you should choose to continue to participate in our programs,” observing that recipients might wish to contact their lawyer.

Philip Morris, R. J. Reynolds, Brown & Williamson, and Lorillard intended, shortly after Governor Vilsack had signed the bill into law on May 15, to file a lawsuit to overturn the ban on promotions to adults on the grounds that it was preempted by the Federal Cigarette Labeling and Advertising Act, which provides that: “No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are in conformity with the provisions of this act.” As late as May 24, Reynolds had drafted a “Statement regarding complaint filed against the State of Iowa,” which announced that the four companies had filed suit that day together with two retail store owners in Iowa. Reynolds specified that the law, “[u]nder the guise of youth-smoking prevention,” prohibited “programs that are developed for and limited to adult smokers,” including price discounts (“buy-one-get-one-free offers and coupons”), distribution of lighters with a product message, and “sampling to adult smokers in age-restricted facilities.” The economic nub of the oligopoly’s complaint was that: “Given the extremely restricted environment in which we operate, promotional programs play a vital role in Reynolds Tobacco’s ability to compete for adult smokers’ business. These programs are also an important means by

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375 PMUSA, “Draft letter to all Wholesalers in the State of Iowa” (May 2000), Bates No. 2082186454.
376 Brown & Williamson Tobacco Corporation to Our Direct Buying Customers Servicing Stores in Iowa and Retail Customers with Stores in Iowa, “Iowa ‘Youth Protection’ Legislation” (May 18, 2000), Bates No. 82572356 (addressed to Faeth Whlse, Ft. Madison).
which retailers generate in-store traffic and sales of tobacco and other items.” The company alleged that the ban would cause “severe...and irreparable harm to manufacturers and the state’s retailers without materially advancing the goal of youth-smoking prevention,” which could “far more directly and effectively be served by means that do not restrict commercial trade and free speech.”

In fact, the suit was not filed on May 24 and when it was a week later, the cigarette manufacturers were not plaintiffs. Why they instead chose to choreograph the litigation—as their progenitor, the Tobacco Trust, had done in Iowa and elsewhere since the nineteenth century—as brought by two straw-men-retailers is not clear because the emails and memoranda that their lawyers exchanged during the latter half of May and that presumably shed light on this and other tactics were deemed privileged and not made public. For example, a “Series of emails concerning retailer participation in the industry lawsuit against the State of Iowa for passing legislation that bans cigarette promotion” initiated by Patricia Barald, an attorney at Covington & Burling (whose website proudly declares that she “has represented the tobacco industry in such matters as protection of first amendment rights...[and] preservation of highly confidential and proprietary trade secret ingredient and product formula information”), translucently identified the instigators and the instigated.

The complaint that was filed in federal district court in Des Moines on June 1 by Davis, Brown, one of Iowa’s highest-profile corporate law firms, in the names of two store owners in Council Bluffs and Sioux City, Missouri River border towns, repeated Remes’s false claim that the ban had been “added as a last-minute amendment” and even “at the eleventh hour.” To this error the oligopoly attached the non sequitur that the ban “has no relation to the new commission on tobacco use prevention and control that is the focus of the new law.” The State went to some pains to refute the insinuation that the provision

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378 R. J. Reynolds Tobacco Company, Statement Regarding Complain Filed Against the State of Iowa (May 24, 2000), Bates No. 525170359/60.
379 See above Parts I-II.
382 Jones d/b/a The Filling Station v. Vilsack, Complaint, ¶¶ 2 and 12, at 1, 4 (S.D. IA Central Div., C.A. No. 4-00CV-90271, June 1, 2000), Bates No. 98091593/6. In their main appellate brief, the cigarette companies finally stated, marginally more accurately, that the provision was “a last-minute addition to House File 2565,” H-8900 passing “just
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under attack was a helter-skelter, ill-conceived afterthought. Cathy Callaway, the first director of the Tobacco Use Prevention and Control Division of the Iowa Public Health Department, who, in her previous position as director of tobacco control and advocacy at the American Lung Association of Iowa from 1995 to 2000, had monitored the Iowa legislature’s activities regarding “this type of legislation,” gave an affidavit stating that “similar legislation was considered each and every year from 1996 up until the year 2000, when” it was “given careful consideration and thought” and passed.383

The cigarette manufacturers behind the suit argued that the prohibited promotions were “a significant means” of their communications with adult smokers especially because of the federal ban on broadcast media advertising. In particular, the promotions supplied information such as price and “other brand attributes” and reinforced brand loyalty, brand switching, marketing of new brands, thus leaving consumers “better informed...and financially better off...”384

The companies’ central legal claim was that the Iowa ban on distributing free samples and promotional items was precisely the type of state law prohibition based on smoking and health “with respect to advertising or promotion of any cigarettes” whose packages had been labeled in conformity with the Federal Cigarette Labeling and Advertising Act (FCLAA) that that congressional enactment preempted and was therefore invalid under the federal supremacy clause of the U.S. Constitution.385 Considerably less facially plausible was the First Amendment commercial speech claim that “the government may not impose

before the bill was passed by the House.” Appellees’ Brief and Argument at 6 and n.2, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001). This still distorted account suppressed the fact that, as shown above, the provision was not only intensely debated, but had been proposed in other bills as well.

383Jones d/b/a The Filling Station v. Vilsack, Affidavit of Cathy Callaway, ¶¶ 1 and 2, at 1-2 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Sept. 27, 2000) Bates No. 98091419/20. The State referred to Callaway’s affidavit. Jones d/b/a The Filling Station v. Vilsack, Defendants’ Statement of Undisputed Material Facts in Support of Defendants’ Motion for Summary Judgment, ¶1, at 1-2 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Oct. 3, 2000), Bates No. 98091413/4. To be sure, Callaway did not identify the previous bills nor explain exactly how similar they had been. But see Kathie Obradovich, “Ban on Tobacco Freebies OK’d in House, But Has Dim Future,” WC, Apr. 14, 2000 (A3:1) (“House members have debated and approved the measure several times in the past two years, only to have the Senate refuse to consider it”).

384Jones d/b/a The Filling Station v. Vilsack, Complaint, ¶ 20, at 6-7 (S.D. IA Central Div., C.A. No. 4-00CV-90271, June 1, 2000), Bates No. 98091591/8/9.

385Jones d/b/a The Filling Station v. Vilsack, Complaint, ¶¶ 27-34, at 8-10 (S.D. IA Central Div., C.A. No. 4-00CV-90271, June 1, 2000), Bates No. 98091591/600-602.
restrictions on speech in order to keep its adult citizens in ignorance of truthful information about lawful products, even products it considers to be 'vices.' To the extent that the State’s goal is to ‘foster a social and legal climate in which tobacco use becomes undesirable and unacceptable’...and Section 142A.6(6) attempts to further that goal by restricting truthful and protected speech, it clearly and directly violates the First Amendment. (The state countered this claim with the argument that the Iowa law in no way prohibited communications or advertising or promoting the sale of cigarettes, but merely prohibited giving them away. However, since the trial court ruled that the Iowa law was preempted, it never reached the free speech claim.)

In April 2001, liberal federal judge Robert Platt, a Clinton appointee, sustained the cigarette companies’ federal preemption claim chiefly because he regarded the State’s narrow interpretation of the term “promotion” in FCLAA as referring merely to display racks as “untenable” and “unsupported,” especially since it would have required him to treat the word as “superfluous....” More fundamentally, however, Pratt was left “not entirely convinced” that FCLAA’s purpose did not conflict with Iowa’s ban on free distribution because Congress intended “to generally protect the tobacco industry; with the banned promotional activities thus ‘encompassed in the general scheme of the FCLAA...the Court sees no way around the conclusion that FCLAA preempts’ the prohibition. (That numerous critical contemporaries viewed FCLAA as “a shocking piece of special interest legislation” designed “to protect the economic health of the tobacco industry by freeing it of proper regulation” would not justify ascribing

386 Jones v. Vilsack, Complaint, ¶ 39, at 11-12 (S.D. IA Central Div., C.A. No. 4-00CV-90271, June 1, 2000), Bates No. 98091591/603-4.
387 The Filling Station v. Vilsack, Defendants’ Reply in Support of Motion for Summary Judgment, at 3-4 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Nov. 9, 2000), Bates No. 98091341/3-4.
388 The Filling Station, Inc. v. Vilsack, Memorandum Opinion and Order, at A4-A5 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Apr. 16, 2001), reprinted in Appellants’ Brief and Argument, Appendix, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).
390 The Filling Station, Inc. v. Vilsack, Memorandum Opinion and Order, at A-11, A-12, A-13 (S.D. IA Central Div., C.A. No. 4-00CV-90271, Apr. 16, 2001), reprinted in Appellants’ Brief and Argument, Appendix, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001). The Attorney General had agreed not to enforce the ban until the court had ruled on its constitutionality. Id. at A-4.
391 “Cigarettes vs. F.T.C.,” NYT, July 9, 1965 (28) (edit.). See also “8 Congressmen Ask Cigarette Bill Veto,” NYT, July 17, 1965 (26); Elizabeth Drew, “The Quiet Victory
such an intent to Congress four decades later in the wake of the revolution in public knowledge about the health consequences of smoking, about the cigarette oligopoly’s conduct in perpetrating and perpetuating the mass mortality and morbidity of its customers and secondhand smoke victims, and in regulation of and societal attitudes toward smoking and the cigarette industry.)

In his appellate brief the Iowa attorney general, quoting the 1994 Surgeon General’s Report, placed great emphasis on the strategic advantage that handing out free samples had as a marketing device over mere advertising in its ability to put an addictive commodity directly into consumers’ hands—along with the lighter to light it. For example, one company’s marketing test revealed that households receiving free samples by mail increased their consumption by more than four times as much as a control group receiving only discount coupons.392 To be sure, the Surgeon General’s Report expressly analyzed sampling and specialty items as “promotional efforts.”393 The State also reurged the argument it had unsuccessfully advanced in support of its motion for summary judgment that all that Congress had intended with FCLAA was to “control the dissemination of information to the public” in order to insure that warnings about cigarettes were given in a uniform and consistent manner; in contrast, nothing in that statute suggested that Congress wanted to relieve the cigarette industry of state regulation regarding free tobacco samples.394 In pleading for a narrow interpretation of “promotion,” the attorney general recognized that the statutory term could (as the cigarette companies argued) also be “interpreted broadly to include any type of marketing activity intended to increase cigarette sales,” thus preempting any state law that “thwarted efforts by the tobacco industry to increase tobacco sales....” But such an interpretation encountered the difficulty that “no one could seriously contend that the FCLAA preempts” state sales taxes or laws banning sales to minors.395 The key to understanding congressional intent regarding preemption was, as far as the Iowa attorney general was concerned, to be found in the explanation of legislative history contained in the 1969 Senate

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392 Appellants’ Brief and Argument at 6, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).


395 Appellants’ Brief and Argument at 14, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).
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report on that year’s amendment, which inserted “promotion” into the preemption provision. The Senate Commerce Committee declared that this preemption “‘would in no way affect the power of any state...with respect to the taxation or the sale of cigarettes to minors, or the prohibition of smoking in public buildings, or similar police regulations. It is limited entirely to state or local requirements or prohibitions in the advertising of cigarettes.’” 396 The State then argued that handing out free cigarettes, as conduct rather than dissemination of information, fell “in the same category” of non-preempted state police regulations from which Congress did not intend to protect cigarette retailers. 397

The appellate court did not specifically deal with this argument, which the cigarette oligopolists in their brief dismissed on the grounds that “one unremarkable sentence in a single report cannot turn a statute designed to prohibit state restrictions on cigarette advertising and promotion into a statute designed to give states carte blanche to use their ‘police powers’ to ban tobacco advertising and promotion.” 398

Later that year the U.S. Court of Appeals for the Eighth Circuit affirmed Pratt’s “essential holding” that the ban on free distribution was preempted by the FCLAA of 1969, which prohibited state laws from imposing any prohibition, based on smoking and health, with respect to the promotion of any cigarette packages labeled in conformity the federal law. 399 Like Pratt, the appellate judges remained unpersuaded “by the State’s herculean efforts” to “carve out a meaning for ‘promotion’ that is less expansive than its apparent plain meaning, and yet conceptually different from ‘advertising.’” Moreover, they dismissed out of hand the State’s “dire prediction” that the court’s holding would entail imputing to Congress an intent to deprive the states of the “‘power to prohibit a cigarette company from handing out free cigarettes in an elementary school yard.’” The Eighth Circuit panel nevertheless refused to take up the challenge even in dictum, preferring—since the plaintiffs had not contested such a prohibition—not to decide whether such a prohibition would also be preempted; instead, it left the State with the meager consolation that “[f]or a variety of practical reasons, we


397 Appellants’ Reply Brief at 6, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).

398 Appellees’ Brief and Argument at 20, Jones v. Vilsack, 272 F.3d 1030 (8th Cir. 2001).

399 Jones v. Vilsack, 272 F.3d 1030, 1039 (8th Cir. 2001). The appeals court did, however, reverse Pratt’s judgment that all of § 142A.6(6) was preempted rather than merely § 142A.6(6)(a)-(b). Id. at 1038-39.
tend to doubt that cigarette dealers would ever challenge” Iowa’s ban on giving children free cigarettes.\footnote{Jones v. Vilsack, 272 F.3d 1030, 1037-38 (8th Cir. 2001) (quoting Fed’n of Adver. Indus. Representatives, Inc. v. City of Chicago, 189 F.3d 633, 638 (7th Cir. 1999)).} Three years later the Iowa legislature essentially reinstated the restrictions on sampling from 1991.\footnote{2004 Iowa Laws ch. 1073, § 44, at 235, 246 (codified at Iowa Code § 453A.39 (2007)).}

That the court rulings in the Iowa case were hardly the only possible interpretation was made clear in 2005 by the California Supreme Court, which held that a similar California law was not preempted because there was no clear Federal purpose to bar state regulation of the nonsale distribution of cigarettes to minors or adults. The vast distance between the California Supreme Court’s approach and the Eighth Circuit’s may be gauged by the following crucial analysis from the former opinion:

The problem with defendant’s contention that the “plain meaning” of section 1334 bars any state regulation of the free distribution of cigarettes is that, as defendant concedes, it is clear that Congress did not intend section 1334 to preempt state regulation of the distribution of cigarettes to \textit{minors}. To the contrary, Congress has required states to ban tobacco distribution to minors as a condition of receiving federal funds for substance abuse treatment. ... There is no language in section 1334, however, that distinguishes between distribution to minors and distribution to adults. Hence, the state Attorney General here contends that the only way to effectuate Congress’s intent to bar distribution of cigarettes to minors is to draw a line distinguishing between “promotion” and “distribution.” Under this theory, states could not regulate actions intended to persuade persons to smoke a particular defendant’s brand of cigarettes, but it could regulate the actual transfer of the cigarettes not only to minors but also to adults. ... State regulation of nonsale distribution of cigarettes would not conflict with the congressional purpose just described. Although national commerce in cigarettes would be substantially impeded if a tobacco company’s cigarette labeling and advertising had to be altered to comply with the laws of every state, that is not the case for state regulation of free distribution of cigarettes. Moreover, although Congress has enacted extensive legislation governing cigarette advertising, and has authorized the Federal Trade Commission (FTC) to impose further regulations, Congress has never enacted any comprehensive laws governing nonsale distributions nor authorized the FTC to do so. In view of the health hazards of smoking expressly recognized by Congress..., it would be unreasonable to conclude that Congress intended nonsale distribution of cigarettes to continue entirely without regulation. ... First, in 1992 Congress enacted legislation requiring states to prohibit nonsale distribution of cigarettes to \textit{minors} as a condition of receiving federal aid for state programs to treat substance abuse. ... This enactment shows that Congress did not regard
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the FCLAA as barring state regulation of nonsale distribution of cigarettes to minors.

Second, in 1995 Congress enacted a law requiring all federal agencies to prohibit nonsale distribution of tobacco “in or around any federal building.” ... Defendant here points out that Congress has the power to require certain conduct by federal agencies while prohibiting such conduct by state agencies. ... But it is difficult to conceive of a coherent policy that would bar nonsale distributions in or around federal buildings yet preclude states from barring such distributions on state property.

Third, although the FCLAA does not describe what powers are retained by the states, the high court in Lorillard asserted that Congress intended that the “[s]tates remain free…to regulate conduct with respect to cigarette use and sales.” ... If the FCLAA’s bar on state regulation of the promotion of cigarettes extends to barring state regulation of distribution, that prohibition could not logically be confined to nonsale distribution. Discount sales of cigarettes, sales accompanied by rebate offers, and the distribution of coupons entitling a holder to receive free or discounted cigarettes could equally be considered a form of promotion of cigarette sales and use. Thus, such a broad definition would infringe on the state’s retained powers to regulate cigarette use and sales.

Indeed, in terms of smoking’s adverse effect on health, there is very little distinction between the sale of cigarettes at full retail price, the sale of cigarettes at discounted prices, and the free distribution of cigarettes—all place cigarettes in the hands of the public. The FCLAA itself does not draw a distinction between sales of cigarettes and free distributions; it requires labeling of any package in which cigarettes are offered for sale “or otherwise distributed to consumers”..., and it defines the term “‘sale or distribution’” as including “sampling or any other distribution not for sale.”

Youth Access to Tobacco and Possession, Use, and Purchase Penalty Laws: 2000

Another tactic aimed at reducing youth access is penalizing youth for possession, use, and purchase (PUP) of tobacco. While Synar-type policies focus on reducing the supply of cigarettes to youth, PUP policies aim to stunt demand for cigarettes by introducing negative consequences that affect young smokers directly. Most tobacco-control advocates do not favor emphasizing PUP policy because they feel it reinforces the tobacco-industry messages that tobacco is for adults and implies that the individual holds sole responsibility for choosing to smoke. Currently there is no strong evidence that PUP enforcement reduces youth smoking rates.


403 Jean Forster, Rachel Windome, and Debra Bernat, “Policy Interventions and Surveillance As Strategies to Prevent Tobacco Use in Adolescents and Young Adults,” American Journal of Preventive Medicine 33(6S):S335-39 at S336 (Dec. 2007). For more detailed analysis of the ineffectiveness and counter-productiveness of punitive PUP laws,
By the 1999-2000 legislative sessions, anti-smoking groups’ ability to secure enactment of their agenda was marginally strengthened by the Master Settlement Agreement, under which the cigarette manufacturers were prohibited from lobbying against eight kinds of potential legislation, including: limitations on youth access to vending machines; enhanced prosecution of violations of laws prohibiting retail sales to youths; enforcing access restrictions through penalties on youths for possession or use; limitations on tobacco advertising in or on school facilities; and limitations on non-tobacco products designed to look like tobacco products such as candy cigarettes. The types of measures that the legislature was in fact able to pass—amendments to the cigarette sales law—turned out to fall largely within the scope of this framework.

The primary example of such legislation was S.F. 2366, which the Senate Human Resources Committee introduced and unanimously approved on February 28, 2000, both anti-smoking stalwarts Hammond and Dvorsky and pro-tobacco Senators Boettger, Bartz, and Schuerer voting for it. The bill’s chief components included: (1) making the use of a driver’s license by anyone under 18 to obtain cigarettes or other tobacco products a simple misdemeanor punishable by a $100 fine; (2) making it lawful for cigarette permittees to employ persons under the age of 18 to sell cigarettes; (3) striking the provision in the existing law requiring the city or county enforcing the prohibition on use, possession, or purchase of cigarettes by anyone under 18 to use the civil penalty (or criminal fine) paid for such violations for enforcement of this section of the cigarette sales law; (4) authorizing cigarette sales permit holders or their employees, if they have a “reasonable belief based on factual evidence” that a driver’s license presented by a person wanting to buy cigarettes is altered,
falsified, or belongs to someone else to retain the license and deliver it within 24 hours to the appropriate local law enforcement agency; (5) authorizing courts to impose as an alternative to the scheduled fine a penalty of performance of community service or attendance at tobacco education classes for first or second violations of the prohibition against minors’ using, possessing, buying or trying to buy cigarettes or other tobacco products; (6) increasing the scheduled fines for the aforementioned violations from $25 to $50 for a first offense, from $50 to $100 for a second offense, and from $100 to $250 for third and additional offenses; and (7) increasing the criminal penalty for failing to pay these fines or to perform the alternative service/attend tobacco education classes from and to the same amounts.  

When the Senate took up the bill on March 10, an amendment embodying a new bill was filed from the floor by Human Resources Committee chair Boettger. That S-5114 was cosponsored by Majority Leader Iverson and Minority Leader Gronstal signaled that it was a bipartisan leadership initiative whose passage in the Senate was secure. It differed in two major respects from the committee bill. First, it specified that the alternative penalty would be 30 hours of community service or tobacco education for a second violation and, more importantly, imposed for a third or subsequent offense, in addition to the scheduled fine, performance of 40 hours of community service and a 30-day suspension of the violator’s driver’s license. And second, it marginally strengthened the penalty for a retailer’s violation of the prohibition of selling to minors by mandating a permit suspension for a third and revocation for a fourth violation within three (instead of five) years.

Before the Senate voted on this amendment, Republican Senator Jeffrey Lamberti filed an amendment to it from the floor that imposed a fine (of $100 for the first offense, $250 for a second offense, and $500 for a third and additional offenses) on retailers’ employees for selling to minors. Since Lamberti’s father was the founder of Casey’s General Stores, one of the largest cigarette sellers in Iowa, it was hardly surprising that he sought to bring the state’s coercive powers to bear on his family’s company’s employees, whose law-breaking

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407 S.F. 2366, §§ 1, 2, 3, 4, and 9 (Feb. 28, 2000, by Senate Human Resource Committee).
408 S-5114, §§ 3 and 6 (Mar. 9, 2000); http://www.legis.state.ia.us/GA/78GA/Legislation/S/05100/S05114/Current.html. The driver’s license suspension penalty was apparently modelled after a similar provision enacted in Florida in 1997 (which also included community service penalties). 1997 Fla. Laws ch. 162, § 5(1), at 3050, 3053.

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proclivities—which management was purportedly unable to suppress—exposed
owners to liability: “‘If you don’t have some penalty on that clerk you’re never
going to solve the problem.... It gives clerks an excuse not to sell to their
friends.’” Unfortunately for employers under a vicarious liability regime, as
Lamberti later lamented, low-wage convenience store clerks “don’t give a
damn.” After the Senate had adopted both Lamberti’s amendment and the
main amendment by voice votes, it passed the bill unanimously. The strong
support that Robert Cramer (“‘We’re just pulling our hair out’ to stop tobacco
sales to minors”), the president of Fareway Stores, Inc., a privately owned
midwestern grocery supermarket chain—whose founders’ “biblical beliefs”
purportedly keep the stores closed Sundays, but apparently do not extend to
banning cigarette sales—lent to the drivers license suspension proposalową
underscored tobacco retailers’ interest in penalizing everyone except themselves
for sales to minors. Focused as they were on minors, the new provisions in no
way transcended the kinds of government intervention to which the cigarette
oligopolists were willing to pay lip service. Boettger, who regularly supported
measures in the same range, leaped from the significant and empirically verified
fact that “[i]f kids don’t start to smoke by the time they are 19 or 20, they
probably are not going to” to the assertion that S.F. 2366 as passed by the Senate
would “go a long ways towards deterring underage kids from trying to buy
tobacco.” In contrast, Joe Bolkcom, one of the Senate’s leading anti-smoking
militants, worried that the proposed law he had just voted for was too harsh: “It’s
rather punitive to take a person’s license away. Young persons have reason to get
around in their automobiles.”

Two weeks after the House Judiciary Committee had recommended
passage, the full House debated the bill on March 29 and 30. The first
amendment debated was a bomb shell: 14-term Democrat John Connors, an

410Jonathan Roos and Jeff Zeleny, “Tobacco Use May Cost Kids Driving Rights,”
DMR, Mar. 10, 2000 (1A) (NewsBank).
(1A) (NewsBank).
414http://www.hoovers.com/hoovers-stores/ID--47508--/free-co-profile.xhtml
(visited May 24, 2008).
416Jonathan Roos and Jeff Zeleny, “Tobacco Use May Cost Kids Driving Rights,”
DMR, Mar. 10, 2000 (1A) (NewsBank).
assistant minority leader who had been chief of the Des Moines fire department and a lobbyist for the fire fighters union, proposed making it “unlawful for any person to ship or import into this state, or to manufacture, offer for sale, sell, distribute, transport, or possess within this state, cigarettes or tobacco products.” The amendment was actually voted on and lost on a non-record vote, but the Register’s report on the bill did not even mention the matter. Some years later Connors recalled that the purpose of his amendment was to eliminate problems of enforcing the existing partial sales ban. Soon after the vote the House postponed further debate until the next day because “lawmakers...wondered whether the bill could have unintended consequences” and in particular Representative Mary Mascher argued that “the offense of buying cigarettes could ultimately lead to jail time if a teen who has his license suspended decides to drive anyway and is caught behind the wheel. That type of...offense...could cause a criminal record. ‘I’m not sure what tobacco smoking has to do with driving....’"

The next day debate focused on one amendment, filed by one Republican and three Democrats, which: (1) eliminated the driver’s license suspension; (2) made mandatory performance of eight hours of community work requirements for a first offense (unless waived by the court), and 12 and 16 hours for second and further offenses, respectively; and (3) eliminated the provision in the existing law imposing a schedule criminal fine for failure to pay the civil penalty. Some House members argued that the driver’s license suspension was a crucial tool, especially since, as Republican Daniel Boddicker self-ironically noted, otherwise all that “‘[t]hese kids see [is] a bunch of really uncool people like us saying that smoking is bad for them.’” His Republican colleague, David Heaton, a restaurant owner and former president of the Iowa Restaurant Association, chimed in that the license suspension was an “innovative way to encourage minors to not start

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418See above ch. 26.

419House Journal 2000, at 1:1129-31 (H-8524) (Mar. 29). Whatever debate took place on the amendment could not have been very long since it began after 5:00 p.m. and ended before 5:30 p.m. Id. at 1:1128, 1132.

420Other papers, including the Cedar Rapids Gazette, failed to report on the debate at all.

421Telephone interview with John Connors, Des Moines (Apr. 23, 2008). Connors was unable to remember how many votes his amendment had secured.


423Republican Steve Sukup was chair of the Judiciary subcommittee to which the bill had been assigned and floor managed it; the Democrats were Keith Kreiman, Keith Weigel, and Dick Myers. House Journal 2000, at 1:1161 (H-8670) (Mar. 30).
smoking” because teenagers did not pay attention to money. Stripped of this new threat, the bill would not reduce smoking because the only way to deter young people was "to turn our community around in the attitude they have toward smoking.” However, the initial enchantment with the Senate’s driver’s license suspension provision as a “good threat to hold over young smokers” dissipated as some representatives worried whether minors would “wind up with criminal records for smoking,” especially since, as Mascher insisted, they did not have “‘problems getting cigarettes.’” Going further, she was skeptical of the “‘Big Brother’” role into which the legislature was slipping: “‘I’m tired of penalizing kids every time they turn around.’” In the event, after the amendment had been adopted on a non-recorded vote, the bill was overwhelmingly passed on a vote of 86 to 9, such anti-smoking advocates as Doderer, Ro Foege, Ed Fallon, and Mascher voting Nay.

Back in the Senate, the partially defanged bill, especially the removal of the driver’s license suspension provision, encountered resistance from some militant anti-smokers. Connolly, for example, concerned about children’s “‘lifetime of addiction’” that sustained growth of the tobacco market, declared that “‘[a]t some point we have to fight that tobacco lobby, because that’s who’s weakening these bills.’” At the other end of the spectrum, Republican Jack Rife, long one of the Senate’s most belligerent smokers, failed to rise above a clownish contribution

424 Jeff Zeleny, “Teen License Threat Rejected,” DMR, Mar. 31, 2000 (1M) (NewsBank). The information on Heaton’s occupational background is taken from Iowa Official Register: 1999-2000, at 67. Heaton’s commitment to transforming public attitudes toward smoking did not extend to banning smoking in his own Iris Restaurant in Mt. Pleasant, where he permitted smoking in the lounge. Telephone interview with Denise Daniels (who had recently bought the restaurant from Heaton), Mt. Pleasant (Apr. 23, 2008). Heaton’s commitment was also nowhere on display in 2007 when he opposed the dollar increase in the cigarette tax or in 2008 when he consistently voted against the bill to ban public smoking, in large part on the grounds that it would infringe on business owners’ rights. State Representative Dave Heaton, “Upfront” (Feb. 26, 2007); below ch. 35.


426 House Journal 2000, at 1:1161-63 (H-8670) (Mar. 30). Their failure to cite the legislative journals or newspaper accounts of the debates presumably caused Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 67 (2009), on http://repositories.cdlib.org/ctcre/tcpmus/IA2009/, to reach the false conclusion that the “bill as introduced did not contain any particularly controversial provisions....”
to the public policy debate: “‘What do you suppose they did before they had cars? Take the horse away?’” And Boettger, the floor manager, seeking to diminish the number of defectors, presumably found favor with the state’s large-scale cigarette sellers by pointing out that the new fines for store clerks would “‘give the employer some clout to make sure (the law) is enforced.’” The Senate, after having concurred in the House amendment on a 37 to 11 non-record roll call vote, again unanimously passed the bill.  

Yet More Defeats of Anti-Tobacco Initiatives: 2000-2004

The National Cancer Institute is banning Iowa from its list of places where it will hold meetings because the Hawkeye State doesn’t have a statewide restriction on smoking.  

One reform of the clean indoor air law against which the cigarette companies had not agreed to refrain from lobbying and which came nowhere near passage was an amendment to strengthen enforcement by authorizing law enforcement officers to enforce Code chapter 142B. Republican Senator Gene Maddox, a lawyer who disliked smoking, sponsored one such bill, which quickly met its demise in subcommittee in 1999.  Shortly thereafter the Senate State Government Committee introduced a similar bill, which would have limited enforcement to local law enforcement agencies.  The committee, of which Maddox was a member, approved the study bill by a vote of 8 to 3; Democrat Michael Connolly, the chamber’s most active anti-smoking advocate, voted for it, as did all his voting party colleagues, while Republicans split 3 to 3. But once it became S.F. 420 and was referred to the same committee, the bill remained unacted on during the 1999 session and died in subcommittee in

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After appropriating $9.3 million for tobacco prevention for fiscal year 2001 and $9.3 million for 2002, the legislature slashed funding to $5 million for 2003, 2004, and 2005, and increased it only marginally to $5.6 million for 2006 and $6.5 million for 2007; not until fiscal year 2008, when, with Democrats in control of both chambers of the legislature and a Democratic governor for the first time in 42 years, the cigarette tax was increased from 36 cents to $1.36 and the budget allocation for tobacco prevention was doubled to $12.3 million, did spending exceed the amount originally allocated eight years earlier. The low point of $5 million in 2003—which was largely achieved by retaining radically reduced funding for the Just Eliminate Lies anti-tobacco ads and prompted the director of the Division of Tobacco Use Prevention and Control to suspect that


434 For 2002, whereas anti-smoking organizations argued that the state should be allocating at least $20 million of Iowa’s $55 million annual Master Settlement Agreement funds to tobacco use prevention and control, Governor Vilsack proposed cutting 16 percent ($1.5 million) from the previous year’s appropriation in order to balance the budget. Ironically, Senate President Mary Kramer and other Republican legislative leaders decided to protect the previous year’s funding. Tony Leys, “Vilsack Would Cut $1.5 Million from Anti-Smoking Programs,” DMR, Mar. 31, 2001 (1A) (News Bank); Tony Leys, “GOP Aims to Restore Tobacco Money,” DMR, Apr. 25, 2001 (4B) (NewsBank). S.S.B. 1271 contained the full $ 9.345 million appropriation as did its successor bill, S.F. 537, § 1(5)(a), which was filed Apr. 25 and unanimously passed the Senate Appropriations Committee and both houses twice. Senate Journal 2001 at 1:1328, 2:1352, 1532 (Apr. 25 and 26, May 7); House Journal 2001, at 2:1826, 1945 (May 3 and 7).

435 Representative Mary Mascher’s amendment to restore the $9.3 million lost on a party-line vote of 44 to 53, prompting her to accuse the majority of abandoning Iowa’s commitment to “helping keep kids off tobacco” and to denounce the cutback as a “victory...for big tobacco...in Iowa.” Lynn Okamoto, “Teens Rally at Capitol to Fight Cuts in Anti-Tobacco Program,” DMR, Apr. 4, 2002 (1B) (NewsBank). Similarly, in the Senate, Hammond and Fiegen and Fiegen, Bolcom, Hammond, and Tinsman filed two amendments to the same effect, which lost 23 to 27 and 23 to 24. When the Senate version of the bill returned to the House, Mascher filed yet another amendment to restore the funds, but it lost again. House Journal 2002, at 1:1141-42, 1385 (Apr. 3 and Apr. 11) (H-8504, H-8689; Senate Journal 2002, at 1:1092-93 (Apr. 10) (S-5422 and S-5479).

“tobacco companies helped persuade legislators to gut her budget”—corresponded to only 26.3 percent of the minimum recommended by the Centers for Disease Control, putting Iowa in 35th place; the high point of $12.3 million in 2008 still corresponded to only 63.5 percent of the CDC’s recommended level, placing Iowa 18th. By 2005 Iowa was devoting only 4.2 percent of its Agreement payments to tobacco control compared to the national average of 4.7 percent, which resulted from some states’ spending nothing and several states’ allocating more than 30 percent.

Because the few seats that Democrats gained at the November 2000 election were exactly balanced by ones that they lost, Republicans retained their majorities of 30-20 in the Senate and 56-44 in the House. The highest-profile Republican smoker and cigarette company accomplice to lose his seat was Senator Jack Rife, who was defeated after five terms. For the future of Iowa’s anti-smoking regulation arguably the most important accession to the legislature was Democrat Janet Petersen, who, before she became a public relations executive, had worked for the American Heart Association of Iowa in the mid-90s, lobbying for tobacco control. Ironically, she prevailed in the primary for a seat in the House from Des Moines over Kevin McCarthy, an assistant attorney general, who worked in Washington, D.C., as counsel on behalf of the state governments settling under the Master Settlement Agreement. During the 2008 legislative session, as House Majority Leader, McCarthy would enable Petersen to push forward with

437Tony Leys, “Bold Anti-Smoking Ads Face Extinction by State,” DMR, Apr. 22, 2002 (1B) (NewsBank). Even at its pre-cutback level of $3.3 million, the ad budget was a tiny fraction of the $86 spent by cigarette manufacturers to market their commodities in Iowa.


442http://iowahouse.org/2008/03/31/member-profile-rep-janet-petersen/

443“Petersen Defeats McCarthy,” DMR, June 7, 2000 (7A) (NewsBank).
a bill to bring Iowa’s anti-smoking legislation into the 21st century over the resistance of doubters who were unable to envision a majority for any measure stronger than repeal of local preemption.444

But such progress was eight years off. In the meantime, the solid Republican majority in both Houses insured further success to the cigarette oligopoly in killing off any and all serious threats. Undeterred, at the start of the 2001 legislative session Attorney General Miller once again announced a series of proposals to strengthen the state’s laws on the sale, advertising, and regulation of tobacco products toward the end of reducing the number of youth addicts and the toll of tobacco-caused mortality and morbidity. The catalog included: (1) maintaining the appropriation for tobacco use prevention and control programs at no less than $9.3 million; (2) banning non-face-to-face tobacco sales; (3) banning outdoor ads within 1000 feet of schools and playgrounds; (4) limiting point-of-sales ads to black on white; (5) removing any obstacles to local expansion of the clean indoor air law and cigarette sales law; (6) mandating that only fire-safe cigarettes be sold; (7) creating statewide licensing for tobacco sellers in order to relieve the administrative burden on cities and to produce more uniform enforcement; and (8) allowing local governments—if proposal (7) were not implemented—to collect adequate permit fees and fines to finance local enforcement.445

Unmistakably, in formulating his wish list Miller was not so politically naive as to imagine that a legislative majority was available for passage of a comprehensive statewide law protecting Iowans from secondhand smoke exposure. Yet, in spite of his non-utopian standards, he would not see any of his reforms enacted by the 79th General Assembly (and even the status quo of (1) was maintained for one year only). Significantly, in advocating local control under (5), the attorney general emphasized that he took “the position that localities have such authority and are not preempted by state statutes,” but wanted that view clarified to “avoid unnecessary litigation and waste of resources.” The reason for urging this point at this juncture was the emerging interest among various local governments in protecting the members of their communities from secondhand smoke. To be sure, Miller did not explain why local control was preferable for clean indoor air regulation, while it imposed a burden on localities with respect to administering the cigarette permit system. The attorney general’s neglect of the origins of local control in the great

444See below ch. 35.

compromise of repeal of the general ban on cigarette sales in 1921, when the legislature conferred on cities and counties the discretion to continue that prohibition in effect, was astonishing since no state agency either had been or would be granted such authority; consequently, statewide administrative centralization would insure the preclusion of the balkanization of permit issuance that the cigarette oligopoly abhorred but that survived as a legal possibility under the existing law. Consistently with this self-contradictory bifurcation, even Miller’s call for raising permit fees “from their 1921 levels of $50 to $100 a year” did not serve the purpose of renewing the legislature’s objective in 1921 of setting them high enough to deter the proliferation of sales locations, but merely to generate revenues sufficient to support administration and enforcement⁴⁴⁶ (although he was well aware that in 1921 “these permit fees constituted a serious investment”).⁴⁴⁷

Despite the cigarette companies’ obligation under the Master Settlement Agreement to refrain from lobbying over a variety of youth-focused matters, the tobacco industry alone in 2000-2001 spent at least $286,872 on lobbyists in Iowa.⁴⁴⁸ Petersen herself experienced the cigarette industry’s power when in 2001 she (together with a Republican) filed her own modest bill to moderate somewhat the preemptive effect of the anti-smoking and cigarette sales laws on local control, and the House took no action on it at all after referring it to the Human Resources Committee, whose chair, Republican Daniel Boddicker, an electrical engineer, did not even bother assigning it to a subcommittee. Petersen’s bill, without repealing any language in the existing preemption provisions, would merely have specified that enforcement was to be carried out in compliance with the (aforementioned) codification of the constitutional home rule article⁴⁴⁹—a change that would still have considerably constrained local

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⁴⁴⁸John McCormick and Jonathan Roos, “Millions Spent to Influence Iowa Legislators,” DMR, Feb. 24, 2002 (1A) (NewsBank). The tobacco companies were nevertheless far from the biggest spenders, the gambling industry having spent almost $1 million.

action and might have created ambiguity and confusion for judges required, in litigation, to determine the effect of engrafting the general home rule provision onto the statute-specific preemption.

In 2002, Representative Shoultz filed the same bill that he had introduced in 2000 to constrict the definition of “bars” in which no no-smoking areas were required, but it was no more of a threat the second time than it had represented two years earlier. The strategy behind the behavior modification that H.F. 2128 sought to achieve was eminently reasonable: “In order to influence teen-agers and convince them not to smoke, you have to influence their parents and adults around them. And in order to make people stop smoking, you have to make it more inconvenient for them.” Nevertheless, Shoultz himself was almost fatalistically defeatist: “It’s gone to committee, but not a subcommittee, so I don’t imagine it will be discussed... I introduced a similar bill two years ago that didn’t go anywhere, either. Maybe sometime we’ll get a head of a committee who will want to do that. Some members of the (legislature) are afraid of offending people. I suppose they think their constituents won’t like it, so they don’t want to bring it up.” House Human Resources Committee chair Daniel Boddicker, unwilling to “move the bill,” confirmed Shoultz’s prediction: “I do not have enough committee time to do all the bills I have.” With passage of repeal of preemption of local control definitively precluded, Boddicker, conveniently enough, opined that “the issue should be handled on the local level.” Shoultz’s initiative did, however, take on a sharper profile because of its potential relationship to the mini-trend initiated in Ames and Iowa City to pass ordinances restricting smoking in ways that exceeded the mandates of the statewide law. Shoultz commented that his measure “might help prevent the scenario some Iowa City restaurant/bar owners are worried about, in which customers flock to Coralville to patronize restaurants that still allow smoking.” To be sure, he could have added that such a statewide ‘level playing field’ impact might have done away with the need for local control altogether.

Passage of the ordinance in Ames, which went into effect on August 1, 2001 and “augment[ed]” Iowa Code section 142.B by prohibiting smoking, inter alia and most importantly, in restaurants between 6:00 a.m. and 8:30 p.m., and of a similar ordinance in Iowa City, which went into effect on March 1, 2002, prohibiting smoking in restaurants more than 50 percent of whose sales revenues stemmed from food, sparked the formation in June of Tobacco Free Iowa with

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452 See below ch. 33.
the assistance of a $1 million grant from the Robert Wood Johnson Foundation secured at the behest of the Lung-Heart-Cancer organizations. The new group set as one of its goals a statewide campaign to ban smoking in restaurants by means of local ordinances; hoping to be propelled by the momentum of the national movement, Tobacco Free Iowa selected Cedar Falls, Cedar Rapids, Des Moines, Grinnell, and Waterloo as the first five cities for its drive. Unwilling to wait for the Iowa Supreme Court’s decision on the Ames ordinance, the organization vowed, in case the Court struck it down, to shift the focus to the state level. That the initiative immediately encountered opposition from the Iowa Hospitality Association, which represented 7,000 restaurants and bars, could hardly have surprised any observer. Equally self-explanatory was the stance adopted by Philip Morris, the threadbareness of whose PR four years after the Master Settlement Agreement and even after it had finally been compelled to admit that smoking kills, descended to a new level when it pretended to justify its financing of the Ames test suit on the grounds that: “‘Smoking is a matter of choice.... We’re not advocates of smoking. We’re advocates of choice.’”453

The few anti-smoking bills that were filed during the Eightieth General Assembly (2003-2004) were substantively bolder than their counterparts of 2001-2002, but procedurally they, too, made no progress at all.454 Democratic Senators Dick Dearden, Herman Quirmbach, and Robert Dvorsky’s S.F. 87 most importantly dismantled the entire feckless designated smoking area system of Iowa Code § 142B.2—which entrusted vital public health decisions to those with custody or control of public places, who in the vast majority of cases had no professional understanding of the health consequences of secondhand smoke exposure and made their decision based on self-regarding considerations of profitability—and, instead, simply prohibited smoking outright in public places and meetings. In addition, the bill redefined the key statutory term “public place” by deleting several exemptions and expanding coverage to include several places. The bill struck exemptions for: public places with less than 250 square feet of floor space; restaurants with seating capacity for fifty or fewer persons; portions


454In addition, a study bill that would have doubled cigarette permit fees and authorized local governments to impose an application fee of up to $25 also saw no action beyond assignment to a subcommittee. House Journal 2003, at 1:385 (H.S.B. 174, Feb. 20, by Judiciary Committee, assigned to Boal, Kramer, and Greimann).
of retail stores where tobacco was sold; and private, enclosed offices occupied by smokers only even though non-smokers might visit them. S.F. 87 also added coverage of: outdoor bar or restaurant areas; public restrooms; childcare facilities; playgrounds; outdoor auditoriums, theaters, libraries, art museums, concert halls, arenas, and meeting rooms, as well as all corridors, hallways, and lobbies adjacent to these areas. Incongruously, the Senate took no action on this expansive measure beyond assigning it to a subcommittee, while its House companion did not even make it to that stage.

At the 2004 session, House and Senate initiatives focused on local preemption repeal. At the Tobacco Use Prevention and Control Commission meeting on June 20, 2003, six weeks after the Iowa Supreme Court had struck down the Ames ordinance, Linn County Democratic Representative Ro Foege, a non-voting commission member and former smoker, called the decision “very surprising and...a major upset for tobacco control in Iowa.” Mentioning that he and another Linn County legislator had been discussing introduction of a bill to provide for local control, he stressed that this effort needed to be bi-partisan. Agreeing, Senator Joe Bolckom from Iowa City, the other Democratic legislator on the Commission—the Republican members were absent—“offered to help in any way he could.”

Carrying through in 2004, Foege and conservative Cedar Rapids Republican Kraig Paulsen (who in 2008 would vote three times against the bill that finally brought a relatively rigorous no-smoking regime to Iowa)

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455 S.F. 87 (Feb. 4, 2003, by Dearden, Quirmbach, and Dvorsky). Incongruously, instead of strengthening owners’ duty to enforce the ban on smoking, the bill struck the weak language requiring them to “make reasonable efforts to prevent smoking” by posting signs and arranging seating accordingly, and merely required them to post signs.

456 Senate Journal 2003, at 1:185 (Feb. 5).


458 See below ch. 33.


460 Tobacco Use Prevention and Control Commission Meeting, Minutes, June 20, 2003 at 1 (copy furnished by Bonnie Mapes, Director, Tobacco Use Prevention and Control Division, IDPH).


462 See below ch. 35. Perhaps Paulsen supported this local control measure not because of its potential for prohibiting public smoking, but because of his belief that “[t]he most effective government is government closest to the people.”
filed a bill in the House to create considerably more local control under § 142B.6. Without repealing the preemption provision, H.F. 2004 would have amended it so that the statute, instead of superseding local ordinances that were inconsistent or conflicted with it, would have superseded only those that were “less restrictive”; local governments were therefore authorized to adopt, implement, and enforce more restrictive laws and regulations. Assignment to a subcommittee two days after filing, however, was as far as this bill progressed. A month later, veteran anti-smoking Senate Democrats Dvorsky and Bolkcom filed a short bill that would have tacked on a new section to § 142B.6 that would have empowered local governments, “notwithstanding any conflicting provision of this chapter,” to adopt ordinances that “may establish more specific or stringent controls, additional prohibitions, or increased penalties relating to smoking in a public place”; their bill specifically authorized the adoption of ordinances that limited or eliminated the statute’s exemptions for bars. Like the House bill, S.F. 2130 never saw any action beyond assignment to a subcommittee. Hard lobbying for local control by anti-smoking activists at the statehouse in early March failed to revivify either measure.

The 2003 legislative session also witnessed several unsuccessful efforts to raise Iowa’s cigarette tax, which at 36 cents per pack had not been increased since 1991 and ranked 29th among all states. At the beginning of the year Attorney General Miller proposed a 25-cent increase to fund drug treatment and other programs. Unsurprisingly, the Republican legislative leadership immediately rejected the initiative especially after anti-tobacco organizations proposed a $1.00 increase. The chair of the House Ways and Means Committee, Republican Jamie Van Fossen, repeated pro-smokers’ all-purpose oppositional mantra: “‘What’s the goal? ... If we want people to quit smoking, let’s make it illegal.’” Undeterred by the hopelessness of the undertaking, several legislators quickly filed bills, at least three of which, including Senator McCoy’s and Representative

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466 Senate Journal 2004, at 1:261 (Feb. 17).
Foege’s, provided for the full $1.00 raise. Predictably, none of these measures made any progress, but on March 12, Senator Larry McKibben, the Republican Ways and Means Committee chairman, provocatively proposed raising the cigarette tax by 25 cents together with a half-cent increase in the state sales tax in order to institute a flat-rate income tax and overhaul the property tax. Even Iverson, the arch-enemy of tax increases, was willing to consider the cigarette tax because the other elements would promote jobs and growth. Senate Minority Leader Gronstal pilloried the proposal as raising poor people’s taxes in order to cut rich people’s. Nothing came of any of these proposals in 2003 or of Governor Vilsack’s in 2004 to raise the cigarette tax by 60 cents; and even when Republican Senator Tinsman and Representative Heaton observed in 2004 that it would have to be raised to help finance Medicaid in fiscal year 2006, and Democrats criticized them for delaying the inevitable, House Majority Leader Chuck Gipp squelched that discussion as premature. In the event, Democrats would remain unable to increase cigarette taxes until they gained control of both chambers in 2007.

After Years of Failing Stings, Iowa’s Biggest Cigarette Retailers Negotiate Wholesale-Rate Penalties for Selling to Minors: 1997-2003

Cigarettes are not just habit forming—the body builds up a requirement for them. Twenty million smokers cannot do without their weed.

Take the example of a man going to work in the morning.

It’s pouring with rain. There are six cars already parked outside the shop. So, there are at least 90 yards to walk back.

Would he stop for a newspaper? Would he get out for a Kit Kat?

Addicted

The answer is probably No, but he would stop for his fags, because he is addicted to

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cigarettes.

And while buying a pack, he takes a newspaper and a Kit Kat.

With 20 million regular smokers in this country, there is an enormous traffic opportunity built up exclusively on tobacco—and a lot of it could come your way.473

Anti-tobacco advocates may have failed to achieve any legislative gains during the Eightieth General Assembly, but the cigarette industry’s lobbying enabled it at the very least to lighten the burden of violating the no-sales-to-minors law. The origin of what became a dual-track judicial and legislative campaign to undo the penalties imposed on cigarette retailers by prosecutions triggered by a rising volume of sting operations was the chorus of complaints from the relatively large number of businesses that, having reached their second violation, faced suspension of their cigarette sales permits for 30 days, which, they alleged, could cost them as much as $20,000, including the loss of ‘traffic’—that is, the loss of sales of other commodities that cigarette buyers no longer bought because they were buying them in some other store in which they could also get cigarettes.474  Jim Henter, the lobbyist for (and president of) the Iowa Retail Federation, expressly mentioned this loss of “traffic” as affecting even mom-and-pop stores because people “with a habit” would go elsewhere to get their candy bars, etc.475  According to James West, the lobbyist for the Iowa Grocery Industry Association (whose membership included both the large convenience store chains, Casey’s and Kum and Go, and Hy-Vee and Wal-Mart),476 retailers had been especially concerned about the “tremendous difference” in the size of the financial penalty resulting from a permit suspension depending on the volume of cigarette sales and total volume of business in individual stores: in particular, it was “unfair” that the penalty was so severe for convenience stores, a relatively large proportion of whose sales derived from cigarettes, whereas a permit suspension for stores with relatively small sales was

473George Mackin [Philip Morris U.K. sales director], “High Customer Traffic Built on Cigarettes,” _CTN_, Dec. 4, 1981, at 25:1-6 at 1. A Philip Morris lawyer, who foresaw that “this sort of mistake could cause us a lot of problems,” quickly engaged in damage control by asserting that Mackin had permitted a journalist who attended a retailers meeting at which Mackin had spoken to use his name as a by-line although the journalist had written the article, whose contents Mackin had failed to check. J. Hartogh to Donald Hoel (Feb. 9, 1982), Bates No. 2024950723.

474Telephone interview with Donald Stanley, Assistant Attorney General, Des Moines (May 19, 2008). Stanley was chiefly responsible for prosecuting these cases.

475Telephone interview with Jim Henter, Des Moines (May 23, 2008).

Democrats’ Decade in the Desert: 1997-2006

not a problem.  Such frank self-pleading can be amusingly contrasted with the reaction of a Hy-Vee store manager in Cedar Rapids, who, when confronted with a 30-day permit suspension in December 2000—the first ever imposed in Iowa’s second largest city—“pleaded with the City Council to ease his customers’ pain.” Specifically, he requested permission to “serve the 30-day suspension after the holidays because it would be too much stress for regular customers to be unable to buy cigarettes during the most stressful time of the year.” Why customer-addicts, whom retailers otherwise regarded as unfaithful turn-coats who, at the slightest interruption of their drug supply, immediately and permanently ran off to the next best supplier, suddenly became ignorant of a mercantile universe outside of their one and only Hy-Vee store and would be forced to go cold turkey, the manager did not explain. (Nor did he need to: “The city granted the request, but that doesn’t mean city officials were buying in to the ‘cigarette stress’ excuse.”)

Compliance Check-Triggered Permit Suspensions Galvanize Retailers

Compliance checks of the type that cigarette sellers rejected owed their existence to the so-called Synar amendment to the 1992 Alcohol, Drug Abuse and Mental Health Administration Reorganization Act, which required the states to enact laws making it unlawful to sell tobacco to persons under 18 and annually to conduct random unannounced inspections to insure compliance with these laws. A state’s incentive to comply with these requirements was the prospect of losing a significant proportion of its federal substance abuse prevention and treatment block grant funds for non-compliance. Because the U.S. Department

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477 Telephone interview with James West, Des Moines (May 21, 2008).
478 Pam Hinman, “C.R. Tough on Tobacco Sellers,” Gazette (Cedar Rapids), Dec. 9, 2000 (1B) (NewsBank). The council had not previously had a policy as to when the suspension had to go into effect; it then adopted a policy requiring the suspension to take effect one week after the council approved the resolution imposing the suspension. However, ever solicitous of haplessly victimized local merchants—the clerk handling cigarette permits “sympathize[d] with business owners who suffer the penalty for an employee’s actions”—the council did provide for requests for exceptions from the new rule, so long as they were made before the council vote. Id.
Democrats’ Decade in the Desert: 1997-2006

of Health and Human Services did not publish regulations until 1996 setting a goal of lowering retailer failure rates of 20 percent within several years,\footnote{\textit{Federal Register} 61(13):1491-1509, at 1508 (Jan. 19, 1996) (codified at 45 CFR Part 96).} inspections did not begin until that year.\footnote{In August 1997, a newly formed anti-tobacco organization in Iowa City stated that “enforcement hasn’t happened on a local level.” Jim Jacobson, “Anti-Smoking Group Wants Tougher Enforcement of Youth Tobacco Laws,” \textit{Gazette} (Cedar Rapids), Aug. 12, 1997 (1B) (NewsBank).} Through the end of the 1990s Iowa was not one of the few states that achieved that target rate, its retailers’ non-compliance rate reaching 50, 40, 27, 36, 33, and 29 percent in fiscal years 1996, 1997, 1998, 1999, 2000, and 2001, respectively.\footnote{“Buying Tobacco Gets Harder Every Year for Minors in Iowa,” \textit{Gazette} (Cedar Rapids), Nov. 29, 1997 (5B) (NewsBank); Thomas O’Donnell, “Tobacco Checks Barely Under Goal,” \textit{DMR}, Mar. 15, 2000 (5B) (NewsBank); CSAP: State Synar Non-Compliance Rate Table FFY 1997-FFY 2005, on http://prevention.samhsa.gov/tobacco/synartable_print.htm (visited May 21, 2008). See also J. Di Franza and G. Dussault, “The Federal Initiative to Halt the Sale of Tobacco to Children—the Synar Amendment, 1992-2000: Lessons Learned,” \textit{TC} 14:93-98 (2005). In its 1998 grant application, Iowa stated its goal of lowering buy rates from 35 percent in fiscal year 1997 to 20 percent by 2000. In addition to reporting that IDPH and a tobacco control coalition had (unsuccessfully) tried to repeal the state cigarette sales law, the application noted that Cedar Rapids and Indianola were the only places in which law enforcement officers had taken the lead in independently conducting inspections. \textit{Highlights of 1998 Federal Substance Abuse Prevention & Treatment Application, Attachment 6: Tobacco Sales to Minors and Enforcement (Iowa) at 1, 2 (1998), Bates No 2064866298/9.}} Indeed, by 1999, Iowa was due to lose $5 million of its block grant.\footnote{Thomas O’Donnell, “Teens, Tobacco Imperil Grants,” \textit{DMR}, June 14, 1999 (1A) (NewsBank); Thomas O’Donnell, “Iowa Faces $5 Million Tobacco Penalty,” \textit{DMR}, Sept. 18, 1999 (1A) (NewsBank).} Consequently, toward the end of October 1999, the Public Health Department, recognizing that “filing charges for selling tobacco to minors ‘is not being done locally,’” decided to charge merchants directly. In September IDPH began sending warning letters to retailers who had been caught in stings but not prosecuted locally, even though under the law the department should have prosecuted them for the $300 penalty for the first violation.\footnote{Thomas O’Donnell, “Strategy on Tobacco Toughens,” \textit{DMR}, Oct. 27, 1999 (1A) (NewsBank).} By March 2000 IDPH had issued warning letters to 462 retailers, but subjected only eight to the money penalty, which otherwise would have entailed

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a 30-day suspension.\textsuperscript{485}

One of the very few towns to make a strong record of prosecuting tobacco violations was Indianola, whose city council made it a priority. Unlike other city councils, Indianola’s—which, notably, had also been one of the last to prohibit the sale of cigarettes into the 1930s—was undeterred by the fact that strict enforcement was “‘not a popular thing to do for your business owners.’” The resulting decline in violations by two-thirds encouraged the city to persist.\textsuperscript{486} Indeed, by early 2001 Indianola had gone where no other town in Iowa (or perhaps in the United States) had gone in recent years by revoking for one year the permits of two stores (a Wal-Mart and a Phillips 66 gasoline service station) for having been caught selling tobacco to minors four times during the previous three years. To be sure, in the spirit of the city’s plan to generate a “‘learning experience’” rather than impose a punishment, the firms agreed not to contest the charges in exchange for the council’s possibly reinstating their permits in less than a year if they were able to insure that minors could no longer buy tobacco.\textsuperscript{487}

Overlapping chronologically with the Synar checks was the nationally unique system of compliance checks created by the Food and Drug Administration in 1996 when it asserted jurisdiction over cigarettes and smokeless tobacco.\textsuperscript{488} In particular, the regulations, which went into effect on February 28, 1997, prohibited retailers from selling these commodities to anyone under 18 and required them to check the photographic identification of anyone under 27.\textsuperscript{489} From August 1997 until March 2000 (when the U.S. Supreme Court ruled that the FDA lacked jurisdiction over tobacco), the FDA, through contracts it entered into with state agencies, conducted 191,294 checks of more than 123,000 retailers, which uncovered a violation rate of 26 percent. Iowa, where the FDA paid IDPH to conduct 6,975 stings, witnessed an above-average 34 percent violation rate.


\textsuperscript{486}Thomas O’Donnell, “Strategy on Tobacco Toughens,” \textit{DMR}, Oct. 27, 1999 (1A) (NewsBank) (quoting the police chief). On Indianola’s ban in the 1930s, see above ch. 20.


\textsuperscript{488}In the late 1990s Synar checks and compliance checks also merged in Iowa. Telephone interview with Janet Zwick, Des Moines (June 2, 2008). Zwick had for many years been the director of the Division of Substance Abuse and Health Promotion at the IDPH and in charge of tobacco use prevention and control.

\textsuperscript{489}\textit{Federal Register} 61(168):44396, 44616 (Aug. 28, 1996) (21 CFR §§ 897.14(a) and (b)(1)).
In contrast to the financial sanctions under Iowa law, the FDA’s civil money penalties, which kicked in after a notice of violation was sent for a first violation, were hefty: $250, $1,500, $5,000, and $10,000, for second, third, fourth, and fifth violations, respectively. For the more than 5,600 penalties the FDA sought retailers paid more than $1,000,000.\textsuperscript{490}

Just as the federal government had given the State of Iowa an incentive to restrict youth access to tobacco, the state legislature passed that incentive down the line to retailers of tobacco-caused morbidity and mortality. The compliance regime in Iowa did not begin to reduce this huge volume of violations until, in the wake of the Master Settlement Agreement, the legislature in 2000, in addition to creating the legal framework for compliance checks,\textsuperscript{491} appropriated the aforementioned $9.3 million to IDPH for tobacco use prevention and control and directed that agency to dedicate sufficient resources to promote and insure retailer compliance with tobacco laws relating to persons under 18.\textsuperscript{492} IDPH’s allocation of about $1.4 million of the appropriation to the Alcoholic Beverages Division for tobacco retailer enforcement,\textsuperscript{493} which was implemented by providing police and sheriff’s departments $50 for each of two annual compliance checks of the state’s 6,000 tobacco retailers, was largely driven, as Rants observed, “by the fact that Iowa hasn’t done too well as far as keeping tobacco out of juveniles’ hands.”\textsuperscript{494} The result was that the non-compliance rates began to decline, reaching 18


\textsuperscript{491}Iowa Code § 453A.2(6) (2001).

\textsuperscript{492}2000 Iowa Laws ch. 1221, § 2(1), at 672, 674. This same language reappeared in appropriations bills in the following years. E.g., 2003 Iowa Laws ch. 783, § 1(5)(a), at 738, 739.

\textsuperscript{493}IDPH Tobacco Use Prevention and Control Division, FY 06 Projected Budget Allocations Compared with 2001 Budget Allocations (furnished by Bonnie Mapes, Division Director, May 21, 2008). Mapes believed that the amount budgeted to ABD was the same for 2000. Email from Bonnie Mapes to Marc Linder (May 21, 2008).

\textsuperscript{494}“Anti-Tobacco Program Pays,” \textsl{DMR}, Nov. 7, 2000 (5M) (NewsBank).
percent in fiscal year 2002, 11 percent in 2003, and 5 percent in 2004. Although state officials denied any responsibility for the decline, some businesses ascribed the two-percent drop in the number of cigarettes sales permits in 2002 in part to more intensive enforcement. Ironically, ABD’s response unintentionally confirmed the basis of the complaint by the Iowa Attorney General’s Office that many local governments were not imposing the mandatory civil penalties under the cigarette tax provisions in Iowa Code section 453A.

“Our policy has never been to go out and write a lot of tickets.... Our policy has been to have the retailers comply” voluntarily.

The statewide sting program, according to ABD’s administrator, Lynn Walding, represented a “drastic public policy change” that was not based on any change in the law: “There just wasn’t any actual enforcement.” Indeed, so stillborn was the enforcement of the 1991 amendments to the cigarette sales law that when, in May 1998, the Johnson County Attorney Patrick White and County Health Department director Graham Dameron announced that they had “found a first-of-its-kind way to hold businesses accountable if their employees sell tobacco products to a minor” the Cedar Rapids Gazette editorialized that it was “amazing how something so obvious can seem so enlightened.” White pointed out that until then “generally only” underage buyers and the clerks who sold them tobacco were fined, while the cigarette sales permittee often escaped liability. By bringing such cases to the city councils to hold hearings and impose fines, suspensions, and revocations, White intended to “try to stimulate more license holder interest in stopping the sales.” Declaring that he was “not aware that this has been attempted in other locations,” White planned to carry out stings under “a little-used state law (Chapter 453a.22),” but would need city council

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495CSAP: State Synar Non-Compliance Rate Table FFY 1997-FFY 2005, on http://prevention.samhsa.gov/tobacco/synartable_print.htm (visited May 21, 2008). For 2005 and 2006 the rates were 11 and 8 percent, respectively.

496See below.


members’ cooperation. Whether such cooperation would be forthcoming was as yet unclear: when the Solon city attorney had broached the subject a few weeks earlier, the mayor even “questioned the validity of any ‘verdict’” by a council, whose members were not judges. And an official in neighboring Linn County seemed to believe that he was observing a dubious scientific experiment when he allowed as his county “might be interested in the procedure if it worked in Johnson County....” Ten weeks later, when White and Dameron informed the county’s almost 150 cigarette retailers that they would soon begin conducting compliance checks, at least one member of the Iowa City Council reflexively adopted merchants’ position that greater fines for underage buyers was a superior way to deal with teenage smoking: “I don’t know how much more responsible business can be when they’ve trained their employees.... (The business owners) can’t be there 24 hours a day.” In the event, even as Iowa City began conducting stings in the second half of September 1998—of the first six retailers checked one sold to the minor—it seemed more interested in targeting possession by minors than sales by merchants.

The goal of the new public policy was, according to ABD Administrator Walding, to “change the social consciousness of not only kids who are thinking

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504 Brian Sharp, “Tobacco Enforcement Increases,” ICP-C, Sept. 21, 1998 (3A:2-7, 4A:3-5). The city attorney’s office recommended that the city council pass an ordinance adding a local possession charge to the state law so that the city could collect fines to be used for additional enforcement. During the first six months of 1998 the city police had cited underage smokers 107 times. To be sure, enforcement was undermined by the police’s lack of staff and equipment to be able to check for prior possession offenses at the time of issuing the tickets. Consequently, most citations were written as first offenses, thus eliminating the deterrent of the progressive fine. Ten years later, the Iowa City police still lacked such a capacity and were therefore still issuing first offense citations to minors with prior violations. Email from Sgt. Troy Kelsay, Iowa City Police Dept. to Marc Linder (Apr. 28, and May 8, 2008). Yet as early as 2000 a judge had had to suggest that police mark tickets as simple misdemeanors so that judges could exercise the option of sending teenagers to anti-smoking classes. The suggestion was prompted by the fact that only 50 of 128 underage smokers ticketed at the Iowa State Fair appeared before a judge; the others merely paid a fine because the police had written the tickets in such a way that a court appearance was not necessary. “Most Teen Smokers Cited at Fair Paid Fines,” Tribune (Ames), Oct. 13, 2000 (B5:3-5).
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of smoking, but the retailers so that they think twice before making a sale.”

The biggest cigarette merchants, however, appeared to resist having their social consciousness raised. During fiscal year 2001, the number of violations discovered in the course of sting operations at four leading chains in Iowa—Casey’s (convenience store), Kum and Go (convenience store), Hy-Vee (supermarket), and Wal-Mart—amounted to 102, 49, 45, and 11, respectively (which may be an understatement since the database includes almost no checks for the latter half of 2000). In fiscal year 2002, the number of violations at these four sellers changed in different directions: 66, 60, 44, and 17, respectively; but by fiscal year 2003, when the number of checks had been halved, the number of violations also dropped sharply: 44, 23, 21, and 6, respectively. Even more relevantly, just within fiscal year 2001 (or, more accurately, the first half of 2001), the number of second violations, which, if the first violations had been promptly prosecuted, would have resulted in 30-day permit suspensions, amounted to eight for Casey’s, five for Kum and Go, two for Hy-Vee, and one for Wal-Mart. Similarly, within fiscal year 2002, second violations for these four chains numbered seven, five, four, and three, respectively, while in fiscal year 2003 the numbers dropped to two, one, one, and one.

To be sure, these large chains’ liability was vastly diminished by the fact that violations were counted on a per permit (store), rather than a corporate-wide, basis. (Some sense of the


506 http://www.iowaabdl.com/search/results_comp.jsp (visited May 20, 2008). In tandem with the legislature’s reduction of IDPH’s tobacco use prevention and control appropriation from $9.3 million to $5 million from fiscal year 2002 to 2003, the allocation to ABD for enforcement was reduced from $1,514,644 to $1,000,000. As a result, ABD reduced annual checks from two to one, but did conduct a follow-up check of those sellers found non-compliant on the first check. This protocol continued until fiscal year 2008, when, with the increase of IDPH’s tobacco use prevention and control appropriation to $8,800,000, the enforcement budget was increased to $1,150,000 and the two-check a year system was reinstated. Tobacco Use Prevention and Control Commission Meeting, Meeting Briefing (June 6 and Aug. 16, 2002), on http://www.legis.state.iq.us/GA/79GA/ Interim/2002/bref/toba.htm (visited May 22, 2008); email from Nicole Gehl to Marc Linder (May 23, 2008); email from Lynn Walding, ABD director, to Marc Linder (May 23, 2008).

507 This conclusion implicitly underlay the decision in a case involving the question as to whether violations could be aggregated with regard to a chain that closed one of its stores and opened a replacement store 1,200 feet away, both of which stores sold cigarettes to minors. If corporation-wide aggregation were permissible, the Iowa Supreme Court would not have devoted the whole opinion to determining whether the two stores were one place of business. Nash Finch Co. v City Council of the City of Cedar Rapids, Iowa, 672
potential sensitivity of various types of stores to a permit suspension can be gleaned from the percentage of total sales accounted for by tobacco at the 2002 Retail Trade Census: convenience (25); gas station/convenience (12); grocery (3); general merchandise (3); supermarket and other grocery (2); pharmacy/drug (2). 508

Although until this time few 30-day suspensions had been imposed, retailers were very “upset” over the ones that had been, especially since the one-month loss for a large-volume seller such as Kum and Go could amount to $30,000. 509

The Attorney General’s Office was deeply dissatisfied with enforcement at the local level because in many instances city councils and county boards of supervisors (before which, as the entities that issued the permits, local prosecutors or the Attorney General’s Office had to bring the cases) refused to impose the monetary penalties and permit suspensions that the law mandatorily required. Local governments exercised discretion that they lacked or knowingly ignored the statutory requirements in some instances because city officials themselves were on good or family terms with or were themselves the business owners in question or, especially in smaller towns, because they did not want to burden the only convenience or grocery store. 510

Since at least the early 1990s officials at IDPH

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508 U.S. Census Bureau, 2002 Economic Census: Retail Trade, Subject Series: Product Lines: 2002, at 61, 90, 57, 132, 58, 78 (Oct. 2005), on http://www.census.gov/prod/ec02/ec0244slls.pdf. These national data, which refer only to establishments that sold tobacco, are somewhat overstated because they include all tobacco products and not just cigarettes.

At one national convenience store chain, QuikTrip, tobacco sales accounted for about 35 percent of non-fuel sales nationally. Patt Johnson, “Pull Out ID: Walgreen to Card All Smokers,” DMR, May 12, 2001 (1A) (NewsBank).

509 Telephone interview with Brian Meyer, Des Moines (May 29, 2008). Meyer, who in 2008 was a Des Moines City Council member and legal counsel to House Majority Leader Kevin McCarthy, was an Iowa assistant attorney general from 2003 to 2006 after completing an internship at the Attorney General’s Office.

510 Telephone interview with Donald Stanley, Iowa assistant attorney general, Des Moines (May 19, 2008); telephone interview with Andrew Chappell, Johnson County assistant county prosecutor, Iowa City (May 20, 2008). Although, as Stanley repeatedly instructed city council members, the penalties were mandatory and could not be modified or waived, often they imposed none and/or engaged in “a form of plea bargaining” with violators. In at least one instance a city councillor, who had previously worked for one of the violators before the council, stated at a meeting dealing with five violators, including Casey’s and Kum and Go, that “she doesn’t like the State’s concentration on the stings” and that “employers do not sell liquor or cigarettes to minors,” adding that she “felt these were isolated incidents during a busy time of the evening.” Monticello, Iowa, City
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had also been acutely aware of—but ultimately unable to overcome—city councils’ refusal to enforce the law largely because members did not want to get on the wrong side of their local merchants.\(^{511}\)

**Kwik Shop, Inc.’s Frivolous Statewide Litigation Campaign**

The test case by which cigarette retailers in Iowa launched their judicial challenge to penalties featured Kwik Shop, Inc., a Kansas corporation that operated 44 retail convenience stores/gas stations throughout Iowa.\(^{512}\) Significantly, Kwik Shop was a division of the Kroger Company, one of the largest food retailers in the United States, which, however, did not own supermarkets stores in Iowa.\(^{513}\) In 2001, three Kwik Shops with cigarette sales permits were located in Burlington, a Mississippi River town with a population of about 27,000. In May and June of that year the Burlington Police Department conducted a compliance check in each store: one passed both times, one failed once, and one failed both checks.\(^{514}\) Kwik Shop’s failure rate was high elsewhere Iowa as well: in fiscal year 2001 it failed 24 of 77 compliance checks outside of Burlington. In Burlington, it was not until 2006 that all its stores passed all the annual checks; overall, from 2001 until 2007, Kwik Shop failed 12 of 34 stings in Burlington.\(^{515}\) A major in the Burlington police was unable to muster empathy

\(^{511}\) Telephone interview with Janet Zwick, Des Moines (June 2, 2008) (former IDPH official in charge of tobacco use prevention and control). When asked why city councils had failed to enforce the no-sales-to-minors law in the 1990s, the head of ABD, which oversees enforcement of the cigarette sales law, replied: “The simple answer is that public support for the tobacco initiative did not exist at that point in time. That position galvanized when over 80 percent of the public identified themselves as non-smokers, and as funds became available from the master tobacco settlement for enforcement efforts.” Email from Lynn Walding to Marc Linder (June 3, 2008).

\(^{512}\) Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 1-2 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002); Rick Smith, “Cigarette Penalties Called Unjust,” Gazette (Cedar Rapids), Feb. 3, 2002 (3B) (NewsBank).


\(^{515}\) http://www.iowaabd.com/search/results_comp.jsp (visited May 22, 2008). Because the stores in Burlington were sold recently to Gasland and the ABD compliance check database (apparently) retroactively converts a store’s name to that of the current owner, it is possible that the data in the text understates Kwik Shop’s violations. Kwik Shop’s
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non-compliance with the law was highlighted during the checks conducted by the Burlington police at 19 businesses on Nov. 7, 2001, when a Kwik Shop was only one of three that sold cigarettes to minors. “Three Employees Cited for Selling Cigarettes to Minors,” Hawk Eye (Burlington), Nov. 9, 2001 (11A:4-5).


Telephone interview with Bernard Spaeth, Whitfield & Eddy, Des Moines (May 23, 2008).

Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 3-4 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002).

The prosecution did not also request a 30-day suspension of the permit of the store that had committed a second violation within a month of the first since “the violations had to be pursued one at a time because the ruling finding a 1st violation was necessary evidence to show a second violation and so on. That is one reason the backlog was so troubling.” Email from Donn Stanley to Marc Linder (May 23, 2008).
contemplation of litigation was obvious from its representation by a lawyer, the manager of the Burlington Kwik Shops, the company’s district advisor, and an official from its headquarters in Kansas; the presence of the firm’s own court reporter, who also swore in its witnesses, suggested that it aimed at more than merely contesting a relatively small fine. In spite of the presentation of seven exhibits (including a “We card under 18” warning sign, training video, and poster), the company’s lawyer’s explanation that Kwik Shop—which did not contest that its employees had sold tobacco products to minors—took the sale of tobacco to minors seriously by training its employees and sending reminders, and testimony by three managerial employees that the company did everything it could to prevent employees from selling cigarettes to minors, the council unanimously voted in favor of the civil penalty.\footnote{Minutes of the Proceedings of the Burlington, Iowa City Council, Spec. Mtg No. 11 (Dec. 17, 2001), on http://www.burlingtoniowa.org/minutes/2001/sm121701.htm (visited May 22, 2008); James Quirk, Jr., “Fines Levied on Local Retailers,” \textit{Hawk Eye} (Burlington), Dec. 18, 2001 (3A:1-2); Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 4-5 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002). One member abstained because the stores’ manager had been a student of his.} This unanimity, however, was deceptive: although the Burlington city council did not go to the extremes of aldermanic nullification that some other cities witnessed, some members were “uneasy”\footnote{“Sting Complaints—Cigarette Retailers Make One Strong, One Weak Argument,” \textit{Hawk Eye} (Burlington), Dec. 21, 2001 (edit.) (NewsBank).} at “being forced to vote in favor of the state,”\footnote{James Quirk, Jr., “Fines Levied on Local Retailers,” \textit{Hawk Eye} (Burlington), Dec. 18, 2001 (3A:1-2).} and the mayor even expressed his feeling that the statute was not “just.”\footnote{Stephen Martin, “Kwik Shop Appealing in Cigarette Sale Case,” \textit{Hawk Eye} (Burlington), Jan. 19, 2002 (3A:2-3).}

Remarkably, these arguments by retail purveyors of the most lethal consumer commodity ever manufactured resonated with the local newspaper, which editorially opined that stings’ “perceived unfairness” might be causing them to lose their “appeal.” In particular, the Burlington \textit{Hawk Eye} was taken with the assertion by Kwik Shop’s Des Moines corporate lawyer, Steve Doohen, that his client was being deprived of its right of due process insofar as it was not afforded the opportunity to question the minors who had bought the cigarettes or otherwise to defend itself. The newspaper got carried away to the point that it prognosticated that the lawyer’s “argument ultimately may derail the practice” because as much as they “favored penalizing those who sell tobacco to minors,” Iowans also “believe in legal fairness.” But apparently Iowans did draw the line
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at one argument advocated by a Kwik Shop manager at the hearing—namely, “that only clerks, not the retailers themselves, should face fines for illegal sales.” Although the Hawk Eye regarded a financial penalty for the employee and the employer as proper because compliance was a “shared responsibility,” it drew no conclusions about the bona fides of an employer that greedily profited from the sale of a deadly commodity through a small army of employees for whose (purportedly negligently) unlawful acts performed in the course of employment it was unwilling to accept noncriminal economic-regulatory liability. If, contrary to the industry’s mantra, cigarettes are in fact only a very conditionally legal product, and complying with all the conditions imposed by federal, state, and local governments made selling cigarette less than optimally profitable, then like Target Stores, Kroger/Kwik Shop could, even if the sickness and death it facilitated did not faze it ethically, have made a “business decision” to drop them. Predictably, on January 16, 2002, Kwik Shop filed a petition for a writ of certiorari, a declaratory judgment, and a stay with a state district court to review the decision by the city council exercising judicial functions. In what the court later called “a laundry list of allegations,” Kwik Shop asserted that the Burlington City Council had, inter alia, failed to afford it sufficient due process, acted arbitrarily capriciously, illegally, in bad faith, and without impartiality, and denied its rights to constitutionally guaranteed procedural and substantive due process and equal protection. Although the company’s allegations appeared to verge on the claim that Iowa Code section 453A.22 was unconstitutional on its face because it made employers per se vicariously liable for their employees’ unlawful acts, Kwik Shop apparently limited itself to the claim that the law was unconstitutional as applied to it. The former argument would have been foreclosed by Iowa Supreme Court precedent involving the identically structured statute regulating the sale of alcohol to minors by permittees’ employees. In that

525“Sting Complaints—Cigarette Retailers Make One Strong, One Weak Argument,” Hawk Eye (Burlington), Dec. 21, 2001 (edit.) (NewsBank).

526Steve Karnowski, “Target Gives Up Cigarette Sales,” San Francisco Examiner, Aug. 29, 1996, Bates No. S000255. To be sure, cigarettes presumably accounted for far more of Kwik Shop’s total sales than the less than the 0.5 percent at Target.

527Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 1-2 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002).

528Telephone interview with Bernard Spaeth, Whitfield & Eddy, Des Moines (May 23, 2008). Another partner in the same firm who represented Kwik Shop was confused as to whether the claim was based on the statute’s facial invalidity or only as applied. Telephone interview with Steve Doheen, Whitfield & Eddy, Des Moines (May 28, 2008).
case, the court rejected the claim of a retail grocery store, whose license was suspended after an employee had been caught by the police in Ames selling beer to a minor, that Iowa Code section 123.50(3) “violates due process because it authorizes an administrative sanction against the license holder based entirely on the isolated act of a nonmangerial employee and without regard to whether the license holder itself was culpable in hiring, training, or supervising the offending party.”

The legal action, according to the chain’s lawyer, simply reflected the company’s having “had enough” and wanting “to fight back.” In particular, it regarded a one-month suspension of a cigarette permit as the equivalent of a “death sentence” since people came to the stores to buy cigarettes and then bought other items, all of which they would buy at some other store whose permit had not been suspended. Far from representing a concerted effort by tobacco retailers, the suit was purportedly prosecuted solely on the initiative of Kwik Shop, which unsuccessfully sought the involvement of other companies, which, however, declined because they feared that they would be targeted for enforcement.

On July 15, 2002, two weeks before the trial, Stanley again appeared before the Burlington City Council to request that it assess a $300 civil penalty against the third Kwik Shop store, an employee of which had pleaded guilty to selling cigarettes to a minor in November 2001. Without any basis in the law, the company’s district advisor argued that it was innocent because it diligently did everything it could—including providing a three-day training session, showing a video, giving a written test, and using cash registers that asked employees whether they had checked the would-be cigarette buyer’s age—to instruct employees not to sell tobacco to those under 18. This encore performance produced the same unanimous vote for imposing the $300 penalty.

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530 Telephone interview with Bernard Spaeth, Whitfield & Eddy, Des Moines (May 23, 2008). The claim that other retailers feared becoming enforcement targets appears to lack plausibility since all 6,000 permittees were already “targeted” twice a year with the same stings.

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Burlington City Attorney, who allowed as “he would rather be sued by Kwik Shop for enforcing the law...than by the state for not upholding it,” expected the company to file yet another lawsuit as a result of the new penalty.\(^{532}\) The mayor’s reaction—that the law put the council “between a rock and hard place”\(^{533}\)—suggested the city’s merely superficial and compelled commitment to enforcement.

At the end of September 2002, district court judge John Linn issued his ruling, which found all of Kwik Shop’s claims to be “without merit” and denied all of its claims and its request for relief.\(^{534}\) Specifically, the judge underscored the undisputed evidence that the two employees had sold tobacco products to minors, in relation to which Kwik Shop’s arguments concerning its policies, training programs, and community involvement were irrelevant; consequently, the “City Council had no choice but to impose the civil penalty.” Because the company had received both proper notice and a meaningful opportunity to be heard, it had not been subjected to any violation of procedural due process. Because the $300 penalty was rationally related to the legitimate governmental interest in stopping underage purchase and use of tobacco, depriving the company of the $300 (which property interest did not rise to the level of a fundamental right) did not violate its substantive due process rights.\(^{535}\)

Initially, Kwik Shop sought review of the district court decision from the Iowa Supreme Court, but then dropped its appeal\(^{536}\) and paid the penalties later in 2002.\(^{537}\) The action in Burlington was by no means the only one that Kwik Shop filed: it also appealed to Iowa district courts adverse decisions by city councils in Ames, Cedar Rapids, Council Bluffs, and Davenport, and the adverse decision in Linn County district court (Cedar Rapids) to the Iowa Supreme Court.\(^{538}\) On February 18, 2003, two days before the scheduled trial in the Ames


\(^{534}\)Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 12 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002).

\(^{535}\)Kwik Shop, Inc. v City of Burlington, Iowa, slip op. at 6-7, 9-11 (Des Moines Cty Dist Ct., Case No. CVEQ004523, Sept. 27, 2002).

\(^{536}\)Telephone interview with Assistant Attorney General Donald Stanley, Des Moines (May 22, 2008).

\(^{537}\)In 2002 Kwik Shop paid $600 plus $96 in costs. http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm

\(^{538}\)James Quirk, Jr., “Stings Lead to Lawsuit,” *Hawk Eye* (Burlington), July 12, 2002
case, Kwik Shop’s lawyers informed the Attorney General’s Office that the company had made a “business decision” to dismiss all of its suits and/or appeals and would “immediately pay its fines and submit to suspensions where appropriate.” Why Kwik Shop suddenly turned off its well-financed litigation machine—apart from the client’s having “lost its taste for fighting” once it developed the feeling that it was “not getting anywhere”—is as puzzling as why it had found it necessary to file multiple test cases in the first place. As to the latter, one of the company’s lawyers ascribed it merely to the “glut” of penalties that happened to surface at the same time. In contrast, Assistant Attorney General Donald Stanley speculated that the company may have been “forum shopping for a venue to get a favorable ruling” and/or “counting on catching a local prosecutor unprepared.”

Prior to 2000, Ames had “one of the worst [noncompliance] rates among Iowa

\[\text{(NewsBank); James Quirk, Jr., “Council, Kwik Shop Face Off on Citations,” Hawk Eye (Burlington), July 14, 2002 (NewsBank); email from Donn Stanley to Eric Tabor (chief of staff, Iowa Attorney General’s Office) (Feb. 18, 2003) (forwarded to Marc Linder May 27, 2008).}\]

\[\text{539} \text{Email from Donn Stanley to Eric Tabor (chief of staff, Iowa Attorney General’s Office) (Feb. 18, 2003) (forwarded to Marc Linder, May 27, 2008). Kwik Shop voluntarily dismissed both appeals to the Supreme Court on Feb. 18, 2003. Kwik Shop, Inc. v City of Burlington, Docket No. 02-1994 (Feb. 18, 2003), on http://www.iowacourts.state.ia.us/ESAWebApp/AIndexFrm; Kwik Shop, Inc. v City of Cedar Rapids, No. 03-0052 (Feb. 18, 2003), on http://www.iowacourts.state.ia.us/ESAWebApp/AIndexFrm. At this point the resolution of the Davenport case had not been decided, but Kwik Shop dismissed it with prejudice on Feb. 2, 2003 (sic; probably a typo for 2004). http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm}\]

\[\text{540} \text{Email from Assistant Attorney General Donn Stanley, Des Moines, to Marc Linder (May 23, 2008).}\]

\[\text{541} \text{Telephone interview with Steve Doheen, Whitfield & Eddy, Des Moines (May 28, 2008). Five years after the fact Kwik Shop’s lawyer was unable to articulate a reason other than a hazy recollection of some nebulous “resolution” of the dispute. Telephone interview with Bernard Spaeth, Whitfield & Eddy, Des Moines (May 23, 2008). With certitude, Assistant Attorney General Donald Stanley commented that: “There was no compromise with Kwik Shop on penalties. It received absolutely nothing in consideration for its decision to drop its appeal and remaining district court actions.” Email from Donald Stanley to Marc Linder (May 27, 2003).}\]

\[\text{542} \text{Telephone interview with Steve Doheen, Whitfield & Eddy, Des Moines (May 28, 2008).}\]

\[\text{543} \text{Email from Assistant Attorney General Donn Stanley, Des Moines, to Marc Linder (May 23, 2008).}\]
cities”—in 1999, 41 percent compared to a statewide average of 25 percent. City officials had ignored the problem, according to an Ames drug treatment agency that was at risk of losing part of the state’s federal block grant on account of the high violation rate, “because they don’t want to confront business owners who pay $100 each year for a tobacco license,” although the Attorney General’s Office made it clear that the city councils that issued permits were, under longstanding laws, responsible for penalizing retailers.544 More specifically, the then city attorney later explained, the city council had not wanted to become involved in imposing penalties on cigarette retailers because it viscerally did not want to get on the wrong side of local merchants, especially in light of the bitter memories of the controversy over its revocation of an alcohol license some years earlier triggered by the actions of a “hapless” employee.545 The procedures that Kwik Shop deployed in Ames were virtually identical to those it had used in Burlington. After vainly presenting the same irrelevant materials at the city council hearing, on June 27, 2002, Kwik Shop filed in Story county district court the same kind of suit with the same allegations, culminating in the same claim that section 453A was unconstitutional. On February 17, 2003, three days before the nonjury trial was scheduled, Kwik Shop voluntarily dismissed its case and was assessed $215 in costs.546

Sting operations in Cedar Rapids went back to 1994, when IDPH conducted test checks in five counties, including Linn, discovering that teens 16 and younger were able to buy tobacco about half the time.547 Preparatory to the initiation of real compliance checks in May 1996, the police in Cedar Rapids conducted trial stings in January, finding that 21 of 23 business sold to the minor. At a meeting in April organized by the police department and the federally funded COMMIT

545Telephone interview with John Klaus, Ames (May 23, 2008).
546Jason Kristufek, “Kwik Shop Sues City of Ames After Fine,” Tribune (Ames), July 5, 2002; Jason Kristufek, “Kwik Shop Sues Ames over Tobacco Citation,” Tribune (Ames), Nov. 26, 2002 (visited May 23, 2008); http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm; http://www.iowacourts.state.ia.us/ESAWebApp/TViewFinancials (visited May 23, 2008). Because the city council, unwilling to incur retailers’ wrath, had assigned the adjudication to the city attorney, it was inappropriate for him or his office to represent the city council in defending the suit, and therefore Assistant Attorney General Stanley intervened. Telephone interview with Judy Parks, city attorney, Ames (May 23, 2008).
547“Tobacco Accessible to Teens,” Gazette (Cedar Rapids), Nov. 18, 1994 (2B) (NewsBank).
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(Community Intervention Trial for Smoking Cessation) retailers already began to complain that they would be penalized more for contributing to teenager smoking than the teenagers themselves.548 Despite all the publicity, stings soon found Kwik Shop and Hy-Vee selling to 16-year-olds.549 Apparently, however, only clerks were fined, and it was not until 1999, in the wake of state pressure, exerted in order to avoid loss of federal drug abuse block grants, that federal and state law finally began to “trickle down to the local level,” resulting, for the first time, in $300 penalties for 37 permittees.550 By the end of 2000 one of the Kwik Shop stores had racked up its second violation within two years and became, together with a Hy-Vee store and two other businesses, the first to have its cigarette permit suspended for 30 days.551 The owners and managers of the four all agreed that the penalty was “too stiff”—one, a gas station owner for whom cigarettes were only a “sideline business,” threatened to stop selling them “if it gets to be too much of a hassle”552—but only Kwik Shop chose to litigate.

Before the Cedar Rapids City Council Kwik Shop staged a choreography virtually identical to that used in Burlington, down to hiring its own court reporter to “document” the statements of the company’s lawyer and representatives and of the council members “for possible use in a court proceeding down the road.” Kwik Shop decided to strike back at the beginning of 2002 when, based on a third violation in the same store, it faced a 60-day suspension (following ones for 14 and 30 days), which, its lawyer, Steve Doohen, told the city council, could cost it $80,000 in lost revenue. He depicted this sum as disproportional compared to the $100 fines meted out to each of the three stung clerks; more generally, he called the civil penalty “a stiff one in a work world where store clerks often are low-wage earners.” Apparently, however, these wages were adequate compensation for the abysmal skills of the clerks, who asked for identification and then nevertheless misread the birth date on the driver’s license. Echoing a complaint that capitalists, boasting of also being better at their lowly agents’ tasks than they are, have voiced through the ages, a Kwik Shop representative bemoaned that:

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“We have clerks who perhaps don’t care as much as Kwik Shop cares,’’ but, alas, “Kwik Shop supervisors can’t be in the store at all times....” The problem, as far as the convenience store chains were concerned, was that, with decisions left to non-omnipresent local managers, corporate headquarters was unable effectively to deal with the de facto control exercised by 21-year-old clerks—“we don’t get Ph.D. candidates”—vis-a-vis friends who were minors. ABD administer Walding, the state’s chief tobacco enforcement official, whose “‘overall goal [wa]s to partner with the retail community,” reinforced retailers’ position by applauding Walgreen and other companies that “‘take initiative to keep tobacco out of minors’ hands’” and declaring that “[m]ajor responsibility remains with the clerks who sell tobacco....” The company’s concern about being dragged down by minimum-wage workers was especially hollow and ironic inasmuch as in 1999, when Deputy Attorney General Eric Tabor had stated that it was illegal for anyone under 18 to sell tobacco (because it was unlawful for minors to possess it), he himself acknowledged that “retailers would have a hard time staffing their counters if they couldn’t hire teenagers....” The president of the Iowa Grocery Industry Association could not have agreed more: “‘That would be a very big issue for us.... I don’t think it would be the intent of the Legislature to throw teen-agers out of work.’”

Cutting a Legislative Deal Instead

Kwik Shop’s abandonment of the judicial track for eliminating penalties was coordinated with the industry’s decision to turn to the traditionally

554 Telephone interview with an Iowa convenience store chain lobbyist who demanded anonymity (June 13, 2008).
556 Patt Johnson, “Pull Out ID: Walgreen to Card All Smokers,” DMR, May 12, 2001 (1A) (NewsBank). At the same time Walding also accommodated another demand of retailers by introducing the cop-in-the-shop reverse sting in which police posed as clerks in order to ticket underage buyers because “[r]etailers tell us the entire burden shouldn’t fall on their shoulders.... Kids should be held accountable, too.” Madelaine Jerousek, “Sting to Smoke Out Underage Buyers,” DMR, May 4, 2001 (3B) (NewsBank).
accommodating Republican-led legislature for a remedy. What “we were looking for,” Dawn Carlson, the president of and lobbyist for the Petroleum Marketers and Convenience Stores of Iowa,\(^{558}\) frankly observed five years later, was an “affirmative defense to acknowledge our training.” The focus on this issue derived from the experience that “we struggle with training employees. No matter what we do to train them, human error is likely.” While ultimately falling short, this affirmative defense went as far toward achieving retailers’ real goal of severing the statute’s automatic link between employees’ sale of cigarettes to minors and employers’ liability as was politically feasible.\(^{559}\) And as Lamberti added with regard to the Kwik Shop litigation, most retailers had become resigned to the constitutionality of their vicarious civil liability for clerks’ illegal sales.\(^{560}\)

In a memorandum to higher-ups in the Attorney General’s Office, on February 18, 2003, the day on which Kwik Shop’s lawyer had informed him that it would drop all its judicial challenges and pay its penalties, Assistant Attorney General Donald Stanley presciently forecast Iowa cigarette sellers’ strategic reactions: “Other tobacco retailers were following this litigation and this action by Kwik Shop should help us in getting other retailers to pay their fines and serve their suspensions. However, this also probably means the retailers will be more desperate to succeed in amending the law this session. It may also mean the retailers are more confident about accomplishing this task at the legislature.”\(^{561}\) And in fact, as one of Kwik Shop’s lawyers later observed, an aspect of the strategy of dropping all the cases was to proceed instead by lobbying.\(^{562}\) In the event, the very next day the House Public Safety Committee received a study

\(^{558}\)http://www.pmcofiowa.com/index.cfm?page=63 (visited May 24, 2008). The organization represented both smaller stores and all major chains except Casey’s, whose membership, after small-town gasoline retailers (and their Petroleum Marketers organization) had (unsuccessfully) sued it in the 1980s, charging that Casey’s had destroyed them by selling gasoline at below cost and then recouped the losses by charging monopoly prices, was deemed inappropriate. Telephone interview with Dawn Carlson, Des Moines (May 23, 2008); Bathke v Casey’s General Stores, Inc., 64 F3d 340 (8th Cir. 1995).

\(^{559}\)Telephone interview with Dawn Carlson, president and CEO, Petroleum Marketers and Convenience Stores of Iowa, Des Moines (May 23, 2008).

\(^{560}\)Telephone interview with Jeffrey Lamberti, Ankeny (May 30, 2008).

\(^{561}\)Email from Donald Stanley to E[ric] Tabor et al. (Feb. 18, 2003) (forwarded to Marc Linder).

\(^{562}\)Telephone interview with Steve Doheen, Whitfield & Eddy, Des Moines (May 28, 2008).
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bill—which on February 11 it had requested the Legislative Services Bureau to
draft—563—that embodied a first draft of the industry’s desiderata.564 The timing
was, as one of Kwik Shop’s lawyers later confirmed, “no coincidence,” especially
since tobacco permittees had also been lobbying during the litigation phase as
part of a large coordinated effort.565 Speaking specifically about this legislation
but also more generally about study bills, Lamberti observed that “these things
don’t just appear from nowhere.”566

The fulcrum for the legislative initiative was the mandate in State
Government Committee-proposed Senate Study Bill 1117 (which the industry
regarded as a “vehicle” for correction of tobacco control issues)567 to ABD to
develop minimum criteria for tobacco compliance employee training programs
provided by retailers to inform their employees about federal and state regulation
of tobacco sales to minors. Presumably to insure that no burden be imposed on
cigarette sellers’ finances or their workers’ attention span or knowledge base, the
study bill instructed the ABD not to require the program to exceed one hour.568
The actual training, however, as Carlson later noted, “we wanted to do...in-
house.”569 The bill, as Johnson County Attorney J. Patrick White, whose office’s
tobacco stings had been achieving compliance rates upwards of 90 percent,
observed shortly after its enactment, responded to tobacco retailers by giving
them a “‘get out of jail free card’” by conferring on them “essentially...one free
violation if they have had their employees go through training sponsored by the
State.”570 Specifically, S.S.B. 1117 provided that, “unless the retailer directs or

563 Request for Bill Drafting, LSB #2384HC (Feb. 11, 2003) (copy from State
Archives, furnished by Rich Johnson, Legal Services Division Director, LSA).
564 On H.S.B. 170 (Feb. 19, 2003, by Public Safety Committee), see below.
Simms had also worked for Whitfield & Eddy.
566 Telephone interview with Jeffrey Lamberti, Ankeny (May 30, 2008).
567 Telephone interview with James West, Des Moines (May 21, 2008).
companion bill was H.S.B. 245 (Mar. 5, 2003, by Public Safety Committee). The
committee had filed a bill drafting request form for it on Feb. 4. Meaghan McCarthy,
SHSI DM (June 2, 2008).
569 Telephone interview with Dawn Carlson, president and CEO, Petroleum Marketers
and Convenience Stores of Iowa, Des Moines (May 23, 2008).
570 Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2
(visited Oct. 23, 2008). Five years later an assistant attorney in the same office
experienced in section 453A prosecutions used exactly the same “get out of jail free card”
knowingly permits the employee to violate” the no-sales-to-minors section, “the retailer shall not be assessed a penalty...for a first or second...violation...that takes place at the same place of business within a one-year period” and the “underlying violations shall be deemed not to be violations...for the purpose of determining the number of penalties” for the progressive enforcement penalty scheme if the retailers had the aforementioned prescribed training program in place and the employee acknowledged in writing that he or she had completed the program and understood the laws and regulations.571 Significantly, key parts of these extraordinarily retailer-friendly provisions were drafted by the Iowa Grocery Industry Association.572

Lamberti later stressed that retailers had liked the study bill, even though it ultimately did not embody one of their more intriguing suggestions—namely, getting their clerks’ attention by increasing the fine for selling to minors to $1,000. The inescapable self-contradiction inherent in this proposal, which was calibrated to motivate these low-wage workers to stop selling to minors and thus potentially causing their employers revenue losses in the tens of thousands of dollars resulting from a 30- or 60-day permit suspension, lay in its double-edged severity: the possibility of being forced to pay the equivalent of several weeks’ wages as a fine might deter a considerable proportion of potential employees from taking the job to begin with.573

S.S.B. 1117 was received by the Senate State Government Committee on February 26, 2003, a week after H.S.B. 170—a very similar measure, which lacked the provision under which violations would not count under the

572The two free passes, the “knowingly” provision, and the 60-minute limit on training were contained in an amendment (included in the bill drafting files) that bore the computer print-out code: L:\Transitional\JBWest\Iowa_Grocery_Ind_Assoc\Legislative\453A.22. new.doc. The copy in the Senate file bore the committee chair’s initials (MZ) and the House file’s the chair’s signature (Clel Baudley). Request for Bill Drafting, LSB #2384SC (Feb. 11, 2003); Request for Bill Drafting, LSB #2384HC (Feb. 11, 2003).
573Telephone interview with Jeffrey Lamberti, Ankeny (May 30, 2008). According to a convenience store chain lobbyist, companies believed that clerks, who were largely paid $9.00 to $9.50 an hour on a part-time basis, needed to be subjected to more severe fines amounting to three weeks of pay (and fired). Telephone interview with lobbyist who demanded anonymity (June 13, 2008).
574Senate Journal 2003, at 1:325 (Feb. 26). The Senate State Government Committee had filed a bill drafting request form on Feb. 11. Request for Bill Drafting, LSB #2384SC (Feb. 11, 2003) (copy from State Archives, furnished by Rich Johnson, Legal Services Division Director, LSA).
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progressive penalty scheme\textsuperscript{575}—had been received by the House Public Safety Committee but appears not to have been acted on.\textsuperscript{576} (At its meeting on February 21, the Tobacco Use Prevention and Control Commission heard the program administrator of the IDPH Tobacco Use Prevention and Control Division talk about proposed legislation on tobacco retailer fines and penalties, but unfortunately the minutes failed to preserve any of the substance.)\textsuperscript{577} S.S.B. 1117 was assigned to a three-member subcommittee chaired by Republican Bryan Sievers, the committee vice chair. The other Republican member was Doug Shull,\textsuperscript{578} the former chief financial officer of Casey’s,\textsuperscript{579} one of the state’s largest

\textsuperscript{575}The House and Senate bill study files (whose “working title of request” was “Tobacco retailers”) in the State Archives contain identical versions that antedate and differ somewhat from those cited in the text, which are included in the comprehensive collection of study bill books at the University of Iowa Law Library. The working title of the bill drafting requests for the second versions of the House and Senate study bills, which were also identical, was “Cigarette retailer[s] compliance”; they contained identical handwritten insertions (perhaps by Mark Zieman, Senate State Government chair) of the provisions specifying that the first two violations were not to be deemed violations for the purpose of determining the number of violations for which penalties were to be assessed and the 60-minute limit on trainings. Request for Bill Drafting, LSB #2779SC (Feb. 2[?]1, 2003); Request for Bill Drafting, LSB #2779HC (Feb. 2[?]1, 2003).

\textsuperscript{576}H.S.B. 170 (Feb. 19, 2003, by Public Safety Committee), House Journal 2003, at 1:379. This study bill appears, according to the House Journal, not to have been assigned to a subcommittee. However, according to the Iowa Legislative News Service Bulletin, #22 at B (Feb. 19, 2003), it was assigned on Feb. 19 to a subcommittee composed of Dwayne Alons (chair), Kevin McCarthy, and George Eichhorn. Five years later, Alons had only a hazy recollection of the study bill. Telephone interview with Dwayne Alons, Hull (May 28, 2008). Committee chair Clel Baudler, when asked about the study bill’s provenience, (incorrectly) recalled that the Attorney General’s Office had proposed it as “an education thing—to educate the retailers.” Telephone interview with Clel Baudler, Greenfield (May 28, 2008). Apparently H.S.B. 170 was superseded by H.S.B. 245, which was identical to S.S.B. 1117. H.S.B. 245 (Mar. 5, by Public Safety Committee); House Journal 2003, at 1:519. The next day it was assigned to a subcommittee composed of Clel Baudler (chair), Kevin McCarthy, and Tom Sands. House Journal 2003, at 1:532 (Mar. 6). For unknown reasons, on the same day that H.S.B. 245 emerged in the House, the Senate State Government received S.S.B. 1141, which was identical to the already superseded H.S.B. 170, and assigned it to a subcommittee composed of Sievers, Johnson, and Ragan. Senate Journal 2003, at 1:390, 394 (Mar. 5).

\textsuperscript{577}Tobacco Use Prevention and Control Commission Meeting, Minutes, Feb. 21, 2003 at 1 (copy furnished by Bonnie Mapes, Director, Tobacco Use Prevention and Control Division, IDPH) (Threase Harms-Hassoun was the administrator).

\textsuperscript{578}Senate Journal 2003, at 1:327 (Feb. 26). Senator Jack Kibbie was the Democratic
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sellers of cigarettes. (Although Shull failed to mention this revealing dimension of his career in his rather detailed entry in the Iowa Official Register,\textsuperscript{580} anti-tobacco lobbyists\textsuperscript{581} and his Senate colleagues were well aware of his Casey’s connection and his favorable attitude toward bills advantaging his former source of a livelihood.\textsuperscript{582} Notably, in 2004, after the Republicans had lost their Senate majority, he supported ousting Iverson as Senate party leader and replacing him with Jeffrey Lamberti, the son of the founder of Casey’s.\textsuperscript{583} Just a few months earlier both Sievers and Shull had received campaign contributions of $250 and $500, respectively, from the Hy-Vee, Inc. PAC, but they were only two of many Iowa legislators on whom the large supermarket/cigarette merchant had bestowed its largesse.\textsuperscript{584} However, Shull had also been the recipient of contributions from other cigarette sellers, including $200 from Fareway Stores PAC,\textsuperscript{585} $500 from the Iowa Grocery Industry Association/Grocers PAC,\textsuperscript{586} $1,000 from Donald Lamberti, the chairman of Casey’s, and—most intriguingly—$1,000 from W. A. Krause, the founder of Kum and Go, a convenience store/gas station chain competing against Shull’s former firm, Casey’s.\textsuperscript{587}

Despite these cozy connections, an ABD tobacco control official explained the bias in the bill—which was being pushed by the retailers, grocers, and petroleum marketers and convenience store associations—as a result of the fact

\textsuperscript{580}Iowa Official Register: 2005-2006, at 42 (the Register was not published for 2001-2002 or 2003-2004).
\textsuperscript{581}Telephone interview with Jennifer Harbison, Des Moines (May 19, 2008) (lobbyist for American Cancer Society in 2003 who worked on this bill).
\textsuperscript{582}Telephone interview with Sen. Jack Hatch, Des Moines (May 19, 2008).
\textsuperscript{585}http://www.followthemoney.org/database/StateGlance/contributor.phtml?d=222975518 (visited May 20, 2008). Although Fareway, too, contributed money to many legislators, Shull received one of the highest amounts.
that “a certain group of legislators with a certain ideological perspective were given inaccurate information by lobbyists representing retailers. As sometimes happens in the process, the lobbyists had in turn been somewhat misinformed by their clients.” The backers’ “strategy” in moving the bill “was to keep the draft from being introduced until the same day the bill was scheduled to be considered by the senate state government committee.” H.S.B. 170 and 245. This plan was thwarted when House Democrat Kevin McCarthy—who was on the three-member House Public Safety Committee subcommittees to which the companion House study bills were assigned—“caught wind of the bill and...forewarned” the attorney general’s lobbyist and other tobacco control lobbyists that the study bill “had legs.” The tobacco control organizations, which found the original bill “offensive,” then intervened to provide the committee with information indicating that it had been misinformed by retailers as to the reality of the implementation of the new enforcement program. Until a compromise could be forged, the committee declined to move the bill as initially introduced. On March 6, the ABD’s

588 Email from Nicole Gehl to Marc Linder (May 18, 2008).
589 H.S.B. 170 and 245.
590 Telephone interview with Nicole Gehl, ABD (May 16, 2008); email from Nicole Gehl to Marc Linder (May 17 and 18, 2008). The existence of the study bills was presumably not unknown since the requesters of the House and Senate bills checked the “no” box on the LSB bill drafting request form as to whether they wanted the requests to be confidential (otherwise the LSB would not have listed the requests in the index of bill requests or released any information about them). Request for Bill Drafting, LSB #2384HC (Feb. 11, 2003); Request for Bill Drafting, LSB #2384SC (Feb. 11, 2003).
591 Telephone interview with Brian Meyer, Des Moines (May 29, 2008).
592 Telephone interview with Nicole Gehl, ABD (May 16, 2008); email from Nicole Gehl to Marc Linder (May 17 and 18, 2008). ABD was/is responsible for enforcement of tobacco use and sale laws. Among the inaccuracies fed to legislators was retail lobbyists’ assertion that “retailers were not notified of violations and therefore retailers, since [they] could not be expected to correct problems that they were not aware of, were being unfairly treated by the program. Although [sic] not entirely logical, the complaint resonated with a group that was looking for a reason to support the bill. The assertion was simply not true. I submitted copies of the form letter to the committee that was sent out within 48 hours of a local police officer submitting a check to ABD.” Email from Nicole Gehl to Marc Linder (May 18, 2008). The notion that the anti-tobacco movement had had to be informed by McCarthy of the bill’s existence is contradicted by the fact that IDPH had been monitoring and was well aware of the content of the study bills. Iowa Department of Public Health, Legislative Update 9(6) (Feb. 24, 2003) and 9(7) (Mar. 3, 2003), on http://www.idph.state.ia.us/adper/common/pdf/legis/archive/2003/09-06.pdf and http://www.idph.state.ia.us/adper/common/pdf/legis/archive/2003/09-07.pdf.
legislation monitor informed the Iowa Alcoholic Beverages Commission that the retailers and the ABD had reached a “tentative compromise” to modify the study bill, which had “attempted to eliminate penalties for tobacco sales to minors for the retailer by introducing an affirmative defense for training,” by “loosen[ing] the penalty structure for retailers” and permitting the use of such a defense only once every four years.\footnote{Iowa Alcoholic Beverages Commission, Minutes (Mar. 6, 2003), on http://www.iowaabd.com/about_offi ce/commission_minutes/03062003.jsp (visited May 19, 2008) (report by Nicole Gehl).}

On March 12, after hearing a clarification from Eric Tabor of the Attorney General’s Office, the Senate State Government Committee adopted Senator Sievers’ amendment to S.S.B. 1117, which, manifestly the product of a grand compromise between sellers and state enforcement agencies, was a complete reworking of the bill.\footnote{S.S.B. 1117.301 (by Sievers) (copy furnished by LSA).} As unanimously approved—even the chamber’s veteran anti-smoker, Michael Connolly, voted Aye, while Lamberti voted “present” (i.e., abstained)—the bill then became committee bill S.F. 401.\footnote{Committee Minutes for [Senate] State Government (Mar. 12, 2003) (copy furnished by Secretary of Senate); Senate Journal 2003, at 1:511, 523 (Mar. 17). Lamberti reportedly abstained from committee votes affecting his family’s business. Email from Nicole Gehl to Marc Linder (May 17, 2008).} Amended S.S.B. 1117/S.F. 401 differed from S.S.B. 1117 as filed chiefly in four respects. First, if local authorities did not assess a penalty for selling to minors within 60 days of an adjudication of the violation, the matter had to be transferred to IDPH.\footnote{S.F. 401, § 1 (Mar. 17, 2003).} The apparent reason for this change was that, as already noted, until then many local governments had declined to prosecute in compliance with the statute’s mandatory imposition of civil penalties because the violator might be the only convenience store or business in town or, even more perversely, the mayor or some other local official.\footnote{Email from Andrew Chappell, Johnson County assistant attorney, to Marc Linder (May 16, 2008).} With transfer to the IDPH, the Attorney General’s Office would proceed with the prosecution and the civil penalty would accrue to the state rather than the local governments.\footnote{Telephone interview with Nicole Gehl, ABD (May 16, 2008).}

This last feature in large part accounted for the attorney general’s lobbyist’s
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having declared for the bill. The attorney general’s intense interest in this change was easily understood: because many hundreds of violations were going unprosecuted as a result of local governments’ resistance or neglect, back-up prosecutions by the state had become very burdensome, especially since they required an assistant attorney general from Des Moines constantly to be traveling all over the state to appear before city councils. The proposed provision, which would enable the attorney general to prosecute these cases in a centralized fashion before an administrative law judge attached to ABD in Ankeny, promised to ease the burden and eliminate the considerable backlog. Although the Attorney General’s Office had considered proposing such an amendment on its own to the legislature, it had refrained from doing so lest an uncontrollable legislative process, under the influence of a tobacco lobby intensely interested in reducing, if not eliminating, the penalties, generate other changes that would leave the statute weaker than before. But once the cigarette sellers launched the study bill with its extraordinary affirmative defense, the Attorney General’s Office had no choice but to “counterpunch” and salvage the best it could from a process that it not only had not, but might never have, initiated.  

Second, now ABD was required itself to develop the tobacco compliance employee training program (capped at two hours) and to make it conveniently, accessibly, and practicably available to retailers’ employees at no cost to them or their employers. Although ABD would have preferred no new law at all, it salvaged something of a compromise, in part through this provision, which, by entrusting the administration of training to the agency, enabled it to insure standardization and quality. Conversely, retailers, who had wanted to do the training in-house, regarded the provision as a partial setback.

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600 http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=80&type=b&hbill=SF401 (Eric Tabor was the AG’s lobbyist).
601 Telephone interview with Donald Stanley, assistant attorney general, Des Moines (May 20 and 22, 2008). Unfortunately, the substance of Stanley’s post-enactment discussion of S.F. 401 at an important official tobacco control organization meeting was not preserved. Tobacco Use Prevention and Control Commission Meeting, Minutes, Apr. 18, 2003 at 2 (copy furnished by Bonnie Mapes, Director, Tobacco Use Prevention and Control Division, IDPH).
603 Telephone interview with Nicole Gehl, IABD (May 16, 2008).
604 Email from Nicole Gehl, IABD, to Marc Linder (May 17, 2008). Although the training was free to retailers, it was funded by the civil penalties collected from state prosecutions of tobacco sales to minors. Id.
605 Telephone interview with Dawn Carlson, president and CEO, Petroleum Marketers
Third, S.F. 401 significantly relaxed the penalties for cigarette sellers in a way that even the study bill had not. Under the existing law (following a $300 civil penalty for a first violation plus an automatic 14-day permit suspension for failure to pay the penalty), a retailer’s cigarette sales permit was suspended for 30 days for a second violation within two years and for 60 days for a third violation within three years, and revoked for a fourth violation within three years.606 Under the bill, the penalties were now structured this way: for a second violation within two years the retailer was given a choice between a $1,500 civil penalty and 30-day suspension; for a third violation within three years the retailer was assessed a civil penalty of $1,500 and its permit was suspended for 30 days; for a fourth violation within three years the $1,500 penalty was paired with a 60-day suspension; and not until a fifth violation within four years was the permit revoked.607 In other words, the so-called compromise bill enabled retailers to pay their way out of a suspension,608 reduced the suspension periods, and increased the number of violations before revocation kicked in. Crucial to understanding the new penalty scheme is that, as one county prosecutor commented based on experience following enactment, “convenience stores always pay the $1,500 for a second violation because it is so much less than they would lose with a thirty-day suspension.” In contrast, for example, bars, which often did not sell many cigarettes, “choose to serve the suspension on a second violation.”609

Unsurprisingly, it was the convenience stores/gas stations and cigarette retailers generally that pushed for this legislation. In particular, it was, as one of the leading state tobacco enforcement administrators observed, Hy-Vee and Kum-and-Go that “drive this bus.” In other words, Hy-Vee—whose lobbyists, Charles Wasker and William Wimmer, were for many years the Tobacco Institute’s Iowa lobbyists—and Kum and Go most aggressively fought against effective enforcement of cigarette sales regulation.610 Ironically, shortly before securing

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and Convenience Stores of Iowa, Des Moines (May 23, 2008).

607 S.F. 401, § 3 (Mar. 17, 2003).
608 Telephone interview with Brian Meyer, Des Moines (May 29, 2008).
609 Email from Andrew Chappell, Johnson County assistant attorney, to Marc Linder (May 16, 2008). Chappell also pointed out that municipalities presumably did not complain about the amendment because they would receive $1,500 for a second, third, or fourth violation instead of nothing.
610 Telephone interview with Nicole Gehl, IABD (May 16, 2008); http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=Dsp Report&ga=80&type=b&hbill=SF401. On Wasker and Wimmer, see above chs 25-29. Although Kum and Go’s lobbyists, West et al. were listed as undecided on S.F. 401, they
this enfeeblement of the chief law designed to suppress sales to minors, Wasker, echoing his old paymasters’ implausible claims, had asserted: “‘My tobacco clients would be supportive of anything that would be effective in keeping cigarettes out of the hands of children.”\textsuperscript{611} And the senior vice president of Krause Gentle Corporation, which operated 185 Kum and Go stores in Iowa (which had racked up a 19 percent noncompliance rate during the most recent enforcement checks), sanctimoniously chimed in that “‘[w]e don’t think it is right to sell tobacco products to minors.”\textsuperscript{612}

And fourth, S.F. 401, in what was perhaps the principal compromise that the big retailers made, reduced the scope of the study bill’s aforementioned free pass for illegal sales to minors effected by employees: now retailers were entitled to assert the bar to prosecution, based on the employee’s holding a certificate for having completed a training program, only once within four years.\textsuperscript{613}

Substantively virtually unchanged, S.F. 401 passed the Senate by a vote of 41 to 6. Most of those Nays were cast by strong anti-smoking advocates\textsuperscript{614} for whom the blatant blunting of the financial deterrent to the sale of cigarettes to minors remained unacceptable even after modification.\textsuperscript{615} In the House, not a single tobacco control advocate rebelled against the compromise as the bill passed by
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a vote of 96 to 0. Perhaps the members understood no more of the bill’s substance than the other-worldly summary that IDPH had published in its Legislative Update two days before the vote: after mentioning the transfer of jurisdiction after 60 days and ABD’s responsibility for training, it alluded to rest of the bill (which underlined enforcement) as: “Mak[ing] changes on assessing violations.” The bill became law and its provisions remain in the Iowa Code with an attenuated financial deterrent—or, in ABD’s aseptic description, the “retail community,” the attorney general, IDPH, and ABD “worked together on a compromise to the tobacco retailers bill that creates another step in the civil penalty process on the way to revocation....

A somewhat more straightforward assessment came from the grocery stores’ lobbyist who, after genuflecting before the tobacco industry’s shibboleth that “obviously no one wanted to sell cigarettes to minors,” declared that he was unable to say whether the outcome was “win-win,” but that definitely retailers were not worse off after the bill’s passage.

The claim by the president of the Petroleum Marketers and Convenience Stores of Iowa that S.F. 401 as enacted was less favorable to retailers than the original study bill was plausible insofar as it was rooted in the view that cigarette retailers’ highest priority had been to construct an affirmative defense by means of which they could escape liability for employees’ unlawful sales. But to the extent that sellers, driven by the perceived need to escape permit suspension—and the allegedly attendant permanent loss of

616 House Journal 2003, at 1:841-42 (Mar. 26). Before voting on the bill the House substituted it for H.F. 637, which had been its companion bill. One explanation as to the lack of opposition was that the governor’s lobbyist had “instructed all parties to negotiate a deal,” while a backlog of prosecutions from the Attorney General’s Office “created a desire on the part certain parties to settle the matter before the bill went to the floor for debate.” Consequently, some anti-tobacco legislators “may have gone along with the compromise that the anti-tobacco lobby had a part in negotiating.” Email from Nicole Gehl to Marc Linder (May 18, 2008). When asked whether the virtual unanimity was not puzzling, Senator Joe Bolkcom replied: “I didn’t understand it either at the time. Still don’t. Somebody must have made a deal.” Email from Joe Bolkcom to Marc Linder (May 20, 2008).


619 Iowa Code § 453A.22(2) and (3) (2009).


621 Telephone interview with James West, Des Moines (May 21, 2008).
customers who would thenceforth also buy their sodas and newspapers at stores with intact permits—had succeeded in substituting a $1,500 penalty for it, they undermined enforcement almost as effectively as a twice yearly affirmative defense. Nevertheless, even though the monetary penalty was, as Lamberti later stressed, not significant to larger retailers such as Casey’s in comparison to the costs of a suspension, he concluded that retailers would clearly have been better off with the original study bill. Although Johnson County Attorney White acknowledged that the law “change was not huge,” he found it emblematic of the “tremendous power” of “the smoking lobby” that “for all of the focus...on smoking, the change slipped through very quietly.”

Unsuccessful Smoking Ban and Local Preemption Repeal Bills Even in the Wake of Republicans’ Loss of Control of the Senate: 2005-2006

“Iowa has one of the worst track records in the country.”

As Democrats in the November 2004 election gained joint (25-25) control of the Senate with Republicans and came within one seat of parity in the House (51-49), leaving Republicans “with no votes to spare,” even the presumptive Senate Democratic co-leader Michael Gronstal stressed that the voting stalemate “will force us to find common ground.” Without saying it went that more stringent public smoking bans would neither find that ground nor fit the “very limited agenda” of “centralist things” that Senate Republican leader Iverson predicted would be the watchword. In the same vein was Governor Vilsack’s admonition that the message of the election returns was that “the extremes are not what Iowans want.” None of these forecasts of a non-innovative biennium, however, deterred anti-smoking forces from at least introducing the by then traditional bills.

622 Telephone interview with Dawn Carlson, president and CEO, Petroleum Marketers and Convenience Stores of Iowa, Des Moines (May 23, 2008).
banning smoking in restaurants and bars and repealing local preemption or from finally daring to put forward a full-scale revision of Iowa Code section 142B to ban public smoking radically. Under adverse political circumstances, Representative Janet Petersen, the chief sponsor of H.F. 2110, the Smokefree Public Places and Workplace Safety Act, was in effect undergoing a trial run for passing such a statewide ban whenever Democrats gained control of both houses and an anti-tobacco governor would sign such a bill.

The first bill filed in 2005, S.F. 1, would have covered all restaurants and elevated them to the position, theretofore uniquely occupied by elevators, of being exempt from the power otherwise conferred on those with custody or control of public places to designate smoking areas. The short bill filed by Democrat Matt McCoy—whose anti-tobacco profile would become more sharply etched in 2007-2008—from Des Moines, where he was vice president of the Downtown Community Alliance, never progressed beyond the appointment of a State Government subcommittee, despite the fact that committee chair, Michael Connolly, perhaps the Senate’s most ardent anti-smoker, had appointed himself chair of the subcommittee. Four days later, Petersen went McCoy one better by filing a bill to ban smoking in all restaurants and bars, but H.F. 71 did not even get to the stage of being assigned to a subcommittee, though several lobbyists, including one representing the Iowa Retail Federation, declared against it.

The session also witnessed renewed interest in repealing local preemption. This focus was forged by the reaction to Iowa Supreme Court’s decision in 2003 invalidating, on the grounds that it was preempted by Iowa Code section 142B.6, an ordinance passed by the Ames city council in 2001 partially banning smoking in restaurants. In particular, CAFE Iowa CAN—the clumsy acronym for the Clean Air for Everyone Iowa Citizen Action Network—was formed in the wake of that ruling to “advocate for local control” with the “goal” of “educat[ing] the public about the dangers of secondhand smoke and prepar[ing] them to become better advocates.” This indirect, pedagogical approach to local control appealed

630 H.F. 71 (Jan. 14, by Petersen).
633 See below ch. 33.
to CAFE because the process “allows a community to have a discussion about the health risks of secondhand smoke and develop a solution that fits their [sic] community,” and the increased understanding would result in “strong community support for a law protecting nonsmokers.”

Local control was also at the core of the group’s “[b]roader goal[]” of “changing attitudes and behavior of smokers in order to protect others from secondhand smoke. A powerful change process unfolds as a community debates the issue of secondhand smoke. Letters to the editor, town hall meetings, public debate, and media coverage all ensue.” But the overriding significance of local control was its ability to render “the usually influential tobacco companies”—which are “forced to work at the local level through fake front groups and allies,” thus generating a “credibility gap” that did not plague them “as much” at the state and federal levels—“suddenly powerless.”

Senator Quirmbach, having spearheaded the Ames City Council’s adoption of the (judicially invalidated) ordinance, acutely felt the urgent need to clear the way for communities to act. On January 26, 2005, Quirmbach filed S.F. 70, which repealed the existing preemption provision, substituting for it a section on local regulation of smoking, which authorized a city, county, or local health board to enforce the statewide law by adopting ordinances or rules containing standards or requirements “higher or more stringent” than the statute’s. Specifically, the bill mentioned that such local regulations could eliminate exemptions (including that for bars) and prohibit the designation of smoking areas. Two weeks after the bill had been referred to the State Government Committee—the subcommittee to which it was assigned never having met—Quirmbach, as co-chair of the Senate Local Government Committee, presented the textually identical Senate Study Bill 1137, which CAFE called “CAFE’s bill to restore

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634 CAFE Iowa CAN, History, on http://www.cafeiowacan.org/history.htm (visited May 13, 2008). Ironically, despite its communitarian, grass-roots democratic rhetoric, CAFE (or at least its all-important Iowa City branch, whose leaders were also statewide leaders), was run in a top-down, authoritarian manner. This conclusion is based on several years of interacting with them and attending and making a presentation at a CAFE meeting on Feb. 23, 2006.


636 See below ch. 33.

637 S.F. 70 (Jan. 26, 2005, by Quirmbach).

638 Senate Journal 2005, at 1:130, 151 (Jan. 26 and 27).

639 http://www3.legis.state.ia.us/ga/sclist.do?ga=81&start=130

640 S.S.B. 1137 (Feb. 10, 2005, proposed Local Government Committee by co-chair
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Although it was assigned to a four-member subcommittee (chaired by Quirmbach and of which McCoy was also a member), which met, the study bill died too. Foege’s House companion bill also died in committee. Lobbyists for various tobacco-related entities, including the Iowa Retail Federation, declared against one or more of the preemption repeal bills. Despite the repeated defeat of repeal, Foege insisted that it continued to gain legislative adherents. Unlike the anti-tobacco coalition, whose advocacy of local control appeared to be largely opportunistic, Foege seemed to be animated by principle: “I’m not going to tell a business what they can or can’t do.... But I want true local control. If Ireland can ban smoking in their pubs, I don’t know why we can’t. But I think it’s up to those local governments to decide.” To be sure, the principle at stake was, in the welter of myriad state and federal statutes and regulations telling businesses what they could or could not do, difficult to discern, but a major reason for the lack of success in passing such a measure was succinctly stated by the Central Iowa Tobacco-Free Partnership—the opposition of the large tobacco companies and their lobbyists by whom local non-profit organizations were “‘outgunned and...outspent.”

Quirmbach).

CAFE, Action Alerts, on http://www.cafeiowacan.org/alerts.htm (visited May 13, 2008). CAFE’s lobbyists (Battles and Harms-Hassoun) declared for S.F. 70 without identifying their client; the Cancer and Heart organizations also declared for it as did Judie Hoffman, the former Ames City Council member. http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&ga=81&hbill=SF70 (visited May 18, 2009).

The meeting took place on Mar. 3, 2005. http://www3.legis.state.ia.us/ga/sclist.do?ga=81&start=60. Unfortunately, neither the Iowa State Archives nor the Senate President’s office has the minutes of this meeting, the latter stating that subcommittees do not produce minutes. Telephone interview with Kay, Senate President’s office (May 14, 2008).

H.F. 261 (Feb. 10, by Foege and Schickel); House Journal 2005, at 1:332 (Feb. 10).


Erin Morain, “Going Smoke-Free Can Be Profitable, Owners Say,” Business Record

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At the end of 2005, CAFE issued a “Position Statement on Secondhand Smoke,” declaring that it “supports local communities’ efforts to pass local clean indoor air ordinances and other policies that prohibit the use of tobacco in all public places and workplaces. We support passage of legislation that restores local control for laws and regulations relating to smoking prohibitions. CAFE IOWA CAN would support a statewide law only if it protects the health of all workers, did not include exemptions including but not limited to ventilation, size of workplace, type of business, or age restrictions, and it included a clause that restored local control over secondhand smoke to Iowa’s cities and counties.”

Around New Year Threase Harms Hassoun, CAFE’s lobbyist, met with Senator Matt McCoy three times. As a result, a week later one of CAFE’s leaders confidently observed that McCoy “will be introducing a statewide bill and we worked with him to get everything we wanted in it.”

At the outset of the 2006 session, Petersen (and Dubuque Democrat Pam Jochum) filed H.F. 2110—Senator Matt McCoy introduced the companion bill S.F. 2136—which signaled its new approach to suppressing public smoking by repealing in toto the old law codified in chapter 142B, which had become as obsolescent as the initial medical-scientific understanding of the health consequences of secondhand smoke exposure had been in 1978, when the first version of the old law had been enacted. In contrast to the existing statute, which was bereft of any statement of legislative findings, public policy, or intent, the Smokefree Public Places and Workplace Safety Act, which was based on a model statute melding those passed in Delaware, Massachusetts, New York, Rhode Island, and Washington, began with the finding that environmental tobacco smoke caused and exacerbated disease in nonsmoking adults and children, which sufficed to justify the regulation of smoking in public places and workplaces in

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646 C.A.F.E. Iowa CAN, “Position Statement on Secondhand Smoke” (n.d. [Dec. 21, 2005]). The document bore no date, but the title of the attachment containing the document emailed by Eileen Fisher, one of CAFE’s leaders, on Jan. 7, 2006, stated the date.
647 Email from Eileen Fisher to Marc Linder (Jan. 7, 2006).
648 S.F. 2136 (Feb. 1, 2006).
649 H.F. 2110, § 17 (Jan. 24, 2006).
650 Jonathan Roos, “Proposal Would Ban Smoking in Workplaces,” Des Moines Register, Jan. 18, 2006 (4B) (NewsBank); telephone interview with Patty Funaro, Legislative Services Bureau, Des Moines (May 5, 2008). Funaro has been the chief Iowa legislative drafter of smoking-and tobacco-related bills since the 1990s.
order to reduce the level of exposure and protect public and employees’ health.\footnote{H.F. 2110, § 1(2) (Jan. 24, 2006).}

Breaking with the old law’s utterly feckless method of leaving it up to building owners to designate smoking areas, Petersen’s measure outright banned smoking in “public places” and “all enclosed locations within places of employment” as well as in two generic types of outdoor locations: “[o]utdoor sports arenas and other entertainment venues where members of the general public assemble to witness entertainment events” and “within fifty feet of any enclosed area where smoking is prohibited....” Interestingly, this latter no-smoking zone served not to protect nonsmokers from walking through a gauntlet of smoke on the way into and out of buildings, but “to insure that tobacco smoke does not enter that area through entrances, windows, ventilation systems, or other means.”\footnote{H.F. 2110, § 3(1) & (2).} In other words, at the beginning of 2006 Petersen had not yet focused on the risks of secondhand smoke exposure outdoors.

The comprehensive scope of the smoking ban in “public places” (“an enclosed area to which the public is invited or in which the public is permitted”) was suggested by the non-exhaustive list of 20 types, including restaurants, bars, retail stores, retail service establishments, government buildings, shopping malls, public transportation facilities, laundromats, banks, child care facilities, public and private educational facilities, places of public assembly in indoor locations, libraries and museums, entertainment venues such as theaters, auditoriums, concert halls, convention facilities, bingo facilities, indoor sports arenas, hotel lobbies, and health care provider locations.\footnote{H.F. 2110, § 2(11).} The exemptions from the smoking ban encompassed: private residences (if not used as a child care or health care facility); 20 percent of hotel/motel rooms (unless the smoke “infiltrated” into areas where smoking was banned); retail tobacco stores (subject to the same proviso); private/semi-private rooms in long-term care facilities if all the occupants request smoking-permitted rooms (and subject to the same proviso); private clubs having no employees (except when the general public was invited to a function); outdoor places of employment; private hire limousines; and workplaces where smoking was an integral part of a cessation or medical/scientific research program.

In addition to requiring employers to explain the prohibition to all employees and persons applying for employment and everyone with custody/control of covered public places and places of employment to post no-smoking signs and remove all ashtrays, Petersen’s bill prohibited retaliation against any employee, job applicant, or customer for exercising any right under the law and preserved
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the legal rights against the employer (or anyone else) of any employee working in a location where an employer permitted smoking. Enforcement was multi-pronged. Although it was administratively entrusted to local health boards, while judicial magistrates were to hear and determine violations, those with custody/control of smoking-prohibited places were also enforcement agents in the sense that they “shall inform persons violating” the law of its provisions. The use of the present participle was a crucial element of the enforcement process because it manifestly imposed on owners the duty to monitor, police, and intervene actively and directly vis-a-vis violators while they were in the act of violating, rather than merely posting signs or generally circulating information ahead of time. Employees and private citizens were also entitled to enforce the law by bringing legal actions, while complaints could be filed with local health boards or IDPH by any person. If anyone with custody or control of a public or workplace failed to comply with the law, both the local health board and any person aggrieved by that failure was entitled to seek injunctive relief to enforce the law. H.F. 2110 imposed civil penalties of: (1) $50 for smoking in a prohibited area; (2) a maximum of $100 for a first violation by a person in custody/control, of $200 for a second within one year, and of $500 for any additional violation within one year; (3) a minimum of $2,000 to a maximum of $10,000 for discharging or in any way discriminating against an employee for filing a complaint, providing information, or bringing an action under the law. Each day on which any violation took place was considered a separate violation. In addition to these monetary penalties, persons in custody/control were also subject to suspension or revocation of any permit or license issued to them for the premises where the violation occurred. Finally, violations of the law constituted public nuisances, which local health boards or IDPH was empowered to abate by injunction or restraining order. Finally, Petersen and McCoy removed the barrier that the cigarette oligopoly and the Iowa Supreme Court had erected to additional local controls by eliminating the existing law’s preemption provision and, instead, inserting a section prohibiting the law from being interpreted or construed “to permit smoking where smoking is otherwise restricted or prohibited

654 H.F. 2110, §§ 6-7.
656 H.F. 2110, §§ 9, 16. For failure to pay in a timely manner the $50 scheduled fine for smoking in a prohibited place the magistrate was required to issue a citation, and, if the person failed to appear, to issue an arrest warrant, but no one under 18 could be detained in a secure facility for failure to pay. Id. §16 (referring to Iowa Code § 804.1).
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by other applicable laws” or “to prevent political subdivisions from adopting ordinances or regulations...more restrictive than the provisions” of the new law.657

Petersen admitted, before she had even filed the bill, that it faced an “uphill battle. ‘We need to get a debate going...I think the public is for it, but is the Legislature for it?’”658 She quickly got her answer: H.F. 2110 may have finally put Iowa in a position to debate state-of-the-art statewide anti-smoking legislation, but the Republican leadership was having none of it. House Speaker Christopher Rants made it clear that “he would block debate” of a cigarette tax increase and “other significant smoking restrictions.” Petersen’s other rhetorical question—“This has been an issue I’ve followed since the early ‘90s and we have not made a lot of progress. Do we want to wait for the market to determine when Iowans should go into a clean indoor air environment?”659—also received an instantaneous answer from House Majority Leader Chuck Gipp, who indulged in the self-fulfilling prophecy that chances of passage were “‘bleak’”: though a nonsmoker who was “‘not defending smoking,’” he defended not passing the bill on the grounds that there were “‘tax-paying entities that have to compete.... A lot of them are establishing themselves whether to be smoke-free or not. They want that option.’”660 That view mirrored the stance adopted by the Iowa Restaurant Association, which insisted that its members “should be allowed to accommodate customers who still want to smoke.” The organization’s president, Doni DeNucci, who did not “‘believe the state should take away that part of their business,’” failed to explain how catering to smokers’ self- and other-destructive addiction could accommodate restaurant and bar owners’ employees’ desire to maintain their health intact. As McCoy described the inhospitable consequence of the hospitality industry’s profit-über-alles practice and policy: “‘Increasing your risk of dying from cancer should not be a condition of employment....’”661

At a meeting of the Iowa Alcoholic Beverages Commission on February 16 a staff member in charge of monitoring alcohol and tobacco legislation delivered the bill’s epitaph: “H.F.2110 is probably more about making a statement...than

657H.F. 2110, § 11.
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In spite, or perhaps precisely because of the bill’s vast curtailment of the universe of public places in which smoking would be permissible, the House took absolutely no action on it after it had been referred to the Human Resources Committee. Petersen herself blamed its premature death on “opposition from restaurant-industry lobbyists and legislative leaders such as Rants,” who counterintuitively claimed a preference for smoke-free restaurants but not for “‘dictat[ing] everything restaurants do’” because “‘[p]eople have a choice.’” Senate Democratic Leader Gronstal expressed the belief that McCoy’s companion bill would pass if Iverson let it come to a floor vote, but it failed to survive its referral to the Local Government Committee. Oddly, despite CAFE’s boast that it had secured inclusion in the bill of all of its desiderata, its lobbyist declared “undecided” on it, whereas the Heart, Lung, and Cancer organizations, in addition to such groups as the Iowa Medical Society, Iowa Nurses Association, and Iowa Health Systems all declared for it. Unsurprisingly, even before the bills had gone nowhere, the following companies, which either produced, sold, or promoted smoking, declared their opposition to H.F. 2110 and/or S.F. 2136 through their lobbyists: Harrah’s Operating Company, Iowa Grocery Industry Association, Cigar Association of America, Dubuque Greyhound Park & Casino, R. J. Reynolds Tobacco Company, Ameristar Casinos, and Iowa Restaurant Association.

Finally, the 2005-2006 General Assembly again witnessed an array of bills increasing the cigarette tax. Those proposing the highest increases (ranging from


666 S.F. 2136 (Feb. 1, 2006, by McCoy); Senate Journal 2006, at 1:164 (Feb. 1).

$1.00 to $1.64) made, as usual, no progress. However, a Senate Ways and Means Committee bill mandating a much more modest 36-cent raise specifically to fund educational programs actually passed the Senate toward the end of the 2005 session by a vote of 38 to 12, but then died in the House.

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668 H.F. 215 (Feb. 4, 2005, by Schickel et al.) ($1.00); S.F. 130 (Feb. 8, 2005, by Dvorsky et al.) ($1.00); H.F. 237 (Feb. 9, 2005, by Mascher) ($1.64, all to be spent on medical assistance and tobacco control and prevention fund); H.F. 2022 (Jan. 9, 2006, by Tomenga and R. Olson) (64 cents, revenue for senior living trust fund).

The Battle Against Smoking in the Senate Itself: 1985-2008

“I’m a goddamn smoker and fuck you.”

As in the late nineteenth and early twentieth century, conflict over smoking in the building housing the Iowa legislature remained a microcosm of the larger societal struggles. And as in the 1970s, progress toward eliminating secondhand smoke exposure in the Senate in the 1980s and 1990s and into the twenty-first century was much slower than in the House. Democrat Beverly Hannon, a two-term senator from 1985 to 1992, looking back a few years after her departure, observed that: “We had some really emotional fights over smoking.”

More than two decades after her arrival in the Senate she recalled that the air in the Senate chamber was oppressively smoke-filled, in no small part because all the smokers from the House who were no longer allowed to smoke there drifted over to the Senate to buy cigarettes from a vending machine and to smoke, causing the air in the chamber to turn into a blue haze. “Some of the non-smoking clerks,” as she recalled in 1997, were threatening to quit, they wouldn’t talk to smokers or hid the ashtrays at the computer stations. When I’d pick up a phone in the Senators’ lounge, it stunk [sic] from stale old tobacco. Guys like [Democrat] Al[vin] Miller would leave cigarettes smoldering in ashtrays while they walked away. P.U. the stench was awful! Several legislators had air purifiers on their desks. Finally, smoking was confined to back benches and certain parts of back of senate, but it was still awful. Rife used to stroll over in the corner near where I sat and puff away. He and Phil Brammer almost came to blows over smoking. Phil ended up having a lung replaced due to emphysema, so it was a life and death issue with him.

At the beginning of each session...I’d get a sinus infections, irritated eyes and throat.

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1Telephone interview with former Iowa State Senator Al Sturgeon, Sioux City (Apr. 28, 2007) (describing the attitude of the Senate’s smoking leadership toward nonsmoking senators in the late 1980s and early 1990s).

2See above ch. 18.

3See above ch. 25.

4Untitled (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.

The Drs. said it could be from 2nd hand tobacco smoke....

Senate Democrat Beverly Hannon et al. v. Bill Hutchins, Democratic Majority Leader and Future R.J. Reynolds Iowa lobbyist

No person, while sitting in authority in either chamber of the Iowa legislature, shall use, possess, or exhibit or enhance the use of any tobacco product as defined in section 98.42, subsection 1, when being observed by minors.\(^7\)

In 1985, with Democrats occupying 29 of the chamber’s 50 seats,\(^8\) a bipartisan group of eight Democrats and seven Republicans filed an amendment to Senate Resolution 3, amending the chamber’s permanent rules, to add language tracking the rule that the House had adopted in 1979: “Smoking is not permitted in the senate chamber while the senate is in session except in the perimeter seating area.”\(^9\) However, before the Senate could deal with this amendment, it had to vote on a motion to reconsider the vote by which Senate Resolution 3 itself had been adopted. Although the Senate voted 25 to 24 to reconsider, the absence (or non-voting) of one Democrat meant that the vote lacked the constitutional majority of 26, and thus the motion lost; the procedural result was that the amendment was out of order.\(^10\)

\(^6\)Beverly Hannon, [untitled notes] (Feb. 22, 1997), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA.


\(^8\)“Members of Iowa General Assemblies 1981-2002,” at iv, on http://www.legis.state. ia.us/Pubinfo/Library/Members19812002.pdf


\(^10\)State of Iowa: 1985: Journal of the Senate: 1985: Regular Session Seventy-First General Assembly 1:320-21 (Feb. 7). Leonard Boswell was the missing Democrat. Also ruled out of order was an amendment to the amendment filed by Democrat Don Gettings (who also supported the first amendment) including in the ban seats assigned for the press. State of Iowa: 1985: Journal of the Senate: 1985: Regular Session Seventy-First General Assembly 1:321; State of Iowa: 1985: Journal of the Senate: 1985: Regular Session
Pointing to the “real health problem” of 3,000 non-smokers dying of lung cancer annually, the amendment’s chief sponsor, James Wells, a labor union Democrat from Cedar Rapids in his second Senate term after 12 years in the House where he had early on led the struggle for restricting smoking in public, declared: “This was just the first round.” The closeness of the vote prompted Wells to conclude that support was also growing for a smoking ban in all public buildings except bars. Senator Joseph Coleman, a two-pack a day smoker of unfiltered cigarettes for 40 years and the proposal’s “most vocal back-room critic,” groused: “These guys from the House think they can come over here and just change everything....” In turn, Wells voiced the suspicion that in case the reconsideration vote had succeeded, “a deal had been cut to allow Coleman or another senator to preside over the debate instead of Lt. Gov. Robert Anderson,” who did not smoke. Coleman admitted that it would not have surprised him had he wound up in the chair to resolve the issue of whether the ban proposal was germane to the resolution on the Senate rules, but Wells insisted that he was “not going to have a smoker decide on it....”

In 1987, at the outset of the next General Assembly, when, in spite of the publication the previous year of the Surgeon General’s first report on the health consequences of involuntary smoking, smoking was still permitted everywhere in the Senate—which “stood almost alone among state offices”—a group of ten senators, led by Republican Ray Taylor, but including Hannon and Democrat Jean Lloyd-Jones of Iowa City, filed a floor amendment to the resolution containing the Senate’s permanent rules that would have added to the decorum rule: “Smoking shall not be permitted in the senate chamber at any time.” The bare-bones account in the Senate Journal merely stated that the amendment lost on a 22 to 22 tie vote. But the detailed report in the Des Moines Register shed important light on the quality of the arguments advanced during the floor debate,

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13 Jane Norman, “Iowa Senate Clings to Smoke-Filled Room,” DMR, Jan. 16, 1987 (2A:2-4 at 2).


which appears to have been dominated by the contributions of the heavy-smoking Coleman, a 30-year member of the Senate, who declared that he would “‘defy’” the rule, if it were passed, and “would have to be carried out bodily....” Trivializing smoking bans as a “‘fad’” and asserting that hair spray probably posed a greater danger than cigarette smoke, he insisted that despite his nicotine addiction, he would live as long as his non-smoking colleagues. When he asked rhetorically what smokers contributed to the state of Iowa each year, Taylor shot back: “‘A lot of cancer.’” Coleman, who had been thinking in terms of cigarette taxes, expressed doubt that any senator had died of lung cancer during his incumbency. Significantly, Majority Leader C. W. “Bill” Hutchins, who otherwise had not promoted anti-smoking legislation, but had recently quit smoking, “was observed voting in favor of the amendment” on the non-roll-call vote.  

A month later, Lloyd-Jones filed this remarkable resolution:

WHEREAS, the surgeon general of the United States has determined that smoking is hazardous to the health; and
WHEREAS, it is [sic] been determined that passive smoke creates health risks to nonsmokers; and
WHEREAS, the Senate does permit smoking in its chambers; and
WHEREAS, the Senate is concerned about the health of its members; NOW THEREFORE,

BE IT RESOLVED BY THE SENATE, That the secretary of the Senate is directed to purchase individual desk top air cleaners to be placed on the desks of those Senators who smoke to eliminate smoke from the Senate chambers.

Although Lloyd-Jones’s party controlled 30 of the Senate’s 50 seats, the chamber took no action on the resolution after having referred it to the Rules and Administration Committee, and as late as 1989—with the Democrats’ still
exercising the same three-fifths majority— the Iowa General Assembly’s Legislative Handbook disclosed that whereas the House did not permit smoking on the House floor, including the speaker’s station, in the press boxes, visitor’s galleries, members’ rest rooms, or committee rooms during meetings, “[t]here are no corresponding restrictions for the Senate.” In such an “unlimited smoking” environment, Lloyd-Jones pointed out, “there was nowhere to get away from the smoke. You just had to put up with choking and coughing.” Two decades later, Hannon still vividly recalled that she used to use a small, quiet, plug-in fan to blow back (in vain) the smoke that senators and their staff surrounding her seat in the chamber were constantly blowing her way.

Multiply frustrated, on March 30, 1987, Hannon requested an opinion from Attorney General Tom Miller for “legal clarification” of the state law on smoking prohibitions (Iowa Code ch. 98A.2, section 6), in particular as to the meaning of the term “public building.” Specifically Hannon wanted to know:

What or who is the “controlling governmental body, officer, or agency” in the Iowa Senate and the Senate Lounge? Who has the authority to declare smoking and non-smoking areas if the Senate rules do not speak to that issue? If there is no Senate rule regarding this, does above referenced code language require no smoking or does it permit smoking?

There are two microscopic signs by the press benches in the Senate which say smoking permitted. Who has the authority to have them there if Senate rules are silent? The Governor recently ordered cigarette vending machines removed from the Capitol. Does the Capitol include the Senate Lounge and does the Governor’s order extend to the Senate Lounge?

... Also, what recourse does a person have who has to be present on the Senate floor to perform his or her job, to be protected from second-hand smoke which is irritable or harmful to the person, in a building which has no smoking signs at its entrance, and which is a public building?

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23. Telephone interview with Beverly Hannon, Anamosa, IA (Feb. 28, 2007); email from Beverly Hannon (Mar. 3, 2007). Hannon’s account was reminiscent of disputes over the use of air nozzles on airplanes to blow smoke out of no-smoking sections.

24. Letter from Beverly Hannon to Tom Miller (Mar. 30, 1987), Beverly Hannon
Initially, the Iowa Attorney General’s office gave Hannon’s staff oral advice that the Senate “determined its own rules and the manner in which those rules were implemented.” Then on May 1, 1989, Deputy Attorney General Elizabeth Osenbaugh sent Hannon an advice letter as written confirmation. Osenbaugh set forth, based on other statutes and attorney general opinions, that the law’s ban on smoking in a “public meeting” did not apply to legislative committee meetings because the former encompassed only meetings of members of a “governing body,” which neither the legislature nor its committees were. Without being able to offer similar statutory-interpretive certainty regarding the legislature as a “public place,” Osenbaugh argued that even if the law encompassed meetings of the legislature and its committees, the Iowa constitution “would give each house the authority to determine whether and to what extent smoking would be permitted.” And “in order to avoid significant constitutional questions”—for example, Article III, section 9 of the Iowa Constitution empowered each house to “punish members for disorderly behavior”—she explained to Hannon, “we would construe the statute as not applying at all to areas under the control of the General Assembly.” She therefore concluded that the law did “not govern smoking in areas under the control of the General Assembly or to legislative meetings” because each house had the authority to adopt smoking rules applying to those places and meetings.

Hannon’s reference to the cigarette vending machine was yet another point
of contention between senatorial smokers and nonsmokers, whose numbers she estimated at the time as 12-13 and 37-38, respectively. During the summer of 1986, a number of public health officials, including the president of the Polk County Medical Society, the state public health commissioner, and the president of the Iowa State Board of Health, requested that Governor Terry Branstad ban cigarette vending machines in the State Capitol complex on the grounds that they illegally made cigarettes available to minors. The governor’s spokesman said that he would not object to the removal of the machines—which were under the authority of the Commission for the Blind and the operation of which provided jobs for blind people—if the legislature agreed. On December 31, 1986, Governor Branstad signed an executive order prohibiting the sale of tobacco products in areas of buildings under his control in the State Capitol Complex and all offices occupied by state government. In 1987, while the Senate was considering the clean indoor air act that the House had passed, the governor ordered the cigarette vending machine removed from the basement cafeteria of the Capitol because it was unsupervised and children used it. At that point, Majority Leader Bill Hutchins and Minority Leader Calvin Hultman, both heavy smokers and future cigarette company lobbyists, agreed to order the machine installed in the Senate lounge. But, as the press reported, the Senate’s anti-smoking forces “were not amused.” On Friday March 27, when workers wheeled the machine up to the entrance to the Senate two hours after the Senate had adjourned for the week, Hannon and Lloyd-Jones, “alerted to the machine’s presence, rushed to the doors of the Senate and conferred with Senate staff members about what to do with the machine, which the workers had been instructed to deliver to the lounge. ... The group huddled for a few minutes and decided the machine should be placed in the men’s restroom instead. But that suggestion was turned down by [the] cafeteria manager..., who said it wouldn’t be permitted by sanitation inspectors.” The workers then delivered it to the Senate lounge. As Hannon later described the episode: “We were outraged and talked to whomever [sic] would listen, but most just shrugged their shoulders.

28Letter from Senator Beverly Hannon to Dr. Wayne Witte (May 29, 1987), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.
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so wanted to fill the slots with super glue or something, but didn’t.” Beverly Hannon and Lloyd-Jones “tried to block the damn thing from coming in. We got them not to put it in the lounge, because all the lobbyists would buy and smoke there. We lost that battle though. The cigarette machine ended up in the hall by the Secretary of State’s office, which is back of the Senate.”

On March 30, Hutchins ordered what had become the last cigarette machine in the Capitol to be moved into a hallway behind the Senate chambers. The majority leader tried justify its presence on the grounds that “some House members and senators that smoke thought that it was really kind of foolish not to have cigarettes available in the Capitol” because: “If they ran out, they’d have to run downtown.” Thus Hutchins rationalized retention of the machine as a means of avoiding public criticism of senators for exacerbating the energy crisis by “frequently” driving to buy cigarettes. The reason that the Register concluded that the “anti-smoking caucus of the Senate was mum” was later revealed by Hannon. That day she had circulated a petition requesting that “the cigarette vending machine be removed from the Senate Lounge and from the Senate,” which 17 other senators signed, “but some refused to sign for fear of retribution.” Beverly Hannon herself, who said she would be “happy” if she “could get half of the members to sign,” “never presented” the petition to Majority Leader Bill Hutchins, a smoker, because her Democratic colleague (and future Majority Leader) Michael Gronstal and others “advised cool it, it will only hurt me and not accomplish what I want.” More specifically, as she later recalled, Gronstal told her that “if you present this, you’d better be ready to run for Majority Leader” because leadership would regard it as “mutiny” against Hutchins, though “[t]he

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33 Beverly Hannon, [untitled notes] (Feb. 22, 1997), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA.
35 Letter from Beverly Hannon to Dr. Wayne Witte (May 29, 1987), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA (untitled).
37 Beverly Hannon, [untitled notes] (Feb. 22, 1997), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA. In another untitled
Republicans would love to have me do it." Beverly Hannon, [untitled notes] (Oct. 7, 1995), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (1), IWA.

Quickly deciding that she “was in enough trouble with leadership already,” she would “let someone else throw themselves on the sword as far as rules were concerned, I’d support whatever legislation we could get through instead.” Still, “it really ticked...off” Hannon, especially since there were “only 11 smokers of the 50 senators and many felt strongly against smoking in the senate area.”

Hannon saw different personal leadership styles as in large part responsible for the different outcomes in the House and Senate: “[T]he house voted to make itself non-smoking, even though [House Speaker Don] Avenson was a smoker himself. That was the difference between him and Hutch[ins], he’d consider others, not just himself.”

Soon after the legislature had adjourned for 1987, Hannon confided to a correspondent: “Some sessions and meetings are painful almost, they are so smoke-filled.” Referring as well to the successful efforts by some senators in 1986-87 to water down, if not kill, the clean indoor air act amendments, she indulged in this lament: “I tell you, this Senate is a place to behold. I get very discouraged at times. The smoking issue is quite typical of other issues also. I can’t understand how some obnoxious people have such inordinate power over a majority.”

But despite these defeats, Hannon also managed to engineer at least one significant public health and symbolic victory in 1987 in the Human Resources Committee she chaired. As she described the incident in a letter to a constituent during the 1987 session:

[T]here are some real foes of any restrictions on smoking in the Senate, and they seem to
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hold inordinate power. However, there are some hopeful signs. The most outspoken opponent, who killed the [clean indoor air amendments] bill on me last year, is Sen. Joe Coleman. He says he’ll have to be carried out of the chamber if we restrict smoking there. (We should be so lucky!) He serves on the Human Resources committee which I chair. We adopted no smoking during meetings rules. He didn’t attend the meeting when we adopted rules. First meeting after we came in, lit up and blew his cork when I reminded him of our rules. Wanted know whether I was going to call sargent [sic] at arms to have him removed. I said no, but we adopted the rules through a democratic process which he has always supported, and would appreciate it if he’d respect the wishes of the committee. He crushed his cigarette out with loud protest, but hasn’t smoked in my meeting since! How about that?66

In 1987 the House, controlled by Democrats, extended the no-smoking areas to include visitors’ galleries and House members’ rest rooms.67 Democrat David Osterberg, a college economics professor, member of the American Friends Service Committee, and former Peace Corps volunteer,68 who proposed the rule change, supported by the Rules and Administration Committee, argued against smokers seeking to stymie additional restrictions: “I think we’re compelled by the health of colleagues to prohibit smoking in this chamber.” In contrast, Republican Kyle Hummel, outdoing his belligerence in 1985, irrelevantly asserted that it was “impossible to regulate every activity someone might consider offensive. ‘Maybe we should pass a law that everyone has to have his Right Guard on before coming in every morning so we don’t offend anybody,’ he said in defense of smokers’ rights.”69 Republican Mike Van Camp, an electrician and IBEW member from Davenport,70 tried to amend the rule by deleting the aforementioned two additional locations, but his amendment lost on a non-record vote.71 Then, on another non-record vote, the House adopted the amendment, offered by Osterberg and 11 others, to add “the west part of the lounge provided

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67House Resolution 2, at 23 (Rule 50) (filed Jan. 12, 1987).


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for telephone use.”52 Thus from 1987 to 1991, the House rule read: “Smoking shall not be permitted in the house committee rooms, the west part of the lounge provided for telephone use, or on the floor of the house, at the speaker’s station, in the press boxes, visitors’ galleries, or house members’ rest rooms.”53 For the first time, then, since the ascendency of the cigarette, the House banned smoking in the chamber itself even while it was not in session.

Nonsmoking senatorial assaultees had not had let their agency be drained from them by the repeated defeats inflicted by the autocratic leadership. In early December 1990, the Senate, “where smokers’ right prevail unfettered,” was on the brink of limiting smoking to designated areas. The Democratic Majority Leader, Bill Hutchins, “‘a smoker who has quit on several occasions and plans to do so again,’” conceded that there was “considerable sentiment to do something about it this year.’” The reason that “[t]he politics of a long-sought Senate smoking ban shifted” was not that the elections on November 6 had reduced the overall Democratic majority from 30-20 to 28-22, but that specifically Senator Coleman, who at 34 years held the Senate longevity record, had been defeated.54 In 1986, Coleman, who “fervently fought any move to limit smoking,”55 had opposed a ban on smoking in public buildings and offices, “‘because I smoke, and I think other smokers should...too... As a smoker, I’m getting tired of being the one who gets pushed around. I have rights too, you know.’”56 Coleman, who had “smoked three packs of unfiltered cigarettes daily for almost 40 years,”57 had vociferously opposed all attempts to limit smoking. Lloyd-Jones, one of the Senate’s leading anti-smoking advocates, observed that “‘Joe was so adamant about it that people didn’t want to offend him’”; consequently, his departure made regulation possible. By December Lloyd-Jones, who was part of the Democratic leadership, and Hutchins developed a proposal to limit smoking to benches along the chamber’s east and west sides; in addition, two lounges would be available

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for senatorial and staff smokers. Lloyd-Jones told the Register that the aforementioned cigarette vending machine—"the only still allowed to operate on state property"—over which Lloyd-Jones and Hannon had battled in 1987, would probably remain in the Senate as a part of a compromise with smokers. Coleman may have departed, but one of his fellow addicts, Republican Jack Rife, was having none of it: "I'm opposed to hard and fast rules' limiting smoking." But three days later, when the Senate Rules and Administration Committee met a few weeks before the opening of the newly elected General Assembly, "Senate leaders, half puffing on cigarettes, delayed action" on Hutchins and Lloyd-Jones's proposal. The Senate's smoking leaders appeared to have anticipated Philip Morris's strategy of "aggressively maintaining and protecting the social and physical space in which adult smokers can enjoy our products" under the false banner of "accommodation" and "courtesy". Critics said a discreet hint to smokers might be more appropriate. Chief among them was Democrat Emil Husak, assistant majority leader, who, "while lighting his pipe, said: "I question why we need rules.... This is the Senate. I think you make suggestions."" The resistance prompted Majority Leader Hutchins to agree to appoint a committee to draft another compromise limiting smoking. By this time, observed the Des Moines Register in January 1991, the Senate had become "the renegade of state government, allowing smoking anywhere in violation of state law. Gov. Terry Branstad and the Iowa House long ago approved limits on the use of tobacco in the areas of the Statehouse under their control." At the beginning of the new General Assembly in 1991, with Coleman

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gone, the “anti-smoking coalition of clerks and legislators finally got the senators to designate a smoking area....”64 Lloyd-Jones, now the president pro tempore, as a Rules and Administration Committee member “helped lead the fight to establish smoking rules. She had sought a ban on smoking but settled for a compromise. Under the new policy, adopted unanimously by the rules committee last month [i.e., December 1990], smoking in the Senate Chamber is restricted to designated areas.” As a result, the Register reported, “[n]on-smokers in the Iowa Senate were breathing sighs of relief”—exactly what else they would be breathing was as yet unknown. Even which areas had been so designated remained officially undisclosed. All the Legislative Handbook revealed, without any specification, was that: “The Senate policy restricts smoking to designated areas only,” adding just as obscurely that: “Copies of the policy are available from the Secretary of the Senate’s Office”—a substantively and procedurally opaque mystery still being repeated by the Handbook in 1995.67

This lack of transparency was rooted in the fact that the smoking rule was embodied not in the Senate Permanent Rules, but in the Access to Senate Chamber and Rules of Senate Decorum68: whereas the full Senate votes on the

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64 Untitled, unaddressed (Apr. 17, 1995), in Beverly Hannon Papers, Box 27, Folder: Health-Smoking, IWA.

65 Thomas Fogarty and Jonathan Roos, “Grim Legislature Faces Budget Deficit, War Fears,” DMR, Jan. 15, 1991 (A1) (NewsBank). Unfortunately: “There are no minutes whatsoever for the senate rules committee for 1990-1991 in the archives. Seeing as other records of minutes for the senate rules committee have been sent prior and after that date, I can say that there would be little chance that anyone else would have the records. The agency that transfers/sends over the minutes of the senate rules committee is very good and prompt about getting documents out of their office and into the archives. There is a small chance that when the other records for 1990-1991 were being sent to the archives...somebody could have taken them or that they just happened to be misplaced.” Email from Meaghan McCarthy, Assistant State Archivist, SHSI, DM (Feb. 22, 2007).

66 Legislative Service Bureau, Legislative Handbook: Iowa General Assembly 30 (n.d. [1991]).

67 Legislative Service Bureau, Legislative Handbook: Iowa General Assembly 21 (n.d. [1995]) (“Copies of the Senate policy may be obtained from the Secretary of the Senate’s Office”). As late as 2007 Cynthia Clingan, the long-time assistant secretary of that office, stated that before there was a website such rules were distributed only to senators since no one else had a need for them. Telephone interview (Feb. 19, 2007). Since other people, for example the public in the gallery, visited the Senate, that justification carried little weight.

68 The bare policy was presumably embodied in the Access to Senate Chamber and Rules of Senate Decorum as it was from 1997 forward (see below). The Iowa State
former, the Senate Rules and Administration Committee, which the Majority Leader chairs, unilaterally determines the latter. The system, according to Senator Michael Connolly, arguably the chamber’s most militant anti-smoker, “was structured that way so the leadership could control the smoking rules. The majority leader at that time [Bill Hutchins] supported smoking in the Senate which had been a long held tradition.”  

Shortly after losing her seat to Rife, Beverly Hannon, who had fought so persistently for a smoke-free Senate, noted that it had taken “7 years to get the smokers to just smoke in the corners. Bill Hutchins and Jack Rife were two of the major opponents to [sic] smoking restrictions.” Interestingly, when redistricting pitted Rife, the Republican minority leader and “the main block of [sic] getting stricter public smoking laws” against Hannon, for the same Senate seat in 1992 in what at the time was the most expensive legislative election campaign in Iowa history (Hannon and Rife receiving about $45,000 and $64,000, respectively), the cigarette industry could plausibly have been expected to contribute heavily to insure the reelection of their advocate and the defeat of their enemy. Nevertheless, RJR-PAC and Philip Morris-PAC gave him only $200 and $100, respectively, in addition to $200 contributed by the Tobacco Institute’s lobbyist, Charles Wasker. Moreover, RJR-PAC and Philip Morris-PAC also contributed $500 and $100, respectively, in 1990.  

Many years later, Hannon clearly recalled that the designated smoking areas in 1991 were the Senate lounge/coat-rack/telephone room, the coffee room/visitor

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Archives has no copies of this separate body of Senate rules. Although it is unclear when the Senate began issuing such rules, the version that the Senate Rules and Administration Committee adopted on Jan. 21, 1988 and that is filed directly after Senate Resolution 1 (embodying the permanent rules) in the bill book at the University of Iowa Law Library includes no rule on smoking.

69Email from Mike Connolly to Marc Linder (Apr. 24, 2008). In a version obscuring the substance of the disputed rule, a lawyer in the Senate Secretary’s office, who had worked in the Senate since 1974, insisted that the reason for this informality and the reason that the Rules and Administration Committee was entrusted with making the rule on behalf of the whole Senate was to avoid an interminable amendatory process. Telephone interview with Cindy, Jan. 2007.

70Untitled note (Feb. 17, 1993), in Beverly Hannon Papers, Box 14, Folder: Legislative Service: Notes and Recollections (2), IWA.

71[Beverly Hannon] to Phil Brammer (Mar. 24, 1993) (quote), and Beverly Hannon, [untitled note] (Feb. 27, 1997), in Beverly Hannon Papers, Box 8, Folder: Campaign, 1992: Rife, Jack (Opponent) General, IWA. This folder also contains a listing of Rife’s campaign contributions, which in the meantime have been unlawfully destroyed by the Iowa Ethics and Campaign Disclosure Board.
area, the interior perimeter of the Senate chamber, and the press boxes. The concentrated smoke from the interior perimeter so inundated the chamber that the air quality improved very little and the non-smoking senators and staff at their desks in the Senate chamber in fact benefited very little from the new rule. As Hannon’s tenure came to an end in 1992, the Register archly noted that Senators could go “do nicotine” in the corners of the chamber, the back corridors, and a nap room.

The 1991 Senate Journal left no trace of the debate that had produced that body’s first regulation of smoking in 64 years. The only hint that smoking had even been discussed in committee emerged from a floor amendment to Senate Resolution 1 embodying the permanent rules by Democrat Michael Gronstal of Council Bluffs, a former assistant majority leader and future majority leader. On January 14 he offered and withdrew an amendment to the rule governing the powers of the Committee on Rules and Administration providing that it “shall not adopt an administrative policy on smoking in the chamber which unfairly discriminates against staff members who are required as a condition of their employment to occasionally work in the chamber.”

This abortive amendment was designed not to protect staff members from exposure to secondhand smoke, but to permit them to smoke—just as Gronstal six years later thoughtfully

72 Telephone interview with Beverly Hannon, Anamosa, IA (Feb. 28, 2007); email from Beverly Hannon (Mar. 9, 2007). Hannon described the lounge and coffee room as “part of the same long rectangular space, partially divided by a peninsula which had a small sink and the coffee pots. Only senators were allowed in space 1. Senators could permit lobbyists, guests to come into 2. There was an ordinary door dividing 1&2 from senate chamber, which was open most of the time. Smoke could waft in, but I don’t think much did. The chairs, carpet and phones in 1&2 reeked of tobacco tho. Down a few steps from 2 was a small room where lobbyists sat. I think they could smoke there.” Email from Beverly Hannon (Mar. 3, 2007).


75 Senate Resolution 1 at 28 (Jan. 14, 1991) (Rule 36).

76 State of Iowa: 1991: Journal of the Senate: 1991 Regular Session Seventy-Fourth General Assembly 2:1885. Each legislator had/has one staff member (“secretary”) who sat next to him or her in the chamber during the entire proceedings.

77 Senator Lloyd-Jones recalled that at that time both Gronstal and his secretary smoked. Telephone interview with Jean Lloyd-Jones, Iowa City (Feb. 24, 2007). Gronstal was a heavy smoker, but, according to ex-Senator Beverly Hannon, supported rules to restrict smoking. Telephone interview with Beverly Hannon (Feb. 28, 2007).
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fought to give parity to legislators’ secretaries with regard to having soft drink cans in the chamber.\(^{78}\)

The reason that the Senate delegated resolution of the smoking issue to the Rules and Administration Committee may well have been that the leaderships of both parties were members and could therefore authoritatively resolve the matter.\(^{79}\) The fact that the committee reached a compromise that ceded very little to the anti-smoking camp may have been linked to the fact that Majority Leader Hutchins smoked and later became a cigarette company lobbyist in the Iowa legislature.\(^{80}\)

\(^{78}\)See below.

\(^{79}\)In 1990 the six-member committee included the Democratic Majority Leader Hutchins, Assistant Majority Leader Lloyd-Jones, Republican Minority Leader Calvin Hultman (who became a Philip Morris lobbyist), and Assistant Minority Leader John Jensen. *Iowa Official Register: 1989-1990*, at 32. Unfortunately, by the time she was interviewed in 2007, Lloyd-Jones could not recall the committee meeting at which the compromise was reached. Telephone interview with Jean Lloyd-Jones, Iowa City (Feb. 24, 2007). Beginning in 1991 the Senate Rules required that the majority leader chair the Rules and Administration Committee. Sen. Res. 1, Rule 36 (1991). In 1991 Hutchins remained majority leader and chairman of the Rules Committee; the Republican minority leader and ranking committee member, Jack Rife, was also a smoker, who “resented the anti-smoking effort.” *Iowa Official Register: 1991-1992*, at 32; Phoebe Howard, “Sparks Fly As Debate Begins on Smoking in Senate Chamber,” *DMR*, Jan. 14, 1993 (4) (quote). According to Lloyd-Jones, since each party caucuses after the election and elects leadership, it is “entirely possible that it was the new [1991] committee that approved the rule [in December 1990].” Email from Jean Lloyd-Jones (Feb. 25, 2007).

\(^{80}\)For example, in 1997 Hutchins lobbied for R. J. Reynolds Tobacco Co., while former Republican Majority Leader Calvin Hultman lobbied for Philip Morris USA. “Lobbyists Earn Big Bucks Influencing Others,” *DMR*, Aug. 3, 1997 (4). According to ex-Senator Hannon, former majority leaders can exercise special clout as lobbyists because they know so many secrets about so many legislators, though she was not intimating that they engage in blackmail. Telephone interview with Beverly Hannon (Feb. 28, 2007).

\(^{81}\)No internal tobacco industry documents were found suggesting that the Tobacco Institute or individual firms ever became involved in struggles over smoking in the Iowa legislature or Capitol itself. In neighboring Minnesota, in contrast, the Tobacco Institute
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In 1989 did discuss the possibility of rolling back, within the Comprehensive Public Smoking Program, a 1988 statute that had been interpreted by the state Employee Relations Commissioner to ban smoking in open areas of the state capitol. Because, according to TI’s Midwest regional head, Michael Brozek, private offices were exempt, and consequently “many legislators and capitol staff [were] upset by the privilege this afforded selective senior staff,” TI’s Minnesota lobbyists opined that the controversy generated by the action of Representative Phyllis Kahn (the chief advocate of the state’s breakthrough anti-smoking law in 1975) of “slipp[ing] smoking restriction language into a ‘catch-all’ bill during a Conference Committee in the closing days of the 1988 legislative session” could reduce her credibility in seeking to expand the applicability of the Minnesota Clean Indoor Air Act to private workplaces. Michael Brozek to Paul Emrick, Re: Smoking Restrictions—Minnesota Government Buildings (Jan. 11, 1989), Bates No. TI00261037-40. Legislators’ offices, as Brozek knew, were not per se exempt, but (if at all) only by virtue of being ventilated sufficiently to meet the new law’s minimal requirements; the members’ “retiring rooms” were literally covered by the law, but because the legislature could overrule the commissioner, who as a practical matter would have been very loath to try to enforce the law against legislators, those rooms—as Kahn herself acknowledged—would remain available for smoking. Michael Brozek to Paul Emrick, Re: Smoking Restrictions—Minnesota State Buildings (Nov. 11, 1988), Bates No. TI28760163/4; Robert Whereatt, “Smoke-Filled Rooms at Capitol May Be a Thing of the Past,” Minneapolis Star-Tribune, Dec. 28, 1988 (1B), Bates No. TI00261042; “Minnesota Legislator Disputes State Restrictions on Smoking,” Rapid City Journal, Jan. 8, 1989 (C5), Bates No. TI28760585; 1988 Minn Laws ch. 613, § 9, at 726, 730, Bates No. TI28760166 (on tobaccodocuments.org).

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82Letter from [Tamara Barrett] to Representative Wayne McKinney, Jr. and Senator James Riordan (Feb. 13, 1992) (copy furnished by Tamara Barrett) (the letter lacks a sender’s name).
As one of the largest employers, if not the largest, the state has an obligation to keep its workers healthy by eliminating health hazards. It makes for a confused public when they are told that there is no smoking in public places (all state office buildings are public places) and then walk into one and see “Yes Smoking” signs everywhere you look. The state should have been the first, not last, employer to have a total ban on smoking on all state property.

It just makes me sick when I see all these school children who have come to tour this building sitting out here trying to eat their sack lunches with billows of blue smoke all around them. Why not just seat them in front of a car’s exhaust pipe? ... I have let teachers know at our school that visiting the capitol can be hazardous to their classes’ health.... I don’t recommend anyone coming here for a visit, especially when the legislature is here.  

Having exhausted other avenues of recourse, in November Barrett circulated a petition among employees in the state capitol building and sent it to Governor Branstad together with a cover letter. Calling attention to “[t]he smoking crisis” in the Capitol, the 33 petitioners complained that after all the other state office buildings had been “emancipated,” smoke in the Capitol had tripled, as smokers from those places came to the Capitol for smoking breaks. They also bemoaned that “ground floor employees have to virtually hibernate during the winter because it is physically not safe to breath[e] the air during the legislative session.” Requesting that the governor “free us from the oppression of smoking,” Barrett and her comrades advised him that the only solution to this kind of health threat was “total emancipation.” Barrett’s accompanying letter explained that General Services had been giving her the runaround for the better part of two years, claiming that the legislature had barred it from banning smoking in the Capitol. She also informed Branstad that many people, especially in management and legislative offices, had failed to sign because they feared consequences. After the petition had landed on his desk for his signature as one more Capitol employee, the governor called Barrett.

The petition sparked Branstad’s announcement at the end of November that

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83Letter from Tammie J. Barrett to Tim Ryburn (June 22, 1992) (copy furnished by Tamara Barrett).
84Petition for the Prohibition of Smoking on Capitol Grounds (no date [Nov. 12, 1992]) (copy furnished by Tamara Barrett). Of the entire Supreme Court staff only three people smoked. Letter from Tammie J. Barrett to Tim Ryburn (June 22, 1992) (copy furnished by Tamara Barrett).
85Letter from Tammie J. Barrett to Terry E. Branstad (Nov. 12, 1992) (copy furnished by Tamara Barrett).
86Telephone interview with Tamara Barrett, Des Moines (Apr. 2, 2007).
he wanted to secure the agreement of legislative leaders and Iowa Supreme Court officers to make the Capitol smoke-free, a goal that had become more urgent since the ban on smoking in all other Capitol complex buildings had prompted smokers from them to gravitate to the poorly ventilated Capitol basement cafeteria to work, from which smoke drifted to Supreme Court offices. The rotunda, too, “serves as a chimney, quickly spreading second-hand smoke throughout the building” into nosmoking offices. Whereas in the past legislative leaders had opposed a smoke-free building on the grounds that many members “need to feed their addiction in order to function,” the governor’s spokesman, Richard Vohs, waxed optimistic over changes in leadership. Especially the replacement as Senate majority leader of Hutchins (“who was forever trying to quit smoking but could never get the job done, particularly in the stressful closing weeks of the session”) by nonsmoking Wally Horn, whose office bore a “please do not smoke” sign, was taken as a hopeful sign. Horn himself offered a glimpse of the regressive role he would play during the 1993-94 session when he understateledly observed that he was “not certain he wants to make the building a smoke-free area. ’I’ve tried to be tolerant...but I’m not hard-core about it.’”

Taking an unconventional public health position, he allowed as “more restrictions might be the solution, particularly to protect the antiques in the building,” but even on this weak proposal he would require consensus. George Wilson, the pipe-smoking doyen of Iowa tobacco lobbyists, showed even less understanding of the purpose of Branstad’s cigarette tax increases in defending smokers’ “‘rights’” by alleging that it was “‘a little incongruous to balance the budget” with them and “then tell people they don’t want them to smoke.’”

Three days later the Register editorialized that it was hard to believe that smoking was still permitted in the Capitol. On December 23, Branstad—whose re-election as far back as 1986 against Lowell Junkins, former Democratic Senate majority leader and future tobacco industry lobbyist, the Tobacco Institute did not consider “good news for the tobacco industry due to the influence of Mrs. Branstad in her very vocal anti-smoking campaign” —announced that, in

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87David Yepsen, “Smoke-Free Statehouse Considered,” DMR, Nov. 26, 1992, Bates No. T128922943. The article also contained similarly misplaced predictions about the positive consequences flowing from replacement of smoking Senate President Michael Gronstal by nonsmoking Leonard Boswell and smoking House Speaker Bob Arnould by nonsmoking Harold Van Maanen.


89Michael Brozek to George Minshew, Memorandum: Monthly Summary - October, 1986, Regions IV and V (Nov. 13, 1986), Bates No. T122492737. Although the Tobacco Institute’s Iowa lobbyist, Charles Wasker, was “strongly identified with the Republican
response to the employees’ requests, smoking would be banned on the first two floors beginning January 1, but that the third floor would remain unaffected because he could not persuade legislative leaders to agree to a ban in the areas they controlled. Barrett, whom Branstad publicly credited with having mobilized her co-workers to oppose smoking, praised the action, but regretted the failure to ban it throughout the building because “‘the lobbyists will just think it’s OK to smoke around here, too....’” Familiar enough with law to know that a piece of paper was worth little without enforcement, on the eve of the new ban Barrett met with the Commissioner of Public Safety and summarized their conversation in a letter the same day. Taking as her point of departure the notion that “[e]mpathy does not get us what we have fought the better part of three years to attain,” she nevertheless emphasized that the anti-smokers did not expect the capitol police to “spend months on end writing citations,” but “merely...a week of policy enforcement to make it known that this is not a frivolous edict.” Finally, as the new legislature convened in January 1993, Barrett sent a letter to all its members, urging them to eliminate smoking in the rest of the Capitol. She drew their attention to the thousands of visiting school children who were forced to walk the halls “in a haze of smoke,” thus exposed to the message that “smoking is a drug that you don’t have to say no to—if my legislator allows it in our capitol, it must be okay.”

Representatives Philip Brammer and Rod Halvorson Finally Clear the Tobacco Haze in the Capitol Rotunda Despite the Opposition of Democratic Majority Leader Wall Horn and Republican Minority Leader Jack Rife: 1993

Cigarette smokers in the Iowa Senate have taken the offensive against those who would

Party,” since he was, “ironically...very close to” Junkins, if the latter had been elected governor, the Institute’s “legislative profile” would have been “complimented [sic] by the retention of Mr. Wasker’s firm.” [Michael Brozek], Iowa Charles F. Wasker Background (June 30, 1986), Bates No. T122431036, on tobaccodocuments.org.


91Letter from Tammie J. Barrett to Paul H. Wieck II (Dec. 30, 1992) (copy furnished by Tamara Barrett).

restrict public smoking.93

Legislators at the 1993 session were focused on a ban on public smoking, but initially from a personal perspective. As the Des Moines Register formulated the exceptional situation: “Many Iowans who smoke in recent years have been evicted from the workplace—unless they are state senators.” Leading the effort to protect senators from secondhand smoke exposure was Democrat Mike Connolly, an ex-smoker94 and long-time high school teacher in Dubuque.95 Sparking the session’s “first hot debate,” he declared: “Smokers’ rights end where non-smokers’ rights begin. We have a right to clean air.”96 Connolly’s objective was to change the Senate rules to prohibit smoking in the chamber and all areas controlled by the Senate—which his party controlled 27 to 2397—so that the ban on smoking that covered the House chamber and the ground and first floors of the Capitol would extend to the second-floor rotunda and a few rooms.98 Supported by the recent publication of an Environmental Protection Agency report on the health effects of passive smoking,99 Connolly predicted that many state legislatures would be banning smoking in all public places: “This is just the beginning.” By refusing to intervene, the state “could expose itself to liability....” Connolly’s opponents adamantly rejected further restrictions. Republican Minority Leader Jack Rife, a farmer, resented forcing smokers onto the sidewalks in the winter and “subject[ing] them to pneumonia” as “callous, inhumane and certainly in violation of individual rights.”100 One Iowa weekly, reporting that

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97“Members of Iowa General Assemblies 1981-2002,” at iv, on http://www.legis.state.ia.us/Pubinfo/Library/Members19812002.pdf
Rife had even suggested that a basement room for nursing mothers be turned into a smoking lounge, wondered whether Rife preferred that they stand outside in the cold. For Rife’s smoking colleague, Democrat Tony Bisignano—who knew that no compromise was possible with some people who would not be satisfied until tobacco was banned—nicotine addiction was “the bottom line” because a ban would make smokers “distracted and irritable”: so long as selling cigarettes was legal in Iowa, “people need a place to use them.”

In the House, too, anti-smoking advocates were pushing to expand the smoke-free legislative zones. By far the most zealous activist was Democrat Philip Brammer from Cedar Rapids, an ex-smoker suffering from chronic lung disease and severe asthma, who had to use an inhaler to open his clogged lungs twice or three times as often in the Capitol as elsewhere. His special target was the rotunda, which the Senate jointly controlled.

Although the legislature ultimately failed to enact any of the Tobacco Free Coalition’s measures for the rest of Iowa, the narrowly Republican-controlled House (51 to 49) took a decisive self-regarding step when, on January 25, 1993, the Rules Committee proposed a resolution amending the rule to prohibit smoking “in the house or in any area of the capitol building controlled by the house.” During the debate on the Rules Committee Resolution on February 10, Democrat Rod Halvorson offered an amendment to broaden the no-smoking zone by adding “or controlled jointly by the house and senate,” which the House adopted on a
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Republican Stewart Iverson, a smoker who later as Senate majority leader and chairman of the Senate Rules and Administration Committee conferred on himself a unique exemption so that he could smoke in his office, offered an amendment to create an exception “for members and employees of the house and their guests in the area behind the chamber at the top of the stairway leading to the first floor,” but it lost. Consequently, from 1993 to 2008 the House rule read: “Smoking shall not be permitted in the house or in any area of the capitol building controlled by the house or controlled jointly by the house and senate.”

But the problem of smoking in jointly controlled areas persisted because the Senate had not agreed to the ban in the rotunda, “one of the last refuges of smokers in the building,” thus, making it, according to opponents, unenforceable. Other House members were devising other legislative strategies to incorporate the rotunda into the smoke-free zone.

On January 26, the day after the Rules Committee resolution had been filed, Democrat Ed Fallon of Des Moines, one of the most leftwing members of the state legislature, filed a bill to amend the clean indoor air law to prohibit smoking at the Capitol complex and impose a $25 civil penalty for each non-record roll call vote of 76 to 20. Republican Stewart Iverson, a smoker who later as Senate majority leader and chairman of the Senate Rules and Administration Committee conferred on himself a unique exemption so that he could smoke in his office, offered an amendment to create an exception “for members and employees of the house and their guests in the area behind the chamber at the top of the stairway leading to the first floor,” but it lost. Consequently, from 1993 to 2008 the House rule read: “Smoking shall not be permitted in the house or in any area of the capitol building controlled by the house or controlled jointly by the house and senate.”

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violation. It died in the State Government Committee to which it had been referred. During the debate at the beginning of March on House Concurrent Resolution 16 embodying the Joint Senate-House Rules, Democrats David Schrader, who had owned a cigarette vending machine business, and veteran anti-smoking militant Halvorson filed a floor amendment inserting a new rule: “Smoking shall not be permitted in any areas of the capitol building controlled jointly by the senate and the house. However, one house may designate smoking areas within areas of the capitol building controlled exclusively by that house.”

After the House on a non-record roll call defeated by a vote of 33 to 54 the floor amendment filed by Democrats Dennis Renaud, who was in the barber business, and Daniel Fogarty, a livestock farmer, substituting the much narrower language “both houses shall” for “one house may,” the House adopted the new rule, which, however, died in the Senate.

On March 16, 1993, against the background of what he described as the mounting evidence that secondhand tobacco smoke exposure was inconsistent with employees’ right to a healthful work environment, Governor Branstad declared that, effective April 26, smoking would be prohibited in all Capitol complex buildings (thus eliminating designated smoking areas) except those parts of the Statehouse controlled by the legislature. The same day, Halvorson, who had been battling smoking in the House since the 1970s, announced that he had requested an attorney general’s opinion on whether smoking in the Capitol rotunda violated the state clean indoor air law, which limited smoking in public

119 See above ch. 28.
places to areas that had been so designated by those having custody or control of them,\textsuperscript{127} since there was apparently no such designation. House Majority Leader Brent Siegrist objectively put additional pressure on the Senate to agree to ban smoking in the rotunda by pointing out that the governor’s action had “the potential for turning the rotunda into a smoking lounge.”\textsuperscript{128}

The next day, Brammer, who was developing a far-flung anti-smoking agenda,\textsuperscript{129} filed a House Concurrent Resolution proposing that: “Smoking shall not be permitted in any areas of the capitol building jointly controlled by the Senate and the House of Representatives, including the rotunda and the legislative dining rooms.”\textsuperscript{130} The Rules Committee to which it was referred took no action on it.

Stymied but not resigned, Brammer, whose emphysema and asthma had at times “left him unconscious and fearing death,” announced a week later that he could not stand the smoke any longer and would file suit to prohibit smoking in the rotunda. Although Governor Terry Branstad pushed for making state buildings under his control smoke-free, he took the position that the rotunda was under the legislature’s control. The declaratory judgment action that Brammer planned to file would name the governor, the Democratic and Republican party leaders, the Department of General Services, and the Legislative Council as parties, in order to secure a judicial decision as to who had management responsibility of the rotunda. While admitting that it was “‘absurd it has to go this far,’” Brammer, whose need to take oxygen was exacerbated by smoking in the statehouse, blamed the Senate, which “‘holds up anything that has to do with smoking.’” In turn, Rife, the heavy smoking Senate minority leader, accused Democratic House minority members of “‘just trying to make a name for themselves. That’s all this is—an attempt to get a little press.’”\textsuperscript{131} Brammer, who in 1997, the year after he had left the legislature, became the named plaintiff in


\textsuperscript{129}In 1994 Brammer filed an amendment to a tax bill to increase the cigarette tax from 36 to 50 cents per pack, but the bill itself never reached the floor. \textit{State of Iowa: 1994: Journal of the House: 1994: Regular Session Seventy-Fifth General Assembly} 1:792 (Mar. 21), 2:2198-99 (H-5539 to H.F. 2351). During the 76th Session (1995-96) he also filed numerous anti-smoking bills. See above ch. 30.

\textsuperscript{130}House Concurrent Resolution No. 22 (Mar. 17, 1993).

\textsuperscript{131}Phoebe Howard, “Lawmaker to Take Smoking Fight to Court,” \textit{DMR}, Mar. 24, 1993 (1).
a class action against the cigarette companies, and died of emphysema at the age of 67 in 1999, knew whereof he spoke when he charged Rife with having “a bad habit of making offensive remarks about life-and-death matters.”

Two days after his announcement but before he had even filed the declaratory action, Brammer devised a new vehicle for his crusade: on March 25 he filed an amendment to the Human Services appropriations bill titled: “Clean Air Act—Application to Capitol Building.” It provided that: “The capitol building shall be considered a public place pursuant to section 142B.1 and the rotunda area between the chambers of the house of representatives and the senate shall not be designated a smoking area pursuant to section 142B.2. A person who violates the provisions of this section is subject to the penalty provisions of section 142B.6.” The House, a majority of which had already demonstrated its support for this ban, adopted it immediately and passed the bill.

The next day, Brammer and Halvorson announced that Iowa Deputy Attorney General Elizabeth Osenbaugh had issued an opinion stating that “the rotunda is a place used by the general public and therefore subject to the smoking law,” which restricts smoking in public places to areas that have been designated for smoking. The opinion assumed that the rotunda (and the legislative dining room) were not under the exclusive control of either house and were not used for legislative offices, committees, or deliberations, and that the rotunda was open to the general public. Backtracking from the full interpretive breadth of her aforementioned 1989 advice letter to Senator Hannon, the AG’s office confessed that “it would be error to extend this rationale to all areas subject to legislative control, as was suggested in the 1989 letter.” Osenbaugh concluded that applying the smoking rule to the rotunda “would not infringe upon the authority of each house to determine its rules or procedures as legislative proceedings do not occur in the rotunda.” To be sure, she then added that the applicability of the law also meant that the person or entity that had control of the rotunda as a public place was empowered to designate a smoking area, and that “[u]ntil there is a direct conflict between action of either house and chapter 142B, there is no constitutional conflict.” Osenbaugh closed by declaring that “the Legislative Council shall not designate the rotunda as a smoking area.”
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Council should decide whether to designate the rotunda or the legislative dining room as a smoking area. If no designation is made, chapter 142B would prohibit smoking in those areas. Relying on the attorney general opinion, Brammer and Halvorson contended that unless the Legislative Council—which consists of the legislative leadership and of legislators selected by them and is empowered to assign uses of the areas in the capitol—designated the rotunda a smoking area, smoking there violated the law. To ratchet up the level of pressure, Halvorson also requested that the Iowa Department of General Services begin enforcing the clean indoor air law in the rotunda the following week.

Brammer and Halvorson soon learned the perils of gaining an interpretive victory based on a substantively weak statute—unless their tactic was to manipulate an unwary Senate majority leader into making an autocratically unpopular decision. Three days later, taking his cue from Osenbaugh, Brammer, and Halvorson, the non-smoking Democratic Senate majority leader, Wally Horn, the chairman of the Legislative Council, promptly designated the rotunda a smoking area until the Council—which normally does not meet while the legislature is in session—took up the issue, but declined to reveal when he would call a meeting. Horn’s announcement provoked objections from Democratic House Minority Leader Bob Arnould, who accused Horn of abusing his authority as chairman, and Republican House Speaker Harold Van Maanen, who questioned his authority. Horn, while arguing that the legislature was not bound by an attorney general opinion, nevertheless asserted that he wanted to settle the

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137 Iowa Atty Gen. Op. #93-3-3(L) (Mar. 26, 1993). Osenbaugh characterized the law’s applicability to the dining room as “a closer question,” but opined that the application of the law “would not abridge each house’s control of the legislative process...” While conceding that “a court would likely defer to a legislative decision governing its own dining room,” she insisted that the law could constitutionally be applied in the absence of a contrary legislative rule. Id. Since § 142B.2(3) prohibited designating any public place except a bar “as a smoking area in its entirety,” it is unclear what statutory basis underlay Osenbaugh’s argument that the Council was authorized to “designate the rotunda or the legislative dining room as a smoking area” (emphasis added). After all, even though the legislature exempted “factories, warehouses, and similar places of work not frequented by the general public” from the ban on smoking in a public place or public meeting “except in a designated smoking area,” it nevertheless provided “that an employee cafeteria in such a place of work shall have a designated nonsmoking area.” § 142B.2(1).


The next day the \textit{Register}, disgusted that “[c]igarette smokers who gather in the heart of Iowa’s most important structure can continue to foul up the place, by virtue of a ruling from Wally Horn, a non-smoking glutton for punishment,” predicted that: “In time, the non-smokers are going to toss cigarettes out of the Statehouse for good. Smokers may go next if they keep fighting the trend.”\footnote{“Fouling Up the Statehouse,” \textit{DMR}, Mar. 31, 1993 (8) (NewsBank).} It then proceeded to impart a lesson to Senate Minority Leader Rife, a smoker whose limited capacity to imagine the present as history caused him to dub Horn’s decision “fair”\footnote{Jonathan Roos, “Reprieve for Those Who Smoke in Rotunda,” \textit{DMR}, Mar. 30, 1993 (1) (NewsBank).}:

Jack Rife...backs Horn’s rule. “The idea of putting someone out on the street (because they smoke) is ridiculous, he said.”

No, it isn’t

“Some space has to be available to people who choose to smoke,” he said. “All the air can’t be a non-smoker’s air.”

Yes it can and yes it should, in a taxpayer-owned building.

...

Surely, if there is any place that should be off-limits to the polluters, it should be the most conspicuous and popular place at the seat of government. But to accommodate the 26 percent of Americans who smoke, Senator Horn wants to foul the air of all who gather there.

What disrespect for public health. What a poor example for youngsters who visit their Capitol to watch their elected lawmakers in action. What a rotten misuse of power for no better apparent purpose than to show rivals who’s in charge.\footnote{“Statehouse Notes,” \textit{DMR}, Mar. 31, 1993 (4) (NewsBank).}

For good measure Halvorson wondered who had made Horn “‘king of the dome.’”\footnote{“Fouling Up the Statehouse,” \textit{DMR}, Mar. 31, 1993 (8) (NewsBank).} On the same day, March 31, Brammer filed his lawsuit in Polk County District Court, charging that Horn had acted as a “dictator” in designating the rotunda a smoking place without authority, and requesting that the court compel Governor Branstad as well as the Public Safety Commissioner (who is in charge of the Capitol police) and the director of the Department of General Services (which is in charge of maintaining public buildings) to comply with the
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The aforementioned attorney general’s opinion and prohibit smoking in the rotunda, Brammer complained that the officials’ refusal to ban smoking endangered the public’s, in particular legislators’ and lobbyists’, health. Brammer’s lawyer announced that the same day he would request a temporary restraining order to stop smoking in the rotunda.

Already the next day, April 1, District Judge Arthur Gamble held a two-hour evidentiary hearing at which Brammer testified that he avoided the rotunda “like the plague whenever possible” because breathing secondhand smoke aggravated his lung ailments. Indeed, if the situation continued to worsen, Brammer declared, he would be forced to resign his seat in the legislature. His colleague Halvorson added that lobbyists who spend much of their time in the rotunda had told him that the smoke build-up was making them sick: “‘It not only stinks, it’s irritating to breathe the smoke....’”

Ironically, Deputy Attorney General Osenbaugh, who had issued the opinion that formed the legal basis of Brammer’s complaint, appeared in court to represent the governor and the other state defendants, whom she described as “‘bystanders’” to a House-Senate dispute over which the court lacked jurisdiction.

On the day of the hearing both Branstad and Horn weighed in outside of the proceedings. The governor argued that Brammer’s suit took “‘the wrong approach. It should be worked out in normal legislative channels.’” Horn offered reporters a glimpse into the nature of those channels by asserting—in tune with Rife—that Brammer and Halvorson’s ability “‘to make headlines every day’” over a “tempest in a teapot” was “‘kind of disgusting.... They’ve finally found something that gets them on the front page, and a lot of people out there in the state think that all we’re doing is spending hours and hours discussing smoking.’”

The following day, April 2, Judge Gamble dismissed Brammer’s suit, ruling

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146 “Legislator Loses Smoking Suit,” DMR, Apr. 4, 1993 (5) (NewsBank). It is unclear under what authority violators could have been arrested since the penalty section of the smoking prohibition law provided only for civil fines. Iowa Code § 142B.6 (1993).
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that the question of smoking in the rotunda was an internal legislative matter over which the court had no jurisdiction. Brammer, who was assessed court costs, immediately announced that his only other recourse during the legislative session was an action under the Americans with Disabilities Act, which he planned to file the following week.\footnote{150}

Brammer did, however, achieve a victory on April 8, when the full Senate, by a non-roll call vote of 32 to 15, rejected a “pro-smoking amendment”\footnote{151} that would have struck Brammer’s amendment to the Human Services appropriations bill.\footnote{152} In spite of Minority Leader Rife’s complaint that “‘[t]he bottom line is individual rights’” and that “‘I am entitled to some space in this Capitol’”—to which non-smoking Democrat William Dieleman responded by noting that Rife’s rights ended where he began violating someone else’s—\footnote{153} the bill became law\footnote{154} and on July 1, 1993, the legal contest over the toxic and carcinogenic air pollution in the rotunda finally came to an end.\footnote{155} The Tobacco Institute’s acknowledgment of this defeat did not come until the day after adjournment in a communication from a Region IV office employee, who was “tracking...the Iowa Capitol and other government buildings as a local issue,” to the State Activities director of legislative information conveying “the jist [sic] of the whole thing” from Wasker’s office—namely, “that the Capitol of Iowa and state office buildings are

\footnote{150}“Legislator Loses Smoking Suit,” DMR, Apr. 4, 1993 (5) (NewsBank).
\footnote{151}“Senate Agrees with House Bill, Moves to Ban Smoking in Rotunda,” DMR, Apr. 9, 1993 (4) (NewsBank).
\footnote{153}“Senate Agrees with House Bill, Moves to Ban Smoking in Rotunda,” DMR, Apr. 9, 1993 (4) (NewsBank).
\footnote{154}1993 Iowa Laws ch. 172, § 54, at 414, 438.
\footnote{155}“Statehouse Notes,” DMR, Apr. 27, 1993 (4) (NewsBank). The amendment’s legal effect was apparently not vitiated by the fact that it was never directly incorporated into the public smoking prohibition law and that, as part of an appropriations bill, its validity may have expired at the end of the fiscal year on June 30, 1994. A new dispute then arose when some members of the Legislative Council proposed designating a legislative dining room as a public smoking area. Minority Leader Rife was a chief proponent, insisting that smokers needed a place to smoke so that they were not forced to go outside, but other leaders objected. Jonathan Roos, “Statehouse Dining Room Smoking Area Gets Support,” DMR, May 27, 1993 (6) (NewsBank). When the Council reconvened in December to discuss, inter alia, “where to put the smoking room at the statehouse, the Register’s chief political reporter complained: “So far, legislative leaders have spent more time talking about where people can smoke than they have about health-care reform.” David Yepsen, “Primary Could Color Session,” DMR, Dec. 6, 1993 (15) (NewsBank).}
smoke free—no designated smoking areas and this will take place July 1, 1993.”

Also defused was the “extraordinary” feud over smoking between two non-smoking Democrats from the same city (Cedar Rapids)—“Horn was Brammer’s state senator”—one of whom (Brammer) was an “outspoken” leader on the no-smoking issue and the other (Horn) “demonstrate[d] a stubborn streak from time to time.” Such confrontations doubtless contributed to Brammer’s charges that Horn and Rife were “in the tobacco lobby’s pocket” and that the “tobacco lobby owns the management of these two houses.” Rife—who, like Horn, received contributions from the tobacco industry—indignantly rejected claims that such payments in any way influenced his views on smoking, especially in restaurants: “You wouldn’t have to give me a dime and I’d feel the same. A private business belongs to the individual, not the government.”

In June following the close of the session, “[v]irtually all the legislative leaders agreed that smoking eventually will be banned at the Statehouse but disagreed on how much money should be spent to provide a temporary [smoking] facility.” The Legislative Council “balked at a potential cost of $56,000 to create a designated Statehouse smoking area,” but “conceded they probably would end up providing space for smokers” because “the consequences of making the building completely smoke-free could be ugly.” Democrat William Palmer, the Senate president pro tempore, said that smokers turned “surly” if a ban was forced on them, but that it was “just a question of time”; in the interim, however, they should be given time to adjust “before being tossed from the building.” Indicative of the smokers’ (and their facilitators’) priorities was the report that: “The most popular suggestion for a potential smoking area is a former first aid room at the Statehouse, currently being used as a lactation room for nursing mothers.”

In 1995 Johnie Hammond and another senator sought to dissolve the mystery as to what spaces the Senate no-smoking rule governed by filing the following amendment to Senate Resolution 1 embodying the Senate’s permanent rules: “Smoking shall not be permitted in the senate chamber or in any areas controlled

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156 Virginia Brown to Cathey Yoe (May 3, 1993), Bates No. TI28922947.
157 Email from Mark Brandsgard (Feb. 28, 2007). Brandsgard, the Chief Clerk of the House, was the administrative assistant to the House Democratic Minority Leader in 1993.
158 Email from John Patchett (Feb. 28, 2007).
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by the senate, but it was never debated or voted on. An anti-smoking bill (S.F. 2174) whose unanimous passage Hammond managed to secure from her Human Resources Committee in 1996 would not have applied to the Senate itself, but it never even reached the Senate floor.

With the Republicans’ Loss of Their Majority and the Fall of the Cigarette Manufacturers’ Friend, Majority Leader Stewart Iverson, Senator Michael Connolly’s “long battle to rid the Senate of smoking...finally come[s] to an end: 1997-2008

By 1997 the Senate, now controlled by the Republicans 29 to 21, mustered the civil courage and public health intelligence to expand its no-smoking zone. At a Rules and Administration Committee meeting on January 13, the new Republican Majority Leader, chain-smoking Stewart Iverson, who in that capacity was also the committee chair, distributed the Senate Rules for the 77th General Assembly and explained the changes; then the “Access to Senate Chambers and Rules of Senate Decorum” were discussed, but unfortunately the minutes reveal no discussion of the new smoking rule, which read:

5. SMOKING

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164 Email from Mike Connolly to Marc Linder (Apr. 24, 2008).


166 Committee Rules and Administration, Jan. 13, 1997, 11:07-11:10 a.m., 3:15-4:15 p.m., in Access to Senate Chamber and Rules of Decorum, 1997-1998, Senate Rules and Administration Committee, RG 039. General Assembly, SHSI, DM. The only decorum rule discussed was a successful amendment by Senator Gronstal adding secretaries to legislators as the only other group permitted to have soft drink cans in the chamber.
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a. Smoking is not permitted in the senate chamber at any time.

b. Smoking is not permitted in any other meeting rooms, office areas, or other space under Senate control, except for designated areas identified under subparagraph “c” of this section.

c. Room 206 is designated a smoking area for Senators members of the general assembly and legislative staff. Smoking may be permitted in Room 326A at the discretion of the majority leader. The south end of the 2nd floor hallway behind the Senate is designated a smoking area for Senators, Senate employees, registered Senate press persons, former members of the Senate who are not registered lobbyists, and guests of Senators (who must be continually accompanied by a Senator in order to use this area). The Secretary of the Senate will be responsible for clearly marking, maintaining, policing, and maximizing ventilation in these areas Room 206.

The same day the Senate’s two Republican leaders, Iverson and non-smoking President Mary Kramer, agreed finally to remove the cigarettes from the vending machine behind the Senate chamber. Kramer’s reason—that children could buy cigarettes from the unmonitored machine—was the same one that had prompted Governor Branstad to have it removed from the basement seven years earlier before Democratic Majority Leader Hutchins had ordered it delivered to the Senate against the physical resistance of Senators Hannon and Lloyd-Jones. The Kramer-Iverson accord eliminated smoking in an open area where it had been permitted, but designated as smoking areas Iverson’s office, a small room a few steps from the chamber, and a ground-floor area near the legislators’ dining room. Though the agreement (self-)conferred a super-privilege on Iverson, all legislators and staff members were privileged vis-a-vis lobbyists and visitors, who had to go outside to smoke. To be sure, the new rules still had to be approved by the full Senate.

That process proved to be nettlesome. The following day, during the consideration of Senate Resolution 1 embodying the chamber’s permanent rules, a group of 15 Democrats and three Republicans led by Democrat Michael Connolly filed a floor amendment to extinguish smoking altogether: “Smoking Prohibited: Smoking shall not be permitted in the senate or in any area of the capitol building controlled by the senate or controlled jointly by the senate and house.” Connolly argued that it “looks very bad—it looks elitist—when the

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167 Access to Senate Chamber and Rules of Senate Decorum [1997-1998], Senate Rules and Administration Committee, RG 039, General Assembly, SHSI, DM.


169 State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1:55 (Jan. 14), 2:1600 (S-3007). The three Republicans were Andy McKean, John Jensen, and Maggie Tinsman. Directly before filing this amendment,
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Senators Connolly and Mary Neuhauser had requested and received consent to defer action on a much more tepid amendment: “Smoking Restricted: In addition to a written policy on smoking restrictions adopted by the committee on rules and administration, smoking is prohibited in room R15A when a committee or an appropriations subcommittee is meeting in room R15.”

State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1:55-57 (Jan. 14). An even more relaxed version of this amendment was adopted by the Senate on January 28; see below.


170Email from former Iowa State Senator Milo Colton (Mar. 15, 2007). Remarkably, 14 years earlier, Palmer voted against a bill that would have “put[ ] a guaranteed profit [to wholesalers and retailers] on a product [cigarettes] that is contributing more to the health cost increases than any substance other than alcohol.” Tom Witosky, “Iowa Senate Votes to Raise Minimum Price of Cigarettes,” DMR, May 7, 1983 (2A:2-3).


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Republican deserted Iverson—the Senate voted 28 to 20 to reconsider its vote.\footnote{State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1:137 (Jan. 27).} Then on the substantive vote on adopting the amendment again, the ban lost on a 24 to 24 tie: all 21 Democrats voted in favor joined by three Republicans, two of whom (Dr. Redwine and Tinsman) had also voted for it two weeks earlier.\footnote{State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1:138 (Jan. 27).} Although only about one fifth of the senators used tobacco, “‘the old mossbacks,’” Connolly said, were “‘continuing to have their way. It’s a disgrace.’”\footnote{Thomas Fogarty, “Senators Reverse Ground, Vote to Permit Smoking,” DMR, Jan. 28, 1997 (6) (NewsBank).}

The following day, when the Senate resumed discussion of Senate Resolution 1, Assistant Minority Leader Gene Fraise, who in 1990, for example, had voted against smoking curbs, moved the adoption of his curiously narrow amendment: “Smoking shall not be permitted in any area under exclusive control of the senate by anyone other than senators, staff of the senate, and staff of central legislative staff agencies when assigned to work in the senate.”\footnote{State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1:150-51 (Jan. 28).} On yet another almost completely party-line vote, it was rejected 23 to 25 with only two Republicans joining all 21 Democrats.\footnote{State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 2:1601 (S-3008).} Connolly then offered a virtual replica of his failed S-3007, differing only in confining the smoking ban to “any area of the capitol building controlled by the senate.”\footnote{State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 2:1607 (S-3021).} All 21 Democrats voted for it (including Palmer), but they were joined by only two Republicans (Dr. Redwine and Tinsman), producing a 23 to 26 roll call vote.\footnote{State of Iowa: 1997: Journal of the Senate: 1997 Regular Session Seventy-Seventh General Assembly 1:151 (Jan. 28).}
regulation of smoking was fraught with disciplinary peril—at least for third-term Quad Cities Senator Maggie Tinsman, whose seat happened to be next to Iverson’s. During one of the votes the majority leader admonished her to toe the party line, but Tinsman (who had a master’s degree in social work and, for a decade, had been a Scott county supervisor and during half of that period Commissioner of the Iowa Department of Elder Affairs as well), explained that as a member of the board of directors of the American Lung Association of Iowa she could not possibly vote against a smoking ban. Not ten minutes had gone by since she had repeated her act of conscience and defiance on the next vote, when a Senate staffer came to inform her that she had been removed from the Legislative Council (the body that oversees the interim business of the legislature and sets the policies of various legislative agencies such as the Legislative Service Bureau). After having had to ask by whom and learning that it was Iverson himself, she asked the majority leader why he had removed her from the prestigious position. He bluntly told her that his action was the response to her having voted against his leadership. Asked many years later whether she regarded Iverson’s move as vindictive, Tinsman observed that she preferred to call it an exercise of “raw political power.”

More subtle means were also the more typical method for deterring senators from defying Iverson on the issue of smoking, which he took both as a personal affront and as a challenge to his leadership. Veteran legislator Andy McKean, who had a very strong personal feeling against smoking, found himself in a “very tough situation” as a Republican because those who voted against Iverson the “fervent smoker” on smoking issues sometimes had to face consequences. The knowledge that defying Iverson on smoking—on other matters his attitude was much more laissez faire—might make him less inclined to push a deviating senator’s bills made anti-smokers think through carefully whether “in the grand scheme of things” a battle with the majority leader was worth it. Without being able to quantify the phenomenon, McKean was quite confident that the number of anti-smoking Republicans who made the calculation and decided not to challenge Iverson would have sufficed to create a majority to ban smoking in the Senate. In that sense Iverson was singlehandedly responsible for its

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After having sustained his latest defeat, Connolly offered a compromise permitting smoking in only 2 rooms including the majority leader’s:

RULE 45A
SMOKING RESTRICTED

1. Smoking is not permitted in the senate chamber at any time.
2. Smoking is not permitted in any other meeting rooms, office areas, or in other space under senate control, except for areas identified under subsection 3.
3. Room 206 is designated a smoking room for members of the general assembly and legislative staff. Smoking may be permitted in room 326A at the discretion of the majority leader. The secretary of the senate will be responsible for clearly marking, maintaining, policing, and maximizing ventilation in room 206.

At the same time, Connolly raised a “point of parliamentary inquiry that, pursuant to Senate Rule 36, the issue of smoking should be lifted from the rules of decorum and placed in the rules of the senate.” Following a five-minute consideration by Senate President Mary Kramer, the chair ruled that it was appropriate to transfer the smoking rules and that “the determination of this matter will be decided by the outcome of the vote” on Connolly’s amendment. However, on a completely party-line vote, S-3022 was rejected 28 to 21 (even the duly admonished and punished Tinsman having done obeisance to Iverson). As Connolly himself later interpreted this episode, Kramer, an anti-smoker who had worked in health care,

ruled my motion germane and then allowed it to come to a vote. The majority leader at the time, Stewart Iverson, knew he had the power to get the necessary votes in the Republican caucus to defeat my amendment. If my amendment had passed,...it would have gone into the Permanent Senate Rules. Senator Kramer knew that my amendment was obviously germane. After conferring with Iverson, they could have it both ways, allow my amendment to be ruled germane and then kill it when it came to a vote of the full Senate. ... That would be my take on the 5 minute deliberation.

At this point, leadership intervened directly, Iverson and Minority Leader

185 Telephone interview with Andy McKean, Anamosa, IA (Apr. 16, 2008).
188 Email from Mike Connolly to Marc Linder (Apr. 25, 2008).
Gronstal offering a floor amendment that was a weaker version of one that Neuhauser and Connolly had offered two weeks earlier and received consent that action on it be deferred:

Rule 45A

Smoking Restricted

In addition to a written policy on smoking restrictions adopted by the committee on rules and administration, smoking may be prohibited in room R15A by the committee or subcommittee chair when a committee or an appropriations subcommittee is meeting in room R15.\textsuperscript{189}

Senate leadership having already agreed to it, the amendment was adopted on a voice vote followed by adoption of Senate Resolution 1 by a roll call vote of 40 to 9, several Democratic anti-smoking activists (including Connolly, Dvorsky, Halvorsen, Hammond, McCoy, and Neuhauser) opposing it.\textsuperscript{190} The result was thus a ratification of the tentative ruling to permit smoking in Iverson’s office and two back rooms.\textsuperscript{191} The \textit{Register} mocked the senate for being “‘like a nervous addict, [who] chickened out at the prospect of going cold turkey.’” In the end it all boiled down to the fact that some of the small minority of smokers “apparently couldn’t face the indignity of having to huddle in doorways outside the Capitol to get their nicotine fix, like ordinary addicts. So they provided cozy space inside for themselves. The backsliders know no shame.”\textsuperscript{192} How one-fifth of the senators persuaded the non-smoking four-fifths not only to facilitate this addiction, but to do so at the expense of their own health, the newspaper did not explain.\textsuperscript{193} Two months later, when the Senate passed a watered-down bill


\textsuperscript{193}Although the \textit{Register} adopted a very hard-line editorial position against smoking, some stones accurately targeted its own glass house. In response to an editorial attack on Iowa congressional Republicans who accepted money from cigarette company PACs, Senator Charles Grassley noted that the “Register accepts tobacco advertising, and has defended it ‘on the basis of free-speech protections. It should defend those same free-speech rights of employees of tobacco companies....’” The newspaper’s self-interested reply revealed a profound ignorance of omnipresent cigarette advertising’s massive
penalizing underage smokers, Connolly admonished his colleagues that the measure’s deterrence was undercut by the chamber’s “refusal to ban smoking in its own rules. Young people will look at what lawmakers do rather than what they say....”

At the end of 1998, Governor Branstad issued an executive order prohibiting the “use of all tobacco products in the State Capitol Complex and all offices occupied by state government....” In 1999, with the Republicans controlling 30 of the Senate’s 50 seats, Connolly undertook yet another effort to ban smoking. He filed an amendment proposing the following language for Rule 45A: “Smoking Prohibited: Smoking shall not be permitted in the senate or in any area of the capitol building controlled by the senate or house.” Only one Democrat opposed it, while five Republicans (including John Redwine, an osteopathic physician) voted for it, leaving the final vote 23 to 26. Tinsman, who had long voted with anti-tobacco control forces, this time joined her pro-smoking Republican Majority Leader Iverson because, as she reconstructed her decision years later, she probably feared that he would mete out a punishment to her even more severe than the expulsion from the Legislative Council for having defied his leadership on the smoking rule in 1997. Having lost the vote, Connolly immediately asked and received consent to withdraw another amendment that would have prohibited smoking everywhere in the Senate except

197 State of Iowa: 1999: Journal of the Senate: 1999 Regular Session Seventy-Eighth General Assembly 1:150 (Jan. 27). Bill Fink, a nonsmoking high school teacher whose father had died of lung cancer, was the lone Democratic defector. He later explained his vote as flowing both from his perception that the smoking lounge was a reasonable compromise and from his streak of libertarianism. Telephone interview with Bill Fink, Carlisle, IA (Apr. 6, 2008).
198 Telephone interview with Maggie Tinsman, Davenport (Apr. 13, 2008).
in the majority leader’s office.\textsuperscript{199}

The committee rule for the General Assembly in 1999-2000 was the same as in 1997-98 with the aforementioned deletion of the struck out words and addition of those underlined,\textsuperscript{200} and the additional permanent Rule 45A also remained unchanged.\textsuperscript{201} The irony of the Senate’s simultaneously passing a bill imposing more severe fines on underage smokers in 2000 was not lost on the Register’s statehouse reporter, who observed that “when senators debate that anti-tobacco legislation, a place for them to take a few puffs between votes is only a few steps away—in a room behind the Senate chamber. Room 206 is the last smoking enclave in the Capitol and nearby state office buildings.” Iverson, one of only about a half dozen senators who still smoked, defended the smoking lounge on the grounds that his colleagues needed an indoor place close by. His “clout” alone was “instrumental in maintaining rules that allow a smoking room for legislators and members of their staff, as well as smoking privileges in his upstairs office.” Ever a true friend of the cigarette manufacturers, the quondam wannabe Tobacco Institute midwestern regional vice president who had been a smoker “most of his life” and resumed the “habit” after having quit a couple of times, reflected the company line in supporting a focus on children rather than adult smokers. To Connolly’s criticism that it was inappropriate for the state Capitol to be one of the few public places in Iowa with a smoking room, Iverson cavalierly replied that “government already sends mixed signals about tobacco, which he notes is legal for adults to use.” And the compliant Senator Jensen, who for years went along with secondhand smoke exposure to get along, was so delighted with the vastly improved air quality that he was “not too concerned about the few senators who still smoke, ‘as long as they’re not blowing it in my face.’”\textsuperscript{202}

Connolly, however, was not vanquished yet. A few days later, as the Senate was debating the tobacco use prevention and control plan, which would be financed by the state’s $1.7 billion share in the Master Settlement Agreement, Connolly let loose a torrent of amendments accompanied by the accusation that the body had never been “more hypocritical,” though he again failed to


\textsuperscript{200}Access to Senate Chamber and Rules of Senate Decorum [1999-2000], Senate Rules and Administration Committee, RG 039, General Assembly, SHSI, DM.

\textsuperscript{201}Sen. Res. 1, Rule 45A at 37 (as adopted Jan. 27, 1999).

\textsuperscript{202}Jonathan Roos, “Smoking Remains in Senate Lounge,” DMR, Apr. 9, 2000 (1A) (NewsBank). On the more severe fines for underage smokers, see above ch. 31.
eliminate the smoking lounge. 203 Connolly adroitly crafted his amendments to fit the context of the bill. His first amendment to an earlier version of the bill provided that:

In order to comply with section 142A.1 and to demonstrate a firm commitment to the tobacco use prevention and control partnership and to provide a positive model for youth, specifically, and the people of Iowa, in general, the general assembly and the executive branch shall declare the state capitol a smoke-free environment. The general assembly shall adopt any rules necessary to require that all areas controlled by the general assembly or either chamber are smoke-free upon the effective date of this Act. 204

When, four days later, S.F. 2565 was substituted for the first bill, Connolly withdrew his amendment and offered instead S-5438, the first part of which he placed at the beginning of the bill, where the latter expressed the purpose of establishing a “comprehensive partnership” among the legislative and executive branches, communities, and the people of Iowa in addressing the prevalence of tobacco use. After Connolly had withdrawn the second part (requiring the legislature to adopt rules), Republican Senator David Miller offered an amendment to the amendment to add all public elementary and secondary school buildings as smoke-free environments. After Connolly had secured a ruling from the chair that Miller’s amendment was not germane, pro-tobacco Republican Assistant Majority Leader Nancy Boettger succeeded in eliminating Connolly’s amendment with the same parliamentary maneuver. 205 Two days later two more of his amendments—declaring the state capitol and the general assembly, respectively, smoke free—to the same bill met the same fate. 206 Immediately thereafter, in his final effort to ban smoking in the building, Connolly offered an amendment that inserted the smoking ban in the General Assembly as a clause directly into the intent clause of the bill’s preamble after the term “General Assembly,” but on Boettger’s point of order the chair also ruled this amendment not germane. 207 Stymied on this front, Connolly made his final gambit, seeking to impose the requirement that certain members of the new Commission on Tobacco Use Prevention and Control be “from organizations that prohibit the use of tobacco in buildings or portions of building under their control.” However,
sensing, presumably, the hopelessness of this initiative, Connolly withdrew the amendment before Republicans could rule it not germane.\textsuperscript{208}

In anticipation of the next Senate rules battle a few weeks later, at the end of 2000, Democrats announced that they would again seek to “get rid of the smoking lounge.” Hammond, who was looking forward to a “fun fight,” noted that their caucus wanted to be able to show that “we legislators can live by the same rules as we require of everyone else.”\textsuperscript{209} With the number of smoking senators dwindling—for example, Republican Richard Drake had smoked up to three packs a day for 58 years before quitting a year earlier—Minority Leader Mike Gronstal believed that they had the votes this time. The “noncommittal” Iverson declined to say more than that: “I don’t know how important it is. I can also smoke in my office.”\textsuperscript{209} Gronstal, an ex-two-pack-a-day smoker who was the last Senate Democrat to quit smoking, tried humor to shame Republicans into abolishing the exemption to which they persisted in clinging: “The Senate Democrats will take up a collection for any Republican Senator trying to quit smoking by using ‘the patch,’ acupuncture treatments, sessions with a hypnotist or whatever else works for them. ... I’d be happy to share my nicotine gum.” Turning serious, Gronstal explained that Democrats objected not only to the Republican majority’s refusal “to live under the same rules we set for everyone else”—smoking was, after all, already banned everywhere else in the Capitol complex, including the House and the governor’s offices—but also to the “terrible example” that young people would see in the Senate’s “Do as I say, not as I do” approach.\textsuperscript{210}

However, in 2001, when Rule 45A had been removed from the permanent rules,\textsuperscript{211} the Register editorialized, a few senators were still smoking, “with many of the rest fed up with their colleagues’ holdover hideaway.” Except for the aforementioned second-floor Senate lounge, where legislators and staff could smoke, the entire Capitol and adjoining state office buildings had been smoke-free for several years. Iverson, “one of a handful of senators who smokes [sic], has used his position in maintaining Senate rules that allowed a smoking room. He doesn’t want fanfare for the end of this arrangement, but it does signal a realization, at last, that the Senate wasn’t setting a very good example. Now,

\textsuperscript{208}Senate Journal 2000, at 1:1260 (S-5495 to H.F. 2565) (Apr. 19).
\textsuperscript{209}Lynn Okamoto, “Iowa Senate Smokers Could Lose Lounge,” DMR, Dec. 9, 2000 (5B) (NewsBank).
\textsuperscript{210}Democratic Senate Caucus, “Democrats Urge Republicans to Adopt a ‘New Year’s Resolution’ Making the Iowa Senate Smoke-Free” (Iowa Senate Press Release, Dec. 27, 2000).
\textsuperscript{211}Sen. Res. 6 (2001).
smokers can use a balcony above the south entrance of the Capitol.”^{212} When Senator Johnie Hammond and other Democrats announced that they would push for a smoking ban that would target Iverson’s smoking in his office and some dozen others who smoked in Room 206 (the designated smoking room) on the grounds that the Capitol building and legislative offices should operate under the rules banning smoking in all state buildings, Iverson insisted that he had “responded to concerns over time by moving smoking to one room other than in his own office. ‘I think that’s sufficient.’”^{213} Nor was the exemption for the Senate lounge merely a matter of self-aggrandizement or even of secondhand exposure to passers-by: because leaders such as Iverson frequented it, nonsmokers who wanted to participate in important talks felt compelled to enter it. One former Democratic legislator, who saw, for example, non-smoking Governor Vilsack there engaged in talks, later revealed that although previously he had not smoked, after attending meetings in the lounge he soon found himself “bumming cigarettes” to the extent that a decade later he was still trying to stop smoking.^{214}

The Iowa Senate’s no-smoking policy continued to lack the formality of the House rule. As late as 2004, smoking was permitted in a room for lobbyists in the Senate, which other smokers also used; smoking in this room finally came to an end in 2005 when Iverson, its chief facilitator, who also conferred on himself the unique privilege of smoking in his office, had to share power as a result of the 2004 elections, which produced an evenly divided Senate.^{215} And during the 2007-2008 General Assembly, the rule, embodied only in its rules of decorum and not in the Rules of the Senate (now controlled by Democrats 30 to 20), was available apparently only on the legislature’s website. Pursuant to this rule, finally: “Smoking is not permitted at any time in the Senate chamber or in any other area controlled by the Senate.”^{216} Even this statement was, until the last days of the 2008 session, untrue: smoking was still permitted on the balcony behind the Senate chamber. However, after Majority Leader Michael Gronstal had declared on the day that the governor signed into law the statewide ban on

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^{212}“A Kick in the Butt,” DMR, Jan. 31, 2001 (8A) (NewsBank) (edit.).


^{214}Telephone interview with legislator who requested anonymity, Des Moines (May 5, 2008).

^{215}Telephone interview with an unidentified male employee of the Legislative Information Office (Feb. 19, 2007).

smoking in public places that “‘[w]e’re going to stop the smoking on the balcony,’” Senator Connolly, who had arguably fought longer and harder for a smoke-free Senate than anyone else in that body’s history, observed: “That will end in a few more days and the Senate, like most public places in Iowa, will finally be free of smoking. The long battle to rid the Senate of smoking will have finally come to an end.”


\[218\]Email from Mike Connolly to Marc Linder (Apr. 24, 2008).
The State’s Two Main College Towns Adopt Anti-Smoking Ordinances, But the Iowa Supreme Court Invalidates Them as Inconsistent with, and Thus Preempted by, the State Clean Indoor Air Law: 1999-2003

“[B]eing in business is all about making money, and if banning smoking is going to cut our business, then no, we’re not for that.... In this restaurant, I’ve got two servers who have asthmatic reactions being around smoke, and we don’t have them working in the smoking sections.... The other servers actually like working in the smoking section because smokers tip better.”

“I shouldn’t have to suffer because of other people’s choices,” said Brooke Beigly, a UI junior and a waitress and manager at the Brown Bottle.... “It’s in my mind all of the time—how much secondhand smoke I swallowed.”

But Beigly said the decision to allow smoking should be left to each restaurant. “I don’t think it’s up to the City Council to stick its nose in it.”

Beigly, a nonsmoker, said the wait staff generally prefers serving the no-smoking section.

“It gets pretty bad sometimes.... But we don’t want to turn our regular smokers away, either.”

Ever since the cigarette oligopoly, which in the 1980s and 1990s had elevated enactment of statewide preemption of local anti-tobacco ordinances to one of its paramount nationwide legislative goals, concluded in 1990 that it had achieved this objective in Iowa by weakening that state’s already barely functional public smoking law in order to insure that no city or county could lawfully adopt an ordinance embodying a stronger ban, repeal of this preemption of local control—which nationally the U.S. Department of Health and Human Services had declared a public health priority—in turn became the state anti-smoking law.

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3 See above ch. 27.

movement’s highest priority. That preemption had been passed while Democrats controlled both houses of the Iowa legislature and efforts at repeal had failed during that party’s remaining two years in power (1991-92) should have made it clear that, once the even more tobacco company-beholden Republicans gained control of the House in 1993 and the Senate as well in 1997, undoing preemption was doomed.⁵

Consequently, the only path available to anti-tobacco groups was adoption by some city council of a stronger ordinance to be supported by a litigation strategy to persuade the Iowa Supreme Court to vindicate such a measure in spite of the tobacco firms’ best efforts at thwarting it. In the end, the outcome would depend on judicial judgment of the bill-drafting competence in 1990 of Covington & Burling, the Tobacco Institute, and the legislature’s former chief bill drafter, Serge Garrison, who by then had placed his skills at the disposal of R. J. Reynolds.⁶ Although the two university cities, Ames and Iowa City, ultimately passed such weak ordinances in 2001 and 2002, respectively—the former not only without the help, but against the opposition, of part of the anti-smoking health movement—the key organization in each failed to coordinate mobilization or strategy with the other,⁷ and the supporting litigation, which was not carefully planned, proved to be the weak link.⁸ After a state district court judge, in a lengthy and analytically sophisticated opinion, in 2002 had upheld the Ames ordinance against a challenge financed by Philip Morris, the following year the Iowa Supreme Court’s extremely meager and poorly reasoned but unanimous opinion, which evaded the important jurisprudential, political, and socioeconomic issues, put an end to the limited experiments in local control in Ames and Iowa City and insured that no other local government would take up the cause.⁹ However, this judicial defeat of the local control gambit only prompted its supporters to revert to the legislative forum once Democrats regained control of both houses in 2007 in an effort to overturn the judges’ decision by legislative repeal of the preemption provision and passage of an express grant of local power.

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⁵See above chs. 28-31.
⁶See above ch. 27.
⁷While the Iowa City group (in small part based on misinformation) was very critical of the Ames group, the latter largely ignored developments in Iowa City. Email from Linda Muston to Marc Linder (Oct. 23, 2008).
⁸The Iowa Attorney General’s Office early on furnished a memorandum providing crucial support for local ordinances, but then failed even to file an amicus brief when the case came before the Supreme Court.
⁹To be sure, in retrospect, the embarrassingly inferior quality of the Supreme Court’s opinion would presumably have made moot any coordinated litigation strategy.
that would sidestep the constitutional/codified limitations.

**Origins**

What right does the Council or any lobbying group have to dictate how these business-owners run their restaurants and whether or not they choose to allow people to perform a perfectly legal activity therein? Because neither the Council nor CAFE bears any risk, they have no moral authority to dictate business policy.

CAFE can march around banging pots and pans shouting all they like about the evils of smoking. Should they be able to force the imposition of an immoral law? No! Everyone can have a say in this by voting with their dollars.¹⁰

By mid-1998, in localities with an aggregate population of 88 million people, 846 anti-smoking ordinances had been adopted in the United States, 753 of which applied to restaurants.¹¹ Because grassroots campaigns at the local level promoted more focused public debate and education about the health consequences of secondhand smoke exposure, which in turn expanded support for the proposed legal changes and their underlying norms, anti-smoking groups had long viewed local ordinances as a high-priority desideratum. In the many states in which the cigarette companies had succeeded in securing enactment of statutes preempting ordinances stricter than or inconsistent with statewide laws,¹² localities would be able to adopt and implement such ordinances in the long run only if they successfully litigated legal challenges by demonstrating that the ordinances somehow did not run afoul of the preemption provisions (or mobilized legislative majorities to repeal them).

**Ames**

Although Iowa was precisely such a state and anti-smoking health groups

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¹⁰Email from Stewart Wood [“Non-smoker, non-business owner, concerned, freedom-loving citizen!”] to Iowa City Council (Nov. 19, 2001), in City Council Documents, Meeting Folders 2001 (final), Nov. 27, 2001 Special Meeting at 175, on http://www.iowacity.org/weblink/docview.aspx?id=8320 (visited Nov. 4, 2008).

¹¹National Cancer Institute, *State and Local Legislative Action to Reduce Tobacco Use* 32, summ. tab. 1 at 71 (Smoking and Tobacco Control Monograph No. 11, 2000).

¹²Of the 30 state preemption laws in effect in 1998, 14 applied to clean indoor air ordinances. National Cancer Institute, *State and Local Legislative Action to Reduce Tobacco Use* 54 (Smoking and Tobacco Control Monograph No. 11, 2000).
prioritized such local action, the advent of an anti-smoking ordinance in Ames was, ironically, serendipitous. To be sure, Ames was not a complete stranger to anti-smoking ordinances: as early as May 23, 1978, two weeks after the governor had signed into law the state’s first clean indoor air law but five weeks before it went into effect, the Ames city council unanimously adopted an ordinance to protect nonsmokers from tobacco smoke at its own meetings or those of other Ames governmental bodies: “No person shall smoke, or otherwise use, any cigarette, cigar, pipe or other smoking equipment, or other tobacco product, in any room in which a public meeting of the city council or any administrative agency, board, commission, committee or other governmental body of the City of Ames, Iowa is being held, during said public meeting.”

Despite this precedent, according to Herman Quirmbach, an economics professor at Iowa State University and the self-designated instigator of the 2000 ordinance, the latter originated in the late summer/early fall of 1999, while he was door-knocking during his re-election campaign for city council. Asked by a nurse why the City of Ames allowed smoking in restaurants, Quirmbach, who was a council member from 1995 to 2003 before being elected to the Iowa Senate, had to admit that he was unable to answer her question. He later proposed to the

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13See above ch. 25.

14Ames, Iowa, Minutes of City Council Meeting at 50 (May 23, 1978) (copy furnished by City Clerk Diane Voss). From the fact that only one very brief mention of the ordinance’s adoption appeared in several lengthy front-page articles of the local newspaper devoted to the meeting suggests that the action was not controversial. “City-County Mixup Means 24th Street Work Delayed,” ADT, May 24, 1978 (1:4-6).

15Municipal Code City of Ames, Iowa, § 17.7(1) (Ordinance No. 2655, May 23, 1978) (1980). The provision is still in the code http://www.cityofames.org/AttorneyWeb/codeTOC.htm (July 1, 2008). From 1978 to 1990 the Iowa clean indoor air law contained no preemption provision; however, since the Ames ordinance banned smoking (presumably) only in city-owned buildings, it would not have run afoul of the state law even after the enactment of the preemption amendment, which did not restrict any public or private building owner’s power to ban smoking entirely on its/his property. Shortly before the preemption provision was passed in 1990, the Ames city council adopted another ordinance (which was amended in 1995), which, for the same reason, fell outside the scope of the preemption provision: “No person shall smoke, or otherwise use, any cigarette, cigar, pipe, or other smoking equipment, or other tobacco product, in any building under the use and control of the City or City administrative agency, or in any enclosed courtyard of any such building, or in any vehicles, including Cy-Ride, under the use and control of the City or City administrative agency, except in those areas, if any, that have been designated and conspicuously posted as smoking areas.” Municipal Code City of Ames, Iowa, § 17.7(2) (Ordinance No. 3074, Mar. 20, 1990, Ordinance No. 3358, Nov. 21, 1995), on http://www.cityofames.org/AttorneyWeb/codeTOC.htm (July 1, 2008).
To be sure, this chance encounter and Quirmbach’s seizing the opportunity hardly took place in a vacuum. They must be seen as facets of the convergence of several anti-tobacco program developments in Ames, including a tobacco cessation program operating under the auspices of the Mary Greeley Medical Center through the Mid-Iowa Community Health Committee (MICHC), efforts, especially by the Youth and Shelter Services of Ames (YSS), to reduce the prevalence of smoking and tobacco use among young people, and the pressure being exerted on the city council to lower some of the state’s highest rates of violation of the no-sales-to-minors law detected by compliance checks conducted under the authority of the Synar amendment, which were endangering federal funding of various drug rehabilitation programs. Among those groups whose funding was threatened—in 1999, Iowa had lost five million dollars in such funds because stings had caught dealers selling to 36 percent of the teenagers trying to buy—was YSS itself, whose director, George Belitsos, was also co-chair of the Ames [Teen] Tobacco Task Force, which was formed in 1999 by the Mayor’s Youth Committee, YSS, and the American Cancer Society in


17 This “wide community based planning process,” according to Linda Muston, who was vice president for community service at Greeley, included “task forces that addressed teen pregnancy, dental needs, maternal child issues as well as Tobacco/Smoking Cessation. The latter task force had initiatives going with YSS in high schools (Few Do), middle school education, and smoking cessation for adults (in conjunction with ISU Student Health and the MGMC respiratory care department.) The MICHC was made up of lots of community leaders including a city council member, representative of the Ames Public Schools, a McFarland Clinic person, a county supervisor, the head of ISU Student Health, a nursing home administrator, a home health agency provider, a minister, an auxiliary member, etc. Some of the MICHC members were also on this task force. The tobacco use task force morphed into the ATTF [Ames Tobacco Task Force]. It became important for practical, political and social reasons to have the full committee adopt the stance that the ATTF was advancing.” Email from Linda Muston to Marc Linder (Oct. 6, 2008).


19 Rebecca Anderson, “City Council Researches Smoking Ban,” Tribune (Ames), May 12, 2000 (B1:2-4). In 1998, teens trying to buy tobacco in the 12-county area around Ames had been successful 46 percent of the time; by the summer and fall of 2000 the figure had dropped to 19 percent, which was 10 percentage points below the state average. Colleen Rogers, “Story Co. Underage Tobacco Sales Drop,” Tribune (Ames), Jan. 8, 2001 (A1:2).
order to try to secure passage of laws and ordinances to regulate public smoking. Belitsos argued for the ban because “‘[w]e know from prevention theory that the more young people see adults doing stuff they [young people] are banned from doing, the more they want to do it.’” Quirmbach, too, in an alternative narrative, stated in May 2000 that he had “c[o]me up with the idea to look into banning smoking in restaurants while the council was discussing teen smoking” in connection with this Synar amendment “dilemma.” Although the link was “the power of the bad example” perceived by kids when they saw adults smoking in restaurants, Quirmbach noted that protecting employees and adult customers from secondhand smoke was nevertheless the chief justification for the ban.

Iowa City

The timing of a push for a smoking ban in Iowa City was also adventitious. In March 1999, on the occasion of a visit to the University of Iowa by former Surgeon General C. Everett Koop, the country’s most famous anti-smoking campaigner, the “acronymically challenged” Johnson County Citizens for Tobacco Free Youth prevailed on the Iowa City City Council and Johnson County Board of Supervisors to issue Breath of Fresh Air Days proclamations encouraging all citizens and businesses to recognize the days of Koop’s stay


Rebecca Anderson, “City Council Researches Smoking Ban,” Tribune (Ames), May 12, 2000 (B1:2-4 at 4). A restaurant owner denied the force of this argument by insisting that children would still see adults smoking who simply walked outside the business to smoke. Minutes of the Regular Meeting of the Ames City Council at 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss) (statement by Bob Alley).


Although Iowa City also adopted a smoking ordinance, the Iowa Supreme Court preemption case arose only in Ames because the Ames city council passed its ban 10 months earlier, which went into effect seven months earlier and had been in force for two months when suit was filed challenging it, more than three months before Iowa City adopted its ordinance and five months before the latter went into effect. The Iowa City city council might have become the first to pass a ban had it not decided in early October 2000, when it already had in hand a draft ordinance, to prioritize the issue of excessive and underage alcohol drinking, thus causing a year’s delay until the council took up the smoking ban in earnest.

The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

(March 12-14) by going smoke-free. At the council’s meeting on March 2, Dr. Kemp Kernstine, a cardiothoracic surgeon at the University of Iowa Hospital and JCCTFY member who impressed lay audiences with displays of the blackened remains of the lungs of some of his deceased smoking (and secondhand-smoking) patients, urged the council to “make decisions that you can’t smoke in a restaurant, you can’t smoke in a bar. Be like California, Arizona, New York City and Boston who are nonsmoking, you cannot go in a bar in Los Angeles and smoke and that’s what I’d like to see in this progressive community.”

In addition to addressing, at Kernstine’s invitation, a conference on thoracic cancer, Koop lectured on public health and the tobacco lobby (“Anatomy of a Scandal”), and spoke to hundreds of middle school students about the health risks of smoking and tobacco use. Thanks to Koop’s presence, three restaurants went smoke-free for the weekend; their owners found customers’ response so overwhelmingly positive that they maintained their no-smoking status. Later, JCCTFY specifically acknowledged that Koop’s visit had initiated the smoke-free discussion in Iowa City.

JCCTFY, a self-styled “grass-roots coalition of parents, educators, health professionals, and prevention specialists united by a common concern for the health and safety of our children,” had focused from its inception in 1996 on strict enforcement of laws regulating both cigarette sales to minors and possession, use, and purchase of tobacco products by minors. By the latter half of 1999 the

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29 Johnson County Board of Health Meeting (Dec. 8, 1999) (statement of Eileen Fisher, then head of JCCTFY) (audio tape available at JCPHD).

30 Letter from JCCTFY to Council Members (n.d.), in Iowa City City Council, Regular Meeting (June 16, 1998), Correspondence at 31, on http://www.iowa-city.org/weblink/
group, which claimed 40 members, had branched out, aiming now to convince local restaurants (but not bars) voluntarily to go smoke-free—for the sake of their employees’ health—and compiling the “Smokefree Dining Guide for Johnson County” listing 60 such establishments.\textsuperscript{31} Dr. Richard Dobyns, a member of the Johnson County Board of Health, and Graham Dameron, director of the county’s Department of Public Health and affiliated with JCCTFY, agreed that persuasion of restaurant owners should take precedence before seeking to persuade local government to adopt an ordinance. If it proved necessary to move beyond voluntary to compulsory bans, Dobyns, who hoped that Iowa City, as “‘home to the academic health center in this state,’” would take the leadership,\textsuperscript{32} had not yet reckoned with the composition of the city council, three of whose seven members were smoking business owners. Ominously, one of them, Mayor Ernie Lehman, took a strict anti-government, market-knows-best position: “‘The public can dictate where they go to eat. I don’t know why the city would be interested in an ordinance. We should rely on the natural forces of the economy—it’s a natural thing that’s going to occur.’”\textsuperscript{33}

And even if such views did not prevail, already by mid-1999 worries had surfaced that local government lacked the power to adopt anti-smoking ordinances because the state clean indoor air law may have preempted such action. In any event, Johnson County Attorney J. Patrick White perceived the strong possibility of a problem for any local ordinance, which a University of Iowa law professor predicted would run into a court challenge. Contrary to the static view propagated by the \textit{Iowa City Press-Citizen}, however, passage of an ordinance that was later invalidated would not “be simply a waste of time”\textsuperscript{34}: the community education, mobilization, and attitudinal transformation that such an effort would require could easily initiate impulses to create a much more capacious statewide anti-smoking movement.

Further progress in Iowa City was made on September 8, 1999, when, at


JCCTFY’s request. Dameron raised the question of a county or city ordinance banning smoking in restaurants at the county Board of Health meeting, which several members of the group, including its chairperson, also attended. The ban was by no means the only tobacco-related matter on the agenda. Before moving on to the ban, Dameron first asked the Board to consider adopting a resolution regarding Iowa’s share of the Master Settlement Agreement funds from the cigarette industry and then requested approval of a comprehensive tobacco control program on the assumption that Johnson county would receive some Agreement funding. When he reached the issue of ordinances that “would eliminate smoking in restaurants,” Dameron, interestingly, also included “possibly bars.” Opening the discussion, Board member Kelley Donham, a veterinarian and University of Iowa professor in the Occupational and Environmental Health Department of the Public Health College, pointed out that “one can not smoke within 100’ of a public place” in Davis, California, but then immediately cast doubt on the achievement of that seeming anti-smoking nirvana in Iowa by adding that “[w]e may not be able to make those legislative changes at the local level.”

Joe Bolkcom, a first-year state senator—who had just completed six years as a county supervisor following three years in the county Public Health Department working on youth access to tobacco—reinforced that doubt by declaring that local government was “generally pre-empted from making tobacco ordinances.” After an employee of the University of Iowa Pulmonary Cancer Clinic had mentioned that “Attorney General Miller would like to see the preemption challenged,” JCCTFY’s chair observed that when the group asked the Attorney General’s Office for an opinion on the issue: “They indicated that there appeared to be loopholes in Iowa’s law so a local community could pass a local smoking ordinance, but if they did, it would more than likely be challenged by the tobacco companies.”

Thus, already at this early stage leading anti-smoking campaigners in Iowa City were acutely aware of the possible legal impediments to and political repercussions of their legal strategy. And JCCTFY member and Johnson County Attorney White, who would be responsible for defending any challenge to a county smoking ordinance, was ambivalent about the statute’s ambiguous

36Johnson County Board of Health, Meeting Minutes at 1-2 (Sept. 8, 1999) (copy furnished by JCPHD).
38Johnson County Board of Health, Meeting Minutes at 1-2 (Sept. 8, 1999) (copy furnished by JCPHD). On the blocked preemption repeal efforts, see above ch. 28, 30-31.
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language: on the one hand, the legislature may have prohibited local smoking bans, but “[o]n the other hand, because the language is not completely clear, this may not be the case. Only the courts can decide for sure.” In any event, he was (unnecessarily) worried about what he perceived as “pretty expensive litigation” if the county found itself “fighting Goliath” in case the tobacco industry financially supported a challenge.

Just as clear to those attending the Board of Health meeting was the near-term hopelessness of legislative relief: though Bolkcom as a neophyte had no “sense on where the senate stands on votes on smoking,” an internal medicine professor specializing in pulmonary disease was able to report that a few key senate leaders who had blocked an attempt in 1997 to repeal preemption “need to be targeted.”

Perhaps in contemplation of such obstacles, Dameron, in discussing city and county smoke-free restaurant and bar ordinances, pointed to JCCTFY’s smoke-free restaurant pamphlet and expressed his feeling that “they should seek other positive [i.e., non-governmental] initiatives as well.” Dameron’s hesitation about embarking on compulsory imposition of health norms in this area may well have been rooted in his judgment that any ordinance should be countywide in scope and “wouldn’t be effective unless 80 percent to 90 percent of the population supports it”—a level that the movement’s own polling data did not

39Julie Mickens, “Group Pushes to Ban Smoking in Restaurants,” Icon, Oct. 7, 1999 (5:1-2). The day the Iowa Supreme Court issued its decision invalidating the Ames ordinance, White sought to burnish his image by informing the Johnson County Board of Supervisors that “4 years ago, when the topic first came up at public sessions and with the Board of Health, [he] had said that local restrictions on smoking would be illegal in Iowa because the State had preempted that. ... He said that at a public meeting with the Assistant Attorney General, [he] had said he told them that the law was very clear.” Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2 (May 7, 2003), on http://www.johnson-county.com/auditor/min2003/030507ws.htm (visited Oct. 23, 2008).

40Julie Mickens, “Group Pushes to Ban Smoking in Restaurants,” Icon, Oct. 7, 1999 (5:1-2). A study of litigation over local nosmoking ordinances concluded that “[m]unicipalities should not fear the cost of lawsuits: preemption suits do not have high litigation costs, because discovery is not a major element.... These cases are resolved on the law and relatively quickly. In the case of Ames...one attorney working part time defended an implied preemption suit.” M. Nixon, L. Mahmoud, and S. Glantz, “Tobacco Industry Litigation to Deter Local Public Health Ordinances: The Industry Usually Loses in Court,” TC 13:65-73 at 71 (2004).

41Johnson County Board of Health, Meeting Minutes at 2 and audio tape (Sept. 8, 1999) (archived at JCPHD). On the blocked preemption repeal efforts, see above ch. 27.

42Johnson County Board of Health, Meeting Minutes at 4 (Sept. 8, 1999) (copy furnished by JCPHD).
even attain a year later when the campaign was in full swing and without which he and some other activists believed a ban would not be followed.\textsuperscript{43}

At its next meeting on October 13 the Johnson County Board of Health focused so fixedly on the Master Settlement Agreement funding and formulation of a comprehensive tobacco control program that the only attention it devoted to a smoking ordinance was the announcement that at the end of the month JCCTFY would sponsor a town hall meeting on the subject with a panel discussion on health, law, and local policy.\textsuperscript{44} That gathering on October 28, which attracted about 50 attendees, heard Assistant Attorney General Steve St. Clair explain that when the legislature did not make a local government’s right to pass a no-smoking ordinance “perfectly clear,” adoption of one might be challenged in court. And for those looking to the legislature to rectify the situation, state Senator Bob Dvorsky had bad news: tobacco lobbyists’ “strong influence” in the legislature made such a change “tough to do right now.”\textsuperscript{45}

This panel discussion appears to have been JCCTFY’s last highly visible public foray on behalf of an ordinance for Iowa City until the beginning of the academic year 2000-2001, when, in August and September, Clean Air for Everyone, a subsidiary of the Johnson County Tobacco Free Coalition,\textsuperscript{46} came forward with the results of a survey of local attitudes toward secondhand smoke exposure and submitted a draft ordinance to the Iowa City city council,\textsuperscript{47} which JCCTFY had prepared and could have brought forward a year earlier.\textsuperscript{48}


\textsuperscript{44}Johnson County Board of Health, Meeting Minutes at 7 (Oct. 13, 1999) (copy furnished by JCPHD).


\textsuperscript{46}It is unclear when JCCTFY became Johnson County Tobacco Free Coalition. Why it spawned CAFE is clear: “Chris Squier, Stan Glantz, and others had convinced us that working on youth sales was one of the least effective things that we could be spending our time on, so we switched to working on education around secondhand smoke and passed the smokefree restaurant ordinance.” Email from Eileen Fisher to Marc Linder (Jan. 17, 2006).

\textsuperscript{47}See below.

The Board of Health of the People’s Republic of Johnson County
Rejects a Proposal Even to Request the County Attorney to Draft an
Ordinance Banning Smoking in Restaurants

I feel that the logic is simple. If we were talking about some other health risk, such
as AIDS, TB, or smallpox, diseases that we all agree and are used to thinking of as
dangerous to our health, there would be no question. The public must be protected and
would be prevented from exposure to the noxious, toxic, disease-causing organism or
substance, and those with the disease would be quarantined away. There would be no or
at least minimal concern. We would all agree that the greater good was more important
than the potential rights of the individual.

So why is there any question when we are discussing smoking tobacco? Is it because
we don’t believe the science? That can’t be correct. The data is overwhelming! It seems
that the only group that disagrees is the tobacco industry. Should we trust them? Of
course we should not trust them. So then again why? Tobacco smoke has been long
associated with social activity[,] is ingrained in us and it is hard for us to see it otherwise.
It seems safe because it does not cause immediate death or disease. But we must break that
paradigm and regard tobacco smoke like radiation. The difference is that tobacco smoke
is potentially far more dangerous.  

When the Johnson County Board of Health returned to the ordinance at the
body’s meeting on December 8 1999, even its presence on the agenda was
contentious. A week earlier Dameron had informed David Nordstrom, a member
of the Board and of the Occupational and Environmental Health Department of
the University of Iowa College of Public Health, that he had not accepted
Nordstrom’s suggestion to put the ordinance on tobacco use in restaurants on the
agenda, in part for reasons of time constraints unrelated to content, but in part
because two new members would be joining the Board in January with whom
they needed to discuss the issue so that they would be more supportive.
Nevertheless, if Nordstrom still felt that they needed to put it on the agenda,
Dameron said that he would do so.  

His position unchanged, Nordstrom
suggested that the item be titled, “Request for County Attorney to Draft
Ordinance to Prohibit Smoking in Indoor Areas of Restaurants.” He also asked
Dameron to get him the figures on the number of restaurants in the county.  

49Email from Dr. Kemp Kernstine [thoracic surgeon] to Iowa City Council (Nov. 26,
2001), in City Council Documents, Meeting Folders 2001 (final), Nov. 27, 2001 Special
Nov. 4, 2008).

50Email from Graham Dameron to David Nordstrom (Dec. 1 , 1999), in Folder:
Tobacco: 1999-, JCPHD.

51Email from David Nordstrom to Graham Dameron (Dec. 2 , 1999), in Folder:
Those data revealed 376 licensed restaurants and bars in the county, of which 82 were in Coralville and 219 in Iowa City, of which latter category 76 or 35 percent were also liquor licensees. Overall, about 100 or 26 percent of the 376 restaurants claimed to be smoke-free.\textsuperscript{52} The day before the meeting an apparently displeased County Attorney White faxed Dameron: “I’d welcome knowing at who’s [sic] initiative the smoking ordinance item has been added to the agenda and why.”\textsuperscript{53}

At the meeting it turned out that Nordstrom—who was sufficiently attuned to the politics of cigarette company intervention against local smoking ordinances that the previous day, after reading an article in \textit{The New York Times} about Philip Morris’s lobbying against ordinances in New York, he had emailed Dameron and JCCTFY asking whether such lobbying had ever taken place in Johnson County or whether such lobbying expenses had to be disclosed\textsuperscript{54}—had already drafted a resolution, which he distributed. The resolution consisted of a string of 12 medical-, health-, and legal-fact-laden “Whereas” clauses followed by a “Therefore” resolving that the BOH simply “direct the County Attorney to draft a county ordinance to prohibit smoking in all restaurants.”\textsuperscript{55} Despite Nordstrom’s statement that clean air was as important as clean water,\textsuperscript{56} member Diane Joslyn

\textsuperscript{52}Licensed Restaurants & Bars in Johnson County (Dec. 8, 1999), in Folder: Tobacco: 1999-, JCPHD.

\textsuperscript{53}Fax from J. Patrick White to Graham Dameron (Dec. 7, 1999), in Folder: Tobacco: 1999-, JCPHD.

\textsuperscript{54}Email from David Nordstrom to Eileen Fisher and Graham Dameron (Dec. 7, 1999). Fisher replied that she knew of no such lobbying. Email from Eileen Fisher to David Nordstrom and Graham Dameron (Dec. 7, 1999), in Folder: Tobacco: 1999-, JCPHD. For the lengthy and instructive article, see Clifford Levy, “Quietly, Tobacco Giant Fights Local Smoking Bans,” \textit{NYT}, Dec. 7, 1999 (B1, B8).

\textsuperscript{55}Johnson County Board of Health, Resolution Requesting Johnson County Attorney to Draft County Ordinance to Ban Smoking in All Restaurants (Dec. 8, 1999), in Folder: Tobacco: 1999-, JCPHD. The facts included: information on the components of and health consequences of exposure to secondhand smoke and the interconnected claims that smoking bans were “the most effective method for reducing” such exposure, restaurants were public places where many workers and customers were still so exposed, state law permitted smoking, most restaurants in Johnson County, despite JCCTFY’s efforts, still permitted smoking, disease prevention efforts had to address the conditions that gave rise to risky practices, and 77 percent of Iowa adults did not smoke. Nine years later Nordstrom was unable to recall any details of his proposal. Telephone interview with David Nordstrom, Madison, WI (Nov. 3, 2008).

\textsuperscript{56}Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at
(a geologist and co-owner of a water well drilling company)\textsuperscript{57} and chairperson Jim Martinek (a lawyer) did not agree with Nordstrom’s resolution because they felt that “smoking is a matter of choice.” Although he was against smoking, Martinek did not think that Nordstrom’s proposal was a good idea: “I would much prefer that the regulation of smoking in restaurants be a matter of the market place.”\textsuperscript{58} So resistant was Martinek to change regarding smoking that the only thing he “would like to see” was “this is not a smoke-free establishment” posted in restaurants that allow smoking.\textsuperscript{59} What information such signs would have provided in addition to the smoky sensory perceptions that customers would presumably have experienced before reading them is as unclear as the legal need for them since the statewide law already required owners to post “signs indicating no-smoking or smoking areas and arranging seating appropriately.”\textsuperscript{60}

Parrying Dr. Richard Dobyns’ remark that he “would like to consider a less stringent [extreme?] ordinance that would have a better chance of passing,”\textsuperscript{61} Nordstrom half-jokingly countered that “I could have written a much more...

\textsuperscript{57}http://freepages.genealogy.rootsweb.ancestry.com/~slindbloom/pafg38.htm (visited Nov. 1, 2008).

\textsuperscript{58}Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).

\textsuperscript{59}Johnson County Board of Health, Meeting Minutes at 2-3 (Dec. 8, 1999) (JCPHD). His fellow board member, Dr. Richard Dobyns, opined that Martinek was a conservative Democrat on the issue of free will. Telephone interview with Richard Dobyns, Iowa City (Nov. 4, 2008). Nine years later Martinek had absolutely no recollection of anything relating to the ordinance. He self-deprecatingly reflected on his competence to have been a member of the Board of Health by mentioning that previously he had not known that pertussis and whooping cough were the same. Telephone interview with Jim Martinek, Solon (Nov. 1, 2008).

\textsuperscript{60}Iowa Code sect. 142B.3 (1999).

\textsuperscript{61}Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD). Although the Minutes used “stringent,” on the tape Dobyns sounds as though he is saying “extreme.” Dobyns later agreed that his position entailed coverage only of the unincorporated areas of the county, which was tantamount to no coverage at all: his strategy was to make a statement that would encourage cities such as Iowa City and Coralville to adopt ordinances. Dobyns felt that a county ordinance would not pass, in large part because of County Attorney J. Patrick White’s evaluation of its legal untenability and the Board’s respect for his opinion. Finally, Dobyns did not want to waste the administrative staff’s time on an ordinance that would not pass anyway. Telephone interview with Richard Dobyns, Iowa City (Nov. 4, 2008). According to Dameron’s recollection, Dobyns had favored coverage only outside the cities. Email from Graham Dameron to Marc Linder (Nov. 2, 2008).
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extreme resolution. ... I stopped at restaurants.” In response to Dobyns’ argument that depending on how extreme the resolution’s wording was, its proponents would get various kinds of audiences, Nordstrom—who conceded that “[s]moking is a right” even though it was prohibited in many places—insisted that he did not think of his resolution as “extreme” since it did not even cover bars.62

County Attorney White, who viewed Nordstrom’s resolution as “premature,”63 recommended discussion of the legal issues, particularly preemption, before drafting a new resolution. In apparent continuation of the skepticism voiced in his fax, White stated that he wanted to make a presentation to the Board “before spending a fair amount of county dollars on this request.”64 At this point the attacks on Nordstrom’s proposal turned increasingly hostile. After Martinek, whose lawyerly expertise appeared to be as deficient as his knowledge of public health, had warned Nordstrom that defending an ordinance through the court system would take four to six years, Nordstrom underscored that in reality the single sentence at the close of the resolution merely constituted a statement of the Board of Health’s political position on smoking in restaurants. The worst that Dobyns was apparently able to imagine about the ordinance, which was simply in too high a gear from the get-go, was that, if passed, a lot of people would be “irritated.” The resolution’s factual and rather restrained tone notwithstanding, Joslyn joined in this chorus of attacks by asserting that the proposal—which, after all, merely requested that an ordinance be drafted—was “pretty in your face.” Growing increasingly impatient, Nordstrom let on that he was still awaiting a correction of any of his resolution’s factual claims (none would be forthcoming).65

Even JCCTFY left Nordstrom’s resolution in the lurch. Eileen Fisher of that group, approving of Dobyns’ position, charged that discussion “brings a little maybe unwanted attention to the issue before we’re quite ready.”66 She recommended that the Board table the issue because her group was forming a committee to research the possibility of passing an ordinance and the legal issues. Dr. Donham, who saw two issues—preemption and “the citizen’s right to

62 Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).
63 Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).
64 Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD).
65 Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).
66 Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD).
choose,” the latter, however, being limited in the sense that it no longer applied, for example, to wearing seat belts—favored the tenor of the resolution, while Director Dameron sought the Board’s support and leadership. When Nordstrom’s resolution finally came up for a vote, it was defeated 3 to 2, only Donham joining Nordstrom.67 Dobyns then proposed an amendment substituting for Nordstrom’s “Therefore” clause a vaguely worded request that the county attorney and the Public Health Department director “provide information regarding a county regulation to restrict smoking in restaurants” in a report to be heard by March 1, 2000. Nordstrom rejected the proposal as a non-friendly amendment and voted against it joined by his polar opposite, Joslyn, who presumably viewed even this diluted version as too subversive of smokers’ choices, but it gained the other three members’ votes and passed.68

Whereas several participants later ascribed the resolution’s defeat to White’s explanation to the Board that an ordinance could not withstand Supreme Court scrutiny and was therefore misguided because it would waste a lot of money for nothing,69 the inhospitable reception that a majority (including a University of

67 Johnson County Board of Health Meeting (Dec. 8, 1999) (audio tape archived at JCPHD); Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD). Any countywide ordinance passed by the Board would also have to have been approved by the Johnson County Board of Commissioners.

68 Johnson County Board of Health, Meeting Minutes at 3 (Dec. 8, 1999) (JCPHD); Johnson County Board of Health, Resolution Requesting Johnson County Attorney to Draft County Ordinance to Ban Smoking in All Restaurants (Dec. 8, 1999), in Folder: Tobacco: 1999–, JCPHD (copy striking Nordstrom’s language and inserting handwritten amendment together with vote).

69 Telephone interview with J. Patrick White, Iowa City (Nov. 1, 2008). Dameron confirmed that the Board had rejected the proposal largely because of White’s opposition. Telephone interview with Graham Dameron, Iowa City (Oct. 25, 2008). White expressed surprise that the competent city attorneys of Ames and Iowa City had gone along with the ordinances. He speculatively attributed their conduct to their being at-will employees of the city councils, whereas a county attorney had independence as an elected official in his own right. To be sure, White, who charged that Ames and Iowa City had wasted a great deal of money on the cases, was unable to put a dollar figure on the cost of defending a challenge or even to specify the kinds of expenses that it entailed, especially since no discovery was involved. Telephone interview with J. Patrick White, Iowa City (Nov. 1, 2008). In fact, when Philip Morris challenged the ordinance that Ames had adopted in 2001, the Iowa Attorney General pointed out that the district court case “was resolved quickly on the basis of legal arguments, without a costly trial.” Iowa Attorney General’s Report on Secondhand Smoke 39 (2003). Moreover, the Iowa City ordinance was not litigated.
Iowa physician) even of the Board of Health of the so-called People’s Republic of Johnson County accorded Nordstrom’s exploratory proposal shed important light on the inertial power of smoking laissez-faire in Iowa.\textsuperscript{70}

At the Board of Health meeting on March 8, 2000, County Attorney White, after presenting some statutory material, distributed an analysis by Iowa Assistant Attorney General Steve St. Clair, whose views, White conceded, “[i]n legal context...appear to be more supportive of local regulation than White’s view” and in particular argued that “local governments would be able to regulate smoking in restaurants.” White’s “personal conclusion” was “that at the county level we are both expressly and implicitly prohibited from taking away the authority to designate smoking areas that the legislature gave to the custodians of public places.”\textsuperscript{71} To be sure, the county attorney depicted himself as very knowledgeable on the subject, but in fact his claim that “[a]s far as preemption goes, it’s fairly strong,”\textsuperscript{72} considerably overstated the relative potency of Iowa Code section 142B.6, which in 1990 had disappointed even the tobacco industry in comparison to the version that it had promoted.\textsuperscript{73} Although White had already revealed that the Attorney General’s Office disagreed with him, Nordstrom nevertheless asked whether any other lawyers in Iowa had a different opinion, but White professed not to know.\textsuperscript{74} Pamela Willard, a clinical nursing professor at

\textsuperscript{70}Years later, Donham, who characterized the Board of Health discussion as not highly argumentative, regarded the proposed ordinance as a public health statement even if it did not hold up in court. Telephone interview with Kelley Donham, Iowa City (Nov. 1, 2008). Donham’s recollection of the tone of the discussion was not consistent with the hostility directed at Nordstrom’s proposal, which was overwhelming on the audio tape. Nordstrom himself later listed the following reasons among those adduced by some people around 1999/2000 for opposing smoking bans: “1) it is not gov’t’s business, 2) public health can be protected by physical separation and ventilation, 3) the evidence of harm from secondhand smoke is relatively new and weak, 4) the effect of a ban could be negative on the local economy if people eat out less or eat elsewhere, 5) public health education is a more effective approach than public health law, and 6) counties lack the power to restrict smoking because it is reserved by the state.” Email from David Nordstrom to Marc Linder (Nov. 5, 2008).

\textsuperscript{71}Johnson County Board of Health, Meeting Minutes at 2 (Mar. 8, 2000) (JCPHD).

\textsuperscript{72}Johnson County Board of Health, Meeting (Mar. 8, 2000) (audio tape archived at JCPHD).

\textsuperscript{73}See above ch. 27.

\textsuperscript{74}Johnson County Board of Health, Meeting Minutes at 2 (Mar. 8, 2000) (JCPHD); Johnson County Board of Health, Meeting (Mar. 8, 2000) (audio tape archived at JCPHD). St. Clair’s paper, “Developments in Home Rule and Tobacco Regulation” (Nov. 1998), a copy of which is included in JCPHD’s Tobacco file, was a precursor of the formal
the University of Iowa who was a new Board member and did not feel qualified
to challenge White’s legal conclusions (although she would over the following
years experience White as unsupportive of other important health initiatives),75
suggested that the county’s next step be lobbying the legislature to confer greater
express rights on communities. Finally, the BOH discussed adoption of a
regulation in Iowa City and Coralville based on the identification of a health issue
and the impact of a smoking ban on business, and Donham suggested that the
Board issue a statement of its position on smoking in public places, but, according
to the minutes, it appeared not to take any action.76 Consequently, self-deprived
of any regulatory authority, Board members were reduced to working with
business owners “to voluntarily support the ordinance for smoke-free
environments”77 and to writing letters to city councils in support of the ordinances
proposed by JCCTFY.78

The Ames City Council Takes Up the Ban

Rick Carmer, owner of Wallaby’s restaurant in west Ames, said the survey is skewed
because it couches the ban as a public health issue, while restaurant and bar owners see it as local government legislating business activities.

“They’re trying to ram this through based on people’s health.”79

By May 2000, the Ames city council—none of whose members

opinion that he issued in November 2000. See below. In the earlier analysis St. Clair had
stated that there was no reason to believe that the Iowa legislature had, by means of the
preemption amendment, intended to “stabilize an embattled industry in a single, coherent
stroke.” Id. at K-12.

75Telephone interview with Pamela Willard, Iowa City (Nov. 1, 2008).
76Johnson County Board of Health, Meeting Minutes at 2 (Mar. 8, 2000) (JCPHD).
77Christy Logan, “Board Eyes Smoke-Free Local Eateries,” DI, Mar. 9, 2000 (3A:4-6
at 4-5).
78Johnson County Board of Health, Meeting Minutes at 2 (May 10, 2000)(JCPHD);
Kelley Donham, Chairperson, Johnson County Board of Health, to Iowa City City Council
(Dec. 18, 2000), in City Council Documents, Meeting Folders 2001 (final), Jan. 9, 2001
Correspondence at 2, on http://www.iowa-city.org/weblink/DocView.aspx?id=7512
(visited Nov. 1, 2008); Kelley Donham, Chairperson, Johnson County Board of Health,
to Coralville City Council (Dec. 18, 2000), in Folder: Tobacco 1999- (JCPHD).
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smoked—was looking into whether it had the power to ban smoking in restaurants (but not bars) on the grounds of protecting customers and workers from the dangers linked to secondhand smoke exposure. The initiative was, in addition, designed to reduce teenage smoking. The elimination of smoking in restaurants, Quirmbach argued, “could keep minors from believing smoking is socially acceptable.” Because even the total interdiction of over-the-counter sales to teenagers would not cut off all access to cigarettes, he saw the need for a broad view to implement an effective smoking policy.

Initially, the matter had not yet reached the city council’s agenda, though a motion had been made to put it on the agenda in the future. That a ban would not sail through the council was clear from the outset when member Ann Campbell insisted that “a lot more research needs to be done before the council will consider enacting a city ordinance.” Even though she personally did not like smoking in restaurants, she had not examined “all sides of the issues.... It has health ramifications; it has economical ramifications, and we really need more information before we go further.” Remarkably, given its later skeptical (entrepreneurs-and-markets-know-best) editorial position, the Ames Tribune enthusiastically backed Quirmbach’s “progressive idea,” expressing the hope that the city council had “the courage to follow through on it:

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80Email from Linda Muston to Marc Linder (Nov. 18, 2008); email from George Belitsos to Marc Linder (Nov. 19, 2008). Some members may have smoked earlier; three members who had young children at home at the time “were privately very sympathetic to second hand smoke issues.” Email from Linda Muston to Marc Linder (Nov. 18, 2008).

81Rebecca Anderson, “City Council Researches Smoking Ban,” Tribune (Ames), May 12, 2000 (B1:2-4). The local newspaper conjectured that the “smoking ban proposal appears to be an outgrowth of the council’s decision...to crack down on the sales of tobacco to minors.” Richard Lewis, “Chamber Opposes Restaurant Smoking Ban,” Tribune (Ames), Aug. 24, 2000 (A1:6, at A4:6). Nevertheless, a leading member of the Ames Tobacco Task Force later stated that there had been no connection between the Synar amendment stings and the push for the restaurant smoking ban. Telephone interview with Mary Kitchell, Ames (Oct. 3, 2008).


83“Smoking Ban in Restaurants Is Good Policy,” Tribune (Ames), May 16, 2000 (A6:1). The shift in the Tribune’s editorial position might, according to one Ames anti-smoking activist, have been related to the role of Michael Gartner, a strong supporter of no-smoking initiatives, who sold the paper in the latter part of 1999, but whose influence may have carried over initially: “The new owners and editor moved closer to the Chamber/business side as they tried to establish an identity. To the best of my recollection, their editorial policy made the shift. Also, they were trying to make a go of it and could ill afford to alienate the advertising buyers.” Email from Linda Muston to
It’s sure not to be a popular idea to many people, but it’s the right thing to do. There is no “right” to smoke in a public setting and the Ames City Council doesn’t need to provide one. ...

And although it seems absurd to have to counter an economic development argument — this is, after all, a public health issue — a smoking ban in restaurants won’t even hurt tourism, according to a 1999 study in the Journal of the American Medical Association. ...

While we’d like to see the council go even further and ban smoking in bars as well, we’ll settle for a ban in restaurants so that the entire restaurant — not just part of it — is a smoke-free section. We hope the Ames City Council joins dozens of other cities across the nation and embraces Quirmbach’s idea.  

In the spring of 2000, the city council referred the proposal to the city attorney. Quirmbach argued that the state clean indoor air law appeared to allow cities to control smoking in restaurants seating more than 50 (by prohibiting owners from designating smoking areas): “‘What’s at issue still in my mind is whether we can regulate smoking in restaurants under 50, and in that area, the state law is silent.'” In June the council delayed consideration of the issue in order to study it further and solicit the Chamber of Commerce’s views. In July City Attorney John Klaus submitted a legal opinion to the council dealing with the central question as to whether the city had the power to curtail the discretion conferred by the state law on those in custody or control of public places to designate smoking areas. He “conclud[ed] that the City can place smoking restrictions on restaurants of any size to disallow the designation of smoking

Marc Linder (Oct. 9, 2008).


85. Telephone interview with Herman Quirmbach, Ames (Apr. 19, 2008).

86. Jocelyn Marcus, “City Council Considers Banning Smoking in Restaurants,” ISD, May 18, 2000, on http://www.iowastatedaily.com (visited Sept. 27, 2008). A badly garbled newspaper account had city attorney John Klaus writing a letter to the city council stating that “Iowa law allows a city to mimic a state law that bans smoking in restaurants that have a seating capacity of more than 50. The law does not say banning smoking in all restaurants is a direct violation but is ‘inconsistent’ with the law’s intent.” Quirmbach was then cited as stating that a city ordinance could “supersede” the state law allowing smoking sections in restaurants. Rebecca Anderson, “City Council Researches Smoking Ban,” Tribune (Ames), May 12, 2000 (B1:2-4 at 4). The Ames city clerk was unable to find such a letter from Klaus in May. Email from Diane Voss to Marc Linder (Oct. 10, 2008). See below for a discussion of Klaus’s later letter.

areas in those establishments.\textsuperscript{88} Klaus based his conclusion on section 142B.2(2) of the state clean indoor air law ("Smoking areas may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance, or regulation"), whose use of "ordinance" made it apparent that the legislature did intend for cities to have the power to regulate smoking in restaurants, even to the point of prohibiting the designation of a smoking area for a restaurant.\textsuperscript{89}

Unimpressed by the support that the Teen Tobacco Use Task Force/MICHC\textsuperscript{90} had voiced for the "concept of smoke free dining in Ames,"\textsuperscript{91} in mid-August, a month before the city council was scheduled to discuss a smoking ban in restaurants, some owners were already complaining that since Ames was hardly some trendy California city or Aspen, Colorado, such a municipal prohibition could hurt their businesses.\textsuperscript{92} The board of directors of the Ames Chamber of Commerce voted 12 to 2\textsuperscript{93} against the proposal on the grounds that owners should make such decisions, even as health-care groups in the city adopted resolutions supporting the ban.\textsuperscript{94} The Chamber failed to explain why owners’ alleged

\textsuperscript{88}John Klaus to Mayor Ted Tedesco and Members of the City Council of the City of Ames, Iowa (July 18, 2000) (copy furnished by Ames city clerk).

\textsuperscript{89}John Klaus to Mayor Ted Tedesco and Members of the City Council of the City of Ames, Iowa, Re: Ordinance to Ban Smoking in Restaurants (July 13, 2000) (copy furnished by Ames city clerk). Klaus also concluded that the city council was authorized to ban smoking in restaurants with a seating capacity of 50 or fewer because, if the sponsor of the amendment defining covered public places to include restaurants with a seating capacity of greater than 50 was attempting to apply the law’s restrictions only to them, “it was a failed attempt”: “If the legislature had intended to exclude restaurants of less than fifty seats, it could have added wording to the law’s list of places not included.” But since the legislature did not expressly exempt smaller restaurants, a local ordinance banning smoking in them “would not be inconsistent with or in conflict with the legislative intent of the state law.” \textit{Id.}

\textsuperscript{90}This group was later renamed Ames Tobacco Task Force. Mid-Iowa Community Health Committee, Minutes (Oct. 9, 2000) (furnished by Mary Kitchell).

\textsuperscript{91}Resolution approved by the Mid-Iowa Community Health Committee (July 10, 2000) (copy furnished by Linda Muston).


\textsuperscript{94}Susan Kreimer, “It’s Impossible to Clear the Air About Smoking,” \textit{DMR}, Aug. 31, 2000 (1E) (NewsBank). Remarkably, State Senator Johnie Hammond from Ames, an anti-smoking militant, while not surprised by the chamber’s vote because it tended to oppose all regulation, agreed with it that “we have far too much burdensome regulation.” Johnie
knowledge of their customers and their preferences entitled them to make public health decisions for them and employees. The business group had no answer to Belitsos’s questions as to why the air people breathe should not be regulated “[i]f we regulate that employees must wash their hands after using the restroom.” As for the Chamber’s mail survey finding that 65 percent of 98 responding restaurants in Ames already had smoke-free environments, ban proponents insisted that it was misleading inasmuch as most of the establishments with smoke-free policies were parts of national chains governed by corporate policies, whereas most of the locally owned, sit-down restaurants were not smoke-free. Moreover, few people in Ames would have been shocked to learn that “[b]y and large” the owners who permitted smoking in their restaurants were also the ones opposed to the proposed ban.

The council may have decided in July to study the proposed ban while waiting for the Chamber of Commerce to form an opinion, but the latter’s negative view did not dissuade Quirmbach from advocating adoption of a ban without delay. Nevertheless, council member Ann Campbell later characterized Quirmbach’s move to bring the ban to the council before having prepared the ground and, in particular, without having engaged business owners in a dialog, as a tactical error. The Tobacco Task Force strove to shape public opinion by underscoring that the central issue was public health. It not only pointed out that “no credible studies demonstra[e] any loss of restaurant revenue when cities prohibit smoking in restaurants,” but also refuted owners’ red-herring complaints about regulations interfering with their freedom to run their businesses as they saw fit: “Restaurants are already regulated from door to dumpster. We don’t debate whether or not owners can serve old meat or wash dishes in cold water or forgo fire exits.” In preparation for the city council meeting on September 12 devoted to the issue of whether to request the city attorney to draft an ordinance


banning smoking in restaurants the Tobacco Task Force of the MICHC was working together with the American Cancer Society to develop support. In order to counter opponents, who had already become active, the Task Force was especially “looking to the medical community for strong support.”100

What the cigarette industry was doing in preparation for the city council meeting or even whether it was doing anything is unclear, but it was monitoring the ordinance’s progress. For example, in the August 7 issue of its periodic and nationally comprehensive compilation, “Local Issues Activity,” R. J. Reynolds noted that in Ames no ordinance had been drafted yet and the city council was not expected to discuss the issue until September.101 It is possible (but not certain) that at this stage of the controversy in Ames, in contrast to the cigarette industry’s contemporaneous strategy of direct intervention in ongoing campaigns to ban smoking by means of ordinances in other localities,102 manufacturers were simply monitoring developments and planning active involvement in the form of a post-adoption judicial challenge.103 Some confirmation of the existence of such a strategy emerged 16 months later when an employee of a food service equipment company who worked with independent restaurant owners spoke up at city council meeting in Iowa City at which Iowa’s second local smoking ban was adopted. After urging the council to delay the decision for a year until the judicial system had ruled on the Ames ordinance, he explained that he had contacted the National Restaurant Association, pretty powerful lobbying group, to see why they hadn’t shown up in this argument a while back this fall. They referred my [sic] to the Iowa Hospitality Association which is the Iowa branch of that group. Their official position along with the Phillip [sic] Morris people and all those people that are going to come in and lobby you if you decide to try and pass this...after the courts say that it’s okay

100Linda Muston, “Smoke Free Restaurants Ordinance” (Aug. 25, 2000) (copy furnished by Linda Muston). The ACS, according to Muston, had wanted a total ban from the beginning and used the Task Force as a “launching pad” for achieving this goal. Telephone interview with Linda Muston (Oct. 8, 2008).


103PURPORTING not to have any knowledge of such events, the lawyer who ultimately prosecuted such a court challenge for Philip Morris later stated that the account given in the text sounded plausible. Telephone interview with Fred Dorr, West Des Moines (Oct. 14, 2008). See below for further discussion of this point.
to go ahead and do that. Their official position is they’re staying away because they want to wait and see what the courts say and then they are going to move in. ... I think those people are going to come in and the pressure that the Café [sic; Clean Air for Everyone] people put on you that you’re so sick of I don’t think is going to look like anything. ...  

A large majority of the almost two dozen people who spoke up at the Ames city council meeting on September 12 supported the ban on smoking in restaurants. Among the 16 supporters were representatives of the Iowa Department of Public Health, the American Cancer Society, and three local health care entities. Of the five who opposed adoption of an ordinance two owned businesses that would be affected and one represented the Ames Chamber of Commerce. Rick Carmer, a restaurant owner whom some on the Task Force regarded as the strongest opponent of the ban, felt that the ordinance would restrict his free trade; moreover, no customer had ever complained about his smoking policy, nor had anyone at the meeting ever approached him about drifting smoke in his restaurant. Bob James, a truck stop owner, disclosed that a survey revealed that 71 percent of his customers smoked and 95 percent of 596 customers who signed a “petition to ascertain the[ir] feelings” opposed the ordinance. David Maahs expressed the Chamber’s belief that many restaurant owners would go smoke-free even without a government mandate, but that in any case the decision should be made voluntarily by the proprietor (prompting Quirmbach to observe that “it is the chamber’s position that protecting the public health should be optional”). He also encouraged the council to urge the measure’s proponents to engage the restaurant owners in dialog, which the Chamber offered to facilitate (without explaining how an organization that
expressly sided with one of the parties could effectively act as a facilitator). More sensibly, the same offer was made by the Center for Creative Justice.¹¹¹

At the close of the public comment period, long-time council member Judie Hoffman (who later became campaign coordinator for the Story County Tobacco Task Force)¹¹² moved and Quirmbach (the only two sure votes for a total ban)¹¹³ seconded the motion to direct the city attorney to draft an ordinance banning smoking in restaurants that was in compliance with the Iowa Code. Mayor Ted Tedesco then asked the council to give more direction to staff regarding items that needed clarification such as the definition of “restaurant,” the question of whether the smoker or the owner would be cited, the amount of fines, means of enforcement, and models of ordinances from other jurisdictions. Hoffman then urged the council to support the ordinance in the interest of public health. Members Russ Cross and Ann Campbell also spoke in favor of facilitating community dialog, while Quirmbach argued for a dual track, with the council drafting an ordinance in tandem with such dialog. Against the lone Nay of banker Steve Goodhue, the council voted 5 to 1 to set October 10 as the “date certain” for reporting back to the council with a proposed ordinance. Finally, the council unanimously voted to include the CCJ’s services for community dialog.¹¹⁴

¹¹¹Minutes of the Regular Meeting of the Ames City Council at 5-7 (Sept. 12, 2000) (electronic copy furnished by Diane Voss, Ames City Clerk). Ironically, the Center for Creative Justice, which provided probation supervision, was committed to a “philosophy of Restorative Justice [which] views crimes as offenses against the community, not simply as violations against the state. Consequently, having community members become active in accountability and peacemaking helps our community build a sense of safety and capacity for collective action. Restorative Justice practices provide the offender an avenue to work through their difficulties in the context of their own community.” http://www.creativejustice.org/ (visited Sept. 26, 2008).


¹¹³Telephone interview with Herman Quirmbach, Ames (Apr. 19, 2008).

¹¹⁴Minutes of the Regular Meeting of the Ames City Council at 7-8 (Sept. 12, 2000) (electronic copy furnished by Diane Voss, Ames City Clerk). The “date certain” language did not guarantee that the council would vote on the ordinance on that date. “Daniel Lathrop, “Council Approves Writing Ban on Smoking,” Tribune (Ames), Sept. 13, 2000 (1A:6, at A4:4). Cross’s later statement that the council had encouraged mediation and compromise because the a stricter ban could not pass the council conflated various events. Telephone interview with Russ Cross, Ames (Oct. 5, 2008). At this time, since only a restaurant smoking ban was on the agenda, lack of votes was not yet the issue.
Iowa City government took notice that the Ames city council had unanimously voted to direct the city attorney to draft an restaurant smoking ban ordinance.\(^{115}\)

Restaurant owners and anti-smoking activists met on September 28 to debate a draft ordinance prepared by City Attorney Klaus, which proposed a ban on smoking in restaurants less than half of whose monthly gross revenues stemmed from alcohol\(^{116}\)—estimated to encompass largely locally owned sit-down establishments accounting for about 35 percent of the city’s restaurants\(^{117}\)—while exempting counter-top bars in restaurants from 10 p.m. to 2 a.m., so long as no diners were admitted after 9 p.m. An additional exemption for truck stops was, according to Klaus, justified on the grounds that their customers were not citizens of Ames. Remarkably, restaurant owners, who initially seemed to oppose any local regulation, now insisted that they welcomed the ordinance, “but only if it encompasses all public places,” including bars, bowling alleys, pool halls, and even possibly outdoor areas deemed public spaces. The reason for this conversion was owners’ sense that they were being arbitrarily singled out by anti-smokers as the low-hanging fruit in a campaign for an eventual universal indoor public ban. Their suspicion, however, was that the ban would, in the end, not extend beyond restaurants, leaving them as the only regulated businesses. The American Cancer Society’s representative on the Task Force, Nancy Battles, fed these fears by pointing out that advocates in Ames were simply replicating tactics applied elsewhere in the United States: “That means choose restaurants first, where anti-smoking advocates think the public pulse is for the smoking ban.” Couching her movement’s conceptualization of the formation of public opinion in the metastasizing language of commerce, she explained that “‘[w]hat we’ve seen as successful in other communities is there must be a community buy-in’...” In Iowa City, for example, a recent survey (conducted by an anti-smoking group) had found much broader backing for a ban in restaurants than in bars or other public indoor places.\(^{118}\) In turn, anti-smoking advocates were skeptical of


restaurant owners’ new-found support of a wider ban.\footnote{\textsuperscript{119}}

About 70 people attended a public forum/panel discussion of the ban held at city hall on October 2.\footnote{\textsuperscript{120}} The Ames \textit{Tribune} characterized it as “largely a one-sided, and scripted affair” populated by eight anti-smoking panelists and an “almost exclusively anti-smoking audience....” A few businessmen were present, but one cafe owner who felt “outgunned” and left early was portrayed as representative in opining: “‘Us restaurants don’t have the time or the resources to compete.’”\footnote{\textsuperscript{121}} Despite this (alleged) preaching-to-the-choir format, “[i]t was about this time that the ATTF realized that we could not achieve all we wanted to achieve in one, [sic] fell swoop. We realized that we would have to approach the goal of becoming smoke free through a process that involved ‘incrementalism.’” Oddly, the reason for the Task Force’s new-found willingness to compromise lay not in its antagonists’ stiffened resistance, but, rather, in their willingness to compromise: “The restauranteurs [sic] were convinced that they could not forestall the enactment of an ordinance of some kind, so they came forward with a proposal that gave them some options. Their most urgent request was for giving all owners ‘a level playing field.’”\footnote{\textsuperscript{122}} To underscore ATTF’s eagerness to expand the scope of the ban, it informed the city council on October 5 that: “With respect for concerns expressed by local restaurant owners, the Ames Tobacco Task Force supports the restaurants’ advocacy for the inclusion of bars in the smoke free ordinance being considered by the Ames City Council. We believe that this partnership will result in prompt resolution and implementation to ‘clear the air’ in Ames.”\footnote{\textsuperscript{123}}

The two groups met again on October 6, but reached no common ground. The city attorney’s announcement that he had, during the week since they had last met, changed the draft ordinance to move its effective date forward from July 1

\footnotesize{\textsuperscript{120}}Lenwood Monte, \textit{A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food} 16 (n.d.).
\footnotesize{\textsuperscript{122}}Lenwood Monte, \textit{A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food} 51 (n.d.).
\footnotesize{\textsuperscript{123}}Email from Linda Muston (for the ATTF) to the members of the Ames City Council (Oct. 5, 2000) (copy furnished by Linda Muston).
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For example, cigarette manufacturers and one of their law firms and PR firms circulated by email newspaper articles about the progress of the Ames ordinance. E.g., Heather Sidwell (Covington & Burling) to W. J. Leavell (Oct. 11, 2000), Bates No. 525110126 (several recipients at British-American Tobacco).


to January 1 prompted protest from owners as did his deletion—at the suggestion of Quirmbach, who had been responding to requests from anti-smokers—of the exemption for counter-top bars. The only potential sign of an understanding between the parties was the agreement by the anti-smoking forces to endorse the restaurant owners’ proposal to request the city council to apply the ban to bars. No sooner did the antis agree than the owners got cold feet: now unsure as to whether they would make such a request, they focused their attention on convincing the council to take more time to make any decision in order to permit greater public discussion. Why restaurant owners, whose chief concern was the loss of customers to bars if the latter were not covered, would not have wanted to push the council to broaden the ban is unclear; possibly they were motivated by the fear that, in the absence of any gauge of community support for a smoking ban in bars, the council would not extend it, thus leaving restaurants as the sole objects of regulation.124

The cigarette oligopoly continued monitoring events in Ames closely.125 As early as October 2, 2000, the general counsel of the National Smokers Alliance, a front group of the cigarette manufacturers in general and of Philip Morris in particular,126 wrote a letter to a banker-member of the city counsel (copy to the city attorney) instructing him that “[a]fter even a cursory review of the laws and attorneys general opinions in Iowa, it is difficult to escape the conclusion that the Ames City Council is preempted by state law from banning smoking in certain establishments....” After admonishing the council to “remain mindful of the constitutional guarantees of equal protection and due process granted under federal and state law to the business owners in Ames,” the cigarette companies’ puppet delivered its masters’ ever-constant message, to which the NSA “adults” swore fealty—“the accommodation of smokers and non-smokers in public places and in the workplace” and opposition to “government-imposed smoking bans and excessive taxation and regulation of tobacco products.”127 (At exactly the same time the NSA also put in an appearance in Iowa City, offering to pay people to
organize opposition to an anti-smoking ordinance that would prevent restaurant owners from serving all customers as they, rather than the government, saw fit.\textsuperscript{128}

The first draft of the ordinance, which city attorney John Klaus presented to the council on October 3, 2000, was, pursuant to the council’s instruction, “prepared to prohibit designation of smoking areas in all food service establishments except those that have more than 50% of gross revenue from sale of alcoholic beverages.” In contemplation of (preempting) litigation, Klaus took pains to craft the ordinance “to demonstrate its connection to” chapter 142B of the Iowa Code, within the “parameters” of which the ordinance “operate[d]” and with which the ordinance was neither “in conflict” nor “inconsistent.” He emphasized that the ordinance’s “prohibit[ion of] the designation of a smoking area in a certain specified kind of public place” “relies on” the state law’s express provision that “a smoking area shall not be designated in places where smoking is prohibited by ordinance.”\textsuperscript{129} A good sense of the limitations and datedness of the draft ordinance was visible in one of the findings of its preamble to the effect that designating smoking areas in restaurants (as authorized by the state statute) “has curtailed the number of restaurants that can be enjoyed by persons who have an allergy or other heightened sensitivity to smoke”—as if, by the scientific-medical standards of 2000, people without those special vulnerabilities could “enjoy” the exposure to secondhand smoke. The ordinance frankly revealed its purpose as “augment[ing] the state law by prohibiting smoking in certain public places in order to “prevent the designation” in them “of any smoking area....”\textsuperscript{130} The chief public place to which this smoking designation ban applied was one in which “food is prepared or served for individual portion service intended for consumption on the premises of the establishment....”\textsuperscript{131} In such food


\textsuperscript{129}John Klaus, Letter to Ames City Council (Oct. 3, 2000), reprinted in Lenwood Monte, \textit{A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food} 30 (n.d.).

\textsuperscript{130}Ames Ordinances, sect. 21A.100 (first draft) (Oct. 3, 2000), reprinted in Lenwood Monte, \textit{A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food} (n.p.) (n.d.). On the breakthrough in scientific understanding the impact of secondhand smoke exposure in the 1980s, see above ch. 26.

\textsuperscript{131}Ames Ordinances, sect. 21A.120 (first draft) (Oct. 3, 2000), reprinted in Lenwood Monte, \textit{A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City
establishments smoking was prohibited. Exempt from this ban were: (1) interstate truck stops; (2) bars in which the monthly sales of alcoholic beverages for on-premises consumption amounted to more than 50 percent of the establishment’s monthly gross revenues averaged over a calendar year; and (3) restaurant bars with a counter for preparing and serving alcoholic beverages for on-premises consumption between 10:00 p.m. and 2:00 a.m., but only after the rest of this public place had been closed. The civil penalty for the municipal infraction of designating a smoking area in violation of the ordinance was $500 for a first offense and $750 for additional violations; that for smoking in a food preparation/service establishment was only $25.

The mediation meetings that the Center for Creative Justice had been holding between restaurant owners and ordinance backers had aided Klaus in developing some of the proposal’s provisions. But while support for a ban on smoking in restaurants was, according to Quirmbach, “overwhelming,” during the previous couple of weeks “a fairly large block of support had emerged” for a ban on smoking in all public places, including bars and bowling alleys. This more comprehensive approach would, however, have been fraught with important drawbacks. First, its consideration would potentially drag proceedings out for many months and even into 2001. In particular, coverage of bars would tend to slow down the whole process since their owners had not been involved in the process until then. And second, Quirmbach doubted that such a bar ban would be as popular as a restaurant ban: “Again, we’d fall into a pitfall where, by taking a popular measure and loading things onto it that are less popular, we’ll have the whole thing capsize.” If, he argued, most restaurant owners wanted a level playing field in the form of coverage of bars—and Quirmbach was of the opinion that this argument was “not without merit”—then they needed to

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136 Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008).
submit a written proposal and “try to get the Chamber of Commerce to support it.”

At the council meeting on October 10, City Attorney Klaus distributed his revision of the proposed ordinance prohibiting designation of a “smoking area” in any “public place” defined by the state law as an enclosed area used by the public or as a work place with 250 or more square feet of floor space. The anti-smokers were much better prepared for this meeting than they had been a month earlier: whereas 13 of them spoke against the ordinance, only five backers voiced their support; Belitsos, on behalf of the Task Force, endorsed coverage of bars and all public places, but also flexibly expressed support for the ordinance “at any level the council pursues.” Despite a month of mediation by the Creative Justice Center, restaurant and bar owners appeared to be as unreconciled to smoking control as ever. Maahs, for example, reported that the Chamber of Commerce continued to feel that a ban was not needed. Conjuring up the specter of regulation-caused bankruptcy, he claimed that owners could lose their homes since many of their long-term leases and capital equipment and working capital loans were backed by personal guarantees. Carmer opposed the ban in restaurants on the grounds that it singled out that kind of business, but also felt strongly that legislation should not be enacted because it was the people’s right to decide. On behalf of a local bar a lawyer from Nyemaster Goode, the largest Iowa-based law firm, opining that the ordinance was unenforceable, recommended that the council delay its effective date to give opponents time to challenge it in court. Perhaps the most colorful among the “outraged” bar owners to speak up was Peter Sherman, an associate professor of statistics and aeronautical engineering at Iowa State University, who claimed that the ordinance would destroy his business, Boheme, 70 percent of which stemmed from international students, in whose countries of origin “smoking is far more

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138 Minutes of the Regular Meeting of the Ames City Council at 3 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).
139 Minutes of the Regular Meeting of the Ames City Council at 4-6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).
140 Minutes of the Regular Meeting of the Ames City Council at 5 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).

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acceptable than it is here.” He audaciously proposed “an exception in the ordinance that considers people from different countries whose culture has a different perception on smoking.” As far as he was concerned, the council had a “duty to insure the health of businesses” just as it did to protect that of residents. The latter protection apparently did not extend very far: the cigarette-smoking professor, who wanted the ordinance to identify the level at which secondhand smoke exposure was harmful, deemed claims of adverse health consequences from outdoor exposure to secondhand smoke an insult to his intelligence. In a bravura performance of empirically refuted ignorant dogmatism, he asserted that: “You’ll never find an academic who’ll allow his Ph.D. students to do a study on secondhand smoke outside.... And I know a lot of lu-lu academics.” In general he understood anti-smoking trends as driven by the perception that “people who smoke cigarettes are evil” and “we need to squelch that evil out.” Restaurant owner Bob Cummings, who played a crucial

144 Minutes of the Regular Meeting of the Ames City Council at 4 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).

Smoking was not Sherman’s only beef with the city council: before, during, and after this meeting he experienced licensing problems for serving alcohol to minors, for which he was at one point arrested. Jessica Anderson, “Boheme Under Fire from City of Ames,” ISD, July 16, 2002, on http://www.iowastatedaily.com (visited Sept. 8, 2008). Though he does not appear to have brought up the issue at this time, in a letter to the council in 2001, ignoring that customers were protected by and he was subject to numerous health and safety statutes, regulations, and ordinances, he erroneously claimed that “[w]hen persons enter a private business, such as...the one I own in Ames, their rights are superceded [sic] by mine—so long as I do not violate state or federal discrimination laws.” Peter Sherman, “In the Hope of Objective Consideration,” Tribune (Ames), June 21, 2001 (A6:2-4 at 2). Sherman later claimed to have evaded the ordinance while it was in effect by charging a dollar a year membership fee and turning the bar into a private club. “The Flyover Land Talk Show” (Nov. 8, 2006) (audio interview), on http://www.archive.org/
role in mobilizing owners’ support for an ordinance, urged the council to slow the process down so that both sides could reach a compromise.\textsuperscript{150}

In a move that pleasantly and unpleasantly surprised many, the council voted 6 to 0 to authorize the city attorney to expand the draft smoking ban to include all public places (excepting only interstate truck stops)\textsuperscript{151}—an expansion that Quirmbach, despite “pleas from a crowd of protesters who packed” the meeting, justified on the grounds that the “‘response from the community is growing to undertake a broader ban.’”\textsuperscript{152} (Council member Goodhue later contended that “[w]e did not know at that time whether there was support. The ordinance and several media stor[i]es generated interest and sides were drawn. The council listened patiently, but I believe the ordinance lacked support as details of the ordinance were outlined.”)\textsuperscript{153} After the aforementioned lawyer representing a bar had suggested that the mayor ask a legislator representing Ames to request an opinion from the attorney general on the proposed ordinance’s validity, the council unanimously adopted such a motion; state Senator Johnie Hammond, who happened to be present, acknowledged the request on the spot.\textsuperscript{154} In addition to voting unanimously to set the ordinance’s effective date six months after its third reading, the city council scheduled the public hearing on it for November 14.\textsuperscript{155}

The council thus expanded the ban to include all enclosed public places of more than 250 square feet (but not the outdoor seating areas of restaurants or bars) “despite,” as the Ames \textit{Tribune} charged, “knowing there could be a significant public backlash.” Councilor Goodhue, who voted for it, called it the “‘better of two evils.’” Given the anti-smoking groups’ rather timid initial approach, little wonder that Belitsos exclaimed that the new version “exceeds even my wildest dreams.” Yet he was constrained to concede that significant

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\texttt{details/The\_Flyover\_Land\_Talk\_Show\_01 (visited Sept. 28, 2008). City Attorney Klaus stated that it was not lawful for a business to designate itself a private club solely for the purpose of evading the ordinance. “Business Failing to Due to Tobacco Ordinance,” \textit{Tribune} (Ames), Jan. 5, 2002, Bates No. 2085741689A/90.}

\textsuperscript{150}\texttt{Minutes of the Regular Meeting of the Ames City Council at 5 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}

\textsuperscript{151}\texttt{Minutes of the Regular Meeting of the Ames City Council at 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}


\textsuperscript{153}\texttt{Email from Steve Goodhue to Marc Linder (Oct. 13, 2008).}

\textsuperscript{154}\texttt{Minutes of the Regular Meeting of the Ames City Council at 4, 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}

\textsuperscript{155}\texttt{Minutes of the Regular Meeting of the Ames City Council at 6 (Oct. 10, 2000) (copy furnished electronically by City Clerk Diane Voss).}
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compromise might be necessary: he agreed, for example, that the Ames Tobacco Task Force would be open to discussions with restaurant and bar owners even about setting hours at which those establishments would be smoke-free. The reason, according to one owner—who implausibly claimed that “‘[i]f the point is clear [sic] air, I think we can provide that’”—that anti-smoking forces might find such an outcome appealing was the possibility that it would help avoid a long legal battle surrounding the adoption and enforcement of a full ban. That Belitsos and the ATTF—whose self-proclaimed “watchword” was the incrementalist “‘Half a loaf is better than none’” —were willing to consider a measure as minimalist as time- and residual smoke-sharing in restaurants suggested that they were not eagerly looking forward to an “explosive” and “polariz[ing]” community issue in which they would have to confront both smokers and “those who balk at government interference with private business practices....” If, however, as the anti-smoking health groups programmatically proclaimed, a prime virtue of local, as opposed to statewide, anti-smoking campaigns was the opportunity for much more intensive and extensive discussion, they should have been cheered by council member Judie Hoffman’s perception that controversy over the ordinance was “the most closely followed of any public debate in her 13 years on the council.” In any event, the ATTF did thank the council for having moved the city “a step closer to smoke-free dining despite the controversy you have encountered.”

Just three days after the Ames city council had authorized Klaus to draft a broader ordinance, a brief legal memo, titled, “Iowa Law Preempts Local Smoking Regulations,” was already circulating at R. J. Reynolds and Philip Morris. A handwritten annotation on the latter indicates that it was sent “FYI”

156Richard Lewis, “Council Votes to Ban Smoking,” Tribune (Ames), Oct. 11, 2000 (A1:6, A4:1-3). The owner quoted as proposing time-shares for smoking and non-smoking was Rick Carmer, the owner of Wallaby’s, who became one of the plaintiffs challenging the validity of the ordinance to which they had agreed.

157Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food 15 (n.d.).


159Ames Tobacco Task Force, “Public Health Is Priority,” Tribune (Ames), Nov. 16, 2000 (A6:2-4). It is unclear why it took the paper more than a month to publish this letter to the council.


161“Iowa Law Preempts Local Smoking Regulations” (Oct. 13, 2000), Bates No.
to Theodore Lattanazio, vice president for worldwide regulatory affairs at Philip Morris Management Corporation, one of a group of company officials being kept up to date on various local anti-smoking initiatives throughout the United States. Pointing out that efforts were being made “in some Iowa localities to ban smoking in restaurants and other public places,” the memo immediately launched into the untenable bolded assertion that the “plain language” of the identical amendments to the clean indoor air law and cigarette sales law in 1990 and 1991, respectively—passage of which the cigarette industry had secured—“demonstrates the Legislature’s intent to preempt all local regulation of tobacco products. Local governments may not regulate with respect to matters that the state Legislature has reserved to itself. The Legislature has expressed its intention to have exclusive authority in the area of tobacco products.” All of these claims, as will be discussed below, were patently false.

During the run-up to the council’s consideration of the ordinance on November 14, bar owners, notably lacking backing from the restaurateurs, who had provoked their coverage, slowly began to form a coalition among themselves to oppose the council’s “‘messing with our businesses’” by lobbying potentially sympathetic council members to drop or modify the ordinance and propagandizing customers and the public with newspaper ads predicting wholesale closure of bars if the ordinance passed.

The Ames Chamber of Commerce weighed in with resounding rejections of the ban both by its board of directors and its members. On October 25, the board voted 16 to 2 against a smoking ban in public places as it received the results of a survey showing the 66 percent of the membership opposed it, many on the grounds of “local government’s intrusion into private business practices.” The Chamber’s initial resistance tactic took the form of asking the city council to defer any vote until the attorney general had issued his opinion on the ordinance’s validity. If a blanket ban was adopted, the Chamber planned to request insertion

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2081008741 (bearing a fax date of Oct. 23).

162 The sender in the annotation “Ted. Lat. FYI RHG” can be deciphered as Rochelle H. Goldman, the company’s manager of public programs, who was one of those involved in keeping abreast of local anti-smoking activities.


164 They were even wider of the mark regarding the cigarette sales law, under which the authority to issue sales permits was entrusted to local governments. See above chs. 27-28.

of a hardship exemption for businesses that proved that the ban caused them substantial financial losses.\textsuperscript{166} The urgent task of persuading owners that restrictions on smoking would not cause their businesses to suffer prompted Harlan Dubansky, a Task Force member who was also a former owner of supermarkets and convenience stores, to argue that the “‘economic part of [the smoking ban debate] is what we have to win.’” Ironically, at this very time the director of the anti-ban Citizens and Retailers for Fair Trade Practices in Ames was declaring that “‘[w]e see it not so much as an economic issue but as people’s rights....’”\textsuperscript{167}

However, toward the end of October, at least according to the Ames \textit{Tribune}, persuasion seemed out of the question since “the task force’s support for a wider ordinance puts the panel [i.e., city council] on a head-on collision with the restaurant and tavern owners, who met for the second time in a week on Tuesday [October 24] to harden their strategy to fight the ban.” These unilateral meetings provided, to the newspaper’s satisfaction, “increasing evidence that the gulf between the two sides is widening. Each side, firmly convinced its position is just, has jettisoned compromise....” Indeed, ominously, already at this time the owners were vowing, if they failed to scuttle or delay the ordinance in the council, “to battle a ban in the courts.” To be sure, the anti-ban alliance’s consensus was being undermined by the fact that the “bar owners distrust the restaurants for throwing them into the fray by supporting a wider ordinance.”\textsuperscript{168}

On October 26, Attorney General Tom Miller, in town to distribute money to social service agencies, had praised Ames for considering a smoking ban in public places. In announcing that he would issue his opinion in two weeks, he added—in reaction to the aforementioned report that restaurant and bar owners, if unable to thwart adoption of the ordinance, would resort to court action—that “threats from the business community to take” the proposed ordinance to court “would influence how he interprets the ordinance’s legality. ‘[A court battle] is something we will have to consider.... It will affect the way we communicate our opinion.’” Without specifying just how such a threat might color his interpretation, he expressed the hope that the movement of which Ames was now in the vanguard would pressure the state legislature to emulate California in enacting a statewide prohibition. At the same time, however, he also fully


acknowledged that “‘[w]e can’t go there until we change the culture.’” How that cultural transformation would take place and how long that process would last he did not spell out, but the increasingly insistent demands for creation of a smoke-free society by grassroots groups such as those in Ames and the initially divisive debates they triggered were presumably viewed as making a crucial contribution to the spread and absorption of knowledge about the public health consequences of (exposure to) smoking, which would then provoke the requisite reflection to trigger action by a critical mass of militants and acceptance by a critical mass of fellow citizens and legislators to overcome the weight of the past in the form of the freedom to smoke virtually anywhere that addicted smokers had come to take for granted and that the cigarette oligopoly spent great sums on cultivating.

The following day the restaurant and bar owners thought that they had latched onto a propagandistic coup when they complained that Quirmbach, the council’s most vociferous ban backer, had thrust himself into a conflict of interest by virtue of his membership in the Ames Tobacco Task Force. He forthrightly dismissed the allegation, preferring “‘leadership’” as the appropriate label for his having openly put the proposal on the table and worked for it. Even after City Attorney Klaus had expressed the opinion that Quirmbach had violated no legal duty, owners charged that Quirmbach’s dual role conferred on ATTF an unfair advantage in lobbying the council and drafting the ordinance insofar as it “‘virtually had his ear.’” Restaurant owner Rick Carmer instanced the third and final meeting between the owners and ATTF in their failed effort to reach a compromise: the former were “taken aback when Klaus explained he had eliminated a clause that would have allowed restaurant smoking after a certain hour after intense lobbying from Quirmbach.” To be sure, that owners’ outrage was opportunistic rather than principled emerged from their failure to charge conflict of interest after council member Steve Goodhue had voted against the ban in his capacity as representative of the First American Bank on the Ames Chamber of Commerce board of directors.


170Belitsos had argued that local governments “are usually able to enact more stringent laws.... Also, most locally written indoor-air ordinances are self-enforcing. By debating the issue locally, the public is informed and comes to expect compliance.” George Belitsos, “Smoking in Restaurants,” Tribune (Ames), Aug. 19, 2000 (A7:1-2).

The anti-smoking forces also appeared to suffer a symbolic setback when in October the Iowa State University Government of the Student Body Senate expressed its opposition to the proposed broad ban by a vote of 23 to 10, while the central administration of the university, which already banned smoking in all of its buildings except students’ rooms in some dormitories, refused to take a stance on the ordinance. The student president explained that while representatives generally supported a smoking ban in restaurants on the grounds that eating was a necessity, they drew the line at bars, to which, as mere places of entertainment, people who did not like smoking did not have to go. With ISU’s 26,845 students comprising somewhat more than half of the city’s population of 50,731 in 2000, the student politician attitudes, if reflective of those of the larger student body, might have given pause to the local anti-smoking movement, which at this stage appeared to prefer to follow than lead public opinion, although, ironically, preventing 18-22-year-olds from ever starting to smoke was (and remains) one of the most important goals of any tobacco control program.

Clean Air for Everyone Comes Forward with a Draft Ordinance in Iowa City

“Smokers feel like they’re persecuted, but it’s not smokers versus nonsmokers. It’s the public versus the tobacco industry for luring these people into smoking, most when they were under 18. “Smokers are not bad people or dumb people. They got addicted when they were young. It’s a difficult addiction to overcome.”

175For the argument that the student senators were “a very small (and non-random) sample of the overall ISU student population,” see Michelle Clark, “Coverage Shouldn’t Be Editorialized,” Tribune (Ames), Nov. 13, 2000 (A6:2-4) (letter to editor). The students of the ISU Student Health Advisory Committee favored the ban. Chris Gleason, “Students and Smoking,” Tribune (Ames), Nov. 11, 2000 (A6:1-2) (letter to editor).
176Belitsos observed that “[o]ne especially good social reason to ban smoking in restaurants is that adults will begin setting a better example for our young people.” George Belitsos, “Smoking in Restaurants,” Tribune (Ames), Aug. 19, 2000 (A7:1-2).
177Kathryn Ratliff, “Smoke Considered a Risk,” ICP-C, Aug. 23, 2000 (3A:2-7, at 3096
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Champion/ I’m just wondering if we ought to be thinking about some way to do this and not affect people’s businesses...I think in 10 years everything will be non[-]smoking.

Pfab/ So what are you waiting for? ...

Champion/ You know because it may affect people’s incomes Irvin and that might not be important to you but you know what it is to me.

Pfab/ No it is but at the same time if I go out and poison you I may be.178

[Restaurants are and bars are entertainment, they are not essential to living..., we don’t need to go out to eat to be healthy.179

In the meantime in Iowa City, Clean Air for Everyone (CAFE), the “public-awareness branch” of the Johnson County Tobacco-Free Coalition,180 which was formed in 1999 to educate the public about the harms of secondhand smoke,181 was simultaneously laying the legitimational groundwork and discovering the breadth and depth of support for a smoking ban. In August 2000, it paid a market research company to conduct a telephone survey (which the American Cancer Society helped develop) of 400 Iowa City and Coralville residents, 20 percent of whom used tobacco. As presented by Dr. Beth Ballinger, a coalition member and University of Iowa Hospital vascular surgeon, at a news conference, the results revealed that: 68.5 percent believed secondhand smoke to be a health risk; 83.8 percent believed that separating smokers and nonsmokers did not solve the problem; 76.5 percent believed that there should be smoking restrictions in their workplaces; and 88.2 percent believed that there should be smoking restrictions in the businesses they visited.182 When asked, “When I go out, I would prefer it if the restaurant...,” 38.0 percent answered “Not allow any smoking,” while 29.5 percent answered “Limit smoking to a designated area outside.” In contrast, only 24.0 percent preferred what was in essence the power conferred on owners by the then existing law (“Limit smoking to a designated area indoors”) and only 7.0

5A:1-4 at 4) (quoting Eileen Fisher, Johnson County Tobacco-Free Coalition chairwoman).

178 Transcription of Iowa City Council Special Work Session at 68 (July 30, 2001) (colloquy between council members Connie Champion and Irvin Pfab).

179 Transcription of Iowa City Council Special Work Session at 46 (Jan. 7, 2002) (statement by council member Connie Champion).


181 Transcription of Iowa City Council Regular Meeting at 7 (Sept. 19, 2000) (statement of Beth Ballinger).

percent preferred no restrictions at all. Of considerable use in allaying owners’ fears of financial ruin was the result that whereas 51.8 percent of respondents stated that they would be “[v]ery much more likely” to go to a smoke-free restaurant (and 21.8 percent “[s]omewhat more likely”), only 2.3 percent were “[v]ery much less likely” (and 5.0 percent “[s]omewhat less likely”).

Despite these rather favorable responses, CAFE, concluding that it was “clear that people still do not know exactly what breathing it [secondhand smoke] can do,” felt that its educational process and the achievement of a restaurant ban had “a long ways to go.” (By this time upwards of 70 to 100 of the 400 “eateries”—including coffee shops and fast-food places—in Johnson County were already smoke-free.) Release of the survey results was timed to lead into the holding of another town hall meeting, this time in neighboring Coralville, with medical experts, an economist, and an owner who had prohibited smoking in her restaurant. The cultural and communicational space for which the anti-smoking movement was forced to compete was, ironically, reflected in the decision of the Iowa City Press-Citizen to place a large ad for cigarettes in the column immediately adjacent to the lengthy article about the secondhand smoke survey.

A month later CAFE, which for the time being was not planning to cover bars, was finally prepared to bring its proposed ordinance before the Iowa City council, four of whose seven members smoked. At the council meeting on September 19, Dr. Ballinger, alluding to the survey’s salient findings, concluded that “the people in our community are already interested in this issue.” After having informed the council that CAFE would submit a smoke-free ordinance in the next few days, she stressed that the elimination of smoking in restaurants was designed to protect customers, especially young people without a say in their exposure to secondhand smoke, and workers, who “don’t have a choice about

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183Fred Lucas, “Restaurants Split on Smoking Ban,” ICP-C, Sept. 25, 2000 (5A:2-6) (erroneously dating survey to 1999). To be sure, before the legislature acted owners had always had the power to ban smoking.


188Connie Champion, Ernie Lehman, and Mike O’Donnell smoked; Dee Vanderhoef was a sometime smoker. Telephone interview with Karen Kubby, Iowa City (Nov. 17, 2008) (Kubby was a council member from 1989 to 2000).
where they work.” Observing that “probably” four (of seven) council members “would like to see this become a work session item,” Mayor Ernie Lehman stated that when they got the ordinance, they would schedule discussion as time permitted. 189 The mayor, who did not “sense any opposition” and mentioned that some restaurants in Iowa City that had already banned smoking had experienced “better business,” stated that the question might be discussed at the council’s work session on October 2. 190 Failing to foresee the breadth and depth of resistance, the Press-Citizen reported toward the end of September that council members—even the smokers—were just “waiting for” the draft and “seem likely to support” it. For example, Lehman, a smoker, did not “see it being a hassle for anybody.” Though “most government or public buildings,” were, according to the mayor, already smoke-free, one group that was not protected was “folks who work in the service industry.” And council member (and smoker) Mike O’Donnell also purportedly backed an ordinance, in part, apparently, based on his belief that “smokers don’t want to bother anyone.” 191 Neither CAFE nor the council seemed fazed by the conclusion of the Attorney General’s office that, although a local restaurant smoking ban “probably” would not violate state law, the question was still “open.” 192

A Press-Citizen editorial quickly made it clear that a ban would encounter some opposition. Despite fully agreeing that the health impact of secondhand smoke exposure was deleterious and that restaurant non-smoking sections were a “joke,” the paper nevertheless adamantly opposed ordinances proposed by CAFE for Iowa City and Coralville to ban smoking in all restaurants. Its Panglossian market-knows-best position was straightforward:

Iowa City Mayor Ernie Lehman points directly to the reason: Some restaurants already have banned smoking on their own, and their business has increased. More will follow.

We should not make laws to regulate what is being—and will be—regulated by consumers. ...

We are concerned about health issues for employees.

But...considering our terrific economy, no one is being forced to work in a restaurant that allows smoking. There are plenty of other jobs out there. 193

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189 Transcription of Iowa City Council Regular Meeting at 7-8 (Sept. 19, 2000).
As finally presented to the council, CAFE’s ordinance was brief, straightforward, and modest in scope. Following preambular recitals of scientific evidence of the health hazards of secondhand smoke exposure and of results of the August opinion survey in support of intervention, the draft ordinance banned smoking in all restaurants (including those seating fewer than 50 although they were not covered by the state law), defined as indoor food service establishments whose business was the sale of food for on-premises consumption, but only if their alcohol sales accounted for less than 50 percent of their gross receipts. The only other prohibitive feature was worded so incompetently that it (counter-intentionally) appeared to mandate smoking outside smoking-prohibited restaurants: “Smoking shall occur at a reasonable distance outside any enclosed area where smoking is prohibited by this Ordinance to ensure that tobacco smoke does not enter the restaurant through entrances, windows, ventilation system or any other means.” This outdoor ban was, then, designed not to protect those entering/leaving such restaurants from being forced to walk through smoke gauntlets, but only to prevent the wafting of smoke back into the restaurant. Restaurant owners, managers, operators, and employees were required to inform anyone smoking in violation of the ordinance of its “appropriate provisions,” though employees who did not control the use of the premises were not subject to the maximum $100 fine for a first violation, maximum $200 fine for a second violation within one year, or maximum $500 fine for each additional violation within a year of the preceding one—the same schedule of fines that applied to unlawful smokers.194

At its October 2 work session, the city council briefly took up the draft after the City Attorney Eleanor Dilkes had informed the members that she had not reviewed it in sufficient detail to conclude “whether I think we can do it or not.” Shifting the onus onto the council members, she urged them to “establish a policy position as to whether this is something that you want to pursue”; only then could she deal with the “major preemption issue as to whether this is consistent with state law that I’m going to have to satisfy myself about before I can recommend that you can proceed.” Seeing that all seven councilors wished to proceed with the ordinance, Mayor Lehman (apparently in all seriousness) suggested that if the city attorney determined that an ordinance was impermissible, “then we can require you know a skull and cross bones on the front door, or a skeleton and a sign that prohibits people under 16 to be in the restaurant.” Having received her

instructions, the city’s lawyer asked whether the council wanted to deal with (underage/excessive) “alcohol first or smoking in the restaurants [b]ecause...it’s going to be in terms of the resources in my office we need to do them not at the same time.” Lehman opined that alcohol was “a more immediate problem,” smoker Connie Champion adding her belief that “some of the nonsmoking is already being taken care of by restaurant owners....” Hearing no contradictory views, the mayor told Dilkes to “go for it” (i.e., alcohol first).195

Dr. Ballinger of CAFE was so heartened by the council’s “‘unanimous support to look into this’” that she did not expect much controversy. Conflating support for the ban with support for authorizing the city attorney to draft an ordinance (a confusion that marked contemporaneous proceedings in Ames as well), the Press-Citizen reported from the perspective of quasi-inevitability: “Eventually, every restaurant in Iowa City likely will become smoke-free—whether the owners like it or not—after the Iowa City Council indicated unanimous support for the ordinance at a council work session....”196

The Ames Tobacco Task Force, Pessimistic About Securing a City Council Majority for a Broad Ban, But in a Hurry for Some Progress, Acquiesces in Owners’ Proposal for a Part-Time Ban

Although the ordinance contains “red light/green light” time-of-day provisions not recommended by most clean indoor air advocates, Ames deserves great credit for being the first community in the state to achieve a wide-spread smoking ban in restaurants.197

Contradicting all the talk of a widening gulf that the Tribune had been propagating during the preceding weeks, on November 8 it reported that restaurant and bar owners had offered the Task Force a compromise ordinance, the central and most provocative provision of which banned smoking in bars and restaurants (including outdoor areas where food was served) only between 6:00 a.m. and 8:30 p.m.; during the remaining nine and a half hours smoking was to be allowed in designated areas; owners would be authorized to shorten the nonsmoking period even further and extend the smoking period by terminating

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owners set the resumption of smoking at 8:30 p.m. allegedly because they believed that most children would be gone by then. Other provisions included: a ban on smoking in bowling alleys only between 6 a.m. and 6 p.m.; a total exemption for all bars in which food accounted for less than 10 percent of total receipts as well as for pool halls that did not admit minors; an exemption for bowling alleys and truck stops that built a separate enclosed room with a ventilation system; and a total exemption for places with on-premises live music.

The actual text of the proposal (“Non-Smoking Ordinance Guidelines”) expressed a number of these provisions with greater specificity and also included several others omitted by the Tribune. The central guideline concerning restaurants (which did not mention extending the smoking hours if food service was discontinued earlier) specified that at 8:30 p.m. restaurants without liquor licenses “may break out a proportional share of the restaurant as the State Law now reads for a smoking section. No customers under 18 years of age will be allowed in the smoking section.” The same guideline (except for the presence of minors) applied to restaurants, bars, and taverns with liquor licenses. The exemption for taverns 10 percent or less of whose gross sales were accounted for


199 Telephone interview with Bob Cummings, Ames (Oct. 2, 2008). Quirmbach reported that he had tried to persuade owners to push back the starting time for smoking until later in the evening, but they refused. Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008).


201 “Non-Smoking Ordinance Guidelines” (n.d.) (bearing a fax date of Nov. 11, 2000 and Daily Tribune as the fax source) (copy furnished by Linda Muston). The state law did not prescribe any “proportional share of the restaurant”: it merely prohibited the designation of any public place (except a bar) in its entirety as a smoking area, although it did create a special rule for one-room public places: “the provisions of this law shall be considered met if one side of the room is reserved and posted as a no smoking area.” Iowa Code § 142B.2(3) (2000). To be sure, the drifting of smoke made this bifurcation virtually meaningless. Even in the much more stringent Minnesota Clean Indoor Air Act, from which this provision was adopted, “one side of the room” did not mean one half. See above ch. 24.

202 The incompetent drafting of the ordinance guidelines was visible in the use of “will” for restaurants without liquor licenses and “shall” for the other group with regard to the non-smoking hours.
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by food was followed, on the copy faxed to the Tribune, by the forthright italicized parenthetical sentence: “We do have a loophole.” The pool hall exemption was conditioned on restricting admittance to those under 21. The exemptions for bowling alleys (which were also subject to the same nonsensical condition concerning a “proportional share” for smoking in which customers under 18 were not allowed) and truck stops specified that smoking areas had to be glass-enclosed and the ventilation systems had to be separate. Under the heading, “Guidelines Common to All,” the proposal provided that: “Common areas of hotels and motels shall be smoke-free. A Smoke-Free Zone of 15 feet at the entrance/exit of all public spaces shall be maintained, except in locations where adjacent establishments preclude such stipulations. Live Music Venues shall not be addressed at this time.” Finally, enforcement was not to begin earlier than six months after the ordinance’s third reading before the council, but the “Guidelines under Law shall be diligently enforced.” This last merely aspirational admonition, unsupported as it was by imposition of any penalty for violations, revealed how amateurish drafting could comfortably go hand in hand with self-regarding bias.

Rich Johansen, owner of several restaurants and one of the drafters, while calling the proposal a “‘workable solution’” for both sides, shed some light on why owners were giving it “‘broad-based’” backing: “‘It’s a situation where businesses have looked at the fact that there will be an ordinance and why not make the best of it?’” Since owners regarded a ban as inevitable and their proposal came much closer to what they purportedly perceived as their self-interest—as little government intervention as possible—their last-minute gambit to make their businesses less smoke-free appeared to be risk-free, at least for them. Indeed, Johansen’s preference would have been for leaving smoking decisions up to individual owners, more of whom, he insisted years later, would have voluntarily gone no-smoking.

Nevertheless, securing consensus had not been easy: the proposal had, according to Bob Cummings, owner of two restaurants, been “hatched after a weekend of frenetic meetings with various restaurants [sic] and bar owners, several of whom initially resisted the proposal but eventually relented after being lobbied.” In the end, some 50 restaurants and bars supported the compromise, one of whose underlying goals was to “eliminate unfair competition among

203 “Non-Smoking Ordinance Guidelines” (n.d.) (bearing a fax date of Nov. 11, 2000 and Daily Tribune as the fax source) (copy furnished by Linda Muston).

204 Richard Lewis, “Restaurant, Bar Owners Draft Compromise,” Tribune (Ames), Nov. 8, 2001 (B1:2-5, B8:5-6).

The 100-percent consensus that was reached among owners was possible, according to Cummings, because it was designed to last only until the ordinance was tested in court: although Cummings later denied that he or anyone else had planned to test it, owners had known that it would and “had to be tested.” If

206Richard Lewis, “Restaurant, Bar Owners Pitch Ban Compromise,” Tribune (Ames), Nov. 9, 2000 (A1:6). According to Fred Miller, Cummings had owned and/or founded five “different restaurant concepts in Ames,” one of which, O’Malley & McGee’s, had, a few years earlier, been the first to go all no-smoking. Email from Fred Miller to Marc Linder (Nov. 1, 2008).


209Telephone interview with Mary Kitchell, Ames (Oct. 3, 2008). Miller explained owners’ attitudes as based on their intimate knowledge of the customers they risked losing and their misjudgment that potential gains would not be sufficient to overcome that loss. Email from Fred Miller to Marc Linder (Nov. 2, 2008).

210Email from Fred Miller to Marc Linder (Nov. 1, 2008).

211Telephone interview with Bob Cummings, Ames (Oct. 2, 2008). In contrast, his co-
owners received legal advice that it was very likely that the ordinance would not survive a judicial challenge, then ridding themselves of the threat of a ban by securing its adoption and getting it before a court as expeditiously as possible may have been a rational strategy even for owners opposed to governmentally imposed restrictions on smoking in their businesses.

In contrast, on the anti-smoking side the obvious question was: what possible advantage could the ATTF see in agreeing to the compromise? Initially the group’s reaction was “lukewarm” because the proposal failed to achieve what had, after all, been the driving goal behind the whole movement—the complete elimination of smoking (and smoke) in restaurants. As Linda Muston, vice president of community services at Mary Greeley Medical Center and a leading ATTF member, observed: “‘Just stopping at 8:30 [p.m.] does not remove the smoke.’” Belitsos, the key figure in the group, agreed, but nevertheless added that “he may support it because it eliminated smoking in bars at least during certain times.” In the event, the two sides were to meet November 8 to discuss the proposal, which was “the first attempt at compromise of any sort” since the last round had ended in failure in early October.212

The kind of pressure to which the ATTF would soon be subjected was previewed on November 7, when Cathy Callaway, the first director of the Division of Tobacco Use Prevention and Control of the Iowa Public Health Department, animated by the ATTF,213 emailed very high profile members of the anti-smoking movement in California to solicit their views of the proposed compromise:

Is it better to compromise or stand your ground and not get anything when it comes to the clean indoor air ordinance? Ames apparently has a compromise on the table and I think you have talked to this guy, Stan. His name is Bob Cummings and he appears to be leading this compromise charge. His compromise involves smoke-free places until 8:30 p.m. and only for businesses with 10% or more of their income from food. They are trying to decide whether or not to allow Bob to present at the Tobacco Task Force meeting where press will be present tomorrow. Any thoughts?214
Stanton Glantz, a (non-physician) professor of medicine at the University of California at San Francisco and phenomenally productive anti-tobacco researcher, whose prodigious outpouring of articles, based in large part on the millions of documents that cigarette companies had been judicially compelled to produce (and that Glantz himself had played a crucial role in making public), and personal activism had contributed signally to the proliferation of understanding of the dangers of secondhand smoke exposure and the passage of anti-smoking ordinances and statutes, especially in California but also nationally, replied tersely within a few minutes: “This doesn’t sound like a good idea to me. These ‘time’ compromises are very hard to make work, provide appropriate signage, remove ash trays, etc.”\textsuperscript{215} Glantz’s brief comment was remarkable both for confining its criticism to the proposal’s empirical details, thus seeming to imply that with heroic efforts this clumsy and partial ban (of smoking, but not of residual off-gassed smoke)\textsuperscript{216} might be enforcibly protective, and for eschewing a broad-based principled rejection. In contrast, the reply from Elva Yanez, the associate director of Americans for Nonsmokers’ Rights in Berkeley (which Glantz had also been instrumental in developing), a leading anti-smoking lobbying organization that specialized in promoting the adoption of local no-smoking ordinances, was absolutist and instructional, leaving no doubt whatsoever that nothing was better than this feckless compromise:

\begin{quotation}
From ANR’s standpoint, it is always better to stand your ground and get nothing than to compromise and get something ineffective or worse, a tobacco industry promoted alternative such as red light green light or incentives for smokefree policies.

The compromise you outline sounds like Duluth’s ordinance, which brings us back to the idea of why its [sic] not a good idea to share other existing ordinances with your council. The folks in Duluth were quite disappointed with this compromise.

The folks in Ames should stand firm for a good policy. We’d like the [sic] see the draft language so we could better comment on how effective the original draft was. It would be better to stop the process and go back and organize a strong grassroots campaign than to end up with something bad since this would impact all other cities in Iowa for years to come. We recommend that they not introduce this compromise. I’d also recommend that ANR come out and do a policy training as soon as possible.\textsuperscript{217}
\end{quotation}

\textsuperscript{215} Email from Stan Glantz to Cathy Callaway and Elva Yanez (Nov. 7, 2000) (copy furnished by Linda Muston).

\textsuperscript{216} For an early scientific finding of “some evidence of ‘off gassing’ of tobacco smoke vapors from the clothes of smokers or from the porous fabric on the divider walls,” see William Vaughan and S. Hammond, “Impact of ‘Designated Smoking Area’ Policy on Nicotine Vapor and Particle Concentrations in a Modern Office Building,” \textit{Journal of Air Waste Management Association} 40:1012-17 at 1015 (1990), Bates No. 2505613460/3.

\textsuperscript{217} Email from Elva Yanez to Cathy Callaway and Stan Glantz (Nov. 7, 2000) (copy}
furnished by Linda Muston). In light of the sharp criticism that the effort yielded, Muston offered the following explanation as to why ATTF had wanted to approach Glantz and ANR:

"[W]e were all trying to make our case and wanted to learn more. She [Callaway] or Natalie [Battles] or someone had heard him [Glantz] speak at a meeting and suggested that we could learn from him. Of course, he was present in all literature searches and we were looking for support—thus the shock when he was so aggressively opposed to what was happening in Ames.” Email from Linda Muston to Marc Linder (Oct. 14, 2008).

ATTF had in fact been aware of events in Duluth because many of its members “were keeping abreast of various components of the process,” for example, by monitoring news media to keep track of local ordinances elsewhere; especially pertinent material was forwarded to Belitsos, who then circulated it within the group.\(^{218}\) Significantly, although the ordinance that the Duluth city council had passed on June 12, 2000, also included a provision permitting smoking in restaurants with alcoholic beverage licenses between 8:00 p.m. and 1:00 a.m. if minors under 18 were excluded from the premises during those hours,\(^{219}\) Glantz, who studied the battle in Duluth as it was unfolding and later published an analysis of it, focused not on the exposure via off-gassing, but especially faulted proponents of the ban for two “tactical errors”: (1) “fram[ing]
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the ordinance as a children’s health issue” rather than as a workplace health and safety issue led to restaurants’ being classified according to customers’ ages, which “in turn, led directly to the provisions relating to patron age and time of day, which made it virtually impossible to enforce the ordinance” “because [they] allowed smoking even when ‘no smoking’ signs were prominently displayed”; and (2) being “unwilling to use existing research showing that smoke-free ordinances did not affect business revenues” lest “any adverse economic events” that took place after the ordinance went into effect “would be attributed to them” “cost” members of the anti-smoking coalition “the opportunity to establish themselves as credible critics of the tobacco industry’s economic arguments.”

Yet, as Kitchell stressed years later:

I don’t think that Glanz’ criticisms applied to us. Herman Quirmbach is a member of the ISU faculty in economics. He had the Econ department chair present a comprehensive review of the literature regarding the economic impact of tobacco ordinances. From the very beginning, this information was presented in various public venues and media. Also, from the very beginning, we focused on a number of constituencies that were affected by second hand smoke. We did include children, but we included studies about all age groups. One area that we particularly focused on were the employees of establishments that allowed smoking. I presented studies about the health of employees and also cited local examples. As the director of the Ames Free Medical Clinic, I had seen numerous bar and restaurant employees who came to our clinic with regularity. That is why I became so passionately involved. Our message about both these topics was very clear and consistent.

Moreover, whereas the tobacco companies poured enormous resources into fighting a strict ban in Duluth, the reason for ATTF’s agreement to the weak

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221 Email from Mary Kitchell to Marc Linder (Oct. 12, 2008). Another “tactical error” for which Glantz criticized the anti-smoking movement in Duluth was its “seeking to enlist the restaurant/hospitality industry as an ally in the development of the ordinance” in the hope of “avoid[ing] controversy.” Theodore Tsoukalas and Stanton Glantz, “The Duluth Clean Indoor Air Ordinance: Problems and Success in Fighting the Tobacco Industry at the Local Level in the 21st Century,” *AJPH* 93(8):1214-21 at 1220, 1214 (Aug. 2003). ATTF also engaged in such cooperation, to avoid not controversy, but the impossibility of passing an ordinance.

Ames ordinance was, as Belitsos underscored, straightforward: “We did not have the votes for the 100% ban. The compromise was it or nothing would have passed.” Despite the important differences between the two ordinances and the circumstances surrounding their adoption, Glantz charged that “the problematic provisions” of Duluth’s were “quickly replicated in other states, including Iowa....” The lesson that he learned from the first case was the same about which he, ANR, and ACS warned ATTF: “The Duluth experience demonstrates the importance of not accepting weak compromises at the 11th hour in negotiations in order to get something rather than nothing, hoping to revisit and fix a flawed policy later.”

On the evening of November 7 Belitsos wrote to Linda Muston (but did not fax to her until the next morning) a note accompanying a “Proposed Motion and Position Statement” bearing her name and his, which revealed that he still felt uneasy about the compromise about which he had not yet completely made up his mind: “Here it is. I’ll sleep on it & run it by a few advocates in the morning to see what they think of our position. I’ll call with changes...” After declaring that ATTF’s “vision” was to improve “our” community’s health “by eliminating second-hand smoke from all public places,” the draft frankly underscored the unsatisfactory public health consequences of the compromise:

Our current mission and proposal to the Ames City Council is to begin with a smoke-free dining ordinance. We have received tremendous public support for this restaurant ban proposal.

We appreciate the compromise proposal from the restaurant and bar owners because it represents their recognition of the importance of reducing the exposure to second-hand smoke for their patrons and employees. The 8:30 time is very troubling to us because we are opposed to any exposure to second-hand smoke in restaurants. Our original proposal was to eliminate smoking from restaurants, and this compromise does not meet this public health goal. However, we see the inclusion of bars in the compromise as a plus and view this as somewhat [sic] a tradeoff for the 8:30 green light time in restaurants.

If the Ames City Council will not adopt a total ban in restaurants, the Ames Tobacco Task Force will reluctantly support the proposed compromise but will continue to work for a total ban in the future.

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223 Email from George Belitsos to Marc Linder (Oct. 14, 2008).
Thus as of November 8, although Belitsos had apparently not abandoned hope of still securing a majority on the council for a 24-hour-a-day restaurant ban, he no longer believed (if he ever had) that a total ban in all public places was possible with that city council as it was then constituted. The profound disappointment over the limited health benefits of the part-time ban on active smoking produced the overall dispirited tone, which even the inclusion of some bars (which did not compensate for the evening smoking period in restaurants) was unable to dispel.

When Cummings and Johansen met with ATTF on November 8, the Tribune reported that they made what they called a “one-time offer”: despite occupying what appeared to be the weaker position, Cummings allegedly stressed that “[w]e came with our best possible offer.... We did not come to negotiate.” In fact, participants later agreed that the owners had not confronted ATTF with an accomplished fact in the sense that many negotiations had preceded presentation of the compromise. Implausible as Cummings’ claim seemed, he argued that although “not a perfect solution,” the compromise nevertheless “accomplished much of what the anti-smoking forces want, which is a smoke-free environment in public places.” Even the Tribune recognized that it “could be a hard sell” since ATTF clearly wanted a total ban to eliminate the health hazards linked to secondhand smoke exposure. Yet despite having what appeared to be the upper hand, ATTF representatives “effusively praised the businessmen for their initiative.” Nevertheless, they “stopped short of accepting it” until the organization as a whole expressed its support, on which the owners insisted because they refused to present the plan to the council alone. One of the restaurant owners’ chief goals was to insure that the council did not—as it had been contemplating in September—create the worst-case scenario of a restaurant-only ban. The complicated political dynamic on the council and between the

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228Telephone interviews with Len Monte, Ames (Oct. 2, 2008); Bob Cummings, Ames (Oct. 2, 2008); Linda Muston, Coralville (Oct. 1, 2008); Mary Kitchell, Ames (Oct. 3, 2008); Rich Johansen, Ames (Oct. 8, 2008) (calling negotiations on-going and “amicable”). Nevertheless, the key ATTF figure, George Belitsos, when asked outright, also denied that the group had been given a take-it-or-leave-it offer, but then in the course of his own narrative did admit that at some point the owners had put them in that situation in the sense that the group knew that if it did not accept the offer, it would be unable to secure the votes on the city council for any stricter ban. Telephone interview with George Belitsos, Ames (Oct. 10, 2008).

council and the two groups pushed them toward a compromise. ATTF understood that it would obtain nothing from the council if it insisted on a broad ban because it was simply unable to mobilize four votes—a dynamic of which the owners almost certainly were aware.230 (In the latter part of October bar owners had planned to lobby those city council members they believed might be “sympathetic to rescinding...or modifying” the broad ban—“namely, Russ Cross, Steve Goodhue, Sharon Wirth and perhaps Ann Campbell.”)231 At the same time, however, the council’s sense of growing community support for less exposure to tobacco smoke in restaurants and bars meant that the owners could not just rest on their laurels because the council would have pressured them to accept some regulation,232 in part in reaction to pressure from the ATTF itself.233

Whatever stringency the Ames ban possessed was irrevocably relaxed on November 8, when, as Lenwood Monte, one of two ATTF members who had negotiated with the owners, in a monumental exaggeration put it, a “breakthrough of monumental proportion was achieved.... The restaurant owners made an ‘offer that we could not refuse.’ The proposal needed only a few little ‘tweakings’ after this time to be shaped into final form. [F]rom then on...ATTF and the restaurant owners began to work together to develop a compromise that both parties could accept.”234 Kitchell, the other ATTF negotiator, later explained the basis for her having agreed to the compromise: “[I]...had the gut feeling that Bob [Cummings] and Rich [Johansen]’s opposition to the original ordinance was largely based on economic fears—they really did not believe the data that these ordinances did not cause economic harm. I, on the other hand, did believe the data and was confident that their businesses would not suffer. I felt that once they saw that their businesses were not harmed, we could more easily move to an all out ban.”235

The severely watered-down ban that the now openly incrementalist ATTF

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230Telephone interview with Mary Kitchell, Ames (Oct. 3, 2008). Rich Johansen, one of the two owner-negotiators, later stated that owners had not been sure at the time whether ATTF could have secured adoption of a broader ban, but had believed that because a “backlash” had developed against such a ban, ATTF on its own had sought more “common ground.” Telephone interview with Rich Johansen, Ames (Oct. 8, 2008).


234Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food 49 (n.d.).

235Email from Mary Kitchell to Marc Linder (Oct. 12, 2008).
welcomed immediately caused an open breach with the American Cancer Society. During a conference call on November 10, a number of “angry” local and regional ACS officials “‘lowered the boom’” on ATTF, informing that group that it was, “in effect,... ‘letting the ship sink!’” Of special significance was Stanton Glantz’s participation from California. His involvement was calculated to bring additional persuasive power to bear on ATTF since he had written much of the material that they had used in their campaign. Glantz uncompromisingly criticized so-called red light/green light arrangements such as the smoking/no-smoking time-share compromise to which ATTF was about to agree. As Glantz explained in an article he published soon thereafter: “These laws are introduced to local level policymakers (typically by restaurateurs) in places where citizens are pressing for a 100% smoke-free ordinances [sic]. Like the Accommodation Program, ‘Red Light Green Light’ laws only establish minimum restrictions and require signs be posted outside establishments saying

236 George Belitsos stated that the American Lung Association and American Heart Association had joined ACS in opposition. Telephone interview with George Belitsos, Ames (Oct. 10, 2008). Mary Kitchell, while unable to recall, noted that AHA’s “level of involvement in this whole effort was minimal” and ALA had been “more involved in public education” about the consequences of secondhand smoke. Email from Mary Kitchell to Marc Linder (Oct. 12, 2008). Council members Hoffman and Campbell stated that neither ALA nor AHA nor the Iowa Department of Public Health had been involved. Email from Judie Hoffman to Marc Linder (Oct. 14, 2008). Kitchell recollected that the IDPH may not have liked the compromise, but had not spoken out against it as had Natalie Battles of the ACS before the city council. Email from Mary Kitchell to Marc Linder (Oct. 12, 2008). According to an email from a CAFE member to the Iowa City Council urging it not to adopt a time-limited smoking regime as Ames had done, this red light/green light regime had prompted the ALA, AHA, and ACS to “publicly voice[ ] their lack of support for such an ordinance.” Email from Renee Gould to Iowa City Council (Nov. 20, 2001), in City Council Documents, Meeting Folders 2001 (final), Nov. 27, 2001 Special Meeting at 75, on http://www.iowa-city.org/weblink/docview.aspx?id=8320 (visited Nov. 4, 2008).


238 Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food (n.d.). Although Monte depicted the call as part of a physical meeting, other participants stated that everyone participated by telephone. Telephone interviews with Linda Muston, Coralville (Oct. 1, 2008) and Mary Kitchell, Ames (Oct. 3, 2008). Unfortunately, by the time he was interviewed Belitsos had recently “purged” 10 years of records including all ATTF minutes. Email from George Belitsos to Marc Linder (Oct. 9, 2008).

whether smoking is allowed inside. These proposals have great appeal to local policymakers who feel pressured to address smoking in public places since these weak laws give the appearance of taking action without having any protective health effect. Introducing ‘Red Light, Green Light’ laws is an industry tactic aimed at delaying and weakening popular smoke-free efforts.  

The gist of ACS’s criticisms during the conference call was that once adopted, the partial ban would not only be the best that the city of Ames would ever achieve, but that it would become an inferior model for other cities in Iowa. (Later Belitsos would be able to refute this claim by citing the ban adopted in 2002 by Iowa City, which, though narrower in scope, lacked the despised red light/green light feature.) ATTF representatives did not waver or acquiesce in these condemnations. Mary Kitchell, for example, stressed that none of the ACS critics lived in Ames or would have to work or live with the owners in various multifaceted situations. Moreover, since the Iowa Attorney General’s office had advised ATTF that any helpful changes in the state smoking law would be a long time coming, it seemed senseless to the group to do nothing now to alleviate exposure to secondhand smoke and wait, potentially many years, until anti-smoking Democrats gained control of both houses of the legislature. The central fact was that a broad ban could count on the support of only two members of the city council, Quirmbach and Hoffman. In contrast, the two bankers, Russ Cross and Steve Goodhue, though they personally hated smoking, were in principle unable to support the total ban, while Sharon Wirth and Ann Campbell “played it both ways,” but even if one of them had voted for it, the council would still have been deadlocked at 3 to 3. Indeed, one reason, at least in the view of


\[241\] Telephone interviews with Linda Muston, Coralville (Oct. 1, 2008) and Mary Kitchell, Ames (Oct. 3, 2008). When Muston self-ironically recalled that “we were so conceited that we thought we could be the model for Iowa,” her irony referred not to the weakness of the ordinance, but to the fact that, because the Supreme Court soon invalidated it, the ban never became a model for any city. Council member Wirth later argued that, since ACS had known that the more stringent ban would not and the compromise would be adopted, it could retain its purist position and secure the half a loaf (although ACS never articulated such a view). Telephone interview with Sharon Wirth, Ames (Oct. 5, 2008).

\[242\] Telephone interview with George Belitsos, Ames (Oct. 10, 2008). In contrast, ATTF member Linda Muston, who lived in Ames and Iowa City, regarded Iowa City’s ordinance as inferior to Ames’s. Telephone interview with Linda Muston, Coralville (Oct. 8, 2008).

\[243\] Telephone interviews with Linda Muston, Coralville (Oct. 1, 2008) (quote) and
one prominent ATTF member, that the council had unanimously voted to authorize the city attorney to draft the broad ordinance was that it—and especially Cross and Goodhue—may have believed that the courts would eventually invalidate such an ordinance anyway.\textsuperscript{244} To be sure, a council member later insisted not only that the body had thought that the ordinance was on solid legal ground and would be upheld in court, but that it had authorized the city attorney to draft a broad ban because it would have been difficult to vote against such authorization in the face of community pressure.\textsuperscript{245}

ACS’s vociferous opposition was “shocking” to ATTF not in the sense that the Cancer Society had not had a reputation for being purist radicals, but because, in Muston’s ironic words, “most of us were purist idealists and had no idea that some good was not better than no good!”\textsuperscript{246} After the ATTF members had thought about and rejected the ACS’s “purist” better-nothing-than-this-partial-ban denunciations,\textsuperscript{247} “an irreparable rift” erupted between the two organizations for almost a year, during which ACS withdrew its support from ATTF and “actively sought to scuttle the implementation of the Ames agreement” on the grounds that the compromise “did not go far enough...and might harm efforts being put forth

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Mary Kitchell, Ames (Oct. 3, 2008).  One interesting difference between Muston’s and Kitchell’s accounts is that although both agreed that ATTF had never retreated in the face of ACS’s onslaught, Kitchell stated that members had not been torn over the decision, whereas Muston recalled the confrontation as “painful for us.”  Muston opined that Wirth and Campbell had wished that the issue “would go away.”  Telephone interview with Linda Muston, Coralville (Oct. 1, 2008).  Quirmbach, audibly reaching for a polite expression, noted that Campbell had failed to give a “firm commitment.”  Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008).  Another former ATTF member (who declined to be quoted for attribution) characterized Wirth, the possible fourth vote, as having “waffled.”  Telephone interview, Ames (Sept. 28, 2008).  Not having a vote, the mayor cannot break tie-votes in Ames.  The mayor does have a veto power, but, because the council has six members and the four-vote simple majority needed to pass an ordinance is the same two-thirds majority needed to repass an ordinance over a veto, the latter is rarely wielded.  City of Ames Municipal Code §§ 2.6, 2.8, 2.22, on http://www.cityofames.org/attorneyweb/pdfs/Chap02.PDF (visited Oct. 14, 2008); email from Diane Voss, Ames City Clerk, to Marc Linder (Oct. 15, 2008).  Even had Mayor Tedesco had a tie-breaking vote, he would, according to ATTF members, not have cast it in favor of a strict ban.

\textsuperscript{244}Telephone interview with Linda Muston, Coralville (Oct. 1, 2008).

\textsuperscript{245}Telephone interview with Ann Campbell, Ames (Oct. 5, 2008).  By 2008 Campbell was the mayor of Ames.  In contrast, former council member Russ Cross stated that members had known that it was possible that the ordinance might not be judicially upheld.

\textsuperscript{246}Email from Linda Muston to Marc Linder (Oct. 14, 2008).

\textsuperscript{247}Telephone interview with George Belitsos, Ames (Oct. 10, 2008).
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in other communities.” In contrast, ATTF argued to ACS that the compromise was “‘an Ames solution for an Ames problem,’ and we would not comply with unreasonable requests to satisfy an unachievable goal.”248 Since there was nothing locally unique about Ames with regard to its bars and restaurants or the need to protect people from secondhand smoke exposure, the only relevant local circumstance was the inability to muster a majority on the city council to vote for the broad ban. However, since anti-smoking forces in Ames had been organized and cohesive enough to be able to mobilize faster than groups anywhere else in the state, and at one point, at least, all six members of the city council had voted to authorize the city attorney to draft a broad ban, the “Ames problem” may in fact have been a statewide problem that called into question the whole local control priority pursued by ACS, the other health organizations, and even ATTF. Ultimately the principal difference between ATTF and ACS/Glantz/ANR may have been that the latter argued that if the ATTF simply lacked the votes on the city council for a strict ban, it should have withdrawn the proposed ordinance and persisted in grassroots mobilization until it secured a majority on the city council, whereas ATTF took the position that the struggle for and experience with a weaker ban would increase rather than decrease interest in a stronger ban. The ACS/Glantz/ANR position made eminent sense if its proponents believed that, because the anti-smoking movement was riding the crest of the wave of history, the advent of total smoking bans of nationwide scope was just a matter of time and, consequently, that there was no need to pare back maximalist demands. (To be sure, if stringent and capacious bans were really inevitable, it is unclear why the more radical wing of the movement should have splintered its resources opposing the incrementalist wing’s campaigns since they could hardly have slowed down the predicted inexorable progress.) Since both of these positions were (ex ante and ex post) empirically plausible and in this sense both wings may have been ‘right,’ neither should have prompted an attitude of moral superiority249

248Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food 50 (n.d.). Council member Steve Goodhue believed that the ACS had been “unreasonable. They likely had to draw a line given the basis of their organization. They were completely unwilling to discuss any changes to the ordinances and I think that frustrated the council, myself included.” Email from Steve Goodhue to Marc Linder (Oct. 13, 2008). Council member Ann Campbell also characterized ACS’s position as “unreasonable” and clearly having had no chance of passage. Telephone interview with Ann Campbell, Ames (Oct. 5, 2008).

249Muston reported that ATTF’s “soul searching” that accompanied its response to the ACS/ANR’s attack prompted members to question whether their “ownership” of and “pride” in their approach had caused them to be so “bullheaded.” Telephone interview
with regard to their competing strategies for implementing local control.\textsuperscript{250}

While noting that it was “difficult to speculate on these issues,” Mary Kitchell, one of ATTF’s leaders, later perceptively analyzed the complex factors underlying the simple political arithmetic in a way that justified the group’s local strategy, but at the same time raised the aforementioned doubts about the feasibility of local control as a statewide program for achieving an effective and comprehensive ban on public smoking:

Our view was that it would take several years to possibly budge the council into a more stringent ban, and we didn’t want to wait that long and risk that it might not even happen then. If you’re talking about changing the minds of the existing city council members, we didn’t see it happening without making some attempt to work with the opposition. Several members were very clear on that point. If you’re talking about waiting to replace the resisting city council members in a general election, I personally do not vote on single issues, and I think it would have taken exhaustive efforts to hinge a general election on this issue.\textsuperscript{251}

On November 13, the day before the council was scheduled to deal with the proposed ordinance again, ATTF agreed to the compromise because “[t]he impact of reaching a broad range of establishments is deemed significant enough to offset the value lost in late hour smoking in some businesses.” Natalie Battles, the group’s chairperson and the Cancer Society’s representative in it, was the only dissenter among its approximately dozen permanent members: her and ACS’s position was that the continuing permissibility of smoking during certain hours did not serve “the best interests of public health....”\textsuperscript{252} Even Quirmbach, the
council’s “most passionate backer of a full-blown no-smoking ordinance,” concurred in the proposal because “[t]hey’ve given us something we can live with.” And although Belitsos told the Tribune that ATTF did “not expect to push for a wider ban for at least several years,” the owners nevertheless knew that the group would be coming back for a full ban. Support from bar owners, despite the fact that the 10-percent food sales threshold meant that “most free-standing taverns would be exempt,” remained “fuzzy.” Indeed, ominously, the Tribune reported that if the city council did adopt a ban ordinance, “some restaurant and bar owners have said they may fight it in court”—a prediction that prompted Mayor Tedesco to declare: “‘If that’s the case, what have we created? ... One hell of a mess.’”

Tantalizingly, while Monte and Kitchell were drafting the compromise with Cummings and Johansen, these two owners mentioned to ATTF members that “they had been approached by some tobacco interests through attorneys in Des Moines,” but explained that “they had resisted and wanted to achieve a local compromise without outside influences.” Kitchell “took them at their word, realizing that the possibility of intrusion by the tobacco industry was one of their bargaining chips,” although she also “had the gut feeling that association with the tobacco companies was distasteful to them and that they wanted to achieve a solution without them.” While Cummings and Johansen were meeting with their constituencies to discuss the bilaterally drafted compromise, some of the owners, Kitchell speculated, “may have consulted with the tobacco lawyers,” but she added that she had “no proof that the cigarette companies had been financing or organizing resistance to our endeavors,” and even if they had been, “they were not very successful.”

with Linda Muston, Coralville (Oct. 8, 2008).


255Richard Lewis, “Anti-Smoking Forces Back Compromise,” Tribune (Ames), Nov. 14, 2000 (A1:2-5, A8:1-4). Quirmbach later dismissed the importance of the exemption of such pure bars on the grounds that bar owners and patrons constituted a “different culture.” Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008).

256Email from Mary Kitchell to Marc Linder (Oct. 12, 2008). Muston also independently referred to unconfirmed reports at the time that a tobacco industry representative had “contacted some of the restaurant owners and offered support to resist.” Like Kitchell, Muston added that “[i]n general, not many [owners] were favorably disposed to outsiders for the same reason they didn’t want an ordinance to mess with them!” Email from Linda Muston to Marc Linder (Oct. 12, 2008). Quirmbach also later reported that bar owners’ initiative had been local and not introduced by the tobacco
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The day before the November 14 council meeting Mayor Tedesco stated that three days earlier he had received word of a possible compromise for bar and restaurant owners in addition to ATTF’s endorsement of it. Consequently, although the council was to consider a total ban, in fact a compromise would be “‘brought forth.’” On November 14 ATTF released a revised version of its aforementioned “Position Statement,” with which it was in part identical, but whose most sharply worded frustrations were deleted in favor of a more hopeful stance. Thus, ATTF concluded that the “impact of reaching a much broader range of establishments has value that offsets value lost in allowing late-hour smoking in some restaurants.” But even now the group was uncertain as to whether the trade-off would yield a net health benefit: “The compromise proposal may subject fewer overall to second-hand smoke than would a pure restaurant ban.” Abandoning its second thoughts and reluctance, the Task Force, in “the spirit of compromise,” supported the new proposal and encouraged its adoption by the council. Wistfully, it regarded the “compromise as a starting point as we continue to work on our vision of a smoke-free Ames.”

Quirmbach himself, for several reasons, never second-guessed the decision to compromise. First of all, after all the work that ATTF had done, he was not willing to give up on the ban merely because it was not as rigorous as he and others had hoped it would be. Second, simply withdrawing the proposal and trying to organize even more extensive grassroots support for a stricter ban was not practicable because, as a council member, it was not clear to him that the anti-smoking movement would have been able to get any ordinance at all through the council. Third, what was clear to him was that, if adherents rejected the compromise, it would be years before they would be able to try to push for a ban again. And, finally, far from fretting over or regretting the Cancer Society’s sharp attacks, Quirmbach found it politically “very useful” to have the ACS opposing the Ames coalition because it was “always good to be in the middle” (in this instance, between perfectionists at the one extreme and rigid business owners at

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258Ames Tobacco Task Force, “Position Statement” (Nov. 11, 2000) (copy furnished by Linda Muston). It is unclear why ATTF asserted that late-hour smoking would be allowed only in “some” restaurants. Unknown, too, is the reason for deletion from an earlier draft of an expression of concern for the health of employees in “smoke filled workplaces.” [Ames Tobacco Task Force, untitled] (For Release Monday, November 13, 2000) (copy furnished by Linda Muston).
Exposure to Thirdhand Smoke: The New Learning

Significantly, ATTF’s November 7 statement, which self-critically evaluated the stop/start smoking/nosmoking compromise, failed even to allude to the health consequences of the extended exposure to toxic and carcinogenic substances in tobacco smoke that adhered to various surfaces and off-gassed even during the so-called “red-light” no-smoking periods—a phenomenon that R. J. Reynolds Tobacco Company scientists observed in 1992 (“the presence of residual nicotine desorbing from chamber surfaces”) and that later would be called “thirdhand smoke.” As early as 1993, researchers in the Indoor Environment Program at Lawrence Berkeley Laboratory studied how deposited particles from environmental tobacco smoke “may continue to emit semi-volatile chemicals into the room air for a long time” and how “[o]wing to the evaporation of deposited particles and the re-emission of adsorbed chemicals, a recently used smoking site may still exhibit a certain level of ETS constituents,” odor being evidence of the evaporation and reemission. They estimated that, depending on air exchange rates, between 21.5 percent and 3 percent of the total initial mass of side stream ETS particles generated by smoking one cigarette deposited on interior surfaces, yielding, at an estimated evaporation rate of 17 percent per hour of such particles, even “more significant” indoor concentrations of chemicals. Nor does

259 Telephone interview with Herman Quirmbach, Ames (Oct. 31, 2008).
increased ventilation reduce to very low levels exposure to lower volatility hazardous air pollutants and toxic air contaminants such as cresols, naphthalene, and polycyclic aromatic hydrocarbons.\textsuperscript{263} Components of environmental tobacco smoke, as noted in a research paper on infants’ exposure to environmental tobacco smoke-contaminated households based in large part on studies from the 1990s,

are rapidly dispersed after emission and undergo further dynamic chemical reactions. Vapour phase components deposit and are adsorbed onto walls, furniture, clothes, toys, and other objects within 10...minutes to hours after tobacco smoke has been emitted. From there they are re-emitted into the air over the course of hours to months. ETS particulate matter can deposit on surfaces within hours after smoking occurred, from where it may be re-suspended or react with vapour phase compounds. Through this dynamic behavior, ETS can contaminate house dust, carpets, walls, furniture, and other household objects for weeks and months after ETS was emitted from a cigarette.\textsuperscript{264}

Although the science of thirdhand tobacco smoke exposure was only about a decade old by this time, enough of this new learning had spread to allied fields that as early as October 2001 the Iowa City City Council heard from Professor

ETS components and their time scales estimated that deposition and sorption of vapors lasted tens of minutes to hours, deposition of particles lasted hours, and re-emission of sorbed vapors last hours to weeks. Joan Daisey, “Tracers for Assessing Exposure to Environmental Tobacco Smoke: What Are They Tracing?” \textit{Environmental Health Perspectives} \textbf{107} (Supp. 2): 319-27, tab. 2 at 320 (May 1999), Bates No. PM3006697619/20.


\textsuperscript{264}G. Matt et al., “Households Contaminated by Environmental Tobacco Smoke: Sources of Infant Exposures,” \textit{TC} \textbf{13}:29-37 at 29 (2004). Even when “deposited tobacco smoke pollutants are not re-emitted into the air,” as the lead author of this article later observed, “they can still enter the body via dermal transfer and ingestion” (by means of touching of contaminated surfaces). Email from Georg Matt to Marc Linder (Jan. 5, 2009). In a more recent study of housing, Matt et al. discovered that non-smokers’ finger nicotine was higher in housing formerly occupied by smokers compared to housing formerly occupied by non-smokers and its levels were correlated with the dust and surface nicotine present. Georg Matt et al., “When Smokers Move Out and Non-Smokers Move In: Residential Thirdhand Smoke Pollution and Exposure,” \textit{TC} (2010) doi:10.1136/tc.2010.037382 (copy provided by Georg Matt).
William Field, a lung cancer researcher in the Epidemiology Department of the Public Health College at the University of Iowa, who urged rejection of a red light/green light ordinance, that: “From my own research, I know the aerosols and attached carcinogens from cigarettes stay airborne for long periods of time. Even after depositing, the carcinogenic particles often resuspend with only minimal air movement in a room.”

Insidiously, the red light/green light regime could and would actually increase the exposure to tobacco smoke of non-smokers who had previously refused to frequent restaurants and bars that permitted smoking but now ate or drank in them during the non-smoking period because, as an important study from 2002 found, “re-emission of previously sorbed organic compounds may increase exposures to these compounds for a non-smoker who specifically avoids the smoking area during smoking periods but occupies the area during other periods of the day.”

Eight years after the Ames debate two of the leading researchers of thirdhand smoke, in response to a question as to which side had adopted the scientifically more tenable position, observed that the red light/green light regime was “pretty worthless” and had represented a victory for smoking advocates, respectively. A third cutting-edge researcher, whose “own personal feeling” was that “any measure that reduces exposures and cuts down on the times and places when people can be exposed to serious amounts of SHS is a good thing” and that direct exposure to secondhand smoke was “much more important than the sorption-desorption thing,” concluded that the partial ban “should reduce exposures by allowing some to avoid the establishments during smoking hours,”

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265 Email from William Field to Iowa City Council (Oct. 16, 2001), on http://www.icgov.org (Oct. 23, 2001 special meeting correspondence). Nevertheless, when asked seven years later how long resuspension lasted, Field, who is a radon expert, not only did not know, but stated (incorrectly) that little research had been done on the subject; similarly, he did not know whether carcinogenic exposure to such resuspended particulate matter was minuscule compared to that of direct exposure to secondhand smoke. Email between Marc Linder and William Field (Oct. 20, 2008). For more recent research that measured “substantial levels” of “carcinogenic tobacco-specific nitrosamines” of a smoker’s vehicle, see Mohamad Sleiman et al., “Formation of Carcinogens Indoors by Surface-Mediated Reactions of Nicotine with Nitrous Acid, Leading to Potential Thirdhand Smoke Hazards,” PNAS 107(15):6576-81 at 6576 (Apr. 13, 2010), on http://www.pnas.org/cgi/doi/10.1073/pnas.0912820107.


267 Email from George Matt to Marc Linder (Jan. 5, 2009)

268 Email from Jonathan Winickoff to Marc Linder (Jan. 5, 2009).
while exposures from desorption are almost certainly not as hazardous/risky (since we know that some of the nasty compounds don’t stick around).” Although, unlike some researchers, he did not believe that no doubt attached to the claim that people were “being exposed to substantially unhealthful amounts of tobacco smoke compounds via desorption in bars and restaurants, he did argue that since desorption of some hazardous compounds in secondhand smoke “can lead to concentrations of some compounds that are similar to levels that occur during smoking,” the “precautionary principle” spoke in favor of prudence.269

The Attorney General Opines that Local Control Is Not Preempted

An Attorney General’s Opinion is not the final word on the subject, but it is given respectful consideration by courts addressing the same issue.270

As arranged with the Ames City Council on October 10, Senator Johnie Hammond had requested an opinion from the attorney general as to whether local governments were empowered to adopt ordinances prohibiting smoking in certain public places. Specifically she had asked: “In view of subsection 142B.2(2) Code of Iowa, would a city ordinance enacted to prohibit smoking in any public place, as defined by subsection 142B.1(3)...be inconsistent with or conflict with Chapter 142B...?”271 Providentially (but probably not serendipitously), just an hour before the November 14 council session began at 6:00 p.m., the mayor received by fax the Iowa Attorney General’s opinion on the validity of the proposed ordinance, which concluded that it would neither be inconsistent nor conflict with chapter 142B of the Iowa Code.272

Turning first to the issue of express exemption, Assistant Attorney General Steve St. Clair concluded that the provision in section 142B.6 added in 1990 did “not constitute an express statement of legislative intent to bar municipalities from exercising home rule powers”273 because its command that the state law

269 Email from Brett Singer to Marc Linder (Jan. 5, 2009).
“shall supersede any local law or regulation which is inconsistent with or conflicts with”\textsuperscript{274} the state law merely “reflects the same home rule principles embodied in the Iowa Constitution...and does not constitute an express statement of the general assembly’s intent to preempt.” The attorney general opinion supported this conclusion on the basis of the legislature’s having “had no difficulty expressing its intent to preempt with unmistakable clarity in other contexts”—particularly where it had prohibited local governments from adopting any ordinance even “relating to” the subject dealt with by the state statute.\textsuperscript{275}

The Attorney General’s office offered a more nuanced analysis of implied preemption, which “could arise from an overt conflict between” the state law and an ordinance creating “more stringent standards for smoking in public places.” The opinion acknowledged that “[i]n a broad sense, a locality that extends the ban on smoking by prohibiting the designation of smoking areas in certain public places” would in fact be “‘prohibit[ing] an act permitted by a statute,’” which the Iowa Supreme Court had articulated as a touchstone of the kind of local action triggering preemption. “However,” the opinion pointed out, “this expansive approach would mean that a local jurisdiction could never establish more stringent standards, which is something localities are expressly permitted to do as a general matter” by the Code’s home rule provisions. Consequently, the real test had to be “whether the local ordinance prohibits an act expressly sanctioned by state law”; but in fact chapter 142B not only did not expressly sanction smoking in designated public places, but, on the contrary, in section 142B.2(2) “envisions the active involvement of local jurisdictions in expanding the smoking prohibitions of state law.”\textsuperscript{276} Although implied preemption could also arise from the legislature’s intent to occupy the field, the fact that the Supreme Court had rarely found a statute to have met that standard reflected a “strong public policy in favor of granting local jurisdictions the flexibility they need to address local problems,” which in turn flowed from the constitutional grant of home rule. To be sure, the requirement in section 142B.6 of “uniform implementation, application, and enforcement” had to be examined to determine whether it met Supreme Court dictum that the legislature’s clear expression of intent to establish

\textsuperscript{274}Iowa Code § 142B.6 (2001).


statewide uniform regulation might also express an intent to occupy the field. However, the express prohibition of inconsistent or conflicting local ordinances in section 142B.6 constituted clear legislative recognition of the permissibility of "consistent" local regulation in the field." That the legislature had not exalted the desideratum of uniformity above that of local regulation was clearly inscribed in the key section 142B.2(2), on which the opinion then focused.277

Finally reaching the nub of the question about the effect of section 142B.2(2) posed by Hammond and the Ames City Counsel, St. Clair concluded that it “expressly recognizes the authority of local jurisdictions to pass ordinances prohibiting smoking in some public places in which state law would permit smoking. Thus, the general assembly acknowledged that localities retained the authority to establish more stringent prohibitions relating to smoking in public places than those embodied in state law.” In light of the constitutionally enshrined “robust policies favoring home rule,” the Attorney General’s office regarded the implications of section 142B.2(2) as “especially compelling.”278

The Ames City Council Unanimously Passes the Weak Red Light/Green Light Compromise Ban

WHEREAS, it is found that smoking areas have been designated in many such public places in this city; and

WHEREAS, it is found that the designation of smoking areas in those public places has subjected persons to the harmful effects of tobacco smoke on their health, and curtailed the number of public places that can be enjoyed by persons who have an allergy or other heightened sensitivity to smoke; and

WHEREAS, it is deemed to be in the interest of the public health and the economic welfare of the community that designation of smoking areas be prohibited in such public places that are frequented, for the most part, by residents of this city....279


278Office of the Attorney General State of Iowa, Docket No. 0-11-5, at 4 (Nov. 14, 2005) (2000WL 33258478 (Iowa A.G.). To be sure, given the specific wording of section 142B.2(2), the Attorney General opinion dealt only with a local government’s power to restrict the designation of smoking areas, and did not address its power, for example, to modify the statutory definition of “public place.” Id. n. 2 at 5.

Despite the support that the attorney general had just provided for the full ban, the council on November 14 unanimously voted to shrink the scope of its coverage radically. At the outset, Fred Miller announced that restaurant/bar owners and ATTF had asked him to present a compromise proposal, which embodied imperfections from the perspective of each party, which had had to make some concessions. The compromise contained the following elements:

1. Restaurants, bars and taverns shall be non-smoking from 6 AM thru 8:30 PM daily. At 8:30 PM, these establishments may designate a smoking area in compliance with state law.
   -- Bars and taverns are exempt if food sales are 10% of gross sales or less. In the case of food served on premise from outside vendors, these sales are to be included in food sales and gross sales.
   -- Should an establishment decide, on a consistent and regularly scheduled basis, to terminate food service prior to 8:30 PM, then this establishment may begin to allow smoking at the scheduled time.
   -- Outdoor seating areas will be considered as indoor areas if food is served.

2. Truckstop establishments are allowed to establish an unrestricted smoking area that is fully enclosed and has a separate ventilation system. Should the establishment later enlarge the dining area, no expansion can be made of the smoking area.

3. Bowling alleys shall be non-smoking from 6 AM through 6 PM. After 6 PM, these establishments may designate a smoking area in compliance with state law. Due to specific league play, the time to allow smoking on Thursdays is advanced to 3 PM. Bowling alleys are allowed to establish an unrestricted smoking area that is fully enclosed and has a separate ventilation system.

4. Common areas of hotels and motels shall be smoke-free.

5. A smoke-free zone of 15 feet at the main entrance/exit of all restaurants, bars, taverns, truckstops, and bowling alleys shall be maintained except where adjacent establishments preclude such zones.

6. Customers under 18 years of age are not allowed in smoking areas.

7. An ordinance developed from these guidelines shall be effective no earlier than six months following enactment. Diligent enforcement is expected.280

Conversely, the compromise would permit smoking in: (1) bars 10 percent or less of whose total sales stemmed from food; (2) pool halls; (3) truck stops; (4) bowling alleys after 6 p.m. every night except Thursday, when smoking became permissible at 3 p.m.; and (5) establishments with on-premises live music.281

280 Minutes of the Regular Meeting of the Ames City Council at 4-5 (Nov. 14, 2000) (copy furnished electronically by City Clerk Diane Voss).

Among the crowd of about 120 people in attendance at a discussion that, according to several council members, had “caused the most controversy in years over a council action,” about 20 spoke up, 80 percent of whom opposed the compromise. Only one of these opponents regarded the proposal as too weak: Nancy Battles, the Cancer Society representative, criticized it for not adequately protecting the public—including children, adults, and restaurant workers—and urged the council to revisit the full ban. In contrast, Mary Kitchell and Len Monte, the two ATTF representatives who (together with the city attorney and the two hospitality industry representatives, Bob Cummings and Rich Johansen) were serving on the Compromise Proposal working committee, stated that it was willing to “go along with the Compromise because it satisfied some of the requests of both groups.” One restaurant owner opined that he was not convinced that a non-smoking restaurant could make money. Several non-business people (including some who were apparently students from other countries) insisted that any ban constituted an impermissible restriction of freedom and would lead to totalitarianism.

The council then voted 6 to 0 to refer the compromise proposal to the city attorney for drafting as an ordinance. The council’s willingness to change course was dictated by the perception of considerable community opposition to the broad ban. The (non-voting) mayor, for example, explained that he was “somewhat despondent” at [sic] the amount of harsh criticism council members received through e-mails, letter and phone messages.” And the Des Moines

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284Minutes of the Regular Meeting of the Ames City Council at 5-7 (Nov. 14, 2000) (copy furnished electronically by City Clerk Diane Voss).
286Minutes of the Regular Meeting of the Ames City Council at 6 (Nov. 14, 2000) (copy furnished electronically by City Clerk Diane Voss).
289Minutes of the Regular Meeting of the Ames City Council at 5-7 (Nov. 14, 2000) (copy furnished electronically by City Clerk Diane Voss).
290Minutes of the Regular Meeting of the Ames City Council at 7 (Nov. 14, 2000) (copy furnished electronically by City Clerk Diane Voss).
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

*Register* reported that despite the meeting’s “conciliatory tone..., many residents and business owners said [even] the compromise was still too far-reaching.” Once restaurant and bar owners began pushing for a compromise, it was clear to the anti-smoking bloc on the council that it lacked the requisite four-vote majority for the broad ban. As Iowa’s first city to try to pass its own ban, Ames became a flashpoint for national anti-smoking groups and the tobacco industry seeking to bring local pressure to bear on the council. To (some) council members’ relief, the protagonists were willing to settle for a less stringent ban that enabled the council to “scrap the more controversial full ban that has deeply divided the public.” Rick Carmer, the activist restaurant owner, claimed that he would lose money by virtue of the smoking ban on his patio and around his bar, but a total ban would have been worse, and the partial ban would produce less exposure to secondhand smoke. Conciliatorily he owned that “[w]e can live with this” (but then, shortly after it had gone into force, sued to invalidate it). Carmer’s main objection, he later claimed, had not been to the substance of the ordinance, but to the process by which the compromise had been reached and “rammed down our throats” by the council. Generally speaking, owners opposed the ban because they (erroneously) feared—in large part as a result of cigarette companies’ nationwide disinformational campaigns—that they would lose money and/or were ideologically fixated on government interference with their private business decisions.

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292 Email from Judie Hoffman to Marc Linder (Sept. 30, 2008).


295 “For more than a decade the tobacco industry disseminated misinformation asserting that the hospitality industry will suffer financially when smoke-free environments are instituted. Despite the fact that these claims of negative impact are unfounded, this argument has been widely accepted in the hospitality business, thanks to the relationship the tobacco industry has established with organisations whose alleged purpose is to protect the interests of businesses in the hospitality sector. This situation creates problems for public health advocates because individual restaurateurs and bar owners, having heard these claims repeatedly from organisations they trust, oppose smoke-free policies out of fear.” J. Dearlove, S. Bialous, and S. Glantz, “Tobacco Industry Manipulation of the Hospitality Industry to Maintain Smoking in Public Places,” *TC* 11:94-104 at 101 (2002).

296 Telephone interview with Mary Kitchell, Ames (Oct. 3), and Sharon Wirth, Ames
At the beginning of January 2001, the internecine conflict within the anti-smoking movement reached a new high point when the president of the Midwest board of the American Cancer Society wrote its Ames members urging them to ask their representatives on the city council to “vote down the bad ordinance” on the grounds that it would “not protect the health of the people of Ames.” In addition, without revealing what he was specifically talking about or how it could possibly succeed in light of the council’s make-up, the president declared that there was “still time to join our efforts to pass a strong ordinance” by letting the city council “know that you want Ames to have smoke-free restaurants that are truly smoke-free.”

Believing that this “total goal was simply not achievable,” ATTF, committed as it was to accepting the most that it was able to get from the city council in the short run, saw no alternative to swallowing this “hard pill....” Some in Ames at this late date agreed with ACS. One physician, for example, while understanding that “a compromise might at least get things started,” insisted that “such a compromise still stinks! ... Ideally, we should pass a 24/7 smoking ban for public places and let the smokers figure out how to deal with it.”

By the time the council was due to take up the ordinance again in January, the Ames Tribune was suffering from smoking ban fatigue: its market-knows-best and libertarian “principles” had reduced its understanding of the public health question to urging smokers at least to be “polite” because many people found smoke “irritating.” Recognizing that it had nothing coherent to say—“[w]e feel like we’re blowing smoke out of both sides of our mouths, so to speak”—it suggested that the council approve the compromise and finally move on to the many other matters the city had to consider.

After the city attorney had refashioned the compromise proposal into yet another draft ordinance, the council met on January 23, 2001, to discuss it, making only one change (unanimously to shift the implementation date to August 1). Quirmbach called the new draft ordinance “a solution that fully and completely reflects the compromise. ‘It’s a step we all can live with.’”

(Oct. 5, 2008).


298Lenwood Monte, A Breath of Fresh Air: The Story of How Ames Enacted Iowa’s First-Ever City Ordinance Limiting Smoking in All Restaurants and Bars that Serve Food 65 (n.d.).


no public input was permitted, Mayor Tedesco did poll the audience: many stood up in support of the ordinance and only a few in opposition. Public comment would follow in three weeks when the ordinance’s first reading was on the agenda.

In spite of the compromise, ATTF was taking no chances: as early as January 22 it distributed a flyer announcing that the city council would hold its first reading of the “compromise ordinance” on February 13 and calling on the public to show support by attending, contacting council members, or writing letters to the Tribune. Fourteen people spoke up during the public hearing on the ordinance’s first reading on February 13, half of whom supported the proposed ordinance. Two bar owners suggested that the exemption level (that is, food as a proportion of total sales) for bars be raised to 15 and 25 percent, respectively. In response to the many people who argued that the proposed ban would “restrict their general liberties,” Quirmbach pointed out that “any time the City Council passes an ordinance, it does have the effect of restricting persons’ activities.” The council then voted 6 to 0 to pass the ordinance on first reading; by a vote of 1 to 5 it rejected an amendment moved by Wirth to weaken the ban by expanding the universe of exempt bars by raising the proportion of total sales accounted for by food from 10 to 15 percent that triggered the exemption. On February 27 and March 6, the council, again unanimously, passed the proposed smoking ban on second and third reading, respectively, and thus adopted Ordinance No. 3608.

That Ames on August 1 would become the first and only city in Iowa with such an additional set of local prohibitions concerned restaurant owner Carmer, who, despite the possible competitive disadvantage, predicted that the city’s businesses would survive the effects of the partial ban, which he called a “‘wishy-washy

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305 Minutes of the Regular Meeting of the Ames City Council at 5-6 (Feb. 27, 2001) (copy furnished electronically by City Clerk Diane Voss); Minutes of the Regular Meeting of the Ames City Council at 5 (Mar. 6, 2001) (copy furnished electronically by City Clerk Diane Voss).
compromise.” Without explaining whether his antipathy extended to all the other public health regulations that applied to restaurants, he declared that “I just don’t like anybody interfering with our business.” (Council member Goodhue, another lukewarm supporter, later opined that because the “community was very split over this issue...the modified ordinance was a good compromise and this seemed to generate add[itional] support. I believe there were more against the ordinance when it was first introduced than when it finally passed.”)

The final version of the ordinance differed from the first draft in numerous crucial ways. First, smoking and designating smoking areas were prohibited in all “public places” as defined in the state law. Second, a time-of-day exemption was created for food establishments between 8:30 p.m. and 6:00 a.m., during which period designating smoking areas was once again permitted; the exemption also applied to any such establishment that stopped serving food “on a consistent and regularly scheduled basis” before 8:30 p.m. from that time until 6:00 a.m. Third, a total exemption was afforded any food establishment that was also licensed to sell alcohol if non-alcoholic food sales accounted for less than 10 percent of all of its sales. Fourth, the council exempted factories, warehouses, and similar workplaces that the general public did not usually frequent. Fifth, hotels/motels were required to “take such measures as shall be reasonably necessary and effective to keep all lobby areas, corridors and other common areas...free from any level of smoke that can be detected by the unaided human sense of smell.” Sixth, all places that came within the scope of provisions dealing with food establishments, restaurants/bars, truck stops, and bowling alleys were required to “take such measures as shall be reasonably necessary and feasible to maintain all points within fifteen feet of the main entrance and the main exit of such place free from any level of smoke that can be detected by the unaided human sense of smell.” Seventh, those in custody and control of the same places covered by the previous provision were also required to “take such measures as shall be reasonably necessary and feasible to prevent

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308 Email from Steve Goodhue to Marc Linder (Oct. 13, 2008).
309 Municipal Code of the City of Ames, sect. 21A.101 and .102 (Sup #2001-2, Rev. 4-1-01).
310 Municipal Code of the City of Ames, sect. 21A.200 (Sup #2001-2, Rev. 4-1-01).
311 Municipal Code of the City of Ames, sect. 21A.201 (Sup #2001-2, Rev. 4-1-01).
312 Municipal Code of the City of Ames, sect. 21A.205 (Sup #2001-2, Rev. 4-1-01).
313 Municipal Code of the City of Ames, sect. 21A.300 (Sup #2001-2, Rev. 4-1-01).
314 Municipal Code of the City of Ames, sect. 21A.301 (Sup #2001-2, Rev. 4-1-01).
persons under the age of eighteen from being in any area where smoking” was allowed under the ordinance, which made it unlawful for anyone in that age group to be present where smoking was allowed. And eighth, outdoor seating areas were subject to the same prohibitions, provisions, and exemptions stated in all of the ordinance’s substantive sections.

Whereas Belitsos celebrated adoption of the ordinance as “the first time any city in Iowa has passed an anti-smoking ordinance,” a less than wildly enthusiastic councilman Quirmbach called it “a step we can all live with.” Nevertheless, even Quirmbach, years later, praising local control as making it possible to balance various interests in a community, characterized the process as a whole as a pretty good exercise in democracy. What the remedy and recourse were for a democratic process that produced a severely deficient public health outcome, including completely unnecessary large-scale morbidity and mortality, he did not explain.

In contrast, the statewide health organizations denounced the compromise with business owners as a “victory for the tobacco industry.” For example, the American Cancer Society observed that a “watered-down smoking ban won’t save lives” because smoke lingered for weeks in bars and restaurants and confining smoking to certain hours made enforcement difficult. ACS’s opposition to “a step-by-step approach” was based on the fact that “[m]ore people are exposed to life-threatening toxins the longer it takes a community to adapt.” (Ironically, ACS seemed completely unaware that its own unbending commitment to local control in lieu of a one fell-swoop statewide ban was subject to exactly the same criticism since the process of adopting ordinances in all 948 incorporated cities and towns and 99 counties would take a very long time. Indeed, the very fact that not even Ames was able to pass a strict ordinance suggested that ACS’s reliance

315 Municipal Code of the City of Ames, sect. 21A.400 (Sup #2001-2, Rev. 4-1-01).
316 Municipal Code of the City of Ames, sect. 21A.500 (Sup #2001-2, Rev. 4-1-01).
317 Telephone interview with Herman Quirmbach, Ames (Apr. 19, 2008).
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on local control as a statewide strategy was not realistic.)

The Cancer organization bluntly charged that “time limits are ploys used by tobacco companies to keep their products in restaurants.... ‘That should tell you right there it’s a red flag.... The only way to get a healthy environment is to ban smoking all the time.’” All these accusations left Belitsos in disbelief: “‘They’re trying to give us a black eye when we should be getting credit.... It’s only a first step toward our ultimate goal of having all public places in Ames smoke-free. Instead of criticizing us, they should be complimenting us.’”

For good measure, CAFE in Iowa City, where the city council had not even taken up the group’s draft ordinance, joined in the denunciation: one of its spokespeople, Dan Ramsey—who would later become the lobbyist for the American Lung Association of Iowa—called the Ames ordinance “‘a victory for tobacco’ because the council chose to allow smoking in restaurants between 8:30 p.m. and 6 a.m. to limit unfair competition. ‘That doesn’t protect employees.... Smoke lingers for up to two weeks.’”

In contrast, Ames council member Hoffman agreed that from a public health perspective ACS was right—the problem, however, was that the anti-smoking bloc on the council simply lacked the votes to pass a stronger ordinance. Natalie Battles of ACS believed that Quirmbach had pushed to get a ban through the council before he left for the state legislature because he realized that its composition would turn over and a new council would be even less likely to adopt an ordinance, but Hoffman denied that such a consideration played any part in her or Quirmbach’s decisionmaking. Rather, they were simply “excited about moving forward on an important health issue. We both realized that you don’t always get all that you want when you are breaking new ground and it was important to get something started.”

Criticism of Quirmbach’s tactics was not necessarily tied to insinuations about his plans for statewide office. For example, Karla Wysocki of ACS simply concluded that he had acted prematurely: instead of rushing the ordinance to a vote, he and ATTF should have first engaged in more public education. Yet, unlike some harsh contemporaneous critics, she later admitted with alacrity that

321Email from Judie Hoffman to Marc Linder (Sept. 29, 2008).


324Telephone interview with Judie Hoffman, Ames (Sept. 27, 2008).

325Telephone interview with Natalie Battles, ACS, Ames (Sept. 28, 2008).

326Email from Judie Hoffman to Marc Linder (Sept. 28, 2008).
ACS had been “conflicted” over its decision to oppose the Ames ordinance because it recognized that the city’s experience with a partial no-smoking regime had also had its positive aspects. Indeed, Wysocki (who after having been ACS’s health promotions director for Iowa became a Midwest regional official) without any hesitation acknowledged that “we wouldn’t have gotten to where we did” with the enactment of the statewide smoking ban in 2008 without the struggles in Ames, which raised awareness of the health impact of secondhand smoke exposure and increased the demand for change in Iowa.\textsuperscript{327}

Undeterred by Belitsos’s experience, other cities were monitoring events in Ames.\textsuperscript{328} In particular in Iowa City, where in mid-2000 the Johnson County Tobacco Free Coalition had proposed a full ban, a year later the city attorney was drafting an ordinance to ban smoking in establishments less than 50 percent of whose sales stemmed from alcohol. Just how glacially slow a process the ubiquitous adoption of ordinances would be appeared undeniable as initially only a few other jurisdictions voiced interest and even they were taking their time and starting small. Anti-tobacco advocates might regard it as “only the beginning of the debate,” but, for example, Cedar Rapids was planning a ban only in taxis and limousines, while Linn County health officials’ discussion of the possibility of a ban in restaurants envisioned implementation’s taking years. And in Boone, the city’s director of policy and administration—a smoker—asserted that most residents were not eager to join the movement: even non-smokers told him that it should be up to the businesses themselves to decide.\textsuperscript{329}

In the state’s largest city, Des Moines, even health advocates recognized that they had to be considerably more prepared before embarking on an ordinance campaign, precisely in order to avoid the mistakes that Ames had committed in pushing quickly before having done sufficient groundwork. As far as the American Lung Association was concerned: “‘There are too many people who oppose the issue. You have to target the nonsmokers rather than the smokers.’” The preparatory work that the organization had in mind was presumably related to nonsmokers’ attitudes and their underlying knowledge. For example, although 76 percent of Des Moines area nonsmoking residents surveyed in April 2001 regarded smoking in restaurants as a major or minor “bother,” only 18 and 14 percent, respectively, said that they would eat more often in restaurants and spend more time in bars, respectively, if smoking were prohibited there, prompting the

\textsuperscript{327}Telephone interview with Karla Wysocki, Rochester, MN (Oct. 9, 2008).


\textsuperscript{329}Kate Kompas and Lisa Livermore, “Cities Move Toward Bans on Smoking,” \textit{DMR}, June 4, 2001 (1A) (NewsBank).
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*Des Moines Register* to conclude that they “suffer silently.” This acquiescence, the newspaper intuited, might be related to some respondents’ being more concerned about the smoke’s impact on how their food tasted than about cancer; and even when someone was expressly worried about the health consequences of secondhand smoke, “after being seated just a table or two from the smoking section of one restaurant, he did not ask for a new table or leave the restaurant.” Instead of pointing out that moving to a different table would have been useless because the smoke penetrated throughout the restaurant, the *Register* suggested that even nonsmokers and owners who had banned smoking in their own restaurants preferred voluntary action to state intervention. Such views would have been warmly embraced by Doni DeNucci, the executive director of the Iowa Hospitality Association, who, oddly oblivious of the myriad regulations with which her members were already obligated to comply, opined: “‘When you start defining how private business does business, that sets a dangerous precedent.’”

Ironically, the Lung Association, instead of focusing on educating nonsmokers about the lethal consequences of exposure to secondhand smoke and persuading them to be more assertive of their public health right not to be so exposed, backed development of a dining guide to (voluntarily) smokefree restaurants as a step toward mobilizing support for more substantial measures.  

In Ames a few days before the ordinance went into effect, Attorney General Miller spoke of “‘a cultural war between tobacco companies and life’” before highlighting the importance of a 14-hour a day smoking ban and expressing hope that the ordinance would move toward a total 24-hour ban. By the time the Ames ordinance went into effect on August 1, 2001, Belitsos proudly (but exaggeratedly) hailed it as “the first time in Iowa that an entire city will be free from tobacco smoke when eating at local restaurants....” The *Register*’s editorial comment that “they’re ready to pop the champagne corks in Ames,” would very quickly prove itself to be premature: before long Philip Morris became the chief

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332 The signage for restaurants (“Smoke Free Dining”), which was labeled “[s]upported by” the Iowa Tobacco Control Program and Centers for Disease Control and Prevention, bullet-pointed three aspects: (1) smoking was not allowed in restaurants from 6 a.m. to 8:30 p.m., but was allowed in designated smoking sections from 8:30 p.m. to 6 a.m.; (2) the same rules applied to outdoor seating areas; and (3) no smoking was allowed within 15 feet of entrances/exits. “New Ames City Ordinance” (n.d.) (plastic original furnished by Linda Muston).

celebrant. In the meantime, enforcement was largely up to owners, some of whom had originally complained that the ordinance constituted an invasion of their privacy, though, in turn, some were optimistic that their businesses would not suffer at all.334

**CAFE Attacks Red Light/Green Light for Ames and Iowa City**

Anything less than a 100% ban on smoking is not a ban. A part time no smoking ordinance is useless and does not address the health issue since it takes 2 weeks for smoke to clear a closed environment. No smoking for part of the day will not help.335

CAFE was so intent on avoiding alienating even hard-core smokers that it did not even shy away from taking umbrage at the cigarette industry’s matter-of-fact reference to it as a “‘local anti-smoking group’”: “We are not anti-smoking—we are anti-second hand smoke.”336 This preposterously illogical claim, which, because it was wilfully blind to the source of secondhand smoke, was either misleading or should have disqualified CAFE as a critic of others’ partial bans, might nevertheless in a hyper-literaliest sense have explained its fervent opposition to red light/green light schemes as based on the impact of the lingering smoke of past smoking.337


337The view was widespread in CAFE circles. For example, Prof. William Field, an epidemiologist and lung cancer researcher, explained to the city council that support for an ordinance was “not anti smoking. I know many smokers who are considerate of others and do not smoke in restaurants. All we are asking is that people do not smoke while they are in the restaurant.” Email from William Field to Iowa City Council (Oct. 16, 2001), in Iowa City Council Documents, Meeting Folders 2001 (final), Oct. 23, 2001 Correspondence at 1, on http://www.iowa-city.org/weblink/docview.aspx?id=8142 (visited Oct. 19, 2008). CAFE’s position was in part driven by its inability to act consistently with the scientific basis of its support of public smoking bans—namely, that secondhand smoke exposure kills tens of thousands of people yearly in the United States—and its disingenuousness with regard to the identity of the agents of that killing. For example, the
Even before the Ames ordinance went into effect a steady barrage of harsh criticism of its central time- and smoke-share feature began being fired off from Iowa City. After the CAFE draft ban had lain dormant for half a year while the council occupied itself with underage drinking, the city attorney in April 2001 furnished the council with a memorandum summarizing the CAFE draft and the Ames ordinance and posing a number of questions as to the council’s policy preferences so that it could assist her in drafting an ordinance. The second question (following one as to whether members wanted to ban smoking in all “public places” or only in restaurants) read: “Do you wish to set limitations during which times smoking is permitted (similar to the Ames ordinance), and if so, for what time periods?”

At its special work session on April 16, the council finally devoted some attention to the subject. That there was no danger that a(n imaginary) council composed exclusively of zealous anti-smokers might get carried away with radical regulation had become clear just a month earlier during discussion of an addendum to the lease renewing the lease of the bus depot to Greyhound Lines, Inc. When Steven Kanner—a member of the Iowa City Green Party, who ran a non-partisan campaign focused on neighborhood organizing, exploration of municipally owned electricity, and a living wage and was perhaps the council’s most consistently anti-smoking member—proposed a ban on smoking in the building, Dee Vanderhoef, a sometime smoker, former nurse, and self-

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340 Telephone interview with Karen Kubby, Iowa City (Nov. 17, 2008) (former city council member).
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described conservative, who ultimately supported a ban in restaurants, adamantly opposed one in the bus station on grounds that restaurant and bar owners would soon seize on as their own excuse: “I think individual businesses have the choice of whether they ban smoking in their establishment.” Serving as the swing vote, Vanderhoef joined the pro-business smoking members, Champion, O’Donnell, and Lehman, to defeat the amendment by a vote of 4 to 3.

Shortly before the Ames ban went into effect, even Iowa City councilor Ross Wilburn, a social and youth worker whom his colleague Kanner later characterized as a middle-of-the-road Democrat, made it clear that he disagreed with the Ames approach based on “evidence that it takes more than 24 hours for smoke to dissipate.” The Ames ordinance had barely been in force two weeks when Peter Wallace, local pediatrician and CAFE spokesperson, emailed the Iowa City Council that the “red-light, green-light compromise” not only had not worked and would not work, but that “Ames is considering changing theirs. As far as we know, if Ames tightens their ordinance up, we would be the only city in the United States with a red light/green light compromise if we passed one. It says something that no one else has found it workable.”

A few days later council member Vanderhoef exposed this claim about second thoughts in Ames as disinformation: “[T]here have been several comments made in our community that it’s not working well and that the Ames City Council is going to do some changing on it and I was at a meeting with Mayor Tedesco this last week and he said it’s going very well and they have no intention of doing any changing up there [and] that they’re very pleased and that their restaurant owners are delighted with the way it has been designed for them....

As the Iowa City Council was beginning to consider the ordinance, anti-secondhand smoking activists intensified their attacks on Ames-like partial bans.

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342 Transcription of Iowa City Council Special Meeting at 64-66 (quote at 66) (Mar. 5, 2001).
344 Telephone interview with Steven Kanner, Cleveland, OH (Nov. 14, 2008).
347 Transcription of Iowa City Council Special Work Session at 48 (Aug. 20, 2001).
One scientist who offered no basis for his legal prediction assured the council: “Draft a good ordinance that does not include red/light [sic] green light and it will not be successfully challenged (if challenged at all).” The day before the ordinance’s first reading before the council, the *Press-Citizen* opened its op-ed column to dueling pieces by Dr. Peter Wallace and the CEO of the Iowa Hospitality Association. After incorrectly asserting that the proposed ordinance embodied “a complete smoking ban in restaurants”—in fact, it did not cover restaurants with 50 or fewer seats—Wallace urged the council not to “fall prey” to the tobacco industry’s tactics, the result of the successful implementation of which meant that “Big Tobacco won in Ames.” Among the Ames “ploys” and “compromises” against which he warned the council were red light/green light restrictions and “encouraging” area bars to become part of the equation.” To be sure, Wallace was completely correct in critically commenting both that “[t]he key to successful smoke-free restaurant policies is the removal of such visual smoking cues, such as ashtrays,” and posting no-smoking signs, both of which presupposed a totally smoke-free policy, and that time-restricted smoking policies continued to endanger the health of employees and customers who worked and ate during smoking-permitted hours.

### The Cigarette Oligopoly Protects Its Investment in Its 1990 Preemption Amendment: Philip Morris Litigates to Invalidate the Ames Ordinance

So Philip Morris is picking up the tab for the lawsuit filed against the city’s no-smoking ordinance. Does this change things? Well, it does make it harder to pitch this as a struggle between independent little guys and overreaching government. Not only is Philip Morris paying for the suit, but local businesses participating in the fight were recruited by attorneys fighting the case.

On September 24, less than two months after the ordinance had been in force, owners of six restaurant/bars and a truck stop, (allegedly) catching the mayor

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349 Peter Wallace, “Residents Want Smoking Ban,” *ICP-C*, Nov. 27, 2001 (9A:3-7 at 3-4).


351 On the truck stop owner (Bob James), who became the first named plaintiff in the case, see Daniel Lathrop, “Opponents Hope to Cool City’s Anti-Smoking Ardor,” *Tribune*
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of Ames completely by surprise, resorted to the state court system in an effort to enjoin the partial ban on the grounds that it both was inconsistent with the state law, which permitted smoking in designated smoking areas in public places, and that it harmed “‘customer good will, business relationships and profits.’”\(^{352}\) In affidavits filed with the request for a temporary injunction, two of the plaintiffs asserted that they were losing $500 to $700 a week in sales and $75 to $250 a day in food sales a day, respectively.\(^{353}\) Claiming that he closed his kitchen at 3 p.m. on Fridays so that smoking could start earlier, the general manager of the People’s Bar and Grill asseverated that: “‘Instead of being a “no-smoking ordinance,” the effect on businesses in Ames, such as ours, has turned it into a “no-eating ordinance.’”\(^{354}\)

At the temporary injunction hearing on October 2, 2001, lawyer Fred Dorr, asserting that some plaintiffs had suffered large revenue losses, while others considered closing their kitchens at times to limit their losses, and charging that Ames was “‘making its business owners pay the price for a social experiment,’”\(^{355}\) asked state District Judge Carl Baker to lift the ban temporarily. City Attorney John Klaus, who continued to take comfort from Attorney General Miller’s opinion supporting the ordinance’s validity,\(^{356}\) counter-argued that concern about public health (“‘[t]he balance of harm is with people (injured by) secondhand smoke’”) outweighed that about a restaurant’s receipts. The judge was to rule on

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\(^{352}\) Staci Hupp, “Smoking Ordinance Triggers Lawsuit,” \textit{DMR}, Sept. 26, 2001 (5B) (NewsBank). The mayor’s surprise is difficult to reconcile with his aforementioned statement in November about a possible suit. Unlike the mayor, the Ames \textit{Tribune} had deemed litigation inevitable. “It Was Inevitable Smoking Ban Was Headed to Court,” \textit{Tribune} (Ames), Sept. 27, 2001 (A6:1) (edit.) (referring to editorial published on Oct. 13, 2000). Council member Steve Goodhue also stated later that he had not been “surprised the business owners challenged the suit; they told us that from day one.” Email from Steve Goodhue to Marc Linder (Oct. 13, 2008).


Belitsos shed very interesting light on the litigation by suggesting that Big Tobacco had entered the dispute because plaintiffs’ lawyer, Fred Dorr, and his Des Moines law firm, Wasker, Dorr, Wimmer & Marcouiller, lobbied for the tobacco industry. Dorr claimed that “his firm did not lobby the Legislature for tobacco interests. But he wouldn’t comment about whether it represents tobacco companies.”\footnote{358}{David Grebe, “Tobacco Ordinance Heads to Court,” \textit{Tribune} (Ames), Oct. 2, 2001 (A1:2-5 at 3-4 at 3).} (Belitsos related that he had simply called Dorr’s law firm and received a straightforward Yes when he asked the person answering the telephone whether this was the attorney for Philip Morris.)\footnote{359}{Telephone interview with George Belitsos, Ames (Oct. 10, 2008).} Dorr’s denial to the contrary notwithstanding, the firm, which had been the lobbyist of the by this time deceased Tobacco Institute, was lobbying for Lorillard and Brown & Williamson,\footnote{360}{E.g., Bates No. 82120737/41.} and Dorr himself, who had represented R. J. Reynolds in cases in the late 1990s, had defended tobacco companies in the personal injury suit relating to smoking brought by state Representative Philip Brammer\footnote{361}{E.g., Bates No. 86330229/38.} and in the suit for Medicaid reimbursement brought by the State of Iowa.\footnote{362}{See above ch. 31.}

The Ames restaurant owners may have appeared to be the plaintiffs, but the fact that Wasker, Dorr, Wimmer & Marcouiller, the cigarette companies’ principal Iowa lobbyist in general and the one specifically responsible for securing passage of the preemption amendment in 1990\footnote{363}{See above ch. 27.} which formed the basis of the suit, was the plaintiffs’ lawyer should have offered a hint that more than met the eye was going on. In fact, despite the new era allegedly ushered in by the Master Settlement Agreement, Philip Morris, in a cigarette industry tradition going back to the end of the nineteenth century in Iowa,\footnote{364}{See above chs 11-12.} had bought itself some plaintiffs to do its litigational bidding: a hundred years earlier the puppeteer (American Tobacco Company) chose local cigarette merchants to attack the constitutionality of Iowa’s cigarette sales ban; in the twenty-first century, owners of businesses in which the cigarette oligopolist’s commodities were consumed were the puppets of choice in challenging anti-smoking ordinances. According
to Rick Carmer, the most high-profile opponent of the ban and one of the plaintiffs in the lawsuit, owners were “approached by” Philip Morris as a result of discussions they had had with “purchasers” of cigarettes sold by these establishments who then went back to their firms.365

Belfius’s accusation that Dorr’s law firm lobbied for the tobacco industry may have shrunk Dorr’s comfort zone, but Philip Morris, whose “massive profits” from Marlboro, “far and away the most lethal consumer product ever produced,”366 had apparently long since inured it to embarrassment or shame, had no qualms about disclosing that it would “pick up the tab” for the suit, which the company freely admitted was not the first of its kind that it had sponsored. To be sure, such a naked admission was not tantamount to a sudden conversion to truth-telling: instead, the company claimed that it had decided to foot the bill “because we believe in business owner choice.... As they made the request to us, we decided this meets our business objective.... We think that our goals are mutual....”367 Unspoken was such an announcement’s intimidating impact on any other cities in Iowa that might have been considering adoption of their bans. The feisty Just Eliminate Lies group—judiciously allocating $16,000 of its funding from the Tobacco Use Prevention and Control Division of the Iowa Department of Public Health, which derived from the Master Settlement Agreement—had a field day placing large ads in the Ames Tribune (as well as the Register and the Iowa State University student paper)368 headed: “Secondhand smoke kills 53,000 people a year. Apparently, that’s not enough for Philip Morris.” If the target was beyond contrition, at least the public’s contempt for the company would presumably be reinforced by reading that its “mission” in “paying for a lawsuit against the city of Ames...is to overturn a city ordinance that protects the health


367 Staci Hupp, “Tobacco Concern Will Back Lawsuit Against Ames,” DMR, Oct. 3, 2001 (1B:6-7). The Philip Morris official quoted was Billy Abshaw, the company’s manager of media programs.

of Iowans and our right to breathe clean air. Obviously, they believe their profits are more important than lives.”

Angered himself by the suit, Belitsos predicted that “there would be ‘a lot of anger’” if smoking returned to Ames’s restaurants before 8:30 p.m. Recalling that the business community itself had proposed the compromise after the Ames Tobacco Task Force had sought a complete ban, he pointed out that with more than 800 communities having adopted smoking restrictions, the plaintiffs were “‘wasting their money,’ which would be better spent on ‘advertising and improving their business.’” Although Belitsos’s advice was misleading since the vast majority of those communities were located in states in which the ordinances’ validity was not threatened by a statewide preemption law, his implicit advice that the complaining owners should not look the gift horse that his movement had granted them in the mouth was perfectly on target: “‘The alternative is 100 percent smoke-free, because that’s what we will move to in the future.’”

Philip Morris’s intervention nevertheless made Belitsos very pessimistic: because the hospitality industry’s proposal of a compromise had seemed to banish the specter of litigation altogether, the vision of millions of dollars’ being pumped into combating local efforts prompted him to view the ordinance’s survival as “‘doubtful.’” In contrast, Quirmbach, though “disappointed that local restaurants would allow themselves to be used by the tobacco companies” (and thus in essence to double-cross the anti-smoking forces that had been willing to cut back on their demands in order to compromise with the owners), was “‘not the least bit surprised’” by Philip Morris’s action because “‘[i]t’s clear to me that we’ve initiated something here in Ames that’s catching on across Iowa. The tobacco companies have a lot to lose, they make money by producing a product that kills both the user and the people around the user.... We’ve tried to do the responsible thing to protect the people who unwittingly share the same airspace. Of course, the tobacco companies see that as a risk to their products.’” Unclear was whether it was also clear to Quirmbach that Philip Morris was protecting its long-term investment in the lobbying that had created the preemptive legislation in 1990.

References:

369 Tribune (Ames), Oct. 6, 2001 (B9).
372 Quirmbach’s colleague, Judie Hoffman, the council’s other anti-smoking advocate, had been unaware that preemption laws were the cigarette companies’ chief state
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Nevertheless, Philip Morris’s advent in the court room did not instill defeatism in Belitsos: instead, the anti-tobacco coalition sought an ally in Iowa State University in order to extend similar restrictions to the campus (managers of some buildings had requested exemptions from the 15-foot no-smoking zone, not to get around the ordinance, but to offer their “‘clientele’” the ability to smoke “‘so that it won’t affect our business.’”): “‘You cannot underestimate the power of the tobacco industry to manipulate the legal process and public opinion,... They have at their disposal unlimited resources, and my main concern is that it’s going to be hard for a local community to withstand the onslaught of these resources.’” Again, it was unclear whether Belitsos himself was underestimating the manipulation that Philip Morris had effected in 1990 by creating the legal basis for its lawsuit a decade later. In any event, Belitsos’s pessimism was apparently contagious: at least five other cities, including Iowa City, that had been considering a smoking ban “dropped or delayed their plans.” The one silver lining in the adversity brought on by Philip Morris’ open involvement was that the health organizations that “once called the Ames ordinance a ‘‘victory for the tobacco industry’... changed their minds.” Suddenly, in a kind of my-enemy’s-victim-is-my-ally conversion, Threase Harms-Hassoun of the American Cancer Society announced that, although Ames’s was “‘not the best ordinance we could have, it’s still a step in the right direction. It’s important to Iowa and communities who have looked to Ames for taking the lead in this.’”\textsuperscript{373} ACS chose to “‘come back in’” in order to “‘rally with our coalition partners who believe that reducing people’s exposure (is an important goal).’” The real reason, as Belitsos interpreted it, was not to help the group in Ames so much as to ward off the negative impact that Philip Morris’ victory might have on efforts in other cities, eight of which had either put their initiatives on hold or backed off from them.\textsuperscript{374}

Judge Baker’s ruling on October 23 denying the pro-smoking parties’ motion for a temporary injunction against the ordinance prompted an overjoyed Belitsos


to invoke a kind of deus ex machina for the victory over Philip Morris: “‘Oh, thank God.’” Baker found plaintiffs’ arguments “not convincing” because the business owners had failed to prove any economic damage. Belitsos’ ATTF co-chair, Andrew Goedeken, predicted that with the ordinance’s continued enforcement “in 25 years every place would be smoke-free.”

At the hearing on Philip Morris’s marionettes’ motion for summary judgment on December 19, argument, correctly, focused on the crucial provision in the statute under which: “Smoking areas may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshal or by other law, ordinance, or regulation.”

Reaching for a formal canon of statutory construction remote from the substance of the smoking ban, Dorr argued that the law, ordinance, or regulation in question “‘must have the same character or nature (as that of a fire marshall regulation),’” the reason being that “‘a general reference in state law follows a specific reference in its meaning.’” Since the Ames ordinance banning smoking in restaurants and bars entirely during some times had nothing to do with fire safety, it conflicted with and therefore was preempted by state law. In contrast, Ames City Attorney Klaus, eschewing “legal theories” and basing his interpretation on “plain English,” insisted that the “legislature wanted to make clear that...there would be no smoking where smoking would be prohibited by ‘other law’... If the legislature intended the cities not to have this ability, they would have closed the door.”

As far as the partial ban’s alleged economic impact on restaurants was concerned, Klaus relied on a study done by an ISU economist indicating that the long-term impact would be minimal, while short-term losses were a function of the uncertainty left in the wake of the September 11 terrorist attacks rather than of the ordinance.

**Iowa City Adopts an Ordinance, Too**

I mean I don’t know how many ordinances we can make that affect people’s personal

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377David Grebe, “Tobacco Suit Wafting Through the Courts,” *Tribune* (Ames), Dec. 20, 2001 (B1:2-5, B8:1-5). Dorr provided no legislative history on behalf of his claim; nor, for that matter, did Klaus in opposition. In fact, the legislative history is not consistent with Philip Morris’s position. See below.

“It doesn’t matter if people think the ordinance is right or wrong, we are going to do it,” said Councilor Connie Champion.\footnote{Tony Robinson, “Smoking Ban Vote Expected Next Week,” \textit{DI}, Nov. 9, 2001 (1A:5-6).}

While the Ames City Council devoted much of its attention during the fall of 2000 to a smoking ban, Iowa City’s did not even hear back from the city attorney for half a year or initiate serious consideration of a draft ordinance for an entire year. Ames was, however, not completely out of mind: on November 6, the Iowa City city attorney briefly informed the council both that Ames had “passed or almost passed an ordinance prohibiting smoking in public places, restaurant, no smoking restaurant thing,” and that the attorney general would soon issue a legal opinion on the issue, which it would be “great for us to have...before we do it.”\footnote{Transcription of Iowa City Council Work Session at 76 (Nov. 6, 2000).}

By the fall of 2000 it was also becoming clear that CAFE’s efforts to persuade the city councils in the neighboring towns of Coralville and North Liberty were running into resistance from councilors purporting to be concerned about interfering with the rights of business owners.\footnote{Fred Lucas, “Council Leans Toward Smoke-Free Eateries,” \textit{ICP-C}, Oct. 3, 2000 (1A) (NewsBank); Aarti Totlani, “Councils to Discuss Smoking Ordinance,” \textit{ICP-C}, Nov. 20, 2000 (3A) (NewsBank); Aarti Totlani, “Councilors Hesitant on Smoking Ban,” \textit{ICP-C}, Nov. 22, 2000 (4A) (NewsBank). In the event, neither city council voted on, let alone adopted, a ban, although Coralville did devote an open forum to the subject. Andrew Dawson, “Many Want Smoke Ban,” \textit{ICP-C}, Apr. 18, 2001 (1A:1).} And a few months later another initiative suggested that Iowa City itself may not have been a hotbed of anti-smoking militance. In the fall of 2000 parents of children who played in a soccer club in a city park expressed concern about spectators smoking next to children both because of the secondhand smoke exposure and of the involvement of “adults modeling behavior...not consistent with a health and sports message.”\footnote{Sara Langenberg, “City May Ban Smoking at Games,” \textit{ICP-C}, Feb. 14, 2001 (1A).} That parks department officials stated publicly that they were not sure that they wanted “the headache of enforcing a ban” suggested that where smoking was involved, protecting even children might spark opposition.\footnote{Colleen Krantz, “Iowa City May Ban Smoking in Parks,” \textit{DMR}, Feb. 15, 2001 (3B) (NewsBank).}
event, at its meeting in mid-February 2001, the Parks and Recreation Commission voted 5 to 3 not to ban smoking at youth athletic events in city parks. The attitude of the commission chairman, who did not "feel it’s in our realm to prohibit that activity," toward smoking, change, and Iowa City was nicely captured by his reason for declining the parks director’s offer to try to determine what other communities’ smoking park smoking policies were: “I’ve been in a million ballparks and I’ve never seen a no-smoking sign.... But this is Iowa City.”

As soon as it had unanimously supported proposed changes in regulation of alcohol consumption, in April 2001 the city council decided that it was finally in a position to devote some attention to a smoking ordinance. Early in the month the city attorney sent the council a memorandum mentioning that the attorney general’s opinion gave Iowa City “considerable latitude to regulate smoking in public places” and pointing out that the ordinance that Ames had passed covered establishments with as little as 10 percent food sales but also permitted smoking from 8:30 p.m. to 6 a.m. Dilkes then requested that the council answer a number of questions to give her guidance in drafting. Working (apparently) from the Ames ordinance, she asked whether the council wanted to: (1) prohibit smoking in all public places or only in restaurants; (2) set time limits during which smoking was permitted; (3) base limitations on percentage of food sales; (4) exempt establishments that served alcohol and seated fewer than 50; (5) exempt certain kinds of establishments such as truck stops or bowling alleys; (6) prohibit minors’ presence in smoking areas; (7) prohibit smoking in outdoor seating areas; and (8) impose penalties different than those under the clean indoor air act.

At its special work session on April 16, the city council initially had little trouble limiting coverage to restaurants, but one council member succeeded in shaking up his colleagues a bit by reminding them that if secondhand smoke was dangerous to people, then the council had an obligation to protect all workers in public spaces. Apparently sensing that Kanner’s reasoning might actually prevail, Mayor Lehman tried to rush to a vote before others changed their minds, but Kanner asked for discussion. Irvin Pfab expressed support for the wide ban in principle, but not if the public were not “ready” for it. All Kanner had to do to

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386 Sara Langenberg, “City Council Turns Focus on Smoking,” ICP-C, Apr. 4, 2001 (3A) (NewsBank); Sara Langenberg, “Smoking Next on Council’s Table,” ICP-C, Apr. 13, 2001 (3A) (NewsBank).
elicit Pfab’s agreement was to express his belief that “the majority is ready for it” because “the healthy space movement” had been going on for 30 years and had picked up steam. But when Lehman wanted to know whether anyone else was interested in considering the larger ban, even Pfab backslid, enabling Lehman to declare that restaurants alone would be covered.\textsuperscript{388} Dilkes’s question as to whether the council wanted to adopt time limitations as in the Ames ordinance prompted an instantaneous “Absolutely not” from Pfab, but Lehman’s reformulating the question as whether it was possible for a restaurant to turn into a bar after a certain hour caused sufficient disorientation to put the matter into abeyance until the council had defined a covered “restaurant,” though even at this point “carry over smoke” and the possibility that it took several days for “carnagems [sic] to go out of the air” exercised at least Vanderhoef.\textsuperscript{389} After an extended but not compelling consideration had tentatively settled on more than 50 percent sales from food as the defining characteristic of a restaurant and acceptance of coverage of small restaurants,\textsuperscript{390} no one was willing to speak in favor of time limitations, though several members eventually wished to hear public reactions to the proposal.\textsuperscript{391} By this point, O’Donnell, who opposed regulation altogether, ironically boasted that “I think we’ve already improved a lot on what...Ames did.”\textsuperscript{392} He doubtless perceived further progress in the next decision, spearheaded by him and his two smoking colleagues (Lehman and Champion), that smoking not be banned in outdoor restaurant areas; in contrast, only Pfab saw the need for protection there as well.\textsuperscript{393} Finally, the size of the monetary penalty was disposed of quickly, especially since a representative of the non-confrontational CAFE emphasized that it did not want to be “punitive.”\textsuperscript{394}

The policy directives that the council gave Dilkes to mould into an ordinance were not definitive, but they proved to be very similar to the ban that the council

\textsuperscript{388}Transcription of Iowa City Council Special Work Session at 59-61 (Apr. 16, 2001), on \url{http://www.iowa-city.org/weblink/docview.aspx?id=7707}.

\textsuperscript{389}Transcription of Iowa City Council Special Work Session at 62-63 (Apr. 16, 2001).

\textsuperscript{390}Transcription of Iowa City Council Special Work Session at 63-72 (Apr. 16, 2001).

\textsuperscript{391}Transcription of Iowa City Council Special Work Session at 72-73 (Apr. 16, 2001).

\textsuperscript{392}Transcription of Iowa City Council Special Work Session at 75 (Apr. 16, 2001).

\textsuperscript{393}Transcription of Iowa City Council Special Work Session at 75-77 (Apr. 16, 2001).

\textsuperscript{394}Transcription of Iowa City Council Special Work Session at 78 (Apr. 16, 2001).
would adopt nine months later. At this point it embodied these elements: (1) a ban on smoking in restaurants only; (2) no time limitations; (3) a definition of “restaurants” as deriving more than 50 percent of their gross revenues from food sales; (4) coverage of all restaurants regardless of seating capacity; (5) no coverage of outdoor restaurants; and (6) penalties of $25 for the smoker and escalating penalties of $100/$250/$500 for owners and managers.395

The scope of coverage generated by these features, which excluded from protection anyone working or eating in an establishment less than half of the revenues of which stemmed from food (compared to less than one-tenth in Ames), was extraordinarily narrow given the absolute and growing predominance of student drinking establishments in the central downtown business district. (The city council had in recent decades presided over the saloonification of downtown, in the course of which the number of liquor licenses/bars increased from 9/6 in 1975, to 17/10 in 1981, 33/20 in 1998, and 48/32 in 2005.)396 Since, as the manager of one of them pointed out, “most downtown establishments won’t be hurt by the ordinance because a majority of their revenue is derived from alcohol,”397 CAFE’s decision to compromise in this fashion may have been driven by the desire to neutralize what might have proved to be the most virulent source of opposition to a ban, albeit at the price of continuing to expose thousands of college students (including employees) to secondhand smoke and intense peer pressure to smoke.

However, there was no surer symbol of CAFE’s enrollment in the vanguard of the national anti-smoking movement than the fact that, whereas ATTF just a half-year earlier had earned Stanton Glantz’s dismissive criticism, in May 2001 Glantz came to Iowa City, where he spoke at a CAFE-sponsored clean indoor air conference, placing his unambiguous imprimatur on its (i.e., his) strategy: “‘Iowa isn’t California right now, but it’s about like California was in 1987, just as things started to take off. These people really have their act together. They are very organized, and they will succeed.’” He “predicted a comprehensive ordinance would pass in Iowa City in the next few months” because Iowa City satisfied the

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395Iowa City Council Work Session, Minutes at 3 (Apr. 16, 2001). See also Sara Langenberg, “City to Draft Smoking Ordinance,” ICP-C, Apr. 17, 2001 (1A) (NewsBank).
396Ralph Wilmoth, Director of the Johnson County Public Health Department, prepared the sequence of bar density slides (emailed to Marc Linder, Feb. 9, 2006). The borders of “downtown” were S. Clinton St., E. Burlington St., S. Gilbert St., and Iowa Ave. The vast majority of the licenses were located in an even more circumscribed downtown defined by S. Capitol St., E. College St., S. Linn St., and Iowa Ave.
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required public education component of “aiming the message where it would be received, a core of activists and city council support.”\(^{398}\) To be sure, in his pep talk Glantz failed to reconcile the seal of approval he bestowed on CAFE with his previously published analysis of the lessons to be learned from the California experience, in particular, that: “A successful program is not simply directed at keeping kids from smoking but at protecting nonsmokers from secondhand smoke and creating environments that facilitate smokers’ decisions to cut down or quit. Most important, a successful campaign de-legitimates tobacco use....”\(^{399}\)

Nevertheless, in a grotesque clash with this precept, numerous CAFE spokespeople went out of their way to emphasize publicly that the goal of preventing secondhand smoke exposure in no way entailed any critique of smoking itself. For example, just a month earlier, Dr. Leslie Weber, a physician and prominent CAFE member, had stated at a public forum on a smoking ban in Coralville: “I’ve seen the effects of smoking of all kinds in my patients.... Nothing good is to be said about cancer. ... We’re not against smoking. But we are against smoking in restaurants.”\(^{400}\) And CAFE’s spokesperson, Dr. Ballinger, disingenuously denying smokers’ agency (for the 53,000 secondhand-smoke-caused deaths that the anti-smoking movement incessantly and rightfully drove home as the basis for public smoking laws)\(^{401}\) reinforced this hands-off-the-smoker image: “This is not anti-smokers.... This has nothing to do with the people behind the cigarette. It’s just so people who want to go out to eat can breathe clean air.”\(^{402}\) Ironically, this stance, which was deeply rooted in CAFE’s anti-confrontational, non-militant organizational ethos,\(^{403}\) stood in glaring

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\(^{399}\) Stanton Glantz and Edith Balbach, Tobacco War: Inside the California Battles 367 (2000).

\(^{400}\) Andrew Dawson, “Many Want Smoke,” ICP-C, Apr. 18, 2001 (1A:1).

\(^{401}\) For two among many instances of CAFE’s use of the datum, see Eileen Fisher, Clean Air for Everyone to Community Organization, Sept. 29, 2000 (form letter), in JCDPH, Folder: Tobacco - 1999-; C.A.F.E. Iowa CAN, “Position Statement on Secondhand Smoke” (n.d. [Dec. 21, 2005]).

\(^{402}\) Sara Langenberg, “City Council Turns Focus on Smoking,” ICP-C, Apr. 4, 2001 (3A) (NewsBank).

\(^{403}\) See above this chapter. CAFE programmatically refused to revise CAFE Johnson County, The Johnson County Smoke-Free Dining & Entertainment Guide (Jan. 2006), in order to point out which “smoke-free” businesses nevertheless sold cigarettes and especially which ones had been caught in stings illegally selling to minors. Email between Beth Ritter Ruback (CAFE Project Manager) and Marc Linder (Feb. 23, 24, 25, and 26,
contradiction to one of Glantz’s “few simple rules for beating the tobacco industry”: “Do not be afraid of controversy; use it.”

That a considerable lack of unity and understanding still prevailed on the council regarding the ban four months after it had given the city attorney policy directions for drafting an ordinance was clearly on display at the special work session on July 30. Indeed, the incompetence and lack of seriousness of purpose exhibited by the two overt opponents of a ban, Champion and O’Donnell, were so blatant that they raised the possibility that these two smoking businesspeople were in fact engaged in the kind of intentional delay that could redound only to the benefit of the cigarette oligopoly, one of whose tactics in combating local ordinances featured delay.

The discussion was ostensibly prompted by the city attorney’s having included in the information packet for the session data that the council back in April had requested her to collect on alcohol sales of establishments with liquor licenses on the basis of which she sought the council’s direction with regard to drafting an ordinance in accordance with its last directive that such a ban exempt establishments with alcohol sales in excess of 50 percent of total sales. The city administration had sent survey letters to 83 liquor license holders; of the 49 respondents 20 stated that alcoholic beverages accounted for 50 percent or more of their total receipts (and would therefore presumably be exempt), whereas such sales fell short at the other 29 (which would presumably be covered by the smoking ban).
Having given the council the information, Dilkes, who repeated that she felt “comfortable” drafting the ordinance “particularly in light of the Attorney General’s opinion,” explained to the members at the special work session that they now needed to tell her what to do. (In reading the following account it is necessary to bear in mind that the absence of Dee Vanderhoef, who would have cast the decisive fourth vote for a ban, put the council’s orientation at this meeting in a misleading light.) Wilburn immediately declared that he wanted to proceed with the ordinance, including the 50-percent or more provision. His decisiveness was countered by the incoherent waffling of Champion, who purported to believe that restaurants should be non-smoking (though perhaps only according to “the idea of Ames where there is non smoking up to a certain time”), but then contradicted herself by acknowledging that she did “have problems with this ordinance” because “I feel like we’re being big brother that people who own restaurants and bars ought to be able to kind of decide who comes into their restaurant, I can decide who comes into my clothing store.” In adding that she wanted “more input from the people who are really going to be affected,” she meant her fellow business owners—“people out there who’s [sic] businesses will be deathly affected by this ordinance and I guess I do have problems with that”(and perhaps smokers), but not non-smokers who sought smoke-free environments. Wilburn then framed the controversy in the by that time nationally familiar (but nevertheless largely incoherent) terms of health versus rights (as if there were no right to health and as if there were a right to engage in homicidal activity), and declared his allegiance to the former, while emphasizing that businesses were not given the option of letting their employees not wash their hands before handling food. Champion’s irrelevant comment that the state prescribed such regulations prompted Mayor Lehman to wonder aloud whether they should not then “get the state to do this.” Undaunted, Wilburn retorted that since the state was apparently not going to do it, he as a council member was willing to do so. He also used the opportunity to reject time-limited smoking bans on the grounds that carcinogens took a certain amount of time to disappear. In his own inimitable fashion Irvin Pfab peremptorily short-circuited the discussion:

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Mondanaro, did not state that the restaurant was no-smoking, he opined that the owner should make the decision and then customers could choose whether to go to a smoking or non-smoking establishment. See also Sara Langenberg, “City Council to Again Discuss Smoking Ban,” ICP-C, July 27, 2001 (3A) (NewsBank) (erroneously dated Dec. 18).

408Transcription of Iowa City Council Special Work Session at 65 (July 30, 2001).
409Transcription of Iowa City Council Special Work Session at 64 (July 30, 2001).
410Transcription of Iowa City Council Special Work Session at 66 (July 30, 2001).
411Transcription of Iowa City Council Special Work Session at 64 (July 30, 2001).
“I think it’s a health issue, case closed.” Despite Kanner’s objection to a time-limited ban because of the enforcement difficulties, Champion was concerned about restaurants that turned into bars at 8 or 9 p.m. Dilkes patiently explained that the council had already discussed and rejected time limits, but Champion insisted that she needed public input in order to evaluate an ordinance. Populist Kanner was certainly not opposed to a public hearing, but forewarned his colleagues that the “very powerful” tobacco industry would “put up front groups to look like grass root groups....” Dismissing such concerns—“[t]hat’s not what I want to hear”—Champion redundantly made clear how narrow her agenda was: “what I want to hear is how people’s businesses are going to be affect[ed].” Another thing Champion did not want to hear was Pfab’s contention that the council perhaps had an obligation to protect the public’s health: “The public can pretty much protect themselves they don’t have to go into that restaurant.”

Although Champion purported to see the eventual handwriting on the wall for public smoking, her highest priority was “thinking about some way to do this and not affect people’s businesses.” But when Kanner pointed out to her that studies showed that bans did not have a negative economic effect if there was a “level playing field,” she objected that the existence of restaurants that turned into bars and the lack of a ban in neighboring Coralville would thwart the creation of such equality. This stalemate provided the perfect opportunity for her smoking partner in delay, O’Donnell, to opine that “[i]t appears like we need some more discussion.” Pfab, in contrast, was growing impatient with a discussion that was getting long in the tooth and persisted in that view even after Lehman and Dilkes pointed out that most of the delay since CAFE’s submission of the ordinance in the fall of 2000 had resulted from the council’s preoccupation with alcohol. Wilburn, Pfab, and Kanner saw no problem with a straightforward draft based on coverage of establishments with more than 50 percent sales from food and no provision for time-limited smoking, but Champion and O’Donnell wanted to start with an ordinance containing the Ames arrangement, and although Lehman did not expressly take a position, Dilkes correctly intuited that “[l]ooks like you’ve got 3 to 3 at the moment.” (In fact, this very early constellation, augmented by the vote of the absent Vanderhoef, would remain the pattern until the ordinance’s final adoption half a year later.) Desirous of insuring that red light/green light not be the starting point of the council’s deliberations, Kanner argued for beginning with what CAFE proposed as its “strongest position” and modifying it until it was

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412 Transcription of Iowa City Council Special Work Session at 65-66 (July 30, 2001).
413 Transcription of Iowa City Council Special Work Session at 67 (July 30, 2001).
414 Transcription of Iowa City Council Special Work Session at 68-70 (July 30, 2001).
415 Transcription of Iowa City Council Special Work Session at 71-72 (July 30, 2001).
“at least more acceptable to all sides....” The mayor, who apparently no longer remembered that members had had the CAFE proposal since October 2000, asked Dilkes whether they would “accomplish anything...if we got copies of that proposed ordinance, let the Council digest it and then at the next work session discuss it with you....” Although she refrained from expressly identifying her at-will employers’ individual and collective amnesia, Dilkes nevertheless offered to “run through the same list of questions I ran through with you in April”; likewise, when Lehman asked whether she might make some notes on the CAFE ordinance before giving it to the members, she agreed to give them the same memo that she had given them in April and “go through that again.”

Thus, the only upshot of the entire discussion was to request that Dilkes hand the members exactly the same two documents that she had given them 10 and four months earlier, respectively, and that manifestly the opponents had failed to study or, apparently, even to retain. The council, in the Press-Citizen’s diplomatic phraseology, had merely “retrace[d] smoking ban steps” and gone “back over that ground....” Dilkes barely concealed her impatience with the council when, a week later, she stressed that she was “again” enclosing the same materials for their information, adding that it was her understanding that it was the members’ “desire to discuss again whether you wish to proceed with the ordinance and what form you desire it to take.”

One of the opponents’ pretexts for delaying the progress of the ban appeared to be vulnerable to puncturing when Mayor Lehman announced on August 16 that he would be asking the council to request a joint meeting with the Coralville city council in order to consider collaboration to achieve the “level playing field” that “the public” was “constantly” demanding. The very same day CAFE, making sure that the Iowa City Council at its work session on August 20 would appreciate the importance that the group attached to its initiative, held a rally at which Dr. Ballinger declared that it was the council’s “duty” to “draft a strong smoke-free ordinance without compromise....”

416Transcription of Iowa City Council Special Work Session at 73-74 (July 30, 2001).
In the event, the mayor did request the council’s permission, but proponents of a ban on the council wondered whether the plan to cooperate with Coralville—whose city council had thus far failed to muster a majority in favor of a ban—might, to the contrary, prove to be an engine of still further delay. Indeed, Kanner went far beyond wondering: to the conciliatory assurance offered by Champion—who predicted a total ban in a few years, but argued that the town was not yet ready for it—that “[w]e all...know we’re going to say yes [to a ban] we just don’t know what we’re going to say yes to,” he bluntly counterposed his sense that “we’re not all going to say yes, we’ve seen across the country, the patterns are the same everywhere, the pressure comes to water down a bill, make it weaker and weaker and I see this just as part of that pattern of delaying it, talking to the neighbor who has shown that they don’t want to deal with this at the present time in any meaningful way and this is just one more excuse to not pass something strong and make it a healthier environment for the workers and for the children that go into these places.”

Kanner also specified the means of such dilution such as Philip Morris’s strategy of accommodation, including red light/green light arrangements. (Amusingly, O’Donnell, who claimed that “I’m going to end up supporting this at one time or another,” but never did, called the Ames procedure “ludicrous” because it suggested that “after 8:00 smoke doesn’t hurt you....”) As opponents insured that the discussion floundered, Wilburn and Pfab deplored the fact that the council was not even going to deal with the matters that it had asked City Attorney Dilkes to go over with the members. Kanner was willing to agree to the mayor’s suggestion of devoting a whole work session to the topic on the condition that that meeting take place very soon, but Lehman felt that since “people have smoked in restaurants for 200 years, a few days one way or the other is not critical....”

In the end, the only action that a council majority took was to request that an invitation be extended to the Coralville council to discuss a smoking ban at a joint

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423 Transcription of Iowa City Council Special Work Session at 54 (Aug. 20, 2001).
424 Transcription of Iowa City Council Special Work Session at 54 (Aug. 20, 2001).
425 Transcription of Iowa City Council Special Work Session at 50 (Aug. 20, 2001).
426 Transcription of Iowa City Council Special Work Session at 51 (Aug. 20, 2001).
427 Transcription of Iowa City Council Special Work Session at 55, 58, 59 (Aug. 20, 2001).
428 Transcription of Iowa City Council Special Work Session at 61 (Aug. 20, 2001).
meeting on September 5. Even before the joint meeting took place, Coralville Mayor Jim Fausett suggested that that city council might not be ready to adopt a ban like Iowa City’s; at the same time, Mayor Lehman remarked that Iowa City would forge ahead alone if necessary. In the event, as ban supporters had foreseen, Fausett declared during the meeting that Iowa City should proceed on its own because, although things might change, the Coralville council was not yet ready. Ironically, one of its members, John Weihe, who in fact opposed a ban, chose to attack one of his Iowa City policy-mates in pretending that he preferred an all-or-nothing approach: “If I were going to be supportive of it, I’d include bars and vacuum cleaner stores if it’s truly a health issue” (alluding to O’Donnell, who owned a vacuum cleaner store in Coralville). The flagging commitment on the Coralville council can also be gauged by the attitude of one of its purported ban backers: David Jacoby argued that Coralville residents “would be more pro-ordinance if there were no options”—but in fact the city already had two smoke-free establishments.

On September 10, 2001, the Iowa City council finally scheduled October 16 as the date for a special smoking work session the first hour of which was to be devoted to public comment (equally divided between proponents and opponents) and the second hour to council discussion. By the time of the meeting the legal landscape had been potentially altered by the advent of Philip Morris’s judicial challenge to the Ames ordinance, but if one of the cigarette oligopoly’s purposes in fomenting litigation was to deter other cities from adopting their own ordinances by intimidating them with the financial burden of a court defense, it missed its target in Iowa City, where CAFE held a rally in front of city hall at the conclusion of a march before the meeting.

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The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

The Town Hall Meeting: October 16, 2001

[It] seems like the 65 percent is a number that we’ve not arrived at scientifically, maybe it’s a very good number, maybe it is not, but I think we have to start somewhere and...if it works, great.434

A standing-room only overflow audience attended the two-and-a-half hour special smoking working session on October 16 devoted entirely to the ordinance.435 Only a few owners spoke, but the core theme of their angry statements was questioning the justification for the city’s “tak[ing] away the rights of a business man to cater to the market” instead of letting “the market decide whether or not smoking is a good thing....” This argument was linked to the claim that CAFE had targeted restaurants “because they think they can politically get it passed...and they can’t politically get it passed against everybody else.” To try to derail this strategy the anti-ordinance group did not have to reach far to make the point that “[i]f second hand smoke is bad in restaurants it’s bad in lawyers offices, it’s bad in car garages....” (To be sure, when owners’ perpetual call for a “level playing field” was put to the test, the response, unsurprisingly, was that “I wouldn’t campaign for it [i.e., a total smoking ban] because...I don’t think it’s a function that government should be fulfilling.”)436 Another restaurant owner, seething over “[w]hy...you believe that you guys are qualified to tell me how to run my business,” got more personal: after eliciting from the three smoking business owners on the council, Champion, Lehman, and O’Donnell, that he would not be permitted to smoke in their dress, luggage, and vacuum repair shops, respectively, he rhetorically asked whether they had made these decisions on their own or had consulted with the other council members.437 An obliging O’Donnell offered the very market-knows-best answer for which the restaurant owners were looking: “When I had my Burger King downtown and I had my convenience store, I had many people come up to me and ask me if I would be smoke free and that’s what I base[d] my decision on.”438

434Transcription of Iowa City Council Meeting at 51 (Oct. 16, 2001) (Mayor Lehman), on http://www.icgov.org/transcriptions/58.pdf.
435Transcription of Iowa City Council Meeting at 1 (Oct. 16, 2001).
436Transcription of Iowa City Council Meeting at 3-4 (Oct. 16, 2001) (Daryl Woodson, The Sanctuary).
437Transcription of Iowa City Council Meeting at 6 (Oct. 16, 2001) (Kevin Perez, owner of 126).
438Transcription of Iowa City Council Meeting at 5 (Oct. 16, 2001) (Kevin Perez).
439Transcription of Iowa City Council Meeting at 7 (Oct. 16, 2001).
Restaurant owners’ special pleading was considerably less plausible when anti-smoking council members questioned them about public health. For example, when Wilburn asked about the imposition of public health regulation concerning food handling, one owner irrelevantly replied that “you can’t see saminila [sic], you can see and smell smoke”; but even after conceding, in extremis, that some health and safety regulation might be necessary, he sought to evade the issue by analogizing tobacco to obesity and requiring McDonald’s to “get rid of the deep fat fryers,” only to return to the mantra: “You know, there’s a point where it needs to become a market place decision, you know your [sic] not punishing tobacco companies with this, your [sic] punishing small businesses.” After pointing out that in fact Philip Morris did fear such bans lest they cause smokers to quit, Kanner asked the same owner about the health impact on non-smoking workers since the labor market did not automatically slot only smokers into workplaces subject to secondhand smoke exposure, but received only the same evasively unrealistic answer: “I would not choose to work in a meat packing plant because that’s pretty dangerous work even though I might need the job I would choose to take another position, I might choose not to work at a computer terminal all day because of the dangers of carpal tunnel syndrome.”

Following the owners a host of physicians spoke in favor of the ordinance. Dr. Miles Weinberger, the head of the Allergy and Pulmonary Division of the Pediatrics Department at the University of Iowa Hospital, noted that a strong argument could be made for extending the ban beyond restaurants and bars, “but politics is always the art of the possible and you’ve got to start somewhere. Restaurants are a logical place, it levels the playing field for all the restaurant owners....” An allergist, Dr. John Kammermeyer, underscored even the short-term health consequences by pointing out that “exposure to secondhand smoke for half an hour impairs coronary blood flow just as much as it is impaired in chronic smokers. So it has a major quick impact on the person[’]s coronary blood flow and the risk of heart disease and heart attacks.” For precisely such reasons, “if I had my druthers...I think we should have a ban in all public places.....” A different perspective was offered by a pediatrician, Dr. Tom Rosenberger, who explained that banning smoking in various public places would help prevent adolescents who came as non-smoking students to Iowa City from perceiving smoking as a ubiquitously acceptable practice that would prompt them to start.

Dr. Ballinger, a CAFE spokesperson, drawing an invidious comparison with the

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440 Transcription of Iowa City Council Meeting at 8-9 (Oct. 16, 2001) (Woodson).
441 Transcription of Iowa City Council Meeting at 14 (Oct. 16, 2001).
442 Transcription of Iowa City Council Meeting at 16 (Oct. 16, 2001).
443 Transcription of Iowa City Council Meeting at 17 (Oct. 16, 2001).
Ames ban and taking a maximalist position which not even her own group’s draft ordinance lived up to, reminded the council of the three simple components of an effective smoke-free restaurant ban: (1) coverage of all restaurants where a meal was served; (2) all-day coverage; and (3) no exemptions or compromises. She concluded her hard-hitting remarks by urging the council not to let itself be distracted into forgetting that because workers’ and customers’ health was “priceless...it shouldn’t be trivialized by comparing it to false claims without basis about loss of business revenues.”

Potentially crucial information was presented by an economics professor at the University of Iowa, John Solow, who, by focusing on the economics consequences for businesses of the smoking ban, might have fatally undermined owners’ central line of attack. To begin with, he reminded owners, who “can see only the smokers who are to leave their businesses...that there are more non smokers who may come to their businesses and since far more people are non smokers than smokers in the United States there’s no reason to believe that the one is going to out weight [sic] the other....” Less speculatively, he called attention to dozens of solid nation-spanning empirical studies based on objective sales tax data—and “not based on people’s fears, people’s beliefs, people’s anecdotal evidence”—showing that smoking bans had no effect at all on the restaurant business. Solow even addressed the level playing field issue associated with a ban-less Coralville by pointing to the same situation in Palo Alto/Mountain View, California, which, again, generated no impact. In the end, then, Solow concluded that “you should try to lay that to rest and go on with what the doctors say is good for the health of our citizens....” The only problem with this analysis was its failure to deal with the objection raised earlier in the evening by an owner who referred to such sales tax studies whose macro-level analysis was incapable of identifying individual restaurants that had gone out of business because their sales taxes were more than made up for by the opening of a new fast food restaurant. When Kanner reminded Solow of the point, the economist called it a “really good question” that he was unable to answer, although he did point out that a study of Madison, Wisconsin had found that more new businesses opened than closed in the wake of a ban. (In fact, a doctoral dissertation

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444 Transcription of Iowa City Council Meeting at 22 (Oct. 16, 2001). Oddly, another CAFE spokesperson, Eileen Fisher, instead insisted that 68 percent of Iowa Citians wanted smoke-free restaurants “because we want to protect our children, we don’t want our children to work in these places....” Id. at 24.

445 Transcription of Iowa City Council Meeting at 23-24 (Oct. 16, 2001).

446 Transcription of Iowa City Council Meeting at 4 (Oct. 16, 2001) (Woodson).

447 Transcription of Iowa City Council Meeting at 27-28 (Oct. 16, 2001). Dan Ramsey
supervised by Solow that analyzed Iowa City restaurant sales from 1999 to 2004 found that the ban had no significant effect on Iowa City restaurants or on any of five segments based on smoking policy.)

After more than an hour and a half of public comment the mayor eloquently opened council debate: “Okay guys what’s your pleasure?” Advising his colleagues that there was “no point in delaboring [sic] this discussion...if we do not have the will to move forward with this,” Lehman prompted Kanner, Champion, and Pfab to affirm their interest. But before he let them proceed, he asked the city attorney for “a brief run down on the Ames situation.” In a short-circuited description of the preemption issue that no one not immersed in the case could possibly have understood, Dilkes, while admitting that “there’s some language that it’s tough to figure,” nevertheless (again) assured the council that she had “gained a lot of comfort by the Attorney General’s opinion [that “there was no preemption by the State Code”] and...was comfortable with you all proceeding.” Nor was Dilkes alone. Kanner, for example, who was personally lobbied by Attorney General Tom Miller to support the ordinance on the grounds that preemption would not be an obstacle, felt that Miller’s personal approval and authority instilled council members with a certain sense of “safeness” in voting for an ordinance without which the whole campaign would have turned out otherwise. In addition, the city attorney herself, whom Kanner regarded as in general offering the council conservative legal advice, might well have withheld her endorsement of the lawfulness of the ordinance without the

448 Id. at 28.

449 Transcription of Iowa City Council Meeting at 29 (Oct. 16, 2001).

450 Transcription of Iowa City Council Meeting at 30 (Oct. 16, 2001).

451 Transcription of Iowa City Council Meeting at 31 (Oct. 16, 2001).
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attorney general’s opinion.452

With no councilor rushing to make any proposal and Lehman himself not “know[ing] quite how to do this,” he asked Dilkes for an operating definition of a “restaurant” as contradistinguished from a bar and the members whether they wanted a 24-hour ban or the Ames red light/green light option. Noting that they had been bogged down in this same discussion since April, she explained that although she grasped their “idea” that “the more food the more important the ban, the more alcohol the less important,” she still needed to “know from you all what percentage your [sic] talking about.”453 Instead of a straight answer, Champion, a smoker who paid lip service to the need for a ban and confessed that the number of young people smoking in town “totally amazes me,” expressed concern for restaurants that turned into bars after a certain hour and “would be hurt by this ordinance....” Although she believed that a ban would not have a negative impact on most restaurants at all because, like her, a smoker, most people preferred non-smoking establishments, she still wanted to eliminate the adverse competitive effect of exempt bars on restaurants that “do a big bar business....”454

Putting a halt to the seemingly aimless drifting of the conversation, Pfab, out of nowhere, mentioned that at one point Champion had suggested 60 or 70 percent (food sales) as the definitional marker, the point of which at the time he had not grasped, but now he was proposing 70 percent—a figure that was 20 percentage points less inclusive than CAFE’s draft and a full 60 percentage points less encompassing than the Ames ordinance. Pfab’s suggestion immediately provoked resistance from Kanner, who argued that if the major concerns were competitive fairness to owners and health protection for workers and children, the answer was a total ban: “I think if we take that leap as a city...that puts us ahead actually...that’s something that attracts people to our city...if we’re going to attract conferences, I think we’ll get more business...being smoke free.” Urging his colleagues to assume that “leap in leadership,” he proposed making all commercial venues smoke free. Once again paying lip service to the notion that the city would eventually adopt such a broad scope, the inerterately naysaying Champion doubted that the town was ready for that step because not even CAFE thought so. Still operating in a timid mode (but about to vacillate), Pfab was sticking with politics as “the art of the possible,” which Kanner appeared to regard as malleable so that if the council would just exercise leadership, CAFE

452 Telephone interview with Steven Kanner, Cleveland, OH (Nov. 14, 2008). Kanner did not know, but assumed that Miller had also spoken to other council members.
453 Transcription of Iowa City Council Meeting at 32-33 (Oct. 16, 2001).
454 Transcription of Iowa City Council Meeting at 33-34 (Oct. 16, 2001).
“would be happy to have a total ban....” Not interested in devoting precious council time to the pursuit of Kanner’s will-o’-the-wispish utopian idiosyncrasies, the mayor—whom Kanner later characterized as a “right-wing Republican”—tentatively cut short the discussion to “see how many of us are willing to exhibit the leadership and go for a 100 percent ban.” Pfaf, in his inimitable style allowed as he “would if we’d do it,” thus qualifying himself as Kanner’s only backer of a ban that would have applied to all public places, including stores and bowling alleys, and prompting Lehman to declare that radical proposal stillborn (“I think perhaps we won’t spend our time discussing that”) and to steer the council back to the prosaic reality of defining restaurants by the proportion of food sales.

Champion was delighted to water down coverage to “family restaurants,” that is, ones “where people are not drinking large amounts of alcohol...really you go there you have dinner you might have one, the maximum two glasses of wine....” Turning undisguisedly personal, she revealed that: “I love wine but I never have more than two, when I’m out at a restaurant, so I mean I might be able to be very comfortable with that and totally support it.” So long as she felt snug in her comfort zone, it was irrelevant that her proposal “may not be exactly what CAFE wants, but it’s a strong beginning....” How she could possibly know how strong her ban would be when the city attorney told the council that the city had collected data only on bars with 50 percent food sales Champion failed to explain. Although a recent trip to Provincetown had proved to her that under a public places smoking ban even the bars were “jammed [sic] packed,” for Iowa City nothing but “small steps” would do. She succeeded in reinforcing her comfort level by prompting the owner of a restaurant/pub with live performances by local musicians to declare that “that number in that range would probably...safe [sic] us and at the other places.”

Kanner discomfited Champion by inverting her proportions and proposing a smoking ban in any place 20 or 30 percent of whose sales stemmed from food, thus excluding only bars that sold “a few chips or something”; she opposed any law that covered bars that served bar food and thus enabled young people to drink without eating. The mayor then animated those who had yet to reveal their
position to speak up. Vanderhoef admitted that she too had not been entirely “comfortable” with 50/50, but with 70/30 “a little high,” 60/40 would be more acceptable to her. Champion’s smoking/business twin, O’Donnell, unsurprisingly supported her 70/30 arrangement, especially since it identified the only kind of restaurant he could contemplate voting to include in a ban—a place “where you go out with your family and sit down and eat.”

As the debate began to flounder and founder on the shoals of arbitrary numbers shorn of a reasoned public health basis, Pfab persuaded the mayor to permit Dr. Ballinger to shed light on the origin of the 50/50 definition. Her account so transparently reflected CAFE’s past, present, and future position as drenched in non-confrontational compromise that it suggested that the group must have perceived that since it was out of the question that a majority could be found for 50/50, CAFE should start furiously back-pedaling on its principled commitment to 50/50 and portray itself as flexible and appreciative enough to accept even the stripped-down 70/30 proposal:

> Just to give you a little bit of history about this whole thing where the 50 percent number came from when we initially submitted a model ordinance to you, after having thought about this, talked about this, hashed about this, argued about this for literally years we settled on the 50/50 or 51/49 number based on a couple different things. First of all we didn’t want to be seen as a group because we knew that we would become sort of the face of this ordinance. We did not want to as a group be seen as trying to single out certain types of businesses or single out other ones, we were strictly looking for something that sounded logical that if you explained to it somebody on the street. Well what is a restaurant? Well they make more of their money from food than alcohol, that it would be simple for people to understand that we specifically didn’t want to single out places like The Sanctuary or The Mill or anything like that, we didn’t want to go anywhere near that issue and also there is information in the state code where they use the 51 percent thing to define this so we thought that when we were anticipating a potential court challenge that maybe because it was defined that way and this was some of the legal advice that we had that since it was defined that way already in state code in another place that it might potentially be easier to defend.

Seemingly more principled than CAFE, Lehman viewed 50/50 as having a “rather significant impact,” but was unsure as to whether 70/30 would “have any impact”: “But I guess the question is how restrictive do we want to be? At the same time do we want to be so nonrestrictive as to not be effective?” In contrast, Pfab liked the “compromise” he saw looming: whereas 50/50 “would cause
difficulty” for restaurant/bars with live music, for “the people from CAFE I understand 70 is not a problem so I think that’s a pretty decent number,” especially since “that seemed to be where the objections were when I went around in the community.” Feeling stymied in his effort to prod the council to “pick a number,” the mayor decided to resolve a linked issue first: a 24-hour ban or red light/green light? Hearing Pfab and Vanderhoef reject the latter and Champion allowed as at 70 percent she would “be willing to go to 24 hours,” Lehman declared the former chosen and resumed discussion of a percentage as if he were an auctioneer: “obviously the 50 percent is not going to fly, I hear 70 and I’ve heard 60.” Vanderhoef noted that although she “would be happy with the 50,” she offered 60 as a compromise vis-a-vis 70.464

With the council deadlocked, Pfab once again prompted Dr. Ballinger to set the members straight. This time she offered both a modest and a more radical solution:

Well it seems like the question here is trying to make the ordinance apply to as many restaurants as possible and also somehow take into accommodation or into mind those few places where sort of the hybrid [sic]. So you can do that two ways, you can either make the ordinance go 70/30 in other words,... 30 percent alcohol and that will include the true family restaurants. Or you can go really almost the opposite way and what that would end up doing would be including, any in other words that had more than...30 percent food it would be so restrictive that it would include almost any restaurant that sold very much alcohol. In other words it would include The Mill, it would include, and again I don’t want to get into this trap of singling places out but since they’re the ones that have been mentioned, any of these places that are sort of a hybrid it would include all of those, so in other words the only places would be left would be the true bars that had beer nuts and chips. In other words what Mr. Kanner said.465

Champion still wanted none of Kanner’s more inclusive definition, even though Ballinger pointed out that it “would definitely include all of these places and keep them on an even footing that the people at The Sanctuary and The Mill are concerned about.”466 The CAFE surgeon presumably saw a possible opening here to engage owners’ self-interest in expanding the scope of the ban and—disregarding her own admonition not to name names—drove the point home: “Well what would they think about having it go so far the other way that they’re not in competition with the people who have beer nuts and chips in the back but that really almost all of those places are the same, treated the same then.

464 Transcription of Iowa City Council Meeting at 41-42 (Oct. 16, 2001).
465 Transcription of Iowa City Council Meeting at 43 (Oct. 16, 2001).
466 Transcription of Iowa City Council Meeting at 43 (Oct. 16, 2001).
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Vito’s is the same, The Mill is the same, The Sanctuary is the same, The Airliner is the same, Mondo’s downtown is the same, all of those are on the exact same footing and their [sic] not competing with let’s say The Q bar, The Deadwood.\textsuperscript{467}

The only proprietor to speak up, the owner of The Sanctuary, was unmoved by Ballinger’s logic: “[I]t’s the fact that you lose that bar revenue to places where people can smoke where your food sales at that time of night are ancillary for the bar revenue, but if you take away that bar revenue your [sic] taking away a significant portion of your income.”\textsuperscript{468} CAFE’s initiative thus died, and after the city clerk had pointed out that she had recorded Champion, O’Donnell, and Pfab for 70 percent food, and Vanderhoef and Wilburn for 60 percent, the mayor resolved the issue by solomonically weighing in for 65 percent and securing the council’s agreement.\textsuperscript{469}

Just when the mayor opined that “we’ve done our job for tonight folks,”\textsuperscript{470} the city attorney had one more loose end from the catalog of questions she had posed to the council half a year earlier, when she had set forth the features in the Ames ordinance: “What about outdoor seating areas? Does it apply in outdoor seating areas?” The three smokers, Champion, Lehman, and O’Donnell, immediately stated that it was unnecessary, and when Wilburn agreed on the inscrutable grounds that “part of the issue is really just talking about ventilation systems confinement,”\textsuperscript{471} the council decided against a form of protection against secondhand smoke exposure that CAFE had not even requested.\textsuperscript{472}

The concrete result of the proceedings was direction to the city attorney by the council to prepare an ordinance imposing a 24-hour a day smoking ban in restaurants defined as establishments 65 percent of whose gross receipts stemmed from food and non-alcoholic beverages but excluding outdoor service areas and not addressing establishments with separate ventilation systems; conversely, establishments more than 35 percent of whose gross receipts stemmed from the

\textsuperscript{467}Transcription of Iowa City Council Meeting at 44 (Oct. 16, 2001).
\textsuperscript{468}Transcription of Iowa City Council Meeting at 44-45 (Oct. 16, 2001) (Woodson).
\textsuperscript{469}Transcription of Iowa City Council Meeting at 45-46 (Oct. 16, 2001). Although the transcript did not identify those in support, the press reported that Vanderhoef, O’Donnell, Champion, and Wilburn did. Sara Langenberg, “Council Moves Toward Smoking Ban,” \textit{ICP-C}, Oct. 17, 2001 (1A:7, at 5A:2-4 at 4).
\textsuperscript{470}Transcription of Iowa City Council Meeting at 46 (Oct. 16, 2001).
\textsuperscript{471}Transcription of Iowa City Council Meeting at 49-50 (Oct. 16, 2001).
\textsuperscript{472}The council also decided not to decide the question of whether to restrict minors’ presence in smoking areas. Transcription of Iowa City Council Meeting at 46 (Oct. 16, 2001).
sale of alcoholic beverages were exempt.\textsuperscript{473} Vis-a-vis the 50/50 coverage threshold that CAFE had originally proposed in its draft ordinance more than a year earlier, the group could hardly deny that 65/35 was “‘less than we were hoping for,’” but finally getting a “‘number on the table’” after having worked on the project for 18 months purportedly made CAFE “‘happy.’”\textsuperscript{474}

\textit{First Consideration: Nov. 27, 2001}

[A]ll of you have a reluctance to get involved in private enterprise and the way you get involved in it is through public safety or welfare. The question before you is really is there a public health issue here? If there’s a public health issue and the documentation’s been presented to you and you all know in your own mind whether there’s a public health issue to be addressed, then you need to ask how is that addressed? But if public health is what gives you the right, the right, maybe even the duty to be involved in the regulating of smoking in these public places then the public health issue exists regardless whether it’s a restaurant or a bar. And if there is a public health issue that mandates the City Council to become involved and to regulate this then you have to go the whole way and regulate it everywhere. If it were contamination of the water supply, I don’t think you’d be talking about well let’s regulate it in restaurants but not in bars, if you deem this to be a health issue and a contamination of the air supply, that same issue exists regardless of the percent of sales one way or the other. And I would strongly support if it’s your determination that this is a public health issue that you meet your fiduciary responsibility and go the whole way on that decision and that is protecting the entire public if that is your determination.\textsuperscript{475}

[W]e’ve had enormous[ly] more communication on this issue than any issue we’ve ever had in the eight years I’ve been on the Council.\textsuperscript{476}

At the special work session on November 12 Vanderhoef announced that she would be proposing two amendments at the public meeting the following day at which the first formal vote on the ordinance was scheduled. The first change that Vanderhoef proposed was to cover restaurants seating 50 or fewer despite the fact


\textsuperscript{475}Transcription of Iowa City Council Meeting at 31 (Nov. 27, 2001) (statement by Russ Schmeiser, part-owner of a restaurant), on http://www.icgov.org/transcriptions/72.pdf.

\textsuperscript{476}Transcription of Iowa City Council Meeting at 33 (Nov. 27, 2001) (Mayor Lehman).
that the state law did not cover such small restaurants and Dilkes’s caution that the attorney general’s opinion expressly did not take a position on them. To be sure, even Dilkes was constrained to admit that Vanderhoef was making a good argument when she sought to justify the expanded coverage on the contextualized legislative history grounds that when the legislature excluded smaller restaurants it was “thinking in terms of trying to divide a very small restaurant into having [a] smoking section and a non smoking section and they decided that that wasn’t possible in such a small section. Well I think if we’re outlawing smoking section, nonsmoking section in restaurants across the board then we should.”

Likewise, Vanderhoef’s preference for changing the coverage threshold from 65 percent food back to 50 percent on the grounds that it would be “the fairest thing we can do and...the most defensible thing and if we’re looking at public health then this is where to go” would have covered additional establishments. Pfab immediately declared his support for both amendments, but neither of the ban’s other backers (Kanner and Wilburn) committed himself, though non-member proponents had already stated that they would prefer a 50-percent rule.

The first consideration of the ordinance that was scheduled to take place at the November 13 meeting was, on account of what the press called the council’s “rampant” “indecision,” postponed for two weeks. That earlier meeting began with brief public discussion. A medical oncologist at the University Hospital succinctly refuted the cigarette companies’ accommodationist myth by pointing out, in the confrontational manner that CAFE eschewed, that: “Restaurants that allow cigarette smoking in effect, by default[,] give preference to those who smoke and care not for their own health, nor that of their children nor that of their fellow diners nor that of the people who work there.”

The director of the Johnson County Public Health Department announced that the Board of Health (although it lacked a majority to recommend an ordinance to the county board of

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477Transcription of Iowa City Council Special Work Session at 29-32 (quote at 31) (Nov. 12, 2001), on http://www.icgov.org/transcriptions/67.pdf.

478Transcription of Iowa City Council Special Work Session at 32-33 (Nov. 12, 2001).

479Transcription of Iowa City Council Special Work Session at 31, 33 (Nov. 12, 2001).


481Sara Langenberg, “I.C. Smoking Ban Delayed,” ICP-C, Nov. 14, 2001 (1A:2-7 at 3). Despite the delay, the Register wrote that the council had “moved closer...to banning smoking....” Tammara Meester, “Iowa City Plans Vote on Smoking Ban,” DMR, Nov. 14, 2001 (4B) (NewsBank).

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supervisors)  had, in the wake of CAFE’s request, approved a letter supporting smoke-free environments. The ubiquitous Jim Mondanaro, once again congratulating himself for having been “at the very cutting edge of making this a non-smoking community along [sic] time ago” and complaining that at some of his restaurants the self-instituted ban had been “a terrible thing for us,” urged the council to create a “level playing field.” And finally, Dr. Ballinger of CAFE reminded council members that the people of Iowa City wanted a smoking ban that operated 24 hours a day in restaurants (defined as deriving more than 50 percent of its receipts from food) of all sizes. At the same time she stressed that Iowa Citians had told CAFE that “they are not ready for an ordinance that covers bars and there has been no grass roots movement despite the wide publicity of our movement in the subsequent year and a half since. And so we as a group have not expanded our efforts in that direction.” In fact, the CAFE survey from 2000 revealed that support for smoke-free bars was hardly minuscule: 40 percent of respondents favored that protection (in addition to the 70 percent who wanted smoke-free restaurants).

As soon as the council moved to take up first consideration of the ordinance, Vanderhoef offered the first of the two amendments she had announced the previous evening—to include restaurants with 50 or fewer seats—which carried without a dissenting vote. Responding to a request by a restaurant owner, Champion then moved to amend the ordinance by switching the penalties for smokers who smoked in a non-smoking area ($25) and for owners who failed to post signage ($100) on the grounds that the former was “the primary criminal.” Under pressure from colleagues she agreed to equalize the two penalties at $100, but the amendment still failed by a vote of 3 to 4 because ban supporters (such as Wilburn and Kanner) deemed the penalty excessive and/or out of character with the ban as largely self-enforcing.

Vanderhoef then offered her second and more important amendment,

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483See above this ch.
484Transcription of the Iowa City Council Meeting at 46 (Nov. 13, 2001) (Ralph Wilmoth).
485Transcription of the Iowa City Council Meeting at 47 (Nov. 13, 2001).
486Transcription of the Iowa City Council Meeting at 49 (Nov. 13, 2001).
487Sara Langenberg, “Developer Wants Total Smoking Ban,” ICP-C, Dec. 6, 2001 (3A:6-7). Later Dr. Ballinger stated that the figure for bars was 35 percent. See below.
488Transcription of the Iowa City Council Meeting at 50, 52 (Nov. 13, 2001).
489Transcription of the Iowa City Council Meeting at 48 (Nov. 13, 2001) (Daryl Woodson, owner of The Sanctuary).
490Transcription of the Iowa City Council Meeting at 52-56 (Nov. 13, 2001).
expanding coverage by increasing from 35 to 50 percent the minimum proportion of alcohol sales triggering a smoking ban. O’Donnell opened the pro-smoking attack on the amendment on the grounds of procedural fairness, but after the mayor suggested that the council vote on the amendment, but defer first consideration of the ordinance for two weeks, Champion shifted the focus of opposition to the substance of the change, in particular to her proclaimed solicitude on behalf of the financial health of owners of restaurants that became bars at night. Her chief witness was, yet again, Mondanaro, who nevertheless admitted that the council was dealing with a “tough issue.” At this point Kanner pushed the debate in two almost diametrically opposite directions. First, despite CAFE’s position that a total ban would not work, he argued that the public was ready for it. He suspected that CAFE “made a political decision not to pursue that partially in fear of, I think, the tobacco companies coming in with some large bars perhaps, or larger...food and alcohol businesses in the City fighting it. I think they’re going to fight us either way and I think it behooves us, if that’s going to happen, to go all the way. ... I think it’s a matter of us having the political will...to lead the city to that step. [W]e have 75% of the people not smoking.” Kanner’s trial balloon immediately burst when Pfab, Wilbur, and Vanderhoeof all denied that the public was ready, and Champion hypocritically declared that she would have to think about it. More revealing was Lehman’s attempt to wriggle his way out of a forthright choice: “I think there is[sic] really only two positions on this. Either you ban everything or you ban nothing. On the other ha[n]d I don’t think the public is ready to accept a ban on everything and so...I think it’s an indefensible position.” He regarded it as illogical to let people who drank get lung cancer but not those who ate, yet he considered “a single step...better than no step.” Unaware that in six and a half years he himself would experience a total statewide ban, at this point all he could imagine was that his grandchildren would probably frequent non-smoking bars. Deeming a total ban in 2001 politically impossible, Lehman was willing to proceed “incrementally” and “do what we can.” (In fact, however, the mayor almost never voted to take the first step and almost always found a reason to prefer nothing to any half-measures.)

Rebuffed in the one direction, Kanner then sent up his other trial balloon, which secured him strange bedfellows. Persuaded that any arrangement short of a full ban had to be “convoluted,” he saw the council’s goal as getting “the least

491 Transcription of the Iowa City Council Meeting at 56-60 (Nov. 13, 2001).
492 Transcription of the Iowa City Council Meeting at 60-62 (quote at 62) (Nov. 13, 2001).
493 Transcription of the Iowa City Council Meeting at 63-64 (Nov. 13, 2001).
convoluted ordinance we can.” What “struck” him in trying to discover what would help the council in reaching its number one goal of protecting restaurant and bar workers and customers was that “perhaps the red light green light or no smoking before 8:30 p.m. is something that might work better than 65% or 50%.” Admitting that he was “not an expert” (a status he immediately demonstrated) and was merely pursuing his “gut feeling,” he reasoned that whereas under the 50-percent regime perhaps half of the restaurants and bars would not be protected, the 8:30 p.m. approach would, to be sure, still leave “the problem of nicotine [sic] being in the environment[,] but still before 8:30 you don’t have the direct smoke,” which he again identified as a “strong agent for carrying that nicotine” (as if nicotine were the culprit). Because all bars and restaurants would be protected (from active smoking) until 8:30 p.m., he estimated that “at worst it’s a wash as far as protecting workers and patrons” was concerned. Moreover, Kanner insisted that red light/green light created a much brighter line for purposes of administration and enforcement than self-certified data on alcohol sales. He conceded not only that this proposal was “not the perfect answer,” but, astonishingly, that “to a certain extent” it was “probably true,” as “[p]eople say,” that red light/green light “is a cigarette industry tool to weaken any ordinance....” Nevertheless, he threw it out for consideration because it was “less convoluted and...helps us get more of a level playing field.”

His three ban co-supporters, Wilburn, Pfab, and Vanderhoef, were, as Kanner must have realized, having none of it. Vanderhoef in particular felt that the 8:30 p.m. rule “defeats a lot of the purpose of having the ordinance,” in large part because air simply did not “clean[ ] out that fast....” In contrast, the ban’s strongest opponents acknowledged that it “would certainly solve my problem with the unlevel playing field” (Champion) and had “some merit” and should be discussed (O’Donnell). Lehman, in contrast, reaching for yet another reason to do nothing, opined that: “We’re just rattling around trying to find some logical way to do an illogical act. ... But any scenario [other than a total ban] we do does not address the public health issue as a health issue. It is one of convenience. Which is going to be best as far as the bars, restaurants, whatever.”

A fascinating question is whether Kanner had thought through whether he would have been willing to join with the three pro-business smokers in order to adopt the Ames approach against the implacable opposition of his three anti-smoking allies. He offered a hint that he might have been when, right before the
vote on the 50/50 amendment, he asked (knowing with certainty that Pfab, Wilburn, and Vanderhoef had already rejected his proposal out of hand) whether “we had a majority that would consider this as an amendment if we defeated the 50%.” After Champion had replied that “I think I could support you,” Kanner put O’Donnell on the spot, who, like Champion, wanted to have another public meeting. Instead of disclosing his position, the mayor proposed delay so that the “huge change” that red light/green light constituted could be discussed.498 Once the 50/50 amendment had passed by a vote of 4 to 3 (Champion, O’Donnell, and Lehman opposed),499 the council agreed (by a vote of 5 to 2 (Pfab and Wilburn opposed) to the mayor’s proposal to defer first consideration until November 27.500

Two days later the Press-Citizen reported that the new version of the ordinance would reduce by about one-half the number of restaurants that allowed smoking: in addition to the 48 restaurants that already voluntarily prohibited smoking, 25 would be required to ban it, while another 25 restaurants that doubled as bars would be exempt from coverage.501 Editorially the paper accused the council of “waffling” and proposed stiffening the members’ backbone by urging them to “throw the whole thing out” and “[l]et the market decide which establishments will allow smoking....”502

On November 27, the day on which the ordinance finally came up for its first consideration before the council, the city attorney gave the members a memorandum stating that the Attorney General’s Office had informed her that, although arguments could be made to support coverage of restaurants seating 50 or fewer customers, the attorney general was of the view that “the ordinance should be kept as clean and simple as possible and that the Council maintain the ability to take advantage of favorable precedent in the Ames lawsuit and the Attorney General opinion by using the ‘public place’ definition set forth in [sic] State Code. The Attorney General notes that the City can always change the

498 Transcription of the Iowa City Council Meeting at 67-68 (Nov. 13, 2001).
500 Transcription of the Iowa City Council Meeting at 68-70 (Nov. 13, 2001).
501 Sara Langenberg, “Plan Cuts Smoking Options,” ICP-C, Nov. 15, 2001 (1A:2-7, 5A:2-6). The actual list, based on interviews with owners and the city attorney’s earlier survey, included 49 restaurants that were already no-smoking, 23 in which smoking would be banned, 25 that would be exempt, and eight about which accurate information was lacking. “Effects of the 50-50 Smoking Ban,” ICP-C, Nov. 15, 2001 (5A:1).
definition of public place down the road.”\(^{503}\) Although Vanderhoef preferred her more comprehensive coverage, she was willing to await the Iowa Supreme Court ruling upholding the Ames ordinance before offering it again; in the meantime, she moved to amend it as suggested. Even Kanner agreed to go along based on a composite survey that he submitted showing that of 223 places with food licenses and indoor service, with certainty only six and possibly another 15 fell in the 50 seats and under category—such a small proportion that he did not think it would affect “that many people.” After this amendment had carried\(^{504}\) Vanderhoef focused on her other amendatory innovation: since there was nothing in the ordinance “that shows any movement after this point in time for decreasing the amount [sic] gross sales of food to move towards what the goal always would be in my mind[—]to take us down to all places that prepare and serve food should be smoke free,” she proposed an amendment raising the alcohol share to 65 percent in two years (meaning that only establishments with a greater share of alcohol sales would be exempt).\(^{505}\)

In the midst of the debate over this expansion of coverage discussion turned toward a proposed red light/green light amendment that Kanner had distributed that day, pursuant to which the purpose of the ordinance would, forthrightly, be (only) to “protect the public health, comfort and environment by prohibiting smoking in any food establishment/licensee between the hours of 2:00 A.M. and 9:00 P.M.....” In addition, it provided that the council “will vote within two

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\(^{503}\) Eleanor Dilkes, City Attorney, to City Council, Re: Ordinance Regarding Smoking in Food Establishments at 1-2 (Nov. 27, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001 at 176, on http://www.icgov.org.

\(^{504}\) Transcription of Iowa City Council Meeting at 20-22 (quote at 22) (Nov. 27, 2001), on http://www.icgov.org/transcriptions/ 72.pdf. For Kanner’s survey, based on data from Johnson County on food licenses, Johnson County Tobacco Free Coalition’s “Smoke Free Dining,” and Dilkes’s survey of 83 liquor licensees, see “Restaurants/Bars in Iowa City” (Nov. 27, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 182-87. According to the survey, under the proposed 50-50 ordinance, about 184 food licensees would be smoke-free, while 39 eating/drinking establishments would allow smoking. \textit{Id.} at 187. Included in the amendment was another proposal made by Dilkes based on a conversation that she had had with a local business owner: it provided a temporary one-year exemption for new establishments reasonably expecting to have alcohol sales above the 50-percent level and existing establishments making a change in operation that was reasonably expected to bring about a change in the proportion of alcoholic beverage sales above 50 percent. The redlined ordinance is found in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 178-79.

\(^{505}\) Transcription of Iowa City Council Meeting at 23 (Nov. 27, 2001).
years” of the ordinance’s enactment on “whether or not the smoking ban shall be increased to a complete twenty-four hour ban.” Kanner’s hand-out included the following talking points in support of his proposal:

1) Would like a total ban but there are not four votes;
2) If not total ban, then we work for ordinance that is least convoluted and will get us toward the following:
   • Will protect health and well-being of the most food/drink establishment workers and patrons in Iowa City;
   • Easiest to administer (both by businesses and by city);[;]
   • Creates a level playing field;
   • Will eventually lead us to a total ban on smoking[.]507

However, Wilburn’s immediate declaration of opposition to red light/green light prompted Kanner to explain that he had thought that time-limited smoking would achieve his goal of no smoking faster than the 50/50 proposal, but that he was now willing to drop his proposal in favor of the 65/35 amendment because it would move the city in the right direction. Wilburn even succeeded in extracting a promise from Kanner not to raise the proposal again during the ordinance’s three readings.508

At this point the mayor finally revealed his position, which was rejection of 50/50 or Vanderhoeof’s “drastic” proposed 35 percent food/65 percent alcohol, and acceptance of 65 percent food/35 percent alcohol with the understanding of revisiting the issue after three years and considering 50/50. Lehman’s view was based on his perception of an allegedly “very unique situation in Iowa City unlike almost any city in the country[—]we have thousands of customers who are in a downtown area, unfortunately a fairly high percentage of these customers are smokers, an ordinance that prohibits smoking based on this 50 percent is going to make a significant number of these places downtown frankly out of bounds to a lot of those young folks who insist on lighting up and especially when they go with their friends.”509 The uniqueness to which Lehman was referring was difficult to discern in terms of downtown areas in general or of college towns in

506Steven Kanner to City Council Re: Proposed Amendment to the Smoking Ordinance (Nov. 27, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 188.
507Steven Kanner to City Council Re: Proposed Amendment to the Smoking Ordinance (Nov. 27, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 188.
508Transcription of Iowa City Council Meeting at 24 (Nov. 27, 2001).
509Transcription of Iowa City Council Meeting at 24 (Nov. 27, 2001).
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particular, but he unintentionally and unknowingly provided the best reason for the more capacious ban—namely, discouraging or even preventing college students and their non-student age-cohorts from frequenting places where the normality of smoking was cultivated, reinforced, and magnified at a period in their lives when, if they did not start smoking, they probably never would later. After Champion and O’Donnell, the other two smoking businesspeople who opposed the ban, had weighed in against the amendment, it passed by a vote of 4 to 3.\textsuperscript{510}

Discussion then turned to the ordinance itself, Champion and O’Donnell proposing an amendment to revert to the exemption for all establishments selling 35 percent or more alcohol. After Pfab had expressed puzzlement as to how its proponents could claim that they were moving toward smoke-free restaurants when they were in fact taking a step backward, Lehman permitted “public input” but subject to the limitation that “someone has something dramatically different to tell us that we haven’t heard before...”\textsuperscript{511} In fact, the only people to speak were four high-profile business owners. Mondanaro, who owned four restaurants downtown (plus a fifth in Coralville), stated that three of them were no-smoking, but that two would be affected by the 65/35 or 50/50 regime. He favored the red light/green light “compromise” that Kanner had proposed, but complained that CAFE members did not understand the compromise because they did not “have their signatures on the dotted line at banks....” He advocated on behalf of red light/green light because it enabled owners to “take care of all the people at all the restaurants 100 percent of the time until 8:30 to 9:00 at night. And then it lets...all people in the liquor business compete on a level playing field.” In contrast, he protested that after that time, when his restaurants turned into bars, he would be unable to “compete fairly” with full-time bars. Bitterly he accused the city council of blithely “talk[ing] about taking away part of my revenue seeking ability” without sitting in his seat with him and feeling his pain. Short of a total ban—which “we don’t have the initiative or guts to do”—he saw only red light/green light as being “fair” by virtue of “take[ing] everybody into account....” Seeking to undermine CAFE’s criticism of that regime’s impact on public health, he (counterfactually) insisted that “we all have been in restaurants or places where people smoke and then you go in the next day it’s not a factor.”\textsuperscript{512}

\textsuperscript{510}Transcription of Iowa City Council Meeting at 25-26 (Nov. 27, 2001).
\textsuperscript{511}Transcription of Iowa City Council Meeting at 27-28 (Nov. 27, 2001).
\textsuperscript{512}Transcription of Iowa City Council Meeting at 28-29 (Nov. 27, 2001). In spite of his verbal stance in favor of a smoking ban, Mondanaro reinstated smoking in one of his restaurants because “eliminating a segment of the market cut into revenue....” Deidre Bello, “Officials Shrug Off No-Smoking Setback,” \textit{DI}, July 17, 2001 (1:1).
The owner of The Mill, a restaurant/bar also well known for its music, asserted flat out that “[w]e cannot run live music in a no smoking environment because 40 percent of our customers won’t come and neither will their friends.”\(^{513}\) (Despite an apparently orchestrated email campaign to the council complaining about the “disastrous effects on businesses that support the arts, specifically live music at restaurants like the Mill,” under the statewide smoking ban six and a half years later, live music miraculously proved to be so compatible with the absence of smoking that, as one Mill employee put it, “actually our sales have gone up” because people whose aversion to smoke had previously kept them away began frequenting the establishment.\(^{515}\) And as for the smokers, the owner of The Sanctuary observed that “people get used to things.”\(^{516}\)

As was readily foreseeable, Champion’s amendment was then defeated by a vote of 4 to 3, only her fellow smokers O’Donnell and Lehman joining her.\(^{517}\) Knowing that the four-member majority was about to vote in favor of the ordinance, Champion asked what they perceived as their obligation to business owners who in two months informed the council that their business had declined 40 or 50 percent: “This is not just fun and games we’re talking about, this is how people make a living, this is how they make their house payments, and they’re scared to death and I don’t know if they’re right or wrong but I do worry about it and it bothers me that I don’t hear that concern coming from this Council up here....” Rather than asking Champion whether by “this is how people make a living” she meant facilitating the exposure of hundreds or perhaps even thousands of customers and employees to secondhand smoke, some proportion of whom would become ill or die as a result, Pfab suggested going to a 100-percent ban in all places to eliminate any individual owners’ “tremendous disadvantage, while Kanner, more fancifully, mentioned the possibility of using the city’s economic development money to subsidize some of the owners until a 100-percent ban went into effect.\(^{518}\)

The mayor, who wanted it known that “I absolutely support the concept” of smoke-free restaurants and did not “want folks to say that I did not support

\(^{513}\)Transcription of Iowa City Council Meeting at 29-30 (Nov. 27, 2001) (Keith Dempster of The Mill).

\(^{514}\)Email from Aaron Wolfe to Iowa City Council (Nov. 20, 2001), in City Council Documents, Meeting Folders 2001 (final), Special Meeting Nov. 27, 2001, at 174. A very large volume of similar email was sent to the council at this time.

\(^{515}\)Telephone interview with unidentified employee at the Mill (May 19, 2009).

\(^{516}\)Telephone interview with Daryl Woodson, Iowa City (May 19, 2009).

\(^{517}\)Transcription of Iowa City Council Meeting at 32 (Nov. 27, 2001).

\(^{518}\)Transcription of Iowa City Council Meeting at 32 (Nov. 27, 2001).
regulating smoking in restaurants” because he merely deemed 50/50 “too drastic” a starting point, finally grew weary of the council’s “just batting our gums” and called the roll for the inevitable 4 to 3 vote for passage on the ordinance’s first reading. As passed, the ordinance thus excepted establishments whose on-premises alcoholic beverage sales exceeded 50 percent of their gross receipts for on-premises consumption of food, beverages, and alcoholic beverages—a proportion that would be increased to 65 percent two years after the effective date (on March 1, 2004).

The members’ fixed positions and voting patterns strongly suggested that the council would pass the ordinance by the same 4 to 3 vote on the next two considerations.

Second Consideration: Dec. 11, 2001

I understand that there’s an agenda to go to completely smoke free environment. I recently came back from Rochester, Minnesota Mayo-Clinic. The neighbor to the north the, you know, paragon of modern medical achievement. There [sic] downtown is spotless. There are a number of stores available for people to cruise through, beautiful places to sit, all of it non-smoking. I found it to be sterile. I found it to be a different sort of feeling like the hospital had encroached upon the entire place. This is a college town and people in their youth are going to have youthful indiscretions. And I’m not condoning…no one would argue the cost of second hand smoke, of alcohol, of motor vehicles, of guns, of any number of issues to public health. And if you really think that safety is the issue let us all sit back and contemplate, how safe are we? Haven’t we just been reminded of that? You could be on the wrong airplane, you could be in the wrong building, you could be in the wrong remote village in some distant land. None of us are safe. And it's an illusion to legislate safety. My suggestion would be to look at some creative solutions. When I worked at The Mill I saw math professors, Schizophrenics, fraternity boys whooping it up together or at least coexisting in a space that they felt comfortable in. And in these times when people are hurting are we going to start to take away their options of how they should behave in public, using legal substances?... Am I doing what’s right for Iowa City to keep it a place of tolerance, a place of diversity….  

519 Transcription of Iowa City Council Meeting at 33-34 (Nov. 27, 2001).


522 Transcription of Iowa City Council Meeting at 58 (Dec. 11, 2001), on
Unsurprisingly, at the second consideration on December 11, all amendments, including one that would have extended the ban’s reach, and efforts to delay failed. To begin with, the two most prominent opponents, Champion and O’Donnell, pressed, once again, to delay the process. The first of three amendments sought to delay second consideration until February 2002 on the grounds that the Chamber of Commerce wanted additional time to evaluate how the ordinance would affect business. After it had been voted down 5 to 2, Champion offered a more transparently anti-regulation measure postponing the ordinance indefinitely, allegedly on account of the “business climate....” Its defeat by the same vote was followed by her attempt to exempt places that had separate rooms with separate ventilation systems. The rest of the council gave equally short shrift to this typical cigarette industry proposal, which also garnered only Champion’s and O’Donnell’s votes.

Mayor Lehman then reiterated his objections to bans based on percentages of food/alcohol because they were not logically related to the underlying public health problem. Instead, he declared that he would vote for an amendment banning smoking in any establishment that served or prepared food for on-site consumption. Pfab called it a “great idea,” but one that he would not support

http://www.icgov.org/transcriptions/75.pdf. The speaker, Lauren Hanna, was a physician who as a medical student had worked in a smoky restaurant/bar in Iowa City, whose owner, Keith Dempster, chimed in at the same meeting that even a 50/50 percent smoking ban would turn Iowa City “into another damn East Berlin.” Id. at 67-68. Ironically, cigarette smoking was as omnipresent in East Berlin as coal burning. Seven years later Dr. Hanna believed that her opposition to government interference with business owners’ public health decisions had been correct in 2001 and was still correct in 2008 after enactment of the Smokefree Air Act, which she opposed. Astonishingly, she viewed the whole issue exclusively from the perspective of what she regarded as a misguided policy of dealing with addiction, never once on her own even mentioning the central problem of involuntary exposure of nonsmokers to secondhand smoke. Telephone interview with Dr. Lauren Hanna, West Liberty, IA (Nov. 12, 2008).


Transcription of Iowa City Council Meeting at 44-47 (quote at 46) (Dec. 11, 2001). Pfab’s position was purportedly linked to his perception that regulation of restaurants would lead more of them to become bars; this outcome was, in turn, unacceptable because the community’s “number one problem” was “probably...over[-]indulgence and the number of bars....” In view of the saloonification of downtown during the last quarter of the twentieth century Lehman’s declaration that drinking and bars were “not what this community’s all about” was hypocritical. Asked whether the city council’s beholdenness to commerce über alles was so exclusive that there was no chance that it would do
something to reverse the trend toward the saloonification of downtown, the director of the Johnson County Public Health Department noted that: “I am not sure about the City Council’s reluctance to act. There are a couple council members who would like to take action, a couple who have clearly stated that they don’t think minors drinking in licensed facilities is a problem and that business is more important than short or long term health issues, and a couple who basically use avoidance tactics when the issue is brought up.”

Email from Ralph Wilmoth to Marc Linder (Feb. 10, 2006).

526 Transcription of Iowa City Council Meeting at 48 (Dec. 11, 2001).
527 Transcription of the Iowa City Council Meeting at 50 (Dec. 11, 2001).
528 Transcription of the Iowa City Council Meeting at 52 (Dec. 11, 2001).
529 Transcription of the Iowa City Council Meeting at 49 (Dec. 11, 2001).
530 Telephone interview with Steven Kanner, Cleveland, OH (Nov. 14, 2008).
531 Transcription of the Iowa City Council Meeting at 59 (Dec. 11, 2001) (Kevin Perez).
to eat in smoke-free restaurants compared to 35 percent who wanted smoke-free bars, there had been no “extraordinary uprising from the bar owners or people who are primarily frequenters of bars coming forward to ask us for that.” Specifically addressing Kanner’s question, Ballinger sought to impress on ban supporters on the council the pattern that had played itself out over and over again across the country toward the end of the municipal ordinance process: 532

There is uniformly a drive to have this apply across the board everywhere and then everyone says yeah that’s great. Why don’t we do that? And then to appease the people who have not had their concerns addressed, exception after exception, hardship clause, we’ll phase this in, we’ll try to make allowances for people, let’s accommodate everybody, let’s have one big umbrella and bring everybody in underneath it. Let’s try to get along and they end up having an ordinance that looks like Ames, one which is being contested right now on the basis of having so many exceptions and the lack of fairness that is perceived to the people that it applies to. ... We too want smoke free environments across the board in Iowa City however, our common sense tells us that not only can we want it, everybody else has to want it too. And right now we have information that states that people want it in restaurants. We do not have information that states, and I don’t think anybody else has been able to show it to us that they have that, that this would apply and be successful and people would ask for it today in bars. 533

In other words, CAFE believed that covering bars would exceed Iowa City’s capacity for compliance/enforcement.

Kanner, who was indirectly trying to persuade CAFE to free Pfab to vote for the broader ban, pleaded with Ballinger to recognize that her comparison had gotten the relationship between Ames and Iowa City backwards: “We’re making it tougher where Ames was...making it looser....” In response Ballinger began reciting exemptions from the Ames ordinance such as bowling alleys (as if they had ever been covered in any proposed Iowa City ban) and red light/green light, and even though she soon ran up against her ignorance of the facts (“help me out here folks”), Kanner kept trying, in vain, to explain to her that the more exemptions she mentioned, the more she was making his “point,” but she failed

532 Transcription of the Iowa City Council Meeting at 52-53 (Dec. 11, 2001). Ballinger incorrectly depicted the process in Ames: the transformation of the ordinance took place at the beginning, not the end, of the process and in direct negotiations with ATTF, not before the council. Moreover, she entirely misstated the basis of the lawsuit, which had nothing to do with exceptions or fairness, but solely with preemption. Ironically, a bar owner later corrected Ballinger. Id. at 62 (Daryl Woodson). Even more ironically, the same owner then suggested that the council sit on the proposal until the Iowa Supreme Court upheld the validity of the Ames ordinance. Id. at 63.

533 Transcription of the Iowa City Council Meeting at 53-54 (Dec. 11, 2001).
to grasp it even while literally swearing that “I can appreciate your point.”

Knowingly or not, Wilburn cut through the misunderstanding to voice the
suspicion that prevented him and Pfab from casting the deciding vote for
Vanderhoef’s amendment: “We have history right here where we make a move,
several exemptions get introduced. And just here tonight, just introducing it there
were…three other potential amendments. And I suppose it’s a matter of trust as
to what’s going to happen between…a second reading and a third reading. And
that’s the point that I think is being brought up here. ... And I will again add the
point that when we get to a third reading, what other combinations of exemptions
are going to be brought back in to make it resemble the Ames ordinance with a
lot exemptions.”

To dispel Wilburn’s fears, Kanner asked Vanderhoef and Lehman whether
they “intend[ed] to add more exemptions.” Though both straightforwardly denied
any such intention, Lehman did manage to sow confusion by adding: “We’ve
never discussed bars. And I think we need to stick with the restaurants, sort of,
until…unless we want to go into bars. Even the Café folks have not been
interested in pursuing that. We have talked about restaurants from day one and
I think we need to conclude that and then work with bars.” In fact, what CAFE
purported to support was a vote that evening on the ordinance without
amendments because, as other cities had shown, the way to make all public places
smoke-free was “incrementally”; if immediately afterwards the council wanted
to vote on Vanderhoef’s amendment, “we will support you.”

When the mayor finally called for a vote on Vanderhoef’s amendment to
expand the smoking ban to include public places that prepared or served food for
on-premises consumption (thus striking the exemption for bars whose alcohol
sales exceeded 50 percent of their total receipts), Pfab, who presumably
supported the substance of the amendment, nevertheless balked because the
importance of the change meant that the council, instead of being able to vote on
the ordinance’s second consideration, would be going backward to first
consideration. Perceiving a pattern of someone’s always wanting to make a
change as soon as the council got close to a proposed ordinance’s passage (and
echoing CAFE’s insight that “[i]f I were Philip Morris I would want to delay this
ordinance because when ordinances like this are passed I would be selling fewer

534 Transcription of the Iowa City Council Meeting at 54-55 (Dec. 11, 2001).
535 Transcription of the Iowa City Council Meeting at 56 (Dec. 11, 2001).
536 Transcription of the Iowa City Council Meeting at 65 (Dec. 11, 2001) (Eileen
Fisher).
537 Transcription of the Iowa City Council Meeting at 69-70 (Dec. 11, 2001).
Pfab identified the underlying cause: “It’s what the tobacco industry always does.” Vanderhoef tried to persuade Pfab that adoption of the amendment would be the best way of achieving his goal of zero public smoking, but Pfab revealed that his real objection was the fear that despite adoption of the expansive amendment now, the ordinance might fail before its passage on third consideration, leaving anti-smokers with nothing. The surprising 4 to 3 vote against the amendment could have lent credence to Pfab’s suspicion: Lehman’s vote in the affirmative (joined by Kanner and Vanderhoef) could have been interpreted as a Trojan horse that would have exposed the ordinance to ultimate defeat if Lehman turned against it on second or third consideration. If, on the other hand, Pfab’s fear was baseless, he and the other anti-smoking advocates unnecessarily deprived the city of a vastly expanded zone of protection from secondhand smoke exposure. Pfab’s rejectionist position at this point was in large part a function of his following the lead of CAFE, which, as already noted, was both skeptical of risking the success of what it was on the verge of achieving (the 50/50 ordinance) for the sake of a speculative gain and in principle probably too timid to contemplate confronting the opposition of bar owners and their customers who would have been covered by the more comprehensive ban. In the event, on second consideration the ordinance once again passed by a vote of 4 to 3, with the three smokers (Champion, O’Donnell, and Lehman) in opposition. In a vain effort to salvage his reputation, the mayor seized the word to preempt untoward press accounts: “I want to make it very clear that I support a much stronger version...and a much fairer version then [sic] the one we just had [on] second consideration so I really don’t like reading in the papers that the mayor voted against an ordinance that would have...that would have...and I don’t think

538 Transcription of the Iowa City Council Meeting at 65 (Dec. 11, 2001) (Eileen Fisher).
539 Transcription of the Iowa City Council Meeting at 72-73 (Dec. 11, 2001).
540 Transcription of the Iowa City Council Meeting at 74 (Dec. 11, 2001).
541 Vanderhoef later stated that she had believed at the time that Lehman had voted in good faith for her amendment because it had created the more level playing field that he wanted; consequently, in her view, if Pfab and CAFE had not misjudged the situation, Iowa City from the outset would have had a broader ban. Telephone interview with Dee Vanderhoef, Iowa City (Nov. 10, 2008).
542 In fact, Pfab—who later stated that he had not trusted Lehman, in part because the latter had lied to him several times—concluded on the basis of a review of the transcription of the meeting that his vote had been in part driven by his suspicion that Lehman might have been laying a trap. In contrast, Pfab characterized O’Donnell’s actions on the council as actuated by his not wanting to be “an obstructionist to making money” by his business friends. Telephone interview with Irvin Pfab, Iowa City (Nov. 9, 2008).
the other two council people...they’re of the same opinion.”

Third and Final Consideration: Jan. 8, 2002

What we will be doing...is making more restaurants into bars. The number one problem nationally is alcohol. We bypass number one to address number two to make number one more prolific. ... We as a council are here to support business, grow the tax base and look responsibly at economic development and I don't think this addresses any of that.

I’m Jewish and when my people left Egypt a few thousand years ago I’m sure it was a significant blow to the Egyptian property holders and business owners because a lot of their work left. When the slaves were freed in the south I’m sure it was a significant blow to property holders and business owners there too cause a lot of their work left.... But there’s certain...things that’s more important maybe than business. Maybe like life is more important than profit. If businesses are going to be hurt by doing something that hurts other people and by being forced to stop doing something that hurts other people that’s their problem. Because you know, I mean they’re poisoning people. And if you go out of business because you’re forced to stop poisoning people, that’s a small loss.

At the council’s special work session on January 7, 2002, the day before the third and final vote on the ordinance was scheduled, opponents offered several amendments in response to the city attorney’s request that if the council intended to make changes to the ordinance, it discuss them at the work session so that she could draft the requisite provisions before the vote on January 8 in order to spare her the task of crafting the language “during the formal meeting without some time for reflection on the possible ramifications of the language chosen.” Opponents, unsurprisingly, did offer such revisions. Straight off, O’Donnell asked whether anyone would be interested in reverting to the scheme under which smoking would be banned only in establishments deriving at least 65 percent of their sales from food. He justified the amendment by reference to the council’s obligation to businesses “to find out how this is going to affect them financially.”

543 Transcription of the Iowa City Council Meeting at 75 (Dec. 11, 2001) (the last two ellipses are in the transcription).
545 Transcription of Iowa City City Council Meeting at 49 (Jan. 8, 2002) (statement of Richard Lutz).
He secured an expression of interest only from his smoking mate Champion and a decided rebuff from Pfab, who insisted that exposure to secondhand smoke was “still a health issue...not a business issue.” O’Donnell sought to steal Pfab’s rhetoric and turn it against him by asserting that eating was also a health issue—a dark aphorism on which Champion shed light by pointing out that it did not mean that “we...need to go out to eat to be healthy,” but that they were “talking about people’s livelihood’s [sic]...not...about a hobby, we’re talking about people who are making mortgage payments and raising children.” In response to Champion’s question as to what ban supporters had in mind “as a backup” in case businesses began failing, Pfab retorted that as soon as the pending ordinance was passed, he would back a 100 percent ban. O’Donnell illogically claimed that his 65/35 proposal “would have sent a clear message because I think we would have gotten a 7-0 vote”—despite the fact that only he and Champion championed it—whereas the 4-3 vote by which the ordinance would in fact pass “certainly isn’t a good way to start this.” Mayor Lehman, who rejected 50/50 (or, apparently, any other food/alcohol ratio), while seeming to indicate that he might support coverage of all establishments that prepared food, was joined in earnest by Vanderhoef; Pfab promised to vote for an even broader workplace ban, but only after the 50/50 ban had been adopted. Kanner expressed interest in a 100-percent ban in all places that served or prepared food, but at the same time he confusingly echoed CAFE’s concern that “this is a typical tactic, not specific to us perhaps of [sic] individuals but the strategy is used by the tobacco industry to delay and weaken an ordinance such as the case in Ames and so CAFE is urging us to pass this and then go onto something else.” Kanner’s failure to pry Wilburn loose from his attachment to 50/50 insured that the lowest common denominator would prevail. In a literally last-minute effort O’Donnell made yet another stab at rustling up support for “red light green light,” but no one else would join him, thus leaving the ordinance substantively unchanged and prompting the Press-Citizen to conclude that the following night’s vote “may be a mere formality.” At the same time, the newspaper reminded readers, on the eve of final passage, that the effect of the ordinance when it went into force on March 1 would merely be to ban smoking in about 25 restaurants compared to the approximately 50 that had already prohibited smoking voluntarily.

547 Transcription of Iowa City Council Special Work Session at 44-49 (quotes at 46, 49) (Jan. 7, 2002), on http://www.icgov.org/transcriptions/78.pdf.
548 Transcription of Iowa City Council Special Work Session at 48-50 (quote at 49) (Jan. 7, 2002).
549 Transcription of Iowa City Council Special Work Session at 52 (Jan. 7, 2002).
550 Sara Langenberg, “Smoking Ban Nears Approval,” ICP-C, Jan. 8, 2002 (1A)
The council’s third and final consideration of the ordinance took place on January 8, 2002.\textsuperscript{551} After Mayor Lehman had sworn his ritual oath that he “would support a total ban,” Nick Herbold, a University of Iowa student senator (who would soon be elected Student Government president) who did not smoke but attended bars “as much as I can,” registered a protest against an ordinance that would prevent people over the age of 18 who filled the bars after 9 p.m. from making “adult decisions” to be there “if they want to be exposed to smoke....” In pursuit of this self-destructive libertarian goal he deemed red light/green light such a “good compromise” that he wondered why everyone did not support it and asked council members to explain the basis of their opposition. After Vanderhoef had referred to lingering carcinogens and Kanner to the paramount concerns of workers’ health,\textsuperscript{552} Herbold’s request for time to respond triggered the first of Lehman’s outbursts of impatience with the issue’s continued presence on the council’s agenda after “six months and hours and hours”: “believe me...we have worn this one out.” Seizing the mayor’s reluctantly granted permission to comment, Herbold, who conceded that he was ignorant of the science of the suspension of particulate matter, nevertheless opined that red light/green light “helps the people out during the day and...lets the students relax in a non[-]sterile environment where they can, you know, really let go at night.” Skipping over an explanation of the mutual exclusivity of toxicity and sterility, Herbold sought to rebut Kanner’s proletarian agenda by disclosing the results of his telephonic survey of “all the bar employees that I know”: the smokers had said that smoke did not bother them, while the non-smokers “overwhelmingly” said that they either did not find it annoying or that when applying for the job they had understood the risk that they were taking. And a like-minded Herbold chimed in that “every job has a little bit of a risk. I worked road construction a couple summers ago and I took a lot of risks with that. And I think that was part of the job.” His closing admonition to the council to consider red light/green light resonated only with the most reactionary pro-smoking and pro-employer member, O’Donnell, who lamented that he had brought it up just the previous night and “didn’t have the support for it.”\textsuperscript{553}

\textsuperscript{551}Sara Langenberg, “Smoking Ban Passes,” ICP-C, Jan. 9, 2002 (1A:6-7, 4A:3-6).
\textsuperscript{552}Transcription of Iowa City Council Meeting at 40-41 (Jan. 8, 2002).
\textsuperscript{553}Transcription of Iowa City Council Meeting at 42-43 (Jan. 8, 2002), http://www.icgov.org/transcriptions/80.pdf. In fairness to Herbold it should be noted that as a law student five years later he developed a much more critical position on exposure...
Following other public comments (including one by a restaurant owner who asserted that “[n]ot a single owner here has been talked to by big tobacco”),\textsuperscript{554} the mayor once again voiced impatience with having to listen to the public any further, especially since, as far as he (and anyone else) understood, “the Council has pretty much decided what they’re going to do.” In response to an unidentified male audience member’s interjection that the council had still not heard that what it was going to do was wrong, Lehman, reinforcing his point, observed that he agreed that the council was wrong to adopt the ordinance. Even O’Donnell, who wanted to hear more comment (from complaining owners), was compelled to agree with the mayor that the decision had been “made two readings ago.” Garnering the only applause recorded by the transcript, O’Donnell faithfully projected the empirically preposterous claims that his fellow businesspeople had apparently osmotically absorbed from the cigarette oligopoly’s playbook: “We need to replace those signs as we enter Iowa City that say we’re a nuclear free zone and say welcome to Iowa City we’re closed.” By reminding the council of a fact of which they were all aware, Kanner succeeded in pushing the mayor to hear out the few people who still wanted to speak: “This is obviously something that’s touched a nerve in the community. We’ve had the most letters we’ve ever had.”\textsuperscript{555}

Having pro forma listened to the public, the council next heard Champion’s pro forma re-presentation of a motion to defer the ordinance’s third consideration until the Chamber of Commerce had performed an impact study. Her ideological twin, O’Donnell, “of course,” agreed to second her motion, but it lost by the same 5 to 2 vote that had defeated it a month earlier.\textsuperscript{556} As Lehman began to call the roll on the ordinance’s final vote, Vanderhoef revealed that she had been wrestling with the best strategy for securing adoption of her amendment to achieve “zero smoking in restaurants”:

It was suggested to me today to not support the 50/50 and announce it up front so that the others who are supporting 50/50 would be asked to make up their mind right then. What has happened as I see it from this Council is that there has been some fear in the Council that amendments would come around that would change the ordinance as the young gentleman mentioned tonight, the red light green light. We’ve talked about that several different times. We’ve talked about ventilation several times. No one seems to know for sure how everyone is going to come down. So knowing that I have supported the 50/50 from the beginning I will support 50/50. If that passes tonight as soon as it’s done I will

\textsuperscript{554}Transcription of Iowa City City Council Meeting at 45 (Jan. 8, 2002) (Perez).
\textsuperscript{555}Transcription of Iowa City City Council Meeting at 46-47 (Jan. 8, 2002).
\textsuperscript{556}Transcription of Iowa City City Council Meeting at 52-53 (Jan. 8, 2002).
As soon as the ordinance, without fanfare, was adopted by a vote of 4 to 3 (O’Donnell, Champion, and Lehman, as always, opposed), Lehman announced that he would entertain a motion from any member proposing an amendment to amend the ordinance just passed to apply it to “any establishment that prepares or serves food” (or, as the mayor incorrectly paraphrased himself in the alternative, that “serve[s] prepared food”). Making sure that no one was procedurally confused, he stressed that the “ordinance we passed is passed” and thus would in no way be jeopardized by adoption of the more inclusive amendment. Pfab, whom his colleagues appeared to regard as a gadfly, immediately declared himself in favor of a prohibition in all public places and places of employment, but Lehman dismissed the suggestion as irrelevant, and even Vanderhoef felt compelled to add that she would discuss it later but not then. After Kanner (of all people) quibbled over whether the council could discuss such an amendment without notice to the public and Lehman declared, “Yes we can,” the city attorney clarified for the movant the difference between “and” and “or” and asked whether she wanted to exclude places that served only prepackaged foods such as chips and peanuts. Pfab slipped in that he wanted the more inclusive “or,” but Vanderhoef opted for covering only establishments that both prepared and served food for on-premises consumption. Even among her most plausible allies, Vanderhoef found little resonance: Pfab at first refused to second her motion (because it failed to cover restaurants with 50 or fewer seats, thus retaining the “uneven playing field”), agreeing to do so only when no one else would, while Kanner wanted to defer the matter, adding, without explanation, that if forced to vote on the spot, he would vote No. In addition to fearing that failure to support her amendment that very evening might kill it, Vanderhoef urged support for it on the grounds that owners should be put on notice that if the amendment passed, they would not have to bother with certifying their alcohol sales. Pfab, frustrated that everyone dismissed his proposal on the grounds that inclusion of small restaurants might jeopardize the ordinance’s validity, sought to get around the problem by (again) proposing a ban in all public places and places of employment, but no one was interested. Predictably, Wilburn refused to consider Vanderhoef’s proposal until he saw greater movement in the wider public for a total ban. Under pressure from the mayor to conclude the discussion, Kanner expressed a preference for a stricter ban than Vanderhoef was offering.

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557 Transcription of Iowa City City Council Meeting at 53 (Jan. 8, 2002).
558 Transcription of Iowa City City Council Meeting at 54 (Jan. 8, 2002).
559 Transcription of Iowa City City Council Meeting at 55-56 (Jan. 8, 2002).
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either in the form of including all places with a food license or the more inclusive “prepare or serve” language; he might even be willing to support her amendment, but only at a deferred consideration at the next work session. Pfab’s expressed support for Kanner’s position presumably made it clear to Vanderhoef that she had at best three votes for the present (Lehman failing to disclose his position and no one pressing him to take a stance).\textsuperscript{560} The opportunity for seizing on whatever momentum had been built up to expand significantly coverage of the smoking ban and to protect many more people from exposure to secondhand smoke having been squandered, Vanderhoef withdrew her motion to amend and a majority agreed to put it on the next work session two weeks later.\textsuperscript{561}

With CAFE too timid to push beyond the “more options for smoke-free dining” that it perceived the public as supporting,\textsuperscript{562} the ordinance as passed simply prohibited, effective March 1, 2002, those in custody or control of public places where food was prepared or served for on-site consumption from designating any part of the establishment as a smoking area—subject to an exemption for establishments more than 50 percent of whose gross receipts for food, beverages, and alcoholic beverages sold for on-site consumption stemmed from alcoholic beverages, a proportion that was to rise to 65 percent on March 1, 2004 (by which time, however, the ordinance had been judicially invalidated), and a temporary one-year exemption for any establishment “making a change in operation which is reasonably expected to result in a change in the percentage of alcoholic beverage sales” such as to raise it above 50 percent.\textsuperscript{563}

At the council work session on January 22, 2002, Mayor Lehman introduced the last item with “surprise, surprise, Smoking in Restaurants Amendment,” prompting the city attorney to observe that “it’s on the agenda because you all wanted to talk about it.” Just to set the record straight, O’Donnell made no bones about the fact that he had certainly not wanted to talk about it, but forward-looking Lehman simply wanted to find out whether there (still) were “four folks on the Council who would be interested in reintroducing the smoking issue and discussing whether we want to go to a zero smoking tolerance in restaurants.”

\textsuperscript{560} Transcription of Iowa City City Council Meeting at 57-61 (Jan. 8, 2002).
\textsuperscript{561} Transcription of Iowa City City Council Meeting at 61-62 (Jan. 8, 2002); Complete Description of Council Activities at 6 (Jan. 8, 2002). Beyond Vanderhoef, Kanner, and Pfab, Lehman did not identify the fourth vote.
\textsuperscript{563} [City of Iowa City,] Ordinance No. 02-4000, An Ordinance Amending Title 6 of the City Code by Repealing Chapter 7, Entitled “Smoking in Public Places” and Enacting a New Chapter 7, Entitled “Smoking in Food Establishments,” §§ 6-7-3 and 6-7-5 (Jan. 8, 2002).
The not always consistent Pfab at first allowed as “[i]f it was any further down the road I’d be happy to support it,” but after (of all people) O’Donnell had had to remind him that “[t]his is your chance” and Vanderhoef specifically asked him about zero smoking in restaurants, he suddenly said he “would be happy to support that idea.” After Vanderhoef became the second vote, Lehman asked whether there was also a third and fourth; when Kanner became the third, Vanderhoef pressed the mayor as to whether he would cast the deciding fourth vote.\textsuperscript{564} The mayor, however, quickly disabused her of any notion that he would keep the possibility of totally smoke-free restaurants alive:

Well no, no, I don’t want to get into the discussion if we don’t have four people who would like to get into the discussion. I feel we have been discussing this thing for a long, long time, we have been a source of great agitation to people both in favor of a smoking ban and those who opposed a smoking ban. I think it’s time to let the dust settle on this one and see what happens with it. You know I think the public and I also think from the Council’s standpoint you know enough is enough and for the time being I’m willing to proceed with what we have. I don’t think it’s a particularly good ordinance, I didn’t like it when we passed it but on the other hand we had four opportunities to change it and we chose not to so I am not interesting [sic] in discussing it further.\textsuperscript{565}

Not willing to give up quite yet, Vanderhoef asked him: “But you would support the zero?” Administering her a lesson in self-fulfilling prophecies, the mayor informed her that “[i]t isn’t even going to get there unless we’ve got four people that want to talk about it” and “I will not be one of the four.” Still pushing Lehman, Vanderhoef echoed: “Your [sic] not going to be?” An unrepentant Lehman replied: “I am not going to be, at this point in time we had an opportunity, we didn’t do it, I am really not interested in dragging the public through this thing for another six or eight weeks or whatever, I think we’ve, we may revisit this, I think we will at some point in time but for the time being we’ve done enough.”\textsuperscript{566} No one needed to prompt O’Donnell and Champion to ally themselves with their fellow-smoking mayor and no one did ever ask the silent

\textsuperscript{564}Transcription of Iowa City Council Special Work Session at 30-31 (Jan. 22, 2002), on http://www.icgov.org/transcriptions/85.pdf. The transcriptionist could not hear all of Vanderhoef’s words on the audio tape, but the context of what could be heard of the beginning of Vanderhoef’s statement (“Well tell us what”) and the beginning of Lehman’s fully transcribed response quoted in the text strongly suggest that Vanderhoef asked him how he would vote.

\textsuperscript{565}Transcription of Iowa City Council Special Work Session at 31 (Jan. 22, 2002).

\textsuperscript{566}Transcription of Iowa City Council Special Work Session at 31-32 (Jan. 22, 2002).
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Wilburn, who, by failing to take a position, killed the initiative.\(^{567}\)

Paying, once again, lip service to a prohibition that he had opposed at almost every turn—“We do not have four folks and so that’s a discussion that may or, I’m sure it will come up in the future but I think the time now is to move forward”\(^{568}\)—Mayor Lehman, as the Press-Citizen reported, executed a “switch from his position” on January 8 “when he voted against the partial ban and said a more total ban would be more acceptable.”\(^{569}\) (Lehman apparently did not believe that this tergiversational display had forever shredded his credibility on this issue: in January 2004, when, in the wake of judicial invalidation of the Ames and Iowa City ordinances, two legislators filed yet another bill to repeal preemption of local control of smoking, he purported to support it and predicted that its passage would be followed by another effort to ban smoking in Iowa City. He nevertheless added a caveat that, if the situation ever came to pass, it would furnish him with yet another pretext for equivocation: “‘But I feel it should be a statewide thing. That would be better for cities so they don’t have to make laws that conflict with each other.’” In case readers had not intuited the subtext, the newspaper inserted the competitive business context always uppermost in Lehman’s mind: “Coralville has not implemented a smoking ban or pursued the possibility.”\(^{570}\)

As the March 1, 2002 starting date of the Iowa City ban approached, many owners were busy “making changes that will enable them to get around the new law....” One of the live music establishments, for example, magnanimously conferred a twofold public health benefit on customers and workers by “promoting more alcohol specials on weeknights to draw in the alcohol consuming bar crowd,” and thus also insuring them uninterrupted access to secondhand smoke. Competitors whose lopsided alcohol sales already qualified them for an exemption without having to make menu changes did not appreciate the additions to the yes-smoking list. The owner of one well-known restaurant/bar lamented this promotion of alcohol, “‘which we have spent four

\(^{567}\)Transcription of Iowa City Council Special Work Session at 32 (Jan. 22, 2002). Wilburn was present, but spoke only once (and even then only very briefly) during the entire hour-long session. Id. at 24. The minutes incorrectly stated that “[t]here were not four people to amend the smoking ordinance for a zero smoking tolerance in restaurants.” [Iowa City] Council Work Session, Jan. 22, 2002, [Minutes] at 3 (Jan. 30, 2002). In fact, there were not even four votes to discuss such an amendment.

\(^{568}\)Transcription of Iowa City Council Special Work Session at 32 (Jan. 22, 2002).


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years telling people not to do.’’ No wonder that she declared: ‘‘I don’t like the ordinance.’’ 571

By the day the ban went into effect, 44 of 90 establishments licensed to serve alcohol had requested full or temporary exemptions, leaving 56 smoke-free. 572 Within a few days seven more last-minute requests for exemptions were filed, in part by bars that did not even serve food and merely wanted an official piece of paper that they could post demonstrating to customers that they lawfully permitted smoking. 573 (Conversely, the co-owner and employees of one restaurant posted a sign apologizing for the radical improvement in indoor air quality: ‘‘Effective March 1 smoking will no longer be permitted on our premises. We didn’t make this decision. The City Council did.’’ ) 574 At this point, the total impact of the ordinance, according to CAFE, was the conversion of only about 20 formerly smoking-permitted restaurants to newly smoke-free status. Despite the fact that the law increased the number of ‘‘smoke-free dining options’’ by only about 25 percent and left at least 50 restaurants and bars still lawfully permitting smoking, CAFE spun the change as ‘‘huge.’’ 575

The District Court Finds No State Preemption

‘‘The people of Iowa have been unenthusiastic about significant anti-smoking


572 Sara Langenberg, “Restaurant Smoking Rules Go into Effect,” ICP-C, Mar. 1, 2002 (1A) (NewsBank). According to this source 10 of 44 were temporary exemptions, but later it was determined that during the ordinance’s first year of operation 17 of about 50 exemptions had been granted on a temporary basis for one year. By the first anniversary of the ordinance (Mar. 1, 2003), seven of the 17 were granted permanent exemptions, seven failed to file the requisite affidavits to retain the exemptions, and three had additional time to file. Brian Sharp, “City Smoking Law Marks 1 Year,” ICP-C, Mar. 1, 2003 (3A) (NewsBank); Vanessa Miller, “I Expect It to Destroy the Bar Business at Mondo’s and Micky’s,” ICP-C, Mar. 4, 2003 (1A) (NewsBank).


574 Sara Langenberg, “Restaurant Smoking Rules Go into Effect,” ICP-C, Mar. 1, 2002 (1A) (NewsBank)

575 Sara Langenberg, “City’s Smoke-Free List Changes,” ICP-C, Mar. 9, 2002 (1A) (NewsBank) (quoting CAFE spokesperson Eileen Fisher). According to CAFE, 85 eating establishments were smoke-free after the ordinance went into effect.
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On February 13, 2002, plaintiffs having withdrawn their claim for a permanent injunction, Judge Baker issued his ruling denying plaintiffs’ motion for summary judgment, declaring both that the ordinance was neither preempted by nor inconsistent, irreconcilable, or in conflict with chapter 142B of the Iowa Code and that the City of Ames had not exceeded its constitutional or statutory home rule authority, and dismissing the case. Judge Baker’s opinion—unlike the Supreme Court’s ruling 15 months later—was a sophisticated and fine-grained effort to come to grips with the complex interaction of preemption and home rule in the context of a particular statute embedded in a particular set of public policies against the background of considerable Iowa Supreme Court precedent derived from adjudicating the same conflict arising from other statutes resting on other public policies.

Baker began the relevant part of his analysis by dealing with plaintiffs’ claim that Ames’s home rule power was preempted by state law in the form of the clean indoor air act itself:

Plaintiffs argued that this paragraph “must be read to mean that” the law “imposes a mandatory statewide standard of smoking prohibitions which is not subject to local variation”; they further contended that with this language the legislature “expressed its intention to preempt this area of controlling smoking in public places from local regulation....” The city’s interpretation was diametrically opposite: Ames argued that this paragraph was “an express declaration by the legislature that local ordinances are permissible as long as they are not inconsistent with or in conflict with the state law, reinforcing statutory and


constitutional home rule authority.” Moreover, if the legislature had intended to prohibit cities from regulating smoking in public places, “it would have clearly said so.”

To begin with, Baker correctly rejected out of hand Philip Morris’s claim that the 1990 amendment was a statement of express preemption of local regulation: on the contrary, not only did it “not specifically prohibit local action in the area of regulating smoking in public places,” it in fact recognized “the potential existence of ‘local laws and regulations’ referring to their ‘implementation, application and enforcement’ as well as the consequences of inconsistency with state law.” In order to contrast this provision with an example of real express preemption, Baker cited a statute held by the Iowa Supreme Court to prohibit local action: “In order to provide for the uniform application of the provisions of sections 725.1 to 725.10 relating to obscene material applicable to minors within this state, it is intended that the sole and only regulation of obscene material shall be under the provisions of these sections, and no municipality, county or other governmental unit within this state shall make any law, ordinance or regulation relating to the availability of obscene materials. All such laws, ordinances or regulations, whether enacted before or after said sections, shall be or become void, unenforceable, and of no effect upon July 1, 1974.” In the face of such sheer unambiguity, the Supreme Court had no choice but to rule that the “legislature flatly stated its intention that the only regulation of obscene material be by state law and then, in unmistakably clear terms, barred local legislation on the subject.” Baker then forcefully pointed out that, since section 142B.6 neither confined smoking regulation to state law nor specified that smoking bans could not be the subject of local action, no express preemption existed.

Having dismissed the claim of express preemption, Judge Baker turned to a lengthy analysis of the two variants of implied preemption: (1) subject-wide preemption was present when the legislature covered a subject with statutes so as to demonstrate its intention to preempt the field; and (2) conflict preemption
resulted when an ordinance conflicted with a statute such that the ordinance prohibited an act that a statute permitted or permitted an act that a statute prohibited.\textsuperscript{585}

Plaintiffs’ contention that the legislature’s comprehensive legislation in the area of tobacco products, tobacco taxes, and smoking demonstrated its preemptive intent was undermined by the Supreme Court’s ruling that mere “extensive regulation of an area is not sufficient in the absence of a clear expression of legislative intent to preempt regulation of a field by local authorities, or a clear expression of the legislature’s desire to have uniform standards statewide.” Indeed, the Supreme Court required a “high degree of expression” of such an intention as a prerequisite of finding subject-wide preemption.\textsuperscript{586} In seeking to determine whether that requisite “high degree of expression” was present in the 1990 amendment, Baker stressed that, unlike statutes in some other cases, section 142B.6 “does not forbid local authorities from enacting law in the field regulated by chapter 142B,” and the “definite language” that the legislature used in precluding local regulation of obscene materials was distinctly absent. Moreover, the amendment failed to state specifically and definitely that the legislature intended the chapter’s provisions “to be uniform statewide standards without room for variation among local jurisdictions.” It neither ruled out local power to regulate in the same area nor “carve[d] out specific defined areas of permissible local regulation.” Of crucial significance was the fact that the phrase providing that inconsistent local ordinances would be superseded by the statute not only did not eliminate local power to adopt consistent and non-conflicting ordinances, but contemplated their existence; and since the Code itself defined such inconsistency as irreconcilability, Baker concluded that section 142B.6 lacked the “high degree of expression” required to find that the legislature intended to preempt the field of smoking bans in public places.\textsuperscript{587}

Ironically, in rejecting Philip Morris’s claim that the provision added in 1990 terminated any authority that cities might have possessed before then to regulate smoking, Baker’s conclusion (in response to plaintiffs’ request that the court consider the legislative history) that the amendment “does not place any


\textsuperscript{586}Goodell v. Humboldt County, 575 NW2d 486, 499-500 (Iowa 1998).

\textsuperscript{587}James Enterprises, Inc. v. City of Ames, Iowa, Equity No. EQ-CV040013, slip op. at 15-17 (Iowa Dist. Ct. for Story Cty, Feb. 13, 2002).
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restriction on local governments in addition to that already in place through the home rule statute\footnote{James Enterprises, Inc. v. City of Ames, Iowa, Equity No. EQ-CV040013, slip op. at 18 (Iowa Dist. Ct. for Story Cty, Feb. 13, 2002).} precisely echoed the belittling criticism voiced by the Tobacco Institute as it and other cigarette industry personnel were drafting and commenting on the preemption proposals that ultimately became the provision over which a decade later Philip Morris was litigating: “Iowa constitution already says this....”\footnote{Diana Avedon to Melinda Sidak (Feb. 13, 1990), Bates No. TI00301634/6. See above ch. 27. Unbeknownst to him, the Ames city attorney made a very similar argument in his appellate brief: the amendment was merely “an express declaration that local ordinances in this field are valid so long as the ordinance is not inconsistent with or in conflict with the provisions of Chapter 142B....” James Enterprises, Inc. v. City of Ames, 661 NW2d 150 (Iowa 2003), Defendant/Appellee’s Brief and Argument at 8, 2002 WL 33808796. Later Klaus opined that the basis of the Supreme Court’s opinion may have been the rule of statutory construction that a legislature cannot be presumed to have meant nothing by an amendment; consequently, the 1990 amendment cannot merely have repeated the constitutional and statutory home rule provisions. Telephone interview with John Klaus, Ames (Oct. 5, 2008).} Baker carried this reasoning to its logical conclusion in such a rigorous manner as to render plaintiffs’ whole case empty of any substance. Pointing out that the amendment was placed in the same section (headed “Civil penalty for violation—uniform application”) with and below paragraphs dealing with enforcement, fines, and hearings, he detected a strong suggestion that the legislature intended merely to make the enforcement mechanisms uniform statewide; consequently, the amendment’s only impact was to prohibit cities from adopting ordinances imposing different fines or providing for hearings before an official other than a judicial magistrate. Then in response to plaintiffs’ claim that the legislature intended that all of the chapter’s provisions be applied uniformly statewide, Baker observed that the legislature had to be presumed to know that, pursuant to the Code, cities had the power to adopt higher or more stringent standards “unless a state law provides otherwise.” Since the “clear import of the statutory home rule provisions includes the concept that a city ordinance which is more stringent than a corresponding statute is ‘not inconsistent with a state law,’ [t]he statute must unambiguously place restrictions on the power of cities to enact higher standards.... If this is not done, the cities’ home rule authority is intact. ...The language employed in section 142B.6 does not impose such limitations.”\footnote{James Enterprises, Inc. v. City of Ames, Iowa, Equity No. EQ-CV040013, slip op. at 18-20 (Iowa Dist. Ct. for Story Cty, Feb. 13, 2002).} With respect to conflict-preemption, the central interpretive problem with...
which Judge Baker had to deal derived from tensions within the general principles of the legislature’s grant of home rule powers. The Iowa Code specifies, on the one hand, that an “exercise of a city power is not inconsistent with a state law unless it is irreconcilable with the state law,”\textsuperscript{591} and, on the other, that a “city...may set standards and requirements which are higher or more stringent than those imposed by state law, unless a state law provides otherwise.”\textsuperscript{592} The “tension,” as the Iowa Supreme Court had observed, was that “[a]ny distinction between a local ordinance that is inconsistent with state law and one that merely sets a higher standard or requirement is at best subtle.” Thus the Supreme Court had no trouble determining that “[w]hen a state law merely sets a standard, a local law setting a higher standard would not conflict with the state law and would be authorized”\textsuperscript{593}—so long as it did not prohibit what the statute permitted.

Baker, it seems, believed that he was dispensed from having to untangle this interpretive knot because, after mentioning two cases in which the Supreme Court had held that an ordinance’s higher standards failed to pass muster by virtue of unfaithfulness to the overall legislative scheme without drawing any concrete conclusions for the Ames case, he immediately moved on to the other prong of the city’s defense: “In addition to powers inherent in its home rule authority, the City of Ames relies on section 142B.2(2) for statutory authority to enact stricter prohibitory standards than those provided in Chapter 142B.”\textsuperscript{594} That crucial subsection provided that: “Smoking areas may be designated by persons having custody or control of public places, except in places in which smoking is prohibited by the fire marshall or by other law, ordinance, or regulation.”\textsuperscript{595} In other words, and later in detail, Baker acknowledged that only the presence of this provision saved the ordinance because otherwise its more stringent requirement would doom it on the grounds that it prohibited some act that the statute permitted (namely, designating smoking areas).\textsuperscript{596}

The parties disagreed sharply over the meaning of “other law, ordinance, or regulation.” Whereas the city argued that any ordinance that prohibited smoking in a public place fell within the scope of the phrase, Philip Morris insisted on a much narrower interpretation that excluded ordinances designed to control

\textsuperscript{591}Iowa Code § 364.2(3) (2001 and 2009).
\textsuperscript{592}Iowa Code § 364.3(3) (2001 and 2009).
\textsuperscript{593}Goodell v. Humboldt County, 575 NW2d 486, 500, 501 (Iowa 1998).
\textsuperscript{594}James Enterprises, Inc. v. City of Ames, Iowa, Equity No. EQ-CV040013, slip op. at 21 (Iowa Dist. Ct. for Story Cty, Feb. 13, 2002).
\textsuperscript{595}Iowa Code § 142B.2(2) (2001).
\textsuperscript{596}James Enterprises, Inc. v. City of Ames, Iowa, Equity No. EQ-CV040013, slip op. at 24-26 (Iowa Dist. Ct. for Story Cty, Feb. 13, 2002).
secondhand smoke for public health reasons and confined the scope exclusively to fire safety measures based on a canon of statutory construction according to which general words following an enumeration of specific words describing a legal subject comprehend only objects similar to those enumerated by the specific words. The fatal flaw in this argument Judge Baker identified in the missing element of ambiguity: since the “plain meaning” of the crucial word “other” was “‘different or distinct from that already mentioned; additional, or further,’” and therefore the phrase meant any ordinance different from or in addition to whatever came before it (namely, a fire marshal’s prohibition), it appeared to mean what it plainly said and thus application of the special rule of statutory construction was not even needed. As examples of such other laws, ordinances, or regulations banning smoking Baker listed those governing the capitol complex buildings, correctional facilities, Iowa Communications Network classrooms, child care facilities, home food establishments, substance abuse treatment programs, salons and cosmetics schools, facilities managed by the State Historical Society, and courtrooms. He refused to accept plaintiffs’ claim that the legislature meant to preempt the relevant agencies’ power to curtail the designation of smoking areas.597

Reactions to Baker’s decision were predictable. Council member Cross was, given the attorney general’s earlier opinion, not surprised. Far from being even the weak ban’s strongest advocate, Cross was nevertheless pleased “with the outcome because ‘[i]t is possible for those who don’t smoke to enjoy themselves and still allow smokers’ their rights—it just defines the times they can do it.’”598 Reacting to Judge Baker’s decision, Ames Tobacco Task Force co-chair Andrew Goedeken exclaimed a tad prematurely: “‘Big tobacco bit the dust.’” Incomprehensibly, in light of the feckless statewide law, the high school senior went on to characterize the ruling as “‘really speak[ing] volumes to the orientation of Iowa laws,’” which were “‘conducive to protecting public health.’”599

The Latest Is the Greatest: The Iowa Supreme Court Reverses

Champion/ [Y]et we’re saying it’s okay to smoke in bars the waitresses and waiters in restaurants should be protected but people who work in bars should not be. ...
Pfab/ Well that’s, maybe that’s the next move.
Champion/ Well I don’t know, how do you decide who your [sic] going to protect?
Pfab/ Well they used to smoke in airplanes too but they don’t anymore....
Champion/ Well they shouldn’t.
Pfab/ Well but they did for a long time, it was legal, this is legal too. 600

On May 7, 2003, about 10 weeks after having heard oral argument—at which Justice James Carter “questioned whether the word ‘ordinance’ related to the Ames smoking ban” and (ominously) added that “[i]t might not justify banning smoking because the ‘statute says state laws will supersede local laws’”601—the Iowa Supreme Court unanimously reversed Judge Baker’s judgment.602 (Astonishingly, no amicus briefs had been filed: neither the attorney general, nor Iowa City, nor any of the health organizations, nor CAFE had sought to become a friend of the court, although they all understood that the Iowa City ordinance was also at risk.)603 The very brief opinion failed to engage Baker’s thoughtful

603 http://www.iowacourts.state.ia.us/ESAWebApp/AIndexFrm (visited Oct. 20, 2008). Belitsos “was surprised by the lack of support. Our city attorney stood alone. An amicus brief would have been appreciated.” Email from George Belitsos to Marc Linder (Oct. 28, 2008). As late as May 2001 Attorney General Miller had reiterated at a conference on clean indoor air that “State law does not pre-empt Iowa City and Coralville from enacting ordinances that expand state protections.... We stand ready to work with any municipality.” Kathryn Ratliff, “Smoke-Free Leader Lauds CAFE,” ICP-C, May 25, 2001 (3A) (NewsBank) (erroneously dated Aug. 25). Asked later why the attorney general had not filed an amicus brief, the executive officer of the Iowa Attorney General’s office stated that: “Our office did provide substantial assistance to the City of Ames in preparing
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its brief. Our attorney who worked on that matter recalls that our opinion was cited in the city’s brief.” Asked again, he replied: “I think we felt at the time that the work we were doing with Ames was sufficient to make our views known to the court.” Email from William Roach to Marc Linder (Oct. 29, 2008). In fact, the attorney general opinion was not mentioned in the city’s main brief—or the plaintiffs’ briefs or the court’s opinion—which was only about seven pages and of poor quality. Steve St. Clair, who had written the attorney general’s opinion and felt fairly confident that the Supreme Court would affirm the district court’s sound decision, stated that one important reason for not filing an amicus brief was the fear that it might have stamped the Attorney General’s Office as partisan; in this sense the hope had been that the opinion’s mere existence would be more helpful. Telephone interview with Steve St. Clair, Des Moines (Oct. 30, 2008).

Nevertheless, the undergraduate jurisprudes editing the University of Iowa’s student newspaper allowed as the Supreme Court justices, “[t]o their credit...correctly interpreted the law.” The editors, to their credit, recognized that “[u]nfortunately, the law itself is a mistake.” “Save Iowa City’s Smoking Ban by Contacting Legislators,” DI, May 12, 2003, on http://www.dailyiowan.com (visited Oct. 11, 2008).


“Plaintiffs’/Appellants’ Brief and Argument at 9, James Enterprises, Inc. v. City of Ames, 661 NW2d 150, 151 (Iowa 2003), 2002 WL 33808797. The Court did not expressly adopt plaintiffs’ absurd conclusion that the Ames ordinance “seeks to deprive the Hospitality Providers from [sic] what they have been historically able to do...accommodate both smokers and non-smokers....” Id. at 10.

On the morning of the day of the Iowa City City Council’s first consideration of the ordinance the Iowa City Press-Citizen opened its op-ed column to the Iowa Hospitality Association’s regurgitation of the cigarette oligopoly’s accommodationist nonsense on to which the IHA tacked the mendacious assertion that the Ames ordinance “completely” banned smoking in restaurants. Doni DeNucci, “Ban Would Hurt Restaurants,” ICP-C, Nov. 27, 2001 (9A:3-7) (also in Jessica Dumpert (Philip Morris Media Affairs), Newsedge
The Court began its analysis by asserting that “[c]learly, the provision in the ordinance of the city that prohibits designated smoking areas conflicts with the provisions of section 142B.2, which allows such designation.” It then asserted its conviction that (the 1990 amendment of) section 142B.6 “supersedes the conflicting provisions of the city ordinance.” How or why section 142B.2(2), which expressly permitted ordinances to prohibit both smoking and the designation of smoking areas, conflicted with an ordinance that prohibited such designations the Court failed to explain in its rush to unveil the deus ex machina of “settled rules of interpretation,” resort to which in order to resolve a conflict between “provisions of different statutes relating to the same subject matter” was its responsibility. Thus shifting the focus from the conflict between statute and ordinance to that between statutes or between provisions within the same statute, it found such resolution in the Iowa Code’s chapter on construction of statutes, consultation of which prompted it to conclude that

the language of section 142B.6 should curtail any grant of local authority that may be supplied by section 142B.2(2) for two reasons. First, that section comes later in the chapter and purports to govern everything in the chapter that comes before it. Second, it appears that section 142B.2(2) was enacted in 1987, and section 142B.6 was enacted in 1990. Iowa Code section 4.8 provides:

If statutes enacted at the same or different sessions of the legislature are irreconcilable, the statute latest in date of enactment by the general assembly prevails. If provisions of the same Act are irreconcilable, the provision listed last in the Act prevails.

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608 James Enterprises, Inc. v. City of Ames, 661 NW2d 150, 153 (Iowa 2003). An analysis of decisions dealing with preemption of local anti-smoking ordinances concluded that the Iowa case was one of only two in which the “court based its decision solely on express preemption; this was probably because where state statutes clearly prohibit action, local governments do not act.” Jean O’Connor et al., “Preemption of Local Smoke-Free Air Ordinances: The Implications of Judicial Opinions for Meeting National Health Objectives,” Journal of Law, Medicine & Ethics 36(2):403-12 at 405 (Summer 2008).

Because section 142B.6 is the later enactment, its provisions should govern over any conflicting language in section 142B.2.\footnote{James Enterprises, Inc. v. City of Ames, 661 NW2d 150, 154 (Iowa 2003).}

Although the Court had failed to demonstrate a conflict, let alone irreconcilability—and, as the Court later held, “to be ‘irreconcilable,’ the conflict must be unresolvable short of choosing one enactment over the other”\footnote{City of Davenport v. Seymour, 755 NW2d 533, 541 (Iowa 2008).}—between the two sections, it was, at least to its own satisfaction, justified in stamping Q.E.D. on its reasoning.\footnote{Although the outcome would not have changed, the Court, misled by its shoddy research, applied the wrong statutory construction rule from the code. Since the provisions allegedly in conflict were both amendments (enacted in 1987 and 1990), the Court should have applied Iowa Code § 4.11 (2001): “If amendments to the same statute are enacted at...different sessions of the general assembly, one amendment without reference to another, the amendments are to be harmonized, if possible, so that effect may be given to each. If the amendments are irreconcilable, the latest in date of enactment by the general assembly prevails.”} Ames City Attorney John Klaus drew some solace from attributing the Court’s crabbed opinion to its annoyance with the legislature for having written the statute ambiguously: not having wanted this political hot potato, the justices threw it right back at the legislature.\footnote{Telephone interview with John Klaus, Ames (May 23, 2008). In contrast, Assistant Attorney General Donald Stanley, who for many years has been involved in various aspects of tobacco litigation, observed that Klaus’s incompetence at oral argument, especially his inability to answer even the justices’ easy questions, may have shaped the case’s outcome. Telephone interview with Donald Stanley, Des Moines (May 19, 2008).}

Bizarrely, given the crucial role of the ambiguous section 142B.2(2), neither the Iowa Supreme Court, nor Judge Baker, nor the parties in their briefs made any effort whatsoever to examine its legislative history.\footnote{Asked why he had not briefed the question of the legislative history, Philip Morris’s lawyer responded that he had felt that he had a strong enough case based on the text of the statute, vis-a-vis which the Iowa Supreme Court did not give much weight to what individual legislators may have said about what they meant by various amendments.} This lapse was all the more
surprising and unforgivable on the part of the Supreme Court, which, after all, fancied itself such a stickler for faithfully following the Code’s rules of statutory construction, one of which expressly provided that: “If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters... 2. The circumstances under which the statute was enacted. 3. The legislative history. ... 5. The consequences of a particular construction.”

A review of the provision’s history, which originated in 1975 and assumed its final form in 1987, reveals that Philip Morris’s contention that inclusion of the fire marshal demonstrated that the following reference to “other law, ordinance, or regulation” meant that the latter three were limited to fire safety was untenable. The first Iowa anti-smoking bill to use closely related phrasing was S.F. 106, which, when it was originally filed on February 4, 1975, was very brief and prohibited smoking in a few identified types of public buildings (such as museums, libraries, and theaters), but permitted those in custody or control of them to designate smoking areas. The much more comprehensive amended version that the Senate Human Resources Committee recommended and that appeared in the Journal of the Senate on March 12 as S-3313 limited the power of those in charge of the buildings to designate smoking areas by providing that they “may make available smoking areas adjacent to such facilities within the same structure where smoking is not prohibited by any statute, ordinance or lawful rule of this state or any of its political subdivisions...” The amended bill also added a prohibition on smoking on various common carriers, “except in those areas, not exceeding fifty percent of the passenger seating capacity, where smoking is not prohibited by any other statute, ordinance or lawful rule of the United States, this state or any of its political subdivisions...” Although an

be sure, because the lawyer no longer remembered his argument that § 142B.2(2) referred exclusively to fire safety-related ordinances, he was unable to embed his answer in the specifics of the issue. Telephone interview with Fred Dorr, West Des Moines (Oct. 14, 2008).

615 Iowa Code § 4.6 (2001).

616 In 1990, the Tobacco Institute, in light of its dissatisfaction with the final weak language of the preemption amendment, might have regretted not having sought to amend § 142B.2(2) to make this limitation unambiguous, but lobbyists might have regarded the effort as too risky.

617 S.F. 106 (Feb. 4, 1975, by Scott et al.). For a comprehensive account of all the relevant bills from the 1970s, see above ch. 25.


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exhaustive analysis of the committee’s action is frustrated by the fact that the original committee amendment that the Legislative Service Bureau had prepared during the first week in March and from which the committee was working at its meeting on March 11\(^620\) was not preserved in the Iowa State Archives,\(^621\) the minutes make it unambiguously clear that the reference to ordinances did not mean orders of the fire marshal. This conclusion follows from the fact that liberal Republican Senator John S. Murray—who was concerned that those in charge of local buildings not permit smoking in places which the fire marshall had deemed fire hazardous\(^622\)—asked about fire marshal regulations and was informed they would still be in effect.\(^623\) In other words, even though they were not mentioned in the committee amendment, the legal force of any smoking prohibitions issued by fire marshals would be unaffected by the bill; logically, then, the statutes, ordinances, and lawful rules newly included in the committee amendment did not embrace fire marshal regulations.\(^624\)

The source of this language is not documented, but it seems likely, given the Minnesota statute’s impact, as the first broad public smoking ban, on anti-


\(^621\) Email from Assistant State Archivist Meaghan McCarthy to Marc Linder (Oct. 15, 2008).


\(^624\) Although it does not implicate this issue of fire marshal regulations, a puzzle concerning the text of the committee amendment may be mentioned. Immediately following Murray’s question and the response to it Republican Senator William Plymat moved an amendment to add after the word [“may make available smoking areas adjacent to such facilities within the same”] “structure”: ‘Where smoking is not prohibited by any other statutes or ordinances.’” This amendment to the committee amendment was adopted unanimously, the committee amendment as a whole was adopted, and then, after an unrelated amendment was defeated, the bill was passed as amended to the Senate. Senate Human Resources Committee [Minutes] at 1-2 (Mar. 11, 1975) (copy furnished by SHSI DM). Nevertheless, the text of S-3313 as it appeared in the Senate Journal the next day deviated from the text of Plymat’s amendment, “other statutes or ordinances” having been replaced, as cited in the text above, by “statute, ordinance or lawful rule...” (The rest of this sentence in S-3313 was presumably also lacking in the committee amendment, but, since, as mentioned, the original committee amendment is no longer available, its absence is not certain.) Former Senator Murray speculated that it was more likely that the version in the Journal was accurate, the error in the minutes having been caused by the secretary’s not having had the exact wording of Plymat’s amendment when she compiled the minutes. Telephone interview with John Murray, Washington, D.C. (Oct. 17, 2008).
smoking legislation in the mid-1970s in the United States generally and in Iowa in particular\textsuperscript{625} that the wording derived from a Minnesota bill that had been introduced by Phyllis Kahn on January 20, 1975, passed the House on March 10,\textsuperscript{626} was signed by the governor on June 2, and went into effect on August 1: “Smoking areas may be designated by proprietors or other persons in charge of public places, except in places where smoking is prohibited by the fire marshall or by other law, ordinance or regulation.”\textsuperscript{627} (Fire marshals’ ordinances banning

\textsuperscript{625}See above chs. 24-25.


\textsuperscript{627}Minnesota House of Representatives, H.F. No. 79, § 4 (Jan. 20, 1975, by Kahn et al.). The wording of the provision in the enacted law was identical except that “in which” was substituted for “where.” 1975 Minn. Laws ch. 211, § 5, at 633, 634. A similar bill that Kahn had introduced in 1974 and that had also included a provision on designating smoking areas lacked the exception for areas in which smoking was otherwise prohibited. Minnesota House of Representatives, H.F. 2801, § 2(3) (introduced Jan. 16, 1974, by Kahn et al.). This language in the Minnesota statute, which lacked the putative pre-emption provision, was held by the attorney general opinion and a district court not to pre-empt local government action to ban smoking. Minn Op. AG 62B (May 4, 2000), on http://www.ag.state.mn.us/resources/opinions/050400.htm (visited Apr. 12, 2009); Earl C. Hill Bloomington Post 550 v City of Bloomington, Order and Memorandum Denying Plaintiffs’ Motion for Temporary Injunction at 7-8 (Minn. D.C. 4th Jud. Dist., Hennepin Cty, Ct. File No. 05-3733, Mar. 25, 2005), on http://tobaccolawcenter.org/breaking+news/Order+Denying+Temporary+Injunction.pdf (visited Apr. 12, 2009). However, an administrative law judge, without substantive interpretation, ruled that a proposed regulation by the Health Department to ban smoking in office buildings except in private enclosed offices and lunchrooms/lounges and thus to prohibit owners from designating smoking areas elsewhere despite the discretion that the legislature otherwise conferred on owners to do so went beyond the statute and the agency’s statutory authority, although the proposed rule’s effect “is laudable, is supported by public opinion, represents the majority view of the advisory group and is based upon present day knowledge of second hand smoke.” State of Minnesota, Office of Administrative Hearings for the Minnesota Department of Health, In the Matter of Proposed Permanent Rules of the Minnesota Department of Health Relating to Clean Indoor Air: Report of the Administrative Law Judge, Finding of Fact 29.a (1-0900-8678-1, Aug. 2, 1994), on http://www.oah.state.mn.us/aljBase/09008678_rr1.htm. The ALJ reached the same conclusion concerning a proposed rule to ban smoking in all customer areas of retail stores despite the fact that the rule was “supported by the evidence and by most retailers.” Id., Finding of Fact 35.d. The question as to why the statutory provision authorizing owners’ discretion to be overridden by “regulation” did not apply to a regulation proposed to be promulgated by an agency required to “adopt rules and regulations necessary and reasonable to implement the provisions” of the act in question the ALJ neither raised nor answered. 1975 Minn. Laws

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ch. 211, § 7 subd. 1, at 633, 634-35. Presumably it was a foregone conclusion that a constitutional separation of powers issue would have been implicated if the statutory provision had been interpreted as the legislature’s conferral of power on an administrative agency to amend the statute.


H.F. 1130, § 6 (Jan. 23, 1976, by Wells). 629 This identical Minnesota language then appeared in H.F. 1130 filed in January 1976 by Representative Jim Wells. 629 That bill saw no action, but in 1976 the Senate took up S.F. 106, which, as ultimately passed by the Senate on March 3, 1976, included a provision that, as had been the case in 1975, lacked a reference to the fire marshal: “The person or persons authorized to designate smoking areas...shall not designate any area where smoking is prohibited by any other statute, ordinance, or lawful rule of the United States, this state, or any of its political subdivisions.” 630

The House did not consider S.F. 106, but in 1977 Wells filed H.F. 285, which was virtually identical with S.F. 106, reproduced the latter’s provision authorizing the override of discretionary designation of smoking areas, and did not refer to the fire marshal as had his H.F. 1130. 631 After numerous unsuccessful efforts at joining Minnesota and a growing number of states by passing an anti-public smoking law, in 1978 the Iowa legislature finally passed such a bill, which from the time of its filing until its appearance in the session laws included a provision with the same language as S.F. 106: “The person or persons authorized to designate smoking areas...shall not so designate an area where smoking is prohibited by any other statute, ordinance, or lawful rule of the United States, this state, or any of its political subdivisions.” 632

So the law remained until the 1980s after Democrats had gained control of both houses of the legislature. 633 As early as 1983, the chief vehicle for extending coverage was H.F. 248, further-going provisions of which were taken from the 1975 Minnesota law, including the almost verbatim adoption of the anti-smoking in Minnesota covered grocery and large department stores.) 628

633 On the legislative history in the 1980s, see above ch. 26.
preemption provision: “Smoking areas may be designated by persons having custody or control of public places, except in places where smoking is prohibited by the fire marshal or by other law, ordinance or regulation.” 634 From this point forward until the statute was finally amended in 1987, inclusion of the reference to the fire marshal was invariant in all versions of the chief legislation. 635 That language then remained in the Iowa Code until the statute was repealed in 2008. 636

Thus the most straightforward reason for its inclusion in the Iowa statute was, as was the case with regard to some other provisions, simply that it was in the model-like Minnesota statute. It might also be plausible to speculate that the fire marshal was specified because of concern that continued omission might lead to the permissibility of the designation of fire-hazardous areas as smoking areas as a result of some overblown fear of state preemption. However, not only is there no indication that this issue was ever raised during debate, but the House Journal and Senate Journal have left no trace of any discussion at all of this provision. What is not plausible is Philip Morris’s claim during the Ames litigation that “other law, ordinance or regulation” referred back to the fire marshal. This assertion lacked plausibility precisely because the fire marshal’s smoking prohibition had been added to the already existing “other law, ordinance or regulation,” which no one would have had any reason prior to that time to imagine as referring exclusively to fire hazards.

The Ames and Iowa City Ordinances as the First and Last Hurrah of Local Control in Iowa

“I think we made history when we did that [i.e., passed the ordinance]. We helped to get things started at the state level.” 637

I think as we get used to clean air, we get increasingly annoyed by going out and having to walk through clouds of smoke. You might say that well, legislating against, um, unpleasantness is just (mumbled) but I’d also say that public urination is not a health risk. It’s just unpleasant, and we don’t allow that. When you consider smoking, it’s not far

636 Iowa Code § 142B.2(2).
By the time the Supreme Court invalidated it, the Ames ordinance had been in effect for 21 months during which not a single citation had been issued for noncompliance at any of the 135 restaurants and (food-serving) bars. Consequently, post-mortem comments by the legally vanquished in Ames were dejectedly realistic, but in no way fatalistic. While recognizing that “Philip Morris has won its appeal to the Iowa Supreme Court” and a “major battle,” the co-chairmen of the ATTF presciently predicted that “[o]ne day in the not-too-distant future, all restaurants will be 100 percent free of cigarette smoke along with all public places.” In the meantime, however, Belitsos was acutely aware that “Iowa appears to be defying a national trend.” Quirmbach, who by this time was a state senator and may therefore have developed a certain pessimism about the possibilities of repealing the preemption of local control in the Iowa Senate as controlled by the tobacco-friendly Republicans in general and especially under the heavily smoking Majority Leader Stewart Iverson, bewailed the Supreme Court’s having taken Iowa “‘back at least 20 years’” and “‘strongly urge[d] all restaurants in Ames to continue with voluntary compliance.’”

638 Transcription of Special Formal Iowa City City Council Meeting at 14 (Apr. 27, 2010), on http://www.iowa-city.org/weblink/docview.aspx?id=962325 (statement by CAFE member Chris Squier concerning proposed ordinance to extend outdoor smoking ban on pedestrian mall).

639 Http://www.tobaccotaskforce.org/history.html (visited Sept. 26, 2008). This record was, to be sure, ambiguous: it could have resulted from excellent compliance or nonexistent enforcement.


641 David Grebe, “Smoking Ban Snuffed Out,” Tribune (Ames), May 7, 2003 (1A:2-5, at A8:5)

642 See above chs. 31-32.

643 David Grebe, “Smoking Ban Snuffed Out,” Tribune (Ames), May 7, 2003 (1A:2-5, at A8:4-5). The reference to 20 years was presumably purely for rhetorical effect and did not signify any actual state of the law at any particular time. Since no city had attempted to adopt a no-smoking ordinance before the preemption provision was added in 1990 (or between 1990 and 2000), it is not clear how the legal situation could have been worse than it had been before 1990 when restaurants were incorporated into the statewide law as a quid pro quo for preemption. In contrast, some cities (including Ames) had prohibited smoking in certain city-owned buildings (such as city hall), exercising a power that any property owner had prior to and independently of the statewide clean indoor air law. In
In contrast, in Iowa City CAFE leaders, simply “‘maddened’” by the Supreme Court decision, saw no way out of the predicament that Philip Morris’s money had forged for the strategy that local control advocates had hoped would enable them to sidestep the cigarette companies’ overwhelming financial advantages: it would be “difficult for a grassroots group like CAFE to battle tobacco lobbyists at the Statehouse” because of their clients’ “‘hold on legislators.’” In the meantime, the group would have to focus on education in such areas as encouraging voluntary smoking bans, keeping school grounds smoke-free, and insuring that parents not smoke in their children’s presence, and terminate its efforts to request other cities (such as the college town of Grinnell, whose city council had been considering adoption of a clean indoor air ordinance to adopt bans.

For the Ames Tribune, which had supported the ordinance because it was based on a compromise between the restaurant owners and the anti-smokers, but otherwise held “basic reservations about the extent to which government ought to regulate private people making their own choices,” the predicament forced on Ames by the Supreme Court’s making the allegedly free market determine public health outcomes was perfect:

We don’t like to suck down someone else’s cigarette smoke any more than anyone. But the ideal situation would be for customer demands to dictate whether smoking is allowed. And that’s exactly what the Ames Tobacco Task Force is calling for now that the ordinance is struck down. The task force would like businesses to voluntarily continue the smoking ban. And it is urging customers to vote with their feet on where they choose to

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some instances city employees’ unions contested these bans on the grounds that the city governments or agencies had failed to bargain collectively with the unions before implementing them. The Tobacco Institute was, for example, monitoring developments in Waterloo. Legislative Action-Trac (June 17, 1993), Bates No. TI28922786. See also Chauffeurs, Teamsters and Helpers, Local Union No. 738 and Communications Workers of American Local 7175 v. City of Waterloo, Iowa, Case No. 4954 (Public Employment Relations Board, Dec. 2, 1994); Ottumwa Education Association v. Ottumwa Community School District, Case No. 4510 (Public Employment Relations Board, May 27, 1992).


645In Grinnell a community forum had been held and 1,300 signatures collected in support of an ordinance. The Iowa Attorney General’s Report on Secondhand Smoke 17 (May 2003), on http://www.iowaattorneygeneral.gov/images/pdfs/WebReport Versionsmoke.pdf (visited June 7, 2009).

Unlike the Tribune, Attorney General Tom Miller did not seek to make a virtue of a necessity. Instead, he immediately declared that the Court’s decision had made it “imperative” for the legislature to amend the state law to enable communities to pass ordinances protecting “Iowans’ right to breathe clean air.” Apparently still focused on local control and not yet ready to make the leap to the kind of statewide laws that he mentioned as having been passed in California, New York, and Delaware, Miller stressed that Iowa was now one of only 16 states preempting local secondhand smoke ordinances and thus making it impossible for its cities to join the 1,605 communities nationwide that had already adopted them. Bill Roach, the attorney general’s spokesman, insisted that “the ruling puts pressure on the legislature to act to ensure that Iowans can breathe clean air.” Although he did not expect the issue to be considered during the legislative special session in May, he “fully expect[ed] the issue to go on the legislature’s agenda in 2004.” To be sure, with the tobacco industry-beholden Republicans fully in control of both houses of the legislature, Roach’s expectation was, as he himself surely knew, a pious wish. Nevertheless, Senator Quirmbach announced that the Mary Greeley Medical Center, Tobacco Free Iowa, and other organizations would support efforts to educate the legislature about the need to amend the clean indoor air law’s preemption provision in order to restore Ames’s smoke-free dining ordinance.

The press, too, understood that all that the Supreme Court had accomplished was probably “toss[ing] the controversial issue into the hands of state lawmakers.” Republican House Speaker Christopher Rants certainly agreed:

647 “We Haven’t Seen the Last of Fight Against Smoking,” Tribune (Ames), May 8, 2003 (A6:1) (edit.).
650 Likewise, Iowa City’s Senator, Joe Bolckom, must have understood that his call for the legislature to confer power on local government to promulgate rules to regulate clean indoor air would, under the prevailing political arithmetic, fall on Majority Leader Iverson’s tobacco money-deafened ears. Vanessa Miller, “Court Strikes Down Ames Smoking Ban,” ICP-C, May 8, 2003 (1A) (NewsBank).
The debate’s all going to shift from city halls to the State Capitol..... What the outcome will be, I have no idea. I guarantee bills will be filed.”652 To be sure, Rants, a rigid free-marketeer who was also an energetic executor of the tobacco industry’s agenda, was being more than a tad disingenuous about the future of anti-tobacco legislation: he had already been using his power to kill anti-smoking bills and would continue to do so until his party lost its majority in 2006.653

Ironically, the reaction of at least one of the Ames plaintiffs would not have pleased Philip Morris. Rick Carmer, co-owner of Wallaby’s and Dublin Bay, said that he would “not change much right away” because “I think people have gotten used to it.... I don’t think the ordinance is without merit.” Although he favored business owners’ making the decision, he stated that he would not be opposed to strengthening statewide anti-smoking laws because they would create a “level playing field.”654 Indeed, Carmer complied with the invalidated ordinance until the statewide law was enacted in 2008—of which he approved because people were looking for “a little clean air.”655 The fact that Carmer and owners of eight other establishments continued to act as if the ordinance were still in effect (while many more restaurants remained or became 100-percent smoke-free)656 was, in ATTF’s view, a function of the cultural change that had taken root in Ames expressing and reinforcing many residents’ increasingly deep-seated demand to be free of cigarette smoke.657 (In Iowa City, too, some restaurant owners chose to remain voluntarily smoke-free, while others immediately resumed smoking in order to “accommodate our guests’ requests.”)658 Or, as Rich Johansen, one of the owner-negotiators, who continued to comply with the ordinance, put it more opaquely: many people had “changed their eating habits.”659 Another plaintiff, who was going to allow smoking only so long as no one was eating, had allegedly

653See above ch. 31.
655Telephone interview with Rick Carmer, Ames (Oct. 5, 2008). It is unclear whether Carmer was subtly and ironically referring to the consequences of the red light/green light rule on indoor air quality.
joined the suit “‘just’” because of “‘the principle.’”

Carmer’s self-contradictory attitude was also compatible with some restaurant owners’ behavior before the city council: they had, according to Quirmbach, wanted the council to adopt an ordinance so that they would not personally have to make the decision (and be exposed to some smoking customers’ displeasure). Another plaintiff, non-smoking Dirk Rozeboom, who “‘hate[d] having to come home, change my clothes and take a shower’” after exposure to the smoke in his own business, five years later not only favored the statewide ban as it was going through the legislature, but knew that its implementation would not cause him to lose business.

Three days after the Supreme Court issued its opinion the Des Moines Register published an editorial objecting not to the court’s action—but to yet another example of the state legislature’s steadily reasserting its control over cities after the 1968 Municipal Home Rule Amendment to the state constitution had “supposedly released Iowa cities and towns from the iron grip of state control.” After admonishing the legislature to “back off and allow communities to decide for themselves whether they want to impose a stricter standard on smoking than the state,” the newspaper added that whether cities should in fact exercise that power was a “tougher question.” That the Register, just five years before the legislature itself imposed a much broader statewide ban than the Ames activists had ever dreamed of, not only answered its own question in the negative, but did so on the basis of anachronistic laissez-faire, would reveal how quickly nationwide trends would be engulfing Iowa:

Should they ban the use of a legal product in establishments that customers are free to patronize or shun?

The question is complicated by the plight of the hapless employee exposed to the health risk associated with secondhand smoke while waiting tables or tending bar. Civil suits and workers’ compensation actions are a better tool to deal with that issue, however,


661 Carmer unpersuasively claimed that he had become a plaintiff not on account of the substance of the ordinance, but because he had been dissatisfied with the process leading to its adoption. Telephone interview with Rick Carmer, Ames (Oct. 5, 2008).

662 Telephone interview with Herman Quirmbach, Ames (Apr. 19, 2008).


664 “Let Cities Ban Smoking (or Not),” DMR, May 10, 2003 (12A) (NewsBank) (edit.).
than a total ban on smoking.

Otherwise, this issue should be resolved in the marketplace. As long as people are free to choose to smoke, private entrepreneurs should be free to invite smokers into their establishments along with non-smokers who are willing to tolerate the odor—at the risk of driving away those customers who insist on clean air.\textsuperscript{665}

That as late as 2003 this beacon of heartland liberalism deemed permitting the free labor market to bestow emphysema, lung cancer, and heart disease on workers, who (or whose families) could then seek monetary compensation for their irreversibly destroyed health (or death) to be better social and public health policy than simply eliminating the exposure to secondhand smoke at the source was a profound sign of the times. Whether the editorial writer was embarrassed that five years later such comments were being publicly voiced only by self-interested bar owners, their right-wing legislative ideologues, and the cigarette companies is less clear.

On May 13, at the first city council meeting after the ordinance had been struck down,\textsuperscript{666} State Senator Quirmbach requested that the council resist rescinding the ordinance on the grounds that if the legislature statutorily eliminated the preemption obstacle, the ordinance would then become enforceable. Belitsos echoed this view, adding that the Iowa City City Council would also be asked to leave its ban-ordinance on the books.\textsuperscript{667} Belitsos also shared the results of an ATTF survey showing that 87 restaurants—including two whose owners had been plaintiffs—indicated that they would voluntarily continue to comply, while only seven would allow the resumption of smoking as would all the bars in Ames. Belitsos shed bright light on owners’ cigarette industry-induced false predictions of impending doom by pointing out that during the two years since adoption of the ordinance Ames had recorded a net increase of eight restaurants, suggesting a boom for the hospitality industry.\textsuperscript{668} (In a similar vein, council member Goodhue later reported his belief that “most if not all of the owners complied with the ordinance after it was repealed because they had such positive customer feedback and in many cases, their business increased.”)\textsuperscript{669} After several other speakers had urged the council to leave the ordinance on the books, Mayor

\begin{thebibliography}{9}
\item \textsuperscript{665}“Let Cities Ban Smoking (or Not),” \textit{DMR}, May 10, 2003 (12A) (NewsBank).
\item \textsuperscript{667}Minutes of the Regular Meeting of the Ames City Council at 9-10 (May 13, 2003) (copy furnished electronically by City Clerk Diane Voss).
\item \textsuperscript{668}Minutes of the Regular Meeting of the Ames City Council at 10 (May 13, 2003) (copy furnished electronically by City Clerk Diane Voss).
\item \textsuperscript{669}Email from Steve Goodhue to Marc Linder (Oct. 13, 2008).
\end{thebibliography}
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Tedesco had opined that retaining an unenforceable ordinance “would be a disservice to the citizens of Ames,” and City Attorney Klaus had expressed the belief that the ordinance should be repealed even though the Supreme Court’s order did not require repeal. (new) council member Riad Mahayni, a professor of community planning, related that many residents and non-residents had asked him not to vote for repeal and that the city historian had told him that he believed that the city’s code of ordinances included other unenforced ordinances. In opposition to repeal, ex-member Quirmbach mentioned that a large number of people concerned about the issue would be working hard to bring it to the top of the legislature’s agenda, although he admitted that he did not know what its priorities would be in 2004. After council member Hoffman had stated that she saw no harm in leaving the ordinance on the books, the motion to pass on first reading an ordinance to repeal the no-smoking ordinance failed by a voted of 3 to 3; of the four members remaining from 2001, the two bankers, Cross and Goodhue voted for, while Hoffman and Wirth opposed the motion. Nevertheless, the council did vote unanimously to request that the state legislature empower local governments to make decisions on smoking in public places.670

For all its belittlement of the Ames ordinance, the Iowa City City Council lacked the gumption to retain its own ordinance on the books. As soon as the Court struck down the former, the city attorney announced that she would recommend the latter’s repeal.671 The Iowa City Press-Citizen begged to differ: appealing to the Ames action, it argued that “sometimes one may not be legal, but they [sic] may be morally right. In the same spirit, Iowa City councilors also should resist rescinding its ordinance and instead ask for local businesses to voluntarily comply with the law.” And as for those who asserted that not repealing the ordinance was tantamount to “defacing the Iowa Constitution,” they were “primarily smoking ban opponents who see political expedience in forcing municipalities to go through the process of passing another ban later.”672 CAFE may have gnashed its teeth at having to emulate Ames,673 but council member Wilburn praised for his well-spokenness on this topic by businessman-mayor

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Lehman, considerately thought of the potential confusion that retention of the ordinance might cause a business or people looking to move to Iowa City to operate a business. The council, insisting to the very end on distinguishing itself from any Ames-like taint, responded to the city attorney’s request for expedited action and quickly voted unanimously to repeal its ordinance.676

Thoroughly consistent with this hasty disposal of the Iowa City City Council’s narrowly approved anti-smoking ban was its failure to undertake any other initiative to reduce exposure to secondhand smoke that would not have been barred by legislative preemption. For example, just a few months after repeal, council member Kanner made a mild-mannered request for the city to moderate the extent of the smoke gauntlet (formed in part by the four smoking city council members, who, in addition, threw their cigarette butts on the ground) that people were forced to endure on the city’s own land on their way into and out of the Civic Center (city hall), “which is the headquarters of our democracy. People should be able to come without hostile barriers.”

A number of, of organizations and business, mostly non-profit organizations have enacted no smoking within 20 feet of the entranceway. For myself, and I think a number of people, it’s hard to go through smoke on the way to the entrance. The library has a sign, hospitals do, and I was wondering if we could ask that the Civic Center which is quite a public place and we want to be as open and as accessible as possible, if we can consider putting up some signs and asking people not to smoke within 20 feet of the entranceway.

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675Transcript of Iowa City City Council Meeting at 17 (June 10, 2003), on http://www.icgov.org/transcriptions/193.pdf.

676Complete Description of the Council Activities at 5 (June 10, 2003), on http://www.icgov.org/minutes/193.pdf by a vote of 7 to 0. On the day that the Supreme Court issued its opinion, Johnson County Attorney J. Patrick White predicted that if the Iowa City City Council did not repeal the ordinance, “some local retailer will go to court and win quickly.” Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2 (May 7, 2003), on http://www.johnson-county.com/auditor/min2003/030507ws.htm (visited Oct. 23, 2008). That no one filed such a suit in Ames was a function of owners’ having accepted the partial ban.

677Telephone interview with Steven Kanner, Cleveland, OH (Nov. 14, 2008); telephone interview with Karen Kubby, Iowa City (Nov. 17, 2008). Kubby, a (quondam) socialist who had been on the city council from 1989 to 2000, mentioned that during council breaks, sometimes the four-person smoking majority—Dee Vanderhoef was a sometime smoker—“met” outside.

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I just stepped it off, it does give you the front porch and so that gives you some room to come in from different angles at least so you don’t have to go through the smoke.\footnote{679}{Transcription of the Iowa City City Council Meeting at 41 (Oct. 14, 2003), on http://www.icgov.org/transcriptions/213.pdf.}

Three members having expressed interest in talking about it, the mayor decided that it would be put on a work session agenda.\footnote{680}{Transcription of the Iowa City City Council Meeting at 41 (Oct. 14, 2003).} The Press-Citizen quickly mocked the timidity:

[O]ur council is discussing posting signs, near City Hall entrances, that nicely tell smokers to step away from the door before lighting up.

Considering the overwhelming evidence of smoking’s dangers, the council ought to get tough. How about approving an ordinance banning smoking within 100 feet of a city-owned building’s entrance? … Friendly signs at City Hall are better than no action, but a stricter policy with some serious fines—say $100 for a first offense and $200 for a second and each subsequent offense—would go a lot further in curbing such smoking.

Ticketing smokers may sound harsh, but short of hitting their pocketbooks through fines, what else can a municipality do to help them end an addiction that for almost half a century has been known to cause fatalities?\footnote{681}{“Try Some Real Action to Stop Tobacco Smoke,” ICP-C, Oct. 27, 2003 (11A) (NewsBank) (edit.).}

The not so gentle press criticism manifestly failed to achieve its purpose: for many months the question was listed on the agenda as a future work session item, but it was never discussed and the city council never even bothered to exercise the power it indisputably possessed to ban smoking at the entrance to its own building until after the state legislature passed the Smokefree Air Act in 2008.\footnote{682}{Email between Marc Linder and Marian Karr, Iowa City City Clerk (Oct. 27, 2008).} Revealingly, when asked about the issue in 2006, the then city manager Steve Atkins purported to support a smoking ban near entrances to city-owned buildings, but wondered aloud what kind of ordinances a city council with three smokers on it would pass.\footnote{683}{Telephone interview with Steve Atkins (Sept. 15, 2006).} (In contrast, as early as 2006 the Johnson County
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Board of Supervisors unanimously approved a resolution prohibiting smoking and use of smokeless tobacco within 50 feet of all county building entrances and exits—the most restrictive tobacco use policy in Iowa at the time, though not far-reaching enough for at least one supervisor.\(^{684}\) The council and city manager provided an unambiguous answer when they refused for almost eight months even to post the signs required by the 2008 Smokefree Air Act at the very place about which Kanner had complained five years earlier—and when the city government, finally abandoning its unlawful intransigence, did post signs at the entrance (which failed to put anyone on notice as to where exactly smoking was prohibited), it did so only because, in response to a formal complaint about the city’s violation of the new state law, the Iowa Department of Public Health had issued a First Notice of Potential Violation and rejected City Attorney Dilkes’s risible attempt to deny liability on the basis that a tiny no-smoking sign on the building entrance—which was barely legible a few feet away—sufficed to make the city compliant with regard to the statutory duty to post signage at the entrance to the no-smoking grounds 41.6 feet away.\(^{685}\)


\(^{685}\)Eleanor Dilkes to Bonnie Mapes (director, Division of Tobacco Use Prevention and Control) (Feb. 4, 2009); Bonnie Mapes to Eleanor Dilkes (Feb. 12, 2009); email from Marc Linder to Bonnie Mapes (Feb. 24, 2009). Dilkes revealed that the city’s stonewalling was part of a larger agenda: “[T]he real issue is not one sign at the front of City Hall. If the City is required to sign this area, then presumably I should direct City staff to place signs at the entrances to the grounds of all City buildings and in particular at every point that the sidewalk leading to a City building intersects with the sidewalk in the public right-of-way and at the entrance to every parking lot to all public buildings.” In a last-ditch, but unsuccessful, effort to convince IDPH not to enforce the law’s protection of nonsmokers, Dilkes limned this parade of horribles: “My point is...to highlight how requiring the City to post one sign has the potential to require school districts, municipalities, counties, and the State to place thousands of signs on the grounds of every public building, at the entrances to all parking lots connected to a public building,
On April 14, 2008, the day before the governor signed the statewide smoking ban bill, in the course of council discussion of city property smoking policies, Mayor Regenia Bailey expressed concern about people’s having to walk through smoke to get into smoke-free restaurants—an outcome that she (erroneously) did not think was the legislature’s intent—and was contradicted by member Champion, who insisted that her observations in Chicago and San Francisco revealed no such congregation of smokers around doors to restaurants. This cosmopolitan intelligence prompted a surprised Bailey, who was apparently unaware of the council’s prehistory of inaction and whose colleague had conveniently either lost touch with or refrained from invoking her own institutional memory, to interject: “I see people congregating outside this building that smoke.” To be sure, the mayor did not want her new-found interest in the subject to be misunderstood: “I mean, I’ve been known to enjoy a cigarette or cigar. I mean, I’m not a zealot about smoking, I just think that we need to balance the interests, and we recognize the challenges of second-hand smoke, and that particularly we don’t want kids around it.” That the mayor qua Iowa City’s political figure-head and civic role model (presumably unreflectively) paired publicly and unembarrassedly trumpeting her enjoyment of smoking two kinds of tobacco (one of which was atypical for teenage females) with solicitude for children was eerily akin to tobacco companies’ traditional stance. Yet later she knew enough to say that banning smoking in a pedestrian mall playground was “not just an air-quality issue; it’s an example issue.” Exactly which

and at the intersections between sidewalks leading to public buildings and sidewalks in the public right-of-way.” Eleanor Dilkes to Bonnie Mapes (Feb. 4, 2009). To be sure, presumably Dilkes assumed that such arguments would prevail because a few months earlier they had in fact induced Mapes to amend the proposed rules to implement the Smokefree Air Act with regard to the prohibition of smoking on the public sidewalk in front of the city hall. See below ch. 36.

686 In fact, the legislature struck such outdoor no-smoking zones from the bill in order to pass the bill. See below ch. 35.
687 Transcription of Iowa City City Council Special Work Session at 8 (Apr. 14, 2008), on http://www.icgov.org/transcriptions/590.pdf.
688 Transcription of Iowa City City Council Special Work Session at 5 (Apr. 14, 2008).
689 Chris Ratigan, “City May Further Limit Smoking in Public Places,” ICP-C, Aug. 22, 2008, on http://www.press-citizen.com (visited Aug. 22, 2008). Despite the playground’s alleged exemplary status, after the city had banned smoking there as part of a ban covering City plaza, it nevertheless refused to post any no-smoking signs at the playground or anywhere in the plaza itself. Instead, it posted some signs at some (but not even all) of the entry points to the plaza, several of which were not even visible to people entering the plaza—with the unsurprising result that smoking continued unabated
The Two Main College Towns Adopt Anti-Smoking Ordinances: 1999-2003

throughout the plaza. Many months later, after the city manager had been fired (presumably not for his belligerent refusals to post meaningful signs), the interim city manager perpetuated the tradition of refusal to act and deference to the city attorney’s opinion that the existing signs complied with (non-existent legal) requirements; novel were his erroneous claims of the presence of non-existent signs and his excuse of the need to balance “visual pollution” and smoke pollution. [City of Iowa City], Ordinance No. 08-4314: Ordinance Amending Title 6, Entitled “Public Health and Safety,” to Declare Additional Areas as Nonsmoking Places,” § I (1)(Q) (Sept. 9, 2008); email from Marc Linder to Amy Correia, Ross Wilburn, and Mike Wright Iowa City City Council members) (Dec. 13, 2008); email between Marc Linder and Michael Lombardo (Iowa City city manager) (Dec. 16, 2008); email between Marc Linder and Terry Robinson (Parks Department superintendent) (Jan. 7, 2009); email between Marc Linder and Michael Lombardo (Jan. 8, 2009); email between Marc Linder and Dale Helling and telephone interview with Dale Helling, Iowa City (Aug. 4, 2009). Only after lobbying by the businesses represented in the Downtown Association, animated by the desire to enhance “the aesthetic appeal of downtown” by ridding it of countless cigarette butts—an aesthetic mission conjoined with ridding it also of panhandlers—did the council extend the smoking ban to the whole city-owned pedestrian mall. Transcription of Special Formal Iowa City City Council Meeting at 13 (Apr. 27, 2010), on http://www.iowa-city.org/weblink/docview.aspx?id=962325 (statement by Nick Arnold of Downtown Association) (quote). The council unanimously adopted Ordinance 10-4393; Iowa City, City Council Minutes, Regular Formal Meeting (June 1, 2010), on http://www.icgov/votingresults/804.pdf. It was codified in the Iowa City City Code at § 6-10-1 (C&D), on http://www.sterlingcodifiers.com/codebook/index.php?book_id=320.

“interests” Bailey intended to “balance” against protecting the vast majority of residents who did not smoke from what she belittled as the mere “challenges” of lethal exposure to secondhand smoke she saw no need to divulge, but the council’s actions would soon speak loudly enough.

In the event, Bailey’s factual dispute with Champion prompted member Mike Wright to inquire into the possibility of actually doing something, whereas Bailey was apparently prepared to continue acquiescing in the “challenges of second-hand smoke” that she had merely mentioned. (Or perhaps, in the alternative, because she did not believe that a critical mass of protection-deserving children used city hall, she instinctively leaned toward relegating mere adults to self-help in dealing with the “challenges.”) Resurrecting (unknowingly) Kanner’s five-year-old unanswered dormant question, Wright asked: “Could we move it away from the entrances of City buildings?” When his colleague Amy Correia also expressed interest in such a step, City Attorney Dilkes intervened to warn the council that she had to figure out whether “I think you can do anything more than what the State law says.” After Correia had insisted in disbelief that surely “we
would have the ability to say, I mean, other public, other governments have said, ‘No smoking within 20 feet of a public building,’” thus signaling that, after five years of malignant neglect of the health of non-smoking employees and users of city hall, some council members had finally woken up to the existence of a problem and a solution. Dilkes offered them a that-was-then-this-is-now admonition: “[T]hat was prior to when the State law chose to legislate on a state level, as opposed to giving municipalities the right to do that.... They’re now into...legislating about public buildings.... So I think the whole issue has kind of changed.”<sup>691</sup> Ironically, the city attorney was seemingly so intent on leaving the council with the impression that it might have been deprived of its chance to ban smoking around the doors to city hall, that she failed to inform the members that in fact the new state statute achieved the result that Kanner, Wright, and Correia desired by expressly prohibiting smoking on the “grounds of any public buildings....”<sup>692</sup>

Indeed, the city attorney well knew that the city’s power to ban smoking outdoors went far beyond the grounds of public buildings. For example, on June 23, in reaction to O’Donnell’s false claim that “you clearly cannot ban [smoking in a] right-of-way,” Dilkes expressly clarified that “I think you do have the right to prohibit it in the right-of-way, but that would be a designation by you. It’s not prohibited by the statute.”<sup>693</sup> In other words, by virtue of the city’s ownership of all public sidewalks (“because we have control of your right-of-ways”),<sup>694</sup> the city had—and had always had—the power to ban smoking on those sidewalks.<sup>695</sup>

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691 Transcription of Iowa City City Council Special Work Session at 9 (Apr. 14, 2008).
693 Transcription of Iowa City City Council Special Work Session Meeting at 23 (June 23, 2008), on http://www.icgov.org/transcriptions/620.pdf. The city attorney stated more generally that she agreed that the city had authority to ban smoking on city-owned land that was not the grounds of a public building. Email from Eleanor Dilkes to Marc Linder (Aug. 25, 2008).
694 Transcription of Iowa City City Council Special Work Session Meeting at 35 (June 23, 2008).
695 Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 131 (2009), on http://repositories.cdlib.org/ctcre/tcpmus/IA2009/, fundamentally misunderstood the reach of preemption when they asserted that it “barred localities from passing clean indoor air laws in indoor places, but did not prohibit passing laws that made outdoor environments smokefree.” Like any property owner, cities were (and are) empowered to ban smoking on any and all of their properties whether indoor or outdoor. Similarly wrongheaded was their assertion that once SAA had repealed preemption, Iowa City became free to prohibit smoking in outdoor public places. Id. at
Acknowledging and availing itself of this power, the city council audaciously prohibited smoking for three hours a year on sidewalks in front of private profit-making downtown stores “along the parade route of the University of Iowa Homecoming parade....”\textsuperscript{696} Even after a member of the public had explained to the city council that the city was violating the Smokefree Air Act by permitting smoking on the sidewalk in front of city hall, but also pointed out that the statute was irrelevant in the sense that the city already had “the power to ban smoking on every [public] sidewalk,” the mayor declined to address the subject and referred the speaker to the city attorney.\textsuperscript{697} Asked that same day why she had not advised the city council that it could ban smoking on that sidewalk by virtue of its ownership of that and all other public sidewalks, Dilkes replied that she had not because “to date it is not one of the areas they have expressed an interest in regulating.”\textsuperscript{698}

A week before the Smokefree Air Act went into effect in 2008 the Iowa City city attorney informed the council that Ames had banned smoking in all of its city parks,\textsuperscript{699} but the Iowa City council chose to institute a ban only in a few parks and

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\item[696] City of Iowa City, Ordinance No. 08-4314: Ordinance Amending Title 6, Entitled “Public Health and Safety,” to Declare Additional Areas as Nonsmoking Places,” § 1 (1)(Q) (Sept. 9, 2008).
\item[698] Transcription of Iowa City City Council Special Work Session Meeting at 20 (June 23, 2008).  To be sure, the ban was a park rule not written into the city code.  Transcription of Iowa City City Council Special Work Session Meeting at 31 (Aug. 25, 2008), on http://www.icgov.org/transcriptions/638.pdf.
\item[699] Email from Marc Linder to Eleanor Dilkes (Aug. 26, 2008) and email from Eleanor Dilkes to Marc Linder (Aug. 27, 2008).
\end{enumerate}
\end{footnotesize}
then almost exclusively in areas devoted to children’s playgrounds and youth sports areas.\textsuperscript{700} The Iowa City council also exhibited its halfhearted and even cavalier attitude toward secondhand smoke exposure with regard to the city-owned parking ramps. When the issue was first raised, smoker O’Donnell was so disgusted that he sputtered: “And the car exhaust is probably not harmful, I mean, you could...I mean, there’s cars running in there all the time, for Pete’s sake.”\textsuperscript{701} (In fact, smoky bars have much denser concentrations of cancer-causing particles than city streets polluted by heavy diesel bus and truck traffic emissions.)\textsuperscript{702} The other major smoker, Champion—whose principal “concern” about outdoor smoking regulation downtown was that “since I own a business on Dubuque Street...I think you’re going to shift the problem...in front of my business”\textsuperscript{703}—raised the parking ramp issue the next time at the request of fellow-smokers who wanted to know whether they would be permitted to smoke inside their cars.\textsuperscript{704} Unsurprisingly, she declared on their behalf that “I don’t object to somebody going to their car and having a cigarette,” prompting the sometime cigarette-, sometime cigar-smoking Mayor Bailey to chime in: “Right...you can’t smoke to [sic] the way to the car or on the way in, but you could go to your car for your break.”\textsuperscript{705} In his mildest-mannered way, Wilburn punctured his three

\textsuperscript{700}Transcription of Iowa City City Council Special Work Session Meeting at 25 (Aug. 25, 2008); [City of Iowa City,] Ordinance No. 08-4314: Ordinance Amending Title 6, Entitled “Public Health and Safety,” to Declare Additional Areas as Nonsmoking Places,” sect. I (Sept. 9, 2008), codified at Iowa City, Iowa, City Code, § 6-10-1, on http://www.sterlingcodifiers.com/codebook/index.php?book_id=320. The Parks and Recreation Commission had “recommended that smoking not be prohibited in all parks at this time but will revisit the issue after the Act has been in place for a year or so.” Eleanor Dilkes, City Attorney, to City Council, Re: Ordinance Declaring Additional Non-Smoking Areas (Aug. 20, 2008), on http://www.iowa-city.org/weblink/docview.aspx?id= 169931 at 221.

\textsuperscript{701}Transcription of Iowa City City Council Special Work Session Meeting at 32 (June 23, 2008).


\textsuperscript{704}Transcription of Iowa City City Council Special Work Session Meeting at 28 (Aug. 25, 2008).

\textsuperscript{705}Transcription of Iowa City City Council Special Work Session Meeting at 32 (Aug.
smoking colleagues’ solicitude on behalf of their fellow-addicts: “I’m just kind of playing with scenarios that might happen, uh, I’m sitting in my car and I’ve got my windows rolled down.” Wilburn may have indirectly pointed out that the exemption for cars was irrational because, since few people would choose to smoke with the windows rolled up, the smoke would waft out into the ramp as surely as if someone were smoking outside the car in blatant violation of the ban, but his colleagues ignored his logic. Turning to the cigarette oligopoly’s playbook for repartee, O’Donnell allowed as if the car were running, “we all know that’s not harmful.” And councilor Amy Correia chose to ally herself with Champion, both finding that it was “a bit inconsistent” that “you can smoke in your car in the City parking lot here, but then you can’t smoke in your car in the City parking ramp.” This difference in rules between semi-enclosed ramps and wholly outdoor lots completely blinded them to the self-defeating contradiction of designating smoking areas in a supposedly smoke-free ramp. The next evening Wilburn renewed his objection to smoking in a vehicle in a ramp, but his colleagues, despite having been reminded by email of the illogic of their proposal, once again disregarded the objection, and Wilburn joined his colleagues in passing the ordinance unanimously.

The persistent and extensive guerrilla warfare against the regulation and prohibition of smoking and the sale of cigarettes in which the city council and administration of the City of Iowa City—which literally enjoys the reputation of being a freakish leftist enclave in the Iowa heartland—have engaged for many years underscores the risks inherent in the strategy of local control on which CAFE and various health groups relied to the detriment of the anti-smoking movement. These risks were magnified by CAFE’s rigid non-confrontationalism, which caused it to refrain from criticizing powerholders’ refusal to adopt policies and ordinances that would have conferred greater protection on nonsmokers in a

25, 2008).

706 Transcription of Iowa City City Council Special Work Session Meeting at 33 (Aug. 25, 2008).
708 Email from Marc Linder to Regenia Bailey, Amy Correia, Matt Hayek, Ross Wilburn, and Mike Wright (Aug. 25, 2008).
709 Transcription of Iowa City City Council Special Formal Meeting at 44 (Aug. 26, 2008).
710 On the city attorney’s lack of interest in bringing to the city council’s attention the legal arguments in support of the council’s power to deny cigarette sales permits to pharmacies, see email between Marc Linder and Eleanor Dilkes (Jan. 27, 30, 31, and Feb. 1, 2006).
display of gratitude for whatever minimal steps that, for example, the Iowa City
City Council was willing to take. This accommodationist defeatism that
celebrated every minor advance—which also embodied rejection of major
advances—as a “first step”711 and the acquiescence in the city government’s
subversion of the statewide law712 and its own ordinances may in part have been
responsible for the perpetuation of the city’s across-the-board regressive stance
on dealing with the leading public health hazard in the United States.713

For example, instead of criticizing the council’s aforementioned irrational
decision to ban smoking in city-owned parking ramps but nevertheless to permit smoking in the cars
parked there even with the windows rolled down and of advocating deletion of this
nonsensical exception, one of CAFE’s leaders present at the session, Eileen Fisher,
welcomed it as a “first step.”

For example, at the same meeting at which the city council made the decision about
smoking in parking ramps, another prominent CAFE member (and director of the Johnson
County Public Health Department, Doug Beardsley) dogmatically remarked that nothing
could be done about the city’s refusal to ban smoking on the sidewalk in front of city hall
because the law was written that way. In fact, after a complaint was filed about the city’s
action, the Iowa Department of Public Health had to amend its own rule in order to uphold
the city’s action because it recognized that under the earlier (proposed) rule the opposite
outcome was prescribed. See below ch. 36.

For example, as far back as 2004 the Sioux City City Council adopted an ordinance
prohibiting smoking on public property abutting land within 20 feet of a health care facility
sioux-city.org/codemaster/Title_19/16/0050.html (visited May 12, 2006). In contrast,
when the University of Iowa, at the request of several professors (including the dean of the
Public Health College and nationally well-known cancer researchers), approached the
Iowa City government concerning the possibility of the city’s banning smoking on certain
city sidewalks that run through the university campus (on which, pursuant to the Smokefree
Air Act of 2008, smoking is entirely prohibited) but are not owned by the university and
on which university employees and students smoke in such large numbers as to expose
nonsmokers to dense smoke clouds, the city officials expressed no interest. Dean Sue
Curry et al. to Pres. Sally Mason (Sept. 8, 2008); email from Mark Braun (chief of staff
to Pres. Mason) to Marc Linder (Dec. 19, 2008). On the alacrity and intense energy with
which the City of Iowa City fought what had been a mandatory ban on smoking on the
sidewalk in front of city hall pursuant to the rules issued by the Iowa Department of Public
Health implementing the Smokefree Air Act, see below ch. 36.

3221
2007:

The First Democratic Legislative Majority and Governor in 42 Years Enact a One Dollar Cigarette Tax Increase—But Are Unable to Repeal Preemption of Local Control, Let Alone Enact a Statewide Public Smoking Ban

“[T]his is government tinkering with my livelihood.... Small business is already highly regulated by its customers....

“If government left it alone...in a few years, I think almost all restaurants and bars would be nonsmoking anyway.... That’s just where society is heading. I definitely see us going non-smoking down the road. But it should be our decision based on what our customers want.”

“We are not pro-smoking. We are pro-choice,” said Greg [sic; should be Craig] Walter, a lobbyist for the Iowa Restaurant Association.

Darin Beck,...chairman of the Iowa Restaurant Association, spoke with legislators...about...the smoking ban bill....

“We’re not pro-smoking or anti-smoking, we’re pro-business....”

Even in 2007, when, for the first time in 42 years, Democrats controlled both the legislative and executive branches, they were unable to forge a majority for direct smoking control legislation. The resurgent Democrats who regained control of both legislative chambers at the November 2006 elections for the first time since 1992 were hardly radicals. Their leadership included an anti-abortion House Speaker (Pat Murphy) and Senate President (Jack Kibbie), a business-friendly Senate Majority Leader (Mike Gronstal) whom “[b]usiness types

34


2“Is a Smoking Ban in Iowa’s Future?” Gazette (Cedar Rapids), Feb. 10, 2007 (1A) (NewsBank).


4However, both houses of the legislature unanimously passed H.F. 718 prohibiting the sale of fire-safe cigarettes beginning in 2009. House Journal 2007, at 1178 (Apr. 2); Senate Journal 2007, at 1402 (Apr. 24); 2007 Iowa laws ch. 166, at 484.

like...because he doesn’t believe profit is a four-letter word,”6 and a House Majority Leader (Kevin McCarthy) who had run the brief Iowa presidential campaign of right-wing (not yet ex-) Democrat Joseph Lieberman.7 McCarthy’s declaration that they would “try to chart a centrist course”8 so as to govern “in the mainstream”9 sufficed to persuade the Des Moines Register’s chief political commentator that this “middle-of-the-road approach” would “drive the liberals nuts, but...could keep the Democrats in power for years.” The moderation that the party would be displaying was driven in part by the fact that the House leadership was fully aware that its “urban, left-of-center base” could not have gained a majority without the most recently added seats in the more conservative rural districts. Examples of the “balanced” approach the party would follow included not seeking to repeal the state ‘right-to-work’ (i.e., without joining the union that had organized the workplace) law and asking businesses what incentives they wanted in exchange for improved workers compensation benefits for workers. Even with regard to a cigarette tax increase, which the new Democratic governor wanted4 and the anti-smoking movement considered the most powerful tool for reducing smoking prevalence,5 Murphy and McCarthy were not sure it would “fly”: while many Democrats had favored such an increase two years earlier to balance the budget, growing tax revenues had prompted many caucus members to feel that no such tax increase was needed. Consequently, any successful push would have to be bipartisan because Democrats alone lacked the votes.10 Gronstal expected that the Senate would consider a cigarette tax increase, but its passage was a “’tossup,’”11 and, like Governor Chet Culver, he argued that the party viewed it “‘primarily as...a way to discourage teen smoking.’”12

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9Testimony of Sandra Quilty, director of government relations and lobbyist of the American Cancer Society at a Senate Health Subcommittee hearing (Jan. 31, 2007) (audio file furnished by Rusty Martin, communications director, Iowa Senate Democratic Research Staff).
Statewide Ban versus Local Control

Amadeo Rossi, who owns a non-smoking bar in Des Moines [said]...“[s]moking indoors is just not reasonable.”

Welcome to the legislature. This is a sausage making process.

As Democrats surveyed legislative prospects during the interim between the elections and the convening of the General Assembly in January 2007, anti-smoking activists, who for years had been frustrated by the Republican leadership’s bottling up their bills in committee, certainly concurred in Gronstal’s judgment that “‘lots of things are possible now that weren’t possible before.’”

To be sure, agreement on exactly what those things were would be more difficult to reach, especially when even militants advised caution, as Senator Herman Quirmbach, who had spearheaded the Ames local control ordinance in 2001, did in warning the members of the Tobacco Use Prevention and Control Commission not to grow overconfident: after all, bar owners and cigarette smokers voted too.

A particularly prickly issue arose in the anti-tobacco movement as to whether priority should be accorded repeal of the legislative preemption of local governments’ power to adopt ordinances stricter than the existing weak clean indoor air law (passage of which provision the cigarette oligopoly had secured in 1990) or enactment of a statewide ban on smoking in public places. Personally, Gronstal, like Governor Culver, favored the former, and anti-smoking health organizations echoed that opinion, though perhaps for a different reason: they feared that tobacco lobbyists would fill a statewide law with “exemptions and loopholes.” As Jane Miller, the American Lung Association of Iowa’s representative, put it: “‘If we don’t get it right, we will have a very crappy law on

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14 Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin, Communications Director, Iowa Senate Democratic Research Staff) (floor manager Herman Quirmbach’s closing remarks).
16 See above ch. 33.
18 See above ch. 27.
the books for a very long time.”19 One of the leaders of Clean Air For Everyone—which had heard directly from Gronstal before the 2007 session began that “preemption would be overturned. The words he used were ‘Done Deal’”20—was operating on the intelligence that there would be “[n]o change in the state law at this time except for doing away with preemption. There will be bills introduced for a new statewide law, but I don’t think they will go anywhere. Let’s hope not, because if they do they won’t be good and we won’t repeal preemption.”21 More positively, CAFE’s lobbyist, Threase Harms Hassoun, self-confidently “‘guarantee[d]’” legislators that if preemption were repealed, “‘right out of the chute you would have 10 or 12 communities read to go.’”22 (How long it would take for the more than thousand other local governments in Iowa to pass ordinances in the continued absence of one statewide law she did not predict.)

The Iowa Tobacco Prevention Alliance, including the Lung-Heart-Cancer organizations23—or the “anti-smoking crowd,” as Gronstal preferred calling it24—developed an elaborate justification for what more plausibly could be regarded as an opportunistic preference for local ordinances as less amenable to the economic and political power that the cigarette manufacturers’ were able to deploy effectively at the more centralized federal and state levels. Envisioning the tobacco companies as rendered “suddenly powerless” in countless communities, the anti-tobacco health organizations did their best to make a virtue of a necessity by arguing that “[l]ocal control is at the heart of our broader goals of: 1) educating the public about the health effects caused by secondhand smoke and 2) changing attitudes and behavior of smokers in order to protect others from secondhand smoke. A powerful change process unfolds as a community debates the issue of secondhand smoke.”25

20Email from Eileen Fisher to Marc Linder (Jan. 12, 2007) (stating that “[w]e spoke to Senator Gronstal [sic] 2 weeks ago”). To be sure, Fisher added: “However, I have also heard that some Republicans are asking our lobbyist, which do you want most—Tobacco Tax Increase or Local Control, you are not going to get both. The upshot is we cannot take anything for granted and need to keep up our grassroots support for Local Control.”
21Email from Eileen Fisher to Marc Linder (Jan. 15, 2007).
23CAFE was also a member. http://www.iowatpa.org/Default.aspx?pageId=320762
24Telephone interview with Michael Gronstal, Council Bluffs (May 17, 2008).
25American Cancer Society et al., “Why Local Control” (n.d.), on http://www.smokefreioawa.org/Doe/PDF/Why_Local_Control_06_25_07.pdf. This text appears to be taken from the website of Americans for Nonsmokers’ Rights (which also appears as
The Democratic Legislative Majority Enacts a $1 Cigarette Tax Increase: 2007

From a somewhat more nuanced perspective, Cedar Rapids Senate Democrat Rob Hogg described the local control law as “a pilot project, of sorts,” enabling local communities to “experiment with smoking restrictions”; then, in three or five years, the legislature could revisit a statewide ban. Even Representative Janet Petersen, who over many years had demonstrated her preference for a statewide law, was having both kinds of bills drafted, though she recognized that businesses were more likely to oppose local prohibitions because of their perception of an adverse impact on their ability to compete with firms in unregulated towns nearby. Whichever approach the legislature might adopt, the Iowa Restaurant Association made it absolutely clear that it opposed any government’s telling them how to run their business.

In January, IRA set forth its eight legislative priorities, including the statewide ban and preemption repeal, both of which it rejected absolutely (along with an increase in the minimum wage, which it preferred to call the starting or training wage since allegedly “[f]ew employees continue at the minimum wage after their training period is complete [sic]”). As it had for more than two decades, the Restaurant Association took the position that “[c]urrent state law is working, no change is necessary.” Conforming to Philip Morris’s accommodationist ideology from the 1980s, IRA dismissed the ban out of hand because “[o]perators with smoking customers must continue to accommodate

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29. As late as 2008, when “Philip Morris USA understands and agrees that people should be able to avoid being around secondhand smoke, particularly in places where they must go, such as public buildings, public transportation and many areas in the workplace,” it still has not abandoned its efforts to retain as much space as possible for the consumption of its lethal commodities regardless of the impact on employees and nonsmoking customers: “In many indoor public places, reasonable ways exist to respect the comfort and choices of both non-smoking and smoking adults. Business owners—particularly owners of restaurants and bars—are most familiar with how to accommodate the needs of their patrons and should have the opportunity and flexibility to determine their own smoking policy. The public can then choose whether or not to frequent places where smoking is permitted.” http://www.philipmorrisusa.com/en/cms/Responsibility/Government_Relations/Public_Place_Smoking_Restrictions/default.aspx?src=search (visited June 21, 2008).
them in a manner consistent with the wishes of their nonsmoking patrons. If operators cannot accommodate their customers’ preferences, business will be lost.” How restaurant owners could possibly “accommodate” nonsmokers’ “preference” for not being harmed by smokers’ preference to smoke the IRA did not explain any more than it justified its own preference for lives lost over business lost. That it did operate on the basis of such a priority was clear from its support for Iowa’s existing feckless law, which “allows hospitality business owners to accommodate their clientele as they choose.”

Local control was anathema to IRA because it would allegedly “cause confusion among business owners and their customers across the state.” Indeed, IRA regarded a local control regime in particular as a “nightmare” because, as its president, Doni DeNucci, contended, the balkanization would create unfair competitive conditions in adjoining jurisdictions: “The last thing we want to see is 900 different smoking ordinances.” Senate Democrat Matt McCoy, a militant anti-smoker from Des Moines, acknowledged this point, but had a much more cogent reason for favoring a statewide approach: for state legislators local control amounted to “simply passing the buck in a very heated debate for political purposes. ‘You can say you’re for a smoking ban without actually banning any smoking.... It’s a safer bet for some politicians. It shifts the burden of making the decision to the local governments.’” However, as a “pragmatist” he realized that “sometimes you just have to take the small victories,” and if local control was all that the General Assembly would pass, he was confident that at least in the Des Moines area the “progressive communities” would quickly adopt bans.

The comprehensive anti-public smoking bill of the 2007 session was House Study Bill 24, which was proposed on January 22 by Representative Janet Petersen as chairperson of the House Commerce Committee—a position that she had requested from leadership precisely so that she would be able to push the measure with maximum freedom and authority. H.S.B. 24 was virtually identical with the capacious but stillborn H.F. 2110, which she had filed in 2006. At the end of January, Petersen and Senator McCoy, who on January 23

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33 State of Iowa: Journal of the House: 2007, at 1:138 (Jan. 22). The study bill was recorded and assigned to the Commerce Committee on January 18. Id. at 1:24.
34 Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008).
35 For a detailed discussion of the bill, see above ch. 31. The main (but nevertheless trivial) change was the inclusion of a formal definition of “common area.” H.S.B. 24, §
filed S.F. 36, the companion bill, positioning their initiative as a workplace safety measure—“accepting an increased risk of cancer should not be a condition of employment”—declared that they felt that they had enough support from members finally to make smoke-free bars and restaurants a reality in Iowa.

Even more support was visible outside the legislature: a smoking ban was, Petersen explained, “probably the most popular request I get from people of all ages.” Democrat David Jacoby, a member of the subcommittee studying Petersen’s H.S.B. 24, opined that “[o]ne positive view of the statewide ban is we’re not being wimps and passing it off to the local entities....” He and Petersen were ready to send it to the full Commerce Committee, and even Republican subcommittee member Steven Lukan favored the statewide ban, though he still needed to determine his caucus’s position. Nevertheless, their optimism manifestly failed to infect their colleagues: Petersen’s study bill, despite her committee and subcommittee chairpersonship, never even became a House File, while McCoy, after conceding that only six senators supported a statewide ban, saw S.F. 36 die in subcommittee. In spite of the Senate bill’s

2(1). In addition, the word “appropriate” was deleted from the enforcement provision requiring those in custody or control of a nosmoking area to “inform persons violating this chapter of the appropriate provisions of this chapter.” H.F. 2110, § 8(3) (2006) and H.S.B. 24, § 8(3) (2007).


Petersen assigned the study bill to a subcommittee consisting of herself as chair, and Jacoby and Lukan. House Journal 2007, at 1:138 (Jan. 22). Inconsistently, according to the legislative website, the study bill was reassigned on Jan. 17 to T. Olson chair, Lukan, Petersen, Van Fossen, and Wise (citing House Journal 2007, at 65, which does not mention the bill). http://coo.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&key=0024H&GA=82.


swift demise, proponents, according to Senator Staci Appel (who in 2008 would
floor manage a statewide bill to passage), had the votes for passage, but, knowing
that the House could not pass it, chose not to go beyond local control.\textsuperscript{44}

In contrast, not all was quiet on the local preemption repeal front. At the end
of January, the Register (presumably not by coincidence) released the results of
an Iowa Poll showing overwhelming support for “allowing individual
communities to decide whether or not to ban smoking in public places”: 75
percent (including 82 percent of nonsmokers and 43 percent of the 17 percent
self-identified smokers) favored the proposal, while only 23 percent (including
50 percent of smokers and 17 percent of nonsmokers) opposed it.\textsuperscript{45} A number of
such bills were filed, the chief ones being H.S.B. 89 and its identical companion,
S.S.B. 1162.\textsuperscript{46} The very short study bills struck the preemption provision in the
existing law, substituting for it a discretionary grant to cities, counties, and local
health boards to adopt ordinances or rules to enforce “standards or requirements
that are higher or more stringent than those imposed” under the public smoking
statute. Non-exhaustively the study bills then specified that such ordinances/rules
might: (1) limit or eliminate the exemptions in section 142B.2(1) for factories,
warehouses, or similar workplaces not usually frequented by the public; (2)
prohibit the designation of a smoking area; or (3) limit or eliminate the

subcommittee composed of Hatch, Behn, and Schmitz). Despite the bill’s being virtually
identical to S.F. 2136 of 2006 (on which its lobbyist declared “undecided” in 2006),
CAFE, together with the American Cancer Society, the Iowa Hospital Association, Iowa
Medical Society, and Iowa Academy of Family Physicians declared for S.F. 36.
Unsurprisingly, IRA, Iowa Gaming Association, and UST, Inc. (a smokeless tobacco
producer) declared against it. http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category
=lobbyist&Service=DspReport&ga=82&type=b&hbill=SF36 (visited May 18, 2009).

\textsuperscript{44}Telephone interview with Staci Appel, Ackworth (Apr. 12, 2008). Majority Leader
Gronstal also opined that in 2007 there had been close to enough votes to pass a statewide
ban in the Senate. Telephone interview with Michael Gronstal, Council Bluffs (May 17,
2008).

\textsuperscript{45}Tony Leys, “75 Percent of Iowans Favor Bans on Smoking,’ DMR, Jan. 31, 2007,
on www.desmoinesregister.com

\textsuperscript{46}H.F. 35 (Jan. 17, by Foege), House Journal 2007, at 1:114 (referred to Local
Government Committee), and H.F. 187 (Feb. 1, by Petersen et al.), House Journal 2007,
at 1:289 (referred to Local Government Committee), were textually identical to H.S.B. 89.
Moreover, both were referred to the same committee and assigned to the same
subcommittee as the study bill. House Journal 2007, at 1:304, 307 (Feb. 1). Both expired
in subcommittee. As to why multiple bills with identical content were filed, a former
House Speaker noted that this common phenomenon resulted from legislators’ from
wanting bragging rights to authorship of the bill or not realizing that colleagues had the
same plans. Email from Don Avenson to Marc Linder (June 18, 2008).
exemptions in section 142B.2(2) relating to bars or public places consisting of a single room.\textsuperscript{47}

The Senate study bill, which anti-smoking activist and Local Government Committee chairperson Quirmbach assigned to a subcommittee of which he was chair,\textsuperscript{48} saw action first. By this point a dozen or so cities (including Grinnell, Mason City, Sioux City, and Waterloo) had expressed interest in adopting a ban on smoking in some public places.\textsuperscript{49} After Majority Leader Gronstal had expressed the opinion that local control would prevail,\textsuperscript{50} the study bill reemerged as S.F. 236\textsuperscript{51} once the Local Government Committee on a virtually party-line vote (9 to 3) approved it at its meeting on February 19, at which Attorney General Tom Miller and Tobacco Use Prevention and Control Commission chair Dr. David Carlyle spoke and answered questions.\textsuperscript{52} Republican Paul McKinley, one of the three members to vote against the bill, was worried about whether the next target of government’s “tendency to want to tinker in other people’s business” would be trans fat and “what after that...”\textsuperscript{53} Although the new version of the bill expanded the specific provisions that local governments had discretion to strengthen by adding posting of signs and civil penalties,\textsuperscript{54} at the same time it limited the scope of local governments’ discretion by (1) removing local health boards from the group of discretion-wielding bodies, and (2) dropping “but is not limited to” from the capacious grant (“An ordinance...may specifically include


\textsuperscript{48}Kreiman and Zaun were the other members. \textit{House Journal} 2007, at 1:274 (Feb. 5).

\textsuperscript{49}Jonathan Roos, “Panel Backs Bill to Allow Limits on Smoking,” \textit{DMR}, Feb. 20, 2007 (1A) (NewsBank).

\textsuperscript{50}Is a Smoking Ban in Iowa’s Future?” \textit{DMR}, Feb. 10, 2007 (1A) (NewsBank).

\textsuperscript{51}S.F. 236 (Feb. 20, 2007, by Local Government Committee); \textit{Senate Journal} 2007, at 1:418 (Feb. 20).

\textsuperscript{52}[Senate] Committee Minutes for Local Government, Feb. 19, 2007 (copy furnished by Senate Secretary Office); \textit{Senate Journal} 2007, at 1:424 (Feb. 20). The only Republican to vote for the bill was David Hartsuch, an emergency room physician (whose conflicting medical and libertarian views on smoking would surface later). Senator Houser was present but did not vote.


\textsuperscript{54}[Senate] Committee Minutes for Local Government, Feb. 19, 2007 (copy furnished by Senate Secretary Office) (S.S.B. 1162, amendment 702 division B adopted unanimously).
but is not limited to any of the following”).\(^5\) The committee also voted with only one Nay to amend the definition of “public place” in the clean indoor air act to exclude private residences unless they were used as child care facilities, child care homes, or health care provider locations.\(^6\) Within a few days of the introduction of S.F. 236, lobbyists for the Iowa Wholesale Distributors Association, the Cigar Association of America, Reynolds American, and the Iowa Restaurant Association declared against it.\(^7\)

The same day, February 19, House Local Government Committee chair Mary Gaskill confessed that: “It’s so divided, I’m not sure where we’re at.... We’re struggling up here to get some answers, so we need to know what the people want.” House Majority Leader Kevin McCarthy’s “gut” told him that “local control would have more steam,” but his 53-member Democratic caucus had not yet discussed the issue.\(^8\)

Two days later the committee held a public hearing on H.S.B. 89 at which anti-smoking health organizations expressed a decided preference for local control over a statewide ban on the grounds that local ordinances were both easier to enforce and less vulnerable to “crippling exceptions that tobacco-industry lobbyists could try to insert in a statewide bill.” Cathy Callaway of the American Cancer Society, former head of the Public Health Department’s Tobacco Use Prevention and Control program, and president of the Iowa Tobacco Prevention Alliance rested her advocacy of local control on the experience that states with strong statewide bans had started off with local ordinances. The best that bar owners were able to come up with was the “nanny state” mantra, while Wes Ehrecke of the Iowa Gaming Association—who, ironically, “wears a yellow ‘LiveStrong’ bracelet, demonstrating support for anti-cancer forces”\(^9\)—regaled the committee with tales of how “Iowa casinos have invested in high-tech ventilation equipment that can leave inside air cleaner than outside air.” Dan Ramsey of the American Lung Association pointed out that while air-moving


\(^6\) [Senate] Committee Minutes for Local Government, Feb. 19, 2007 (copy furnished by Senate Secretary Office) (S.S.B. 1162, amendment 701) (Zaun voting Nay).

\(^7\) http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=Dsp%20Report&ga=82&type=b&hbill=SF236


systems could clear out visible smoke, carcinogenic toxins remained.\(^{60}\) (A study of two casinos in Connecticut found that respirable particulate air pollution levels in smoking areas was seven times and in nonsmoking areas five times higher than outdoors.)\(^{61}\)

A few hours after the hearing, the House Local Government Committee was scheduled to discuss H.S.B. 89 at its meeting on February 21, but after both parties had caucused, Gaskill announced that the study bill “would not be considered. It most likely will be referred to another committee.”\(^{62}\) Gaskill’s procedural move was prompted by the lack of votes needed to offer a clean bill resulting from the casino and legal-age-restricted bar amendments. House Minority Leader Christopher Rants interpreted Gaskill’s “unfair...’committee shopping’” as showing that she was afraid that Republicans’ amendments (including a statewide ban) would pass. Unfazed, Gaskill still expected the bill to make it to the debate floor from another committee.\(^{63}\) In the event, leadership having refused her request to refer the bill to another committee, she pressed forward under less than optimal circumstances.\(^{64}\)

Following this contretemps, the House Local Government Committee met to discuss H.S.B. 89 again on March 5. After the committee had passed the same amendments that its Senate counterpart had adopted,\(^{65}\) conservative Republican Representative and former state trooper David Tjepkes\(^{66}\) was recognized for amendment 502, of which he ultimately requested withdrawal. Since this amendment would have incorporated Petersen’s H.S.B. 24 in its entirety, Tjepkes—who in 2008 would vote against Petersen’s Smokefree Air Act three times—appeared to be an unlikely sponsor of a statewide ban on public smoking. When asked later why he had offered Petersen’s bill, Tjepkes stated that his purpose was to deal with the concern arising from the “great inequity” of different

\(^{60}\)Tony Leys, “Smoking Bill Moves to a New Committee,” DMR, Feb. 22, 2007 (1A).


\(^{62}\)[House] Committee Minutes for Local Government, Feb. 21, 2007 (copy furnished by Iowa House of Representatives Clerk’ Office).


\(^{64}\)Telephone interview with Mary Gaskill, Ottumwa (June 23, 2008).


\(^{66}\)On Tjepkes’ pro-business, anti-labor, anti-abortion voting record, see http://www.votesmart.org/speech.php?can_id=32435 (visited June 18, 2008).
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rules applying to businesses in adjacent jurisdictions. But when asked further why, if uniformity of application was his goal, he had not simply voted against the study bill and thus attempted to preserve the existing statutory preemption, which already gave him everything he wanted, rather than going to the extreme of proposing Petersen’s statewide ban on smoking which, to boot, permitted local governments to adopt ordinances and regulations more restrictive than her bill’s provisions, Tjepkes was unable to articulate a reason—thus lending support to Roger Thomas’s and Gaskill’s explanation that Tjepkes was merely trying to kill the repeal of preemption of local control. A press report that “[s]ome committee members said the statewide ban might have passed if it had come up for a vote” reinforces the suggestion, since even Democrats knew that they lacked the votes to pass such a ban, that Tjepkes’ tactic was not intended to promote passage of either bill.

Following this abortive but nevertheless significant effort, Representative Geri Huser, a Democrat from Altoona, the location of Prairie Meadows, a racetrack and large casino, proposed an amendment both parts of which not only ultimately killed preemption repeal in 2007, but almost succeeded in thwarting passage of a statewide ban in 2008. The explosive amendment that Huser (whose father had close ties to Prairie Meadows and whose husband was a systems analyst for Casey’s General Stores, one of the largest sellers of cigarettes in Iowa) put forward on behalf of her constituent would have exempted entirely from the clear indoor air act both bars, defined as “legal-age-restricted establishment[s]...primarily devoted to the serving of alcoholic beverages...to

67 Telephone interview with David Tjepkes, Gowrie (June 19, 2008). Similarly, when asked why he had then withdrawn the amendment, Tjepkes, unable to articulate a substantive reason, merely replied that it was a “political strategy thing”: the Republican caucus had asked him to “discontinue that conversation.” Preemption repeal was embodied in H.S.B. 24, § 11(2) and § 11(2) of Tjepkes’ amendment 502.

68 Telephone interview with Rep. Roger Thomas, Elkader (June 18, 2008); telephone interview with Mary Gaskill, Ottumwa (June 23, 2008).


70 Telephone interview with Rep. Roger Thomas, Elkader (June 18, 2008).

71 Telephone interview with Stacy Frelund, American Cancer Society lobbyist, Des Moines (Oct. 2, 2008).


73 The lobbyist for the Lung Association suggested that Prairie Meadows had given Huser the amendment. Telephone interview with Dan Ramsey, American Lung Association of Iowa, Des Moines (May 14, 2008).
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guests on the premises and in which the serving of food is incidental to the consumption of those beverages, including but not limited to taverns, nightclubs, cocktail lounges, and cabarets,” and business locations licensed for pari mutuel wagering, gambling, excursion gambling boats, and racetracks. 74 Parroting Prairie Meadows’ own propaganda (“Throughout the years, our mission has remained the same: to promote economic development, agriculture, jobs, tourism and entertainment and provide financial contributions to programs and organizations that improve the quality of life for all Iowans”), 75 Huser sought to justify the special exclusion by reference to its significant contributions to the state and local economy. Predicting that casinos would eventually go smokefree, she pleaded that until then local bans would competitively disadvantage state-licensed casinos vis-a-vis Indian casinos—an argument that the president of the Iowa Gaming Association trotted out after the vote in thanking legislators for understanding the industry’s importance for the state’s economy 76 and that would be repeated ad nauseam with success in 2008, by which time the casino industry’s stranglehold on the legislative process was so firm that no reason for holding the health of its 10,000 employees (1,300 of whom worked at Prairie Meadows alone) hostage to the alleged need to cater to some gamblers’ nicotine addiction had to be articulated other than the lack of votes to pass any kind of statewide public smoking ban without a casino exemption. 77

Passage of Huser’s amendment on a non-record roll call vote of 12 to 8 (for which some of the committee’s 12 Democrats must have voted) 80 revealed that the advent of Democratic control of the legislature in no way guaranteed enactment of even such a minimalist-procedural part of the anti-tobacco movement’s agenda as repeal of preemption of local control. Indeed, the exclusion from the clean indoor air law of all bars that refused admission to persons under 21 as well as of

74 [House] Committee Minutes for Local Government, Mar. 5, 2007 (copy furnished by Iowa House of Representatives Clerk’ Office) (H.S.B. 89, amendment 702). The amendment would have added bars so defined and casinos (that is, business locations licensed under section 99D of the Iowa Code) to the list of businesses (such as tobacco stores) not defined as covered public places.
79 See below ch. 35.
80 [House] Committee Minutes for Local Government, Mar. 5, 2007 (copy furnished by Iowa House of Representatives Clerk’ Office)
the large and proliferating casino industry so severely undermined the bill’s purpose that its backers, viewing it now as a “poison pill,” was, according to the Cedar Rapids Gazette, “so excited they said they hope the bill dies.” Democrat Roger Thomas, the study bill’s manager in committee, “moved defeat of the bill.” However, he succeeded in persuading only three of the other 11 committee Democrats to follow his course; even joined by five of the nine Republicans, Thomas’s position gained only nine supporters, who were outvoted by the eight Democrats and three Republicans who voted for the amended bill. Chairperson Gaskill wound up voting for a bill with which she did not agree simply to get it out of committee. Some Democrats voted for what they regarded as a deeply flawed measure only because something was better than nothing—or, as Thomas put it: “I know the folks who are opposed to smoking don’t like this, but this might be as good as they get unless they get the statewide ban.” For Tyler Olson, a first-term member from Cedar Rapids (who would successfully floor manage the statewide smoking ban bill in 2008), that outcome was not good at all: “Once you exempt bars and casinos, I’m not sure what’s left....”

The strange-bedfellows politics spawned by legislative compromise bereft of principle emerged as soon as committee bill H.F. 778 (formerly H.S.B. 89) was

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83[House] Committee Minutes for Local Government, Mar. 5, 2007 (copy furnished by Iowa House of Representatives Clerk’s Office).
84Report of [House] Committee on Local Government (21), Mar. 5, 2007 (copy furnished by Iowa House of Representatives Clerk’s Office). Incorrectly the Iowa Department of Public Health reported that the bill “passed out unanimously because it was amended to add exemptions for bars and casinos.” IDPH Legislative Update (Jan. 28, 2008), on http://www.idph.state.ia.us/adper/common/pdf/legis/archive/2008/080128_update.pdf (visited July 5, 2008).
85Telephone interview with Mary Gaskill, Ottumwa (June 23, 2008).
86Telephone interview with Roger Thomas, Elkader (June 18, 2008).
87“Anti-Smoking Bill Would Exempt Bars,” DMR, Mar. 6, 2007 (3B) (NewsBank). When they finally got the statewide ban in 2008 it was without Thomas’s help, who voted Nay on final passage because of the unfairness to small-town bar owners of the exemption of out-of-state-owned casinos. Telephone interview with Roger Thomas, Elkader (June 18, 2008).
introduced and placed on the House calendar\(^89\): the very next day the American Cancer Society’s lobbyist Sandra Quilty declared against it, followed a week later by the Iowa Association of Business and Industry’s three lobbyists.\(^90\) This meeting of the extremes did not augur well for the bill, whose “exemptions were unacceptable to advocacy groups,” causing it to be “put on hold”,\(^91\) it therefore saw no action until it was rereferred to the Local Government at the end of the 2007 session.\(^92\)

Nevertheless, with Senate debate on that chamber’s bill not far off, the press reported that it appeared increasingly likely that the legislature, “pushing aside a dueling” statewide ban, would pass a local control bill. The problem, however, was that even if they received such powers, the governments of some of Iowa’s larger cities, such as Waterloo, Davenport, Sioux City, and Mason City, had as yet detected no interest in regulation of public smoking. And although some mayors and council members acknowledged that interest would intensify if the legislature actually conferred ordinance-making authority, their own pro-business attitudes underscored the risks of inaction associated with the local control strategy. Typical of the laissez-faire approach that would have been inimical to anti-tobacco intervention was the personal belief of Mason City’s mayor that “‘businesses ought to decide what’s appropriate for them. ... We have enough government as far as I am concerned.’”\(^93\)

On March 14, the day after H.F. 778 had been introduced (and the House had passed the Senate bill increasing the cigarette tax),\(^94\) the Senate began debating


\(^{94}\)Thus, although the Senate did not pass the local control bill until after both chambers had passed the $1 cigarette tax increase bill, both bills proceeded through the legislature simultaneously. In that chronological sense, Gronstal’s statement that in 2007 the “anti-smoking crowd” had said that now that we have a tax increase, let’s try a “little more evolutionary step” (i.e., a local control bill), was somewhat misleading. Telephone interview with Michael Gronstal, Council Bluffs (May 17, 2008).
its own preemption repeal bill, S.F. 236, which, realistically, at this point was the session’s last surviving anti-public smoking measure. Republicans, who were purportedly concerned above all about uniformity, filed a number of amendments whose exemptions would have both weakened the bill and made it less uniform. First, Assistant Minority Leader Pat Ward and Mary Lundby (who introduced the first preemption amendment to the clean indoor air act in 1990) offered Huser’s amendment exempting casinos and bars. Ward, who had previously been a utility company personnel director and director of the Iowa Republican party caucus, justified the exemptions in part on the grounds that no children were present in such locations. In the special case of casinos, she claimed—obviously prepped by their owners—that gaming as Iowa’s largest tourist attraction, with 65 percent of its 20 million annual visitors traveling from other states, would be competitively disadvantaged vis-a-vis tribal and out-of-state casinos by a smoking ban. Ward did focus her advocacy primarily on the alleged adverse impact of a ban on casinos’ profits and secondarily on the alleged disemployment effects, but she could not resist interweaving strands of Republican rugged individualist anti-collectivism into the narrative: “Smoking bans should be a business decision and not a legal mandate. Customers all have a choice of where they spend their money and employees all have a choice of where they work.” Parroting one of the cigarette manufacturers’ accommodationist untruths, Ward asserted that with the new filtration systems the air on the gaming floor was better than the outdoor air. In response, floor manager Quirmbach twitted Republicans by urging them to embrace their long-held principle that the best government is that which is closest to the citizens.

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95See above ch. 27.
96http://www.patward.org/about.asp
97In early February Wes Ehrecke, the president of the Iowa Gaming Association, claiming that a smoking ban would reduce casinos’ revenues and tax payments, put out the figure that 65 percent of Iowa casinos’ 20 million annual visitors came from other states. O. Kay Henderson, “Opponents Speak Out Against Smoking Ban in Bars, Restaurants,” Radio Iowa (Feb. 7, 2007), on http://www.radioiowa.com (visited Apr. 25, 2008).
98Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin, Communications Director, Iowa Senate Democratic Research Staff).
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In the end, the amendment lost, but only by the narrow vote of 24 to 26.\textsuperscript{101} All 20 Republicans were joined by four Democrats: Assistant Majority Leader Bill Dotzler and Tom Hancock\textsuperscript{102} (who would vote against Petersen’s statewide smoking ban bill on both floor votes in 2008), Wally Horn (who opposed smoking control as Democratic Majority Leader in the 1990s), and Dennis Black, who would vote against Petersen’s bill once.\textsuperscript{103} Since, with a 10-seat majority, Democrats could spare no more than four defections, the caucus’s cohesiveness was being tested.

Next, Brad Zaun, a former hardware store owner, tested the waters by dumping casinos and exempting only legal-age-restricted bars, insisting that a ban would be very detrimental to family-owned businesses’ bottom line. For those unimpressed by that claim he added a libertarian argument: people who did not like smoke did not have to go to such bars. And finally, in desperation, he ventured out onto the slippery slope: would the legislature next ban alcohol in bars in order to protect people from collateral damage?\textsuperscript{104} Zaun’s half a loaf proved to be marginally less attractive to wavering Democrats than Ward’s whole loaf: with defecting Democrats Hancock and Horn joined only by Davenport veterinarian Joe Seng (who would also vote once against H.F. 2212 in 2008), the amendment was defeated by a vote of 23 to 27.\textsuperscript{105}

Republicans then secured what was arguably their most important victory with an amendment exempting fraternal benefit societies from the scope of covered public places offered by Minority Whip Mark Zieman, a farmer and trucking company owner. Voicing concern that the legislature would start going down the road of letting local governments control a “habit that is condoned by this body,” especially since many members of such organizations had been

\textsuperscript{101} Senate Journal 2007, at 1:738 (Mar. 14) (S-3115).

\textsuperscript{102} There were many “joe six packs” and bars in Hancock’s district. Email from former legislator who required anonymity to Marc Linder (June 19, 2008).

\textsuperscript{103} Senate Journal 2008, at 412, 1000 (Feb. 27 and Apr. 8). On Horn, see above ch. 30.

\textsuperscript{104} Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).

\textsuperscript{105} Senate Journal 2007, at 1:738-39 (Mar. 14) (S-3116); Senate Journal 2008, at 412 (Feb. 27). Zaun’s next amendment, to what he called the “scariest part of this whole bill,” would have redefined “public place” to exclude private residences because the state should not permit local governments to restrict the consumption of a legal product in one’s own home, but Quirmbach, the bill’s floor manager, pointed out that his committee had already included such a provision, and the amendment lost by a vote of 21 to 29, with only one Democrat defecting. Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin); Senate Journal 2007, at 1:739 (Mar. 14) (S-3114) (Rielly).
encouraged to smoke in the military, Zieman ran into Quirmbach’s open arms: the floor manager declared not only that everyone supported veterans and fraternal groups, but that he could not imagine that any city council would take on the Veterans of Foreign Wars or the American Legion. Consequently, he announced that he would not resist the amendment and that members were free to vote as they wished. In the event, the amendment picked up not only all 20 Republican votes, but those of 11 Democrats as well, including Quirmbach’s, though anti-smoking militants Joe Bolkcom and Bob Dvorsky joined 17 other members willing to risk incurring veterans’ wrath.

Zaun described his final amendment as “technical,” designed to insure that smoking would not be prohibited in public places of fewer than 250 square feet or company cars. Oddly, Quirmbach supported the amendment on the grounds that it tightened the language a bit. In fact, however, the insertion of the word “only” into the sentence stating that local ordinances “may specifically include [only] the following” five kinds of provisions in fact substantively narrowed the scope of city councils’ powers to limit or ban smoking and to enforce such actions. Quirmbach himself joined 19 other Democrats and all 20 Republicans in voting for this weakening of his own bill; once again, however, the most prominent anti-tobacco senators, Bolkcom, Connolly, and Dvorsky, did not follow the floor manager’s advice.

With the amendments disposed of, the Senate proceeded to debate the bill. Assistant Majority Leader Bolkcom supported the bill, but found the local control conversation “very strange” because the legislature was lagging behind the more than 70 percent of Iowans who were ready for smokefree bars and restaurants. His colleagues were deferring to local governments simply because they lacked the courage to enact a statewide ban. Pushing the chamber’s collective capacity for analogic reasoning, Bolkcom asked the members to imagine how “crazy” the public would consider them if, instead, they were leaving it to local governments to protect Iowans from asbestos.

106 Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
107 Senate Journal 2007, at 1:740 (Mar. 14) (S-3119). Michael Connolly’s surprising Yea-vote was dictated by the procedural need to be on the prevailing side in order to move to reconsider, a motion that he then withdrew. Id. at 741.
110 Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
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At the other end of the rhetorical spectrum, Republican Jerry Behn was unable to understand why the legislature was debating even local control since Iowa already enjoyed local control—by businesses. As to Behn’s other claim that no one forced anyone to go into businesses owned by those who permitted smoking, Assistant Majority Leader Connolly asked about those who had to work there.\textsuperscript{111} (A background article on the bill published in the \textit{Quad-City Times} just 10 days before the Senate debate offered a reality check on Republican libertarian fantasies: it quoted Rhonda Capron, a Sioux City bar owner and former president of the Iowa Hospitality Association, dismissing the argument that regulation of smoking was required in order to protect employees and customers from secondhand smoke: “‘If my employees brought that up to me, they wouldn’t have a job... When they apply for a job here they know it’s a bar’”—and as far as Capron was concerned, “‘[s]mokin’ and drinking go together.’”\textsuperscript{112} Connolly then warned that beating Big Tobacco on the cigarette tax had not silenced the companies yet; in fact, the vote watering down the bill to exempt fraternal organizations—where many people worked and were exposed to smoke—was an example of the legislators’ having slipped on another Big Tobacco banana peel. Taking umbrage, Zaun asseverated that during his three years in the Senate he had neither been contacted by any tobacco company nor heard tell of anyone else’s having been so approached.\textsuperscript{113}

Senator Zieman, smoking veterans’ and Elks’ paladin, devised the debate’s most incoherent argument by instancing a bar in Decorah that voluntarily went smokefree and flourished: if the legislature let local government ban smoking in all bars, then the owner who made the decision to go nosmoking would lose business to the others—the unfair result of forcing them onto the same playing field. In summary, Zieman felt no inhibitions about denouncing this slippery slope to the “nannystate nannystate nannystate.”\textsuperscript{114}

Republican banker Steve Kettering and media consultant Jeff Angelo were rhetorically transfixed by trans fats as the next New York idea that would haunt Iowa, but they left it to Marshalltown Lawyer Larry McKibben to climb up into even higher flights of fantasy (which he would carry even further in 2008). The assistant minority leader sought to belittle the scientific campaign against

\textsuperscript{111}Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).


\textsuperscript{113}Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).

\textsuperscript{114}Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
smoking by casting tobacco and cigarettes as merely the latest phobic objects of irrational supersensitivity being imposed on unbelievers who simply wished to be left alone. After mock-admonishing his colleagues about the Round-up generated carcinogens in the meat served in the legislature’s cafeteria, he wondered whether cigarettes as “the evil du jour of today” would be followed by “evil corn.” Alas, there was no way to know because the Democrats would not say, but some targeted evil would remain on the agenda as long as “this crew” was running the show.115

In his closing remarks as S.F. 236’s floor manager, Quirmbach once again extolled the local control alternative for highlighting the value of community-level public debate for educating people about the dangers of secondhand smoke exposure at a time of growing but still not universal understanding. Portraying Behn as wanting no regulation and Bolkcom as advocating a statewide law, Quirmbach, an economics professor at Iowa State University,116 got carried away with his own oratory: “That puts this bill right where it ought to be—in the moderate middle ground.”117

In the end, the Senate passed S.F. 236 on a perfect 30 to 20 party-line vote118—a pattern that in the 1970s, 1980s, and 1990s had never characterized votes on smoking control bills because the large number of smoking legislators confounded otherwise typical party positions.

Despite having prevailed on S.F. 236 in the Senate, by the end of the first week of April anti-smoking lobbyists had become pessimistic. On behalf of her client, CAFE, Threase Harms foresaw not only “‘a lost cause for this session’” if the bill did not progress the following week, but “‘a whole new set of obstacles’” in 2008 as an election year. Even at this late date the Iowa chapter of the American Cancer Society was ambivalent about its own legislative strategy or whether it was merely a tactic. Its director of government relations, Sandra Quilty, admitted that it preferred a statewide ban, but the organization was unable to see beyond the invariant historical paradigm that “every state that has gone smoke-free has started by first legislating at the local level.” Whereas this narrative typically was built on the premise that the mass educational component of the struggle for local control was both an end in itself and conveniently also the means to secure it, Quilty now restructured the argument by identifying the

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115 Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
117 Iowa Senate Debate on S.F. 236 (Mar. 14, 2007) (audio download furnished by Rusty Martin).
state legislators as those critically in need of public health enlightenment: “The public sentiment is overwhelmingly supportive, but there is still a lot of education to do in the Legislature on this issue. So we understand the reality and are just pushing for the local control option.” If ACS had in mind the demonstration effect on the legislators of a wave of adoptions of no-smoking ordinances across the state, Democratic Representative Donovan Olson—who objected to his colleagues’ having predetermined exemptions for local communities—cast doubt on this plan’s realism by insisting that “the impact of a local ban would be minimal, as most municipalities wouldn’t pass one.”

A few days later the Democratic leadership offered what amounted to a legislative obituary by stating that differences in exemptions between the House and Senate preemption repeal bills had made compromise unattainable and that this impasse was unlikely to be overcome during the session’s final hectic fortnight. As House Speaker Pat Murphy—who, after passage of the dollar cigarette tax increase, privately delivered the death-knell to preemption repeal for 2007 on the grounds that “we’ve done enough to the smokers in Iowa”—formulated the point of the underlying dispute in more neutral-procedural terms: “If we’re going to turn this back to the cities and local governments, shouldn’t we be giving them some of those decisions instead of taking them right off the top?” In contrast, Quirmbach continued to treat local control not as some kind of opportunistic tactical second-best, but as a goal in its own right: “This is an issue that will take a lot of education of people. We continue to build support for local control. It’s the right way to go.”

Yet one other smoking ban bill came a cropper in 2007. Anthony Menendez, a college student who was a voting member of the Tobacco Use Prevention and Control Commission, an officer in “Just Eliminate Lies” (an innovative anti-smoking organization of Iowa teenagers, financed by tobacco settlement money appropriated by the legislature to the Public Health Department), and a legislative assistant to Representative Ako Abdul-Samad, suggested to him the need for a bill making all schools in Iowa tobacco free and then worked with bill drafters

120 Telephone interview with Dan Ramsey, director of advocacy, American Lung Association of Iowa, Des Moines (Aug. 1, 2008).
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to prepare the appropriate vehicle.123 H.F. 583, filed by Abdul-Samad and 18 cosponsors (including three Republicans) at the end of February, provided that every public school district and accredited nonpublic school “shall develop rules that prohibit a person from using a cigarette or a tobacco product” in any school building or facility under the school’s control, on any school grounds (including athletic fields and parking lots), in any school vehicle, or at school-sponsored or related indoor events held off-campus.124 The bill, which applied to employees, students, and visitors, was designed to insure that all schools banned all (including chewing) tobacco use, but it lacked a penalty provision.125 With some bipartisan support it reemerged as an identically worded Education Committee bill and placed on the House debate calendar, but it was dropped off the calendar and rereferred to committee after Minority Leader Christopher Rants, through whose 527 committee tobacco companies channeled large amounts of money to the Republican party,128 had filed an obstructionist amendment. Mimicking the underlying bill, Rants’ amendment tasked the state capitol authorities with developing rules to “prohibit a person from using” cigarettes or tobacco in the same places including at “state capitol-sponsored or state capitol-related indoor events that are held off state capitol grounds.”129 The bill was again scheduled for debate during the first week of April,130 but having failed to be taken up, it missed the so-called funnel deadline and lost its eligibility for further debate during the 2007 session.131

125Jason Clayworth, “House to Debate School Tobacco Ban,” DMR, Apr. 4, 2007 (5B) (NewsBank). Seventy percent of schools had already had some rule in place.
131Jonathan Roos and Jennifer Jacobs, “Legislative Deadline Kills Scores of Bills,”
In Lieu of a Smoking Ban: A Cigarette Tax Increase

As a cancer physician, I have tried to help many wonderful people who have suffered and died unnecessarily from cancers caused by smoking. Uniformly, these people wish they had quit at an early age, or, better yet, never have taken up the habit. Never have I had cancer patients or their loved ones say they were grateful that the price of their cigarettes was low.¹³²

Ironically, Iowa, the first state to impose a cigarette tax back in 1921,¹³³ not having raised it since 1991, had seen it fall to the eighth lowest among the states by 2007.¹³⁴ The tobacco industry had been able to rely on Republicans to prevent enactment of an increase in cigarette taxes while they were in control of the legislature, but even after incoming Democratic Governor Chet Culver had made good on a campaign pledge¹³⁵ by proposing an increase in the tax from 36 cents to $1.36—at which level “as many as 13,000 kids would not start smoking”¹³⁶ and the “Medicaid gap” between the $89 million that the state had been collecting in tobacco tax and the $301 million that it spent to treat tobacco-related illness would be significantly closed¹³⁷—his party was initially unable to achieve unity on the issue. A few days after New Year the new House Speaker, Pat Murphy, opined: “I don’t think we’ll go that high.” Instead, he suggested an increase in the range of 40 to 60 cents, contending that the dollar increase was not needed in order to achieve “the desired effect on young people.” Murphy did not reveal the basis for this alternative estimate, but he did make it clear that he was “also concerned about the competitiveness of businesses in border communities if..."
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Iowa’s cigarette tax gets out of line with the tobacco taxes of neighboring states.” In fact, at the time, Iowa’s tax was undercut only by Missouri’s 17 cents, and even at $1.36 would still have been lower than South Dakota’s ($1.53) and Minnesota’s ($1.49). The governor publicly disagreed with Murphy’s position, while Republicans warned that their votes would be determined by whether the tax increment was used for health care rather than merely for bolstering the general state budget.138 Such a condition would have been welcome to those Democrats for whom the anticipated additional $134 million in tax revenue would be key to financing universal health care access.139 The governor, too, wanted to use the revenue to expand health insurance coverage of children and some poor people, but Murphy insisted that “‘I just don’t know if we have enough votes to do a buck.’” Senate Majority Leader Michael Gronstal—who represented the border city of Council Bluffs—confirmed that legislators were hearing concerns about the tax impact in border towns.140 Ultimately, Democrats may have argued that the competitive pressure on cigarette sellers on Iowa’s western, southern, and

138Jonathan Roos, “House Speaker: $1 Cigarette Tax Unlikely,” DMR, Jan. 6, 2007 (4B) (NewsBank). The tax in Nebraska, Wisconsin, and Illinois was 64, 77, and 98 cents, respectively. A month later Murphy explained the range of 36 to 64 cents this way: the lower figure was the increase that the Senate had passed two years earlier and the higher figure would have resulted in a tax of exactly $1.00. “Iowa Press,” Iowa Public Television (Feb. 9, 2007), on http://www.iptv.org/iowapress/transcripts07.cfm (visited June 27, 2008).

139Jonathan Roos, “Democrats Push for Comprehensive Health Care,” DMR, Jan. 11, 2007 (4B) (NewsBank). Eventually, the Fiscal Services Division of the Legislative Services Agency estimated that the additional cigarette tax revenue generated by the increase would amount to $129.4 million in fiscal year 2008; it also estimated that demand would decrease by 19.2 percent based on the 27.5 percent price increase (generated by the $1.00 tax increase) and -0.7 elasticity. Fiscal Services Division, Legislative Services Agency, Fiscal Note: SF 128 Cigarette/Tobacco Tax Increases (Mar. 13, 2007), on http://www3.legis.state.ia.us/fiscalnotes/data/82_1023SVv2_FN.pdf (visited June 26, 2008). In fact, the estimate turned out to be very accurate: the tax increase amounted to $128.6 million. Email from Michael Lipsman, Manager, Tax Research and Program Analysis Section, Iowa Department of Revenue, to Marc Linder (June 5, 2008). It is unknown whether Republican Senator Jerry Behn made good on his bizarre bet of a pack of cigarettes that the Democrats would not raise the revenue they thought they would because smokers could buy a carton for $22.29 on line. Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin, Communications Director, Iowa Senate Democratic Research Staff).

eastern borders would last only a few months until buyers tired of driving long distances and resumed buying at in-state stores, but it was the rare legislator, who, like Representative Mark Kuhn, forthrightly declared during floor debate: “I don’t want Iowa to be known as a place to go to buy cheap cigarettes.”

Ultimately a group of Democratic legislators, not the least vociferous among whom was Senator Matt McCoy, rose up and collected so many of their colleagues’ signatures that a shocked leadership abandoned its timid 50-cent increase and embraced the demand for what it now recognized was a doable full dollar.

In contrast, on the Republican side, despite the consistent and almost monolithic opposition to the tax increase, a significant proportion of the (House) caucus, according to its most prominent dissident, Representative Walt Tomenga, recognized the empirically and scientifically confirmed findings of the negative consequences of smoking as well as of the negative correlation between cigarette tax increases and smoking take-up rates by teenagers and smoking prevalence rates among adults. The Republican party nevertheless voted overwhelmingly against the course of action dictated by science because they regarded smokers opposed to paying higher taxes as “our base,” who generated more contributions to the party than the general public, especially at a time when the party had lost its majority status in the legislature.

In the Senate

I think you’re way out of line here. You continue with the people way against you on this issue.... Many people feel these people are purveyors of death...and you’re standing up here all night fightin’ for ‘em.

On January 18, Senate Study Bill 1055, which called for a one-dollar increase, was presented and assigned to a three-member subcommittee of the Senate Ways and Means Committee chaired by Matt McCoy, who in his closing remarks during floor debate seven weeks later declared that he would be

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141 Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio file furnished by Dean Fiihr, communications director, House Speaker Pat Murphy).
142 Telephone interview with Matt McCoy, Des Moines (May 8, 2008).
143 Telephone interview with Walt Tomenga, Johnston, IA (July 17, 2008).
144 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin) (Michael Connolly addressing Republicans).
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back in 2008 to pass a smoking ban: “We will be a smoke-free society, there’s no doubt in my mind, in my lifetime.” A week later the subcommittee, to which committee chair Joe Bolkcom—another anti-tobacco militant, who later conceptualized the tax increase as a “generational decision” on behalf of those who would never start smoking—had also appointed himself, held a hearing at which lobbyists presented predictable views: retailers complained that the higher tax would reduce sales in border cities, while health organizations welcomed the long overdue increase. Afterwards, Bolkcom and McCoy voted in favor of the dollar increase, but with the chief point of contention—how the legislature would decide to spend the revenue—the bill did not deal at all.

On the same day (January 30) that a Register Iowa Poll revealed that 67 percent of Iowans supported the dollar increase, Governor Culver in his first State of the State address to the legislature pressed the issue—on which he had victoriously campaigned—even to the extent of “taking his own party to task on a measure he said would save lives.” Culver dwelt on the quarter of a million Iowans lacking health care coverage, noting that there was “not one legislator in this chamber...who didn’t promise to do something about this.” In order to fulfill these promises the governor proposed an additional $140 million to expand health care access and identified the one dollar cigarette tax increase as “the only responsible way to pay for it.” The initiative would, he declared, in addition, save more than 17,000 lives, “[c]reate a powerful disincentive to start smoking and help others quit,” and “[c]lose the smoke-related budget deficit. Because we have the 9th lowest tobacco tax in the country, the state’s cost of treating smoke-related illnesses is greater than our cigarette tax revenue by more than $50 million...annually. This simply isn’t fair. Nonsmoking Iowans shouldn’t be expected to pay for health care costs of those who choose to smoke.” And those legislators who wanted to raise the tax by only 30 to 60 cents Culver reminded

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146 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
147 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
that “half-measures will only produce half the results.”

Even Speaker Murphy, the skeptic whom the governor’s admonition doubtless primarily targeted, was forced to concede: “I think if we had a vote now, it would be pretty tough to vote against the guy.” At the very least, Culver’s address, as House Ways and Means Committee Chairman Bolkcom recognized, “forced lawmakers concerned about the potential economic impact on cigarette retailers to weigh the costs to businesses against the public benefits.” To be sure, even this cost-benefit analysis of public health was manifestly alien to the retailers themselves as represented by the vice president of a convenience store chain in western Iowa, who pleaded: “At least look at the surrounding states and let us be somewhat lower than them so we can be aggressive about keeping our customers in Iowa.” Why the state government should not be more concerned with keeping Iowans alive and healthy he did not explain.

Bolkcom’s Senate Ways and Means Committee approved S.S.B. 1055 on February 7 by a vote of 14 to 3, all 10 Democrats being joined by four of seven Republicans after the committee, beyond retaining the dollar tax increase, had added a provision creating a health care trust fund in which all cigarette taxes had to be deposited and spent only for health care. Attorney General Tom Miller’s talk to the committee stressing that the cigarette tax was “the single most effective tool at the disposal of state leaders for discouraging smoking” made no impression on the three Republican dissenters, whose objection focused on the alleged competitive disadvantage that would be imposed on businesses in the Missouri and Mississippi river towns. Two days after the committee’s action, House Speaker Murphy began to relent: interviewed on Iowa Public Television’s “Iowa Press,” he remarked that the governor’s “compelling arguments” as well as the realization that several of Culver’s budget proposals, especially in the area of health care, were driven by the governor’s proposed tax increase meant that the first thing the House would look at was whether “we can do a dollar.” The fact that House passage would not be possible if the tax were not spent on health

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care\textsuperscript{156} seemed to create a successful congruence.

Toward the end of February, while the Senate, as Majority Leader Gronstal disclosed, was still a week away from deciding where between 62 cents and a dollar the tax would be set, the House Ways and Means Committee, despite the chamber’s leaders’ skittishness about the larger increase, went ahead and approved, albeit narrowly, on an almost, but not entirely, perfect party-line vote of 13 to 12, H.F. 346 with its one dollar increase.\textsuperscript{157} On a perfect party-line vote the committee did amend the bill to restrict the use to which the cigarette tax could be put to health care, substance abuse treatment and enforcement, and tobacco use prevention and control.\textsuperscript{158}

By the time the Senate debated the cigarette tax increase bill on March 7, numerous lobbyists had predictably declared their clients’ positions. Those in favor of the bill included (in chronological order) the American Cancer Society, Iowa Medical Society, Iowa Nurses Association, Iowa Board of Regents, Iowa Dental Association, Iowa Osteopathic Medical Association, Polk County Medical Society, Iowa Department of Human Services, School Administrators of Iowa, CAFE, and the American Lung Association, while those opposed included Reynolds American, Inc., the Iowa Wholesale Distributors Association, the Cigar Association of America, Inc., Philip Morris USA, Inc., the Iowa Retail Federation, and the Iowa Grocery Industry Association. However, that one particular group lobbied for the tax increase was surprising—labor unions, including the American Federation of State County and Municipal Employees


\textsuperscript{157}H.F. 346 (Feb. 13, 2007, by Foege), House Journal 2007, at 1:442 (introduced); Report of [House] Committee on Ways and Means (25) (Feb. 21, 2007) (copy furnished by House Clerk’s Office); Jennifer Jacobs, “Cigarette Tax Likely to Increase, Leaders Say,” DMR, Feb. 23, 2007 (4B) (NewsBank). Democrat Huser, who was simultaneously pushing the pro-tobacco position on behalf of casinos in public smoking legislation, was the only member to defect. A few weeks later, when conservative Democrat Dawn Pettengill switched parties, Huser said: “’My party may not know it sometimes, but I’m a Democrat.... They can kick me out, but I’m not leaving.’” Jason Clayworth, “House’s Pettengill Switches to GOP,” DMR, May 1, 2007 (1B) (NewsBank).

\textsuperscript{158}H.F. 346, amendment 202; [House] Committee Minutes for Ways and Means (Feb. 21, 2007) (copy furnished by House Clerk’s Office). On a perfect party-line vote a Republican amendment to authorize cigarette tax revenue to be used, inter alia, for Medicaid reimbursement was defeated. H.F. 346, amendment 705; [House] Committee Minutes for Ways and Means (Feb. 21, 2007) (copy furnished by House Clerk’s Office).
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Iowa Council 61 (whose lobbyist was the very first to declare for the bill), the Communication Workers of America Iowa State Council, the United Auto Workers, and the Iowa Federation of Labor (unions’ umbrella organization). Because smoking prevalence is greater within the working class population from which unions draw their members, to back the bill was “not an easy decision” for the leadership of these organizations, according to Jan Laue, IFL executive vice president and lobbyist (and a member of the Bakery, Confectionery, Tobacco Workers, and Grain Millers International Union), especially since for years they had pilloried much lower cigarette taxes as regressive because their impact was more severe on the largely lower-income strata who smoked. IFL finally switched its position and supported the higher cigarette tax in order to make a contribution to the improvement of the health of its smoking members both by encouraging them to quit smoking and by expanding health care access for lower-income Iowans by virtue of the programs that the higher tax was designed to fund—in spite of its regressive character. Similarly, health considerations had motivated AFSCME to switch sides as early as 2003.

Republican opposition to the tax increase during the debate centered on its impact on businesses in towns across the border from states with lower taxes as well as on allegations that the tax was merely “a ploy to increase state

159 http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Matt&Service=Declarations&frame=1. Two days after Senate passage of the bill the Iowa Association of Business and Industry declared against it. The fact that two companies (Casey’s General Stores and Krause Gentle Corp. aka Kum and Go) and one association (Petroleum Marketers and Convenience Stores of Iowa) that presumably would have been among the entities most adversely affected by the tax increase listed themselves as “undecided” does not mean that they in fact did not lobby; the lobbyists for Casey’s, for example, declared against H.F. 346, while Kwik Starr declared against H.F. 346 and H.F. 555.

160 Telephone interview with Jan Laue, Des Moines (June 27, 2008).

161 Telephone interview with Marcia Nichols, AFSCME legislative/political director, Des Moines (June 27, 2008).
spending.”162 In order, presumably, to test Democrats’ bona fides, Republican Larry McKibben offered an amendment that he boasted would “define debate tonight”163 by virtue of striking the whole bill and substituting for it a provision authorizing retailers to increase the minimum price they charged for cigarettes by one dollar, thus allegedly “discourag[ing] smoking without “growing government.””164 Indeed, McKibben was so mesmerized by his own anti-government rhetoric that he even launched the wild accusation that “liberal Democrats” had “hidden behind the honorable efforts of anti-smoking and smoking preventing groups in order to further their desire to grow government.”165 Floor manager McCoy pointed out that the amendment would insure that the state received no revenue from the increase, but that “the retailers would make out like bandits.”166 As a result, the state would be denied the additional revenue to offset part of the cost of health care for smoking-related illness167—an irrational outcome in light of Republicans’ purported insistence on making their support for the bill contingent on insuring that all the tax revenue went to health care.168 McKibben’s amendment attacking Democrats’ effort to “grow government spending”169 was defeated on a party-line vote of 17 to 31, the
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Dr. Hartsuch—who later during the debate declared (in dictum, as it were) that cigarettes should be abolished, though that issue was not on the agenda, having been supplanted by his pet issue of restraining the growth of government—then offered his own amendment, which would have raised the minimum legal age for buying or smoking “this very dangerous drug” to 21, but it lost even more decisively: only 11 Republicans supported it, while seven others joined all 30 Democrats in voting Nay. (When Zaun later offered a stand-alone amendment to increase the age to 21, McCoy was constrained to call it “interesting” and concede that it had “merit,” before relegating it to a discussion that should be held in another debate and successfully administering the coup de grace of nongermaneness.)

Hartsuch destroyed any chance that his proposal might have been approved by tacking on to it a mandatory ten-dollar cigarette and tobacco product purchaser identification card, which he oddly likened to a fishing license and which the Public Health Department was prohibited from issuing to recipients of public assistance or benefits. Hartsuch insisted that barring them from buying (and thus allegedly also eliminating smoking) tobacco “will allow additional moneys to be used for their” food, housing, and clothing and enable them to build up a “nest egg” so they could move out of poverty.

McCoy sought to deflect both of the amendment’s distinct proposals. Although he personally did not favor smoking by those under 21, he pragmatically acquiesced in the country’s having established 18 as the legal age for “nearly every right except alcohol,” which “served us well.” The ban on tobacco purchases by public assistance recipients he dismissed as “very unworkable” and a “severe discriminatory practice [sic] on how individuals choose to live their lives.” Seemingly oblivious of the self-contradictions in

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which he was entangling himself, McCoy rejected the kind of “big brother system” envisioned by this “ill conceived amendment” because it interfered with “individuals hav[ing] the free will to do whatever they want.”

At this point—surprisingly, given the traditionally staged and rehearsed and, when opponents are challenged, evasive character of legislative colloquy—Hartsuch managed to lure McCoy into a spontaneous exchange in which the latter wound up casting himself as an anti-statist libertarian Republican. Asked by the doctor whether he perhaps did not believe that “we as a state have an obligation to see to it that those who are on public assistance are financially directed in such a way as to promote their well-being,” McCoy, insisted that one of the tenets of the abolition of the welfare system was that individuals had to do for themselves what had to be done to move from public assistance to self-sufficiency and self-reliance and that, correlative, the government should not “start micromanaging their lives.” Boring further, Hartsuch—whose own anti-statist Republican libertarianism was at times perforated by the inescapable realities of public health that even he was unable to ignore—first secured McCoy’s immediate assent to the proposition that cigarettes were a very expensive habit, and then asked whether assistance recipients were not “in greatest need of those dollars.” McCoy promptly delivered himself of this admission: “I believe that the poor in this state have always been the group most likely to engage in activities that quite frankly are not helpful to their situation.” However, retreating to his newly found Republicanism, he stressed that since Iowa had legal gambling, liquor, and cigarettes, the state could not be managing people’s lives. This backpedaling culminated in the appropriation of one of the minority party’s shibboleths—“the bottom line is that we are not a nanny state.”

Though at first sensing a trap and dismissing the question as to whether public assistance recipients and other adults had a right to smoke as irrelevant, McCoy eventually recurred to one of the cigarette oligopoly’s slogans: Hartsuch’s amendment “would take away another person’s right to engage in purchasing a product that is a legal product” and thus would be antithetical to “individual freedom and liberty.”

Even less serious or acceptable was the next amendment by Republican Mark Zieman, who mock-self-deprecatingly opined: “Two years ago floating around this chamber was (the idea that) if we could raise the tax on cigarettes $1—20 percent of the people would quit.... Now, I’m not the brightest light bulb in the

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176 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
177 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
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box, however I know if $1 makes 20 percent quit, there’s a pretty good chance $5 is going to make everybody quit.”

It is unclear whether his colleague Brad Zaun intended to supply supporting evidence for his own candidacy as dimmest bulb by charging that Democrats “obviously don’t care about kids and smoking” inasmuch as their “message tonight is if you don’t smoke, start smoking, because we want to spend your money.”

Floor manager McCoy, calculating that the 25-cent a cigarette tax would push the per pack price up to about $8.70 or somewhat above the estimated $8 a pack health-care cost, congratulated Zieman: “I think you’ve got a great idea. Unfortunately, I think it would be too big a climb.” Instead, McCoy proposed adding another dollar the following year and “eventually” arriving at eight dollars: “I like where you’re going,” but, given the failure to raise the tax for 16 years, the sudden increase would be too big a “shock,” which would not give smokers enough time to quit. This fantasy prompted Zieman to draw the conclusion that Republican choreography demanded: the bill was not about health care, but generating revenue.

The overwhelming defeat inflicted on the killer amendment—even a clear majority of Republicans voted Nay—suggested that some pro-tobacco opponents may have feared that Zieman’s logic was impeccable.

Ward made Republicans’ final amendatory effort, which would have lowered the tax increase to 62 cents (making it, at 98 cents, equal to the tax in Illinois). She justified it on the dual grounds that it had a better chance of passing the House and would “relieve some of the heartburn that our colleagues have living on the border of Iowa and Illinois.” But after McCoy had countered that there

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179 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).


181 Senate Journal 2007, at 1:610 (Mar. 7) (S-3074) (8 to 40). Seven Republicans voted for and 11 against the amendment; Hatch was the only Democrat to defect.
were more than enough votes to pass the one dollar tax in the House,\(^{182}\) the amendment failed by a large margin, some Republicans (such as McKibben) presumably voting Nay because they regarded even this amount as too great.\(^{183}\)

The Democrats’ only amendment, offered by floor manager McCoy and adopted on a voice vote, objectively met Republicans’ complaints by mandating that the first \$127,600,000 of the revenue generated by the tax and credited to the general fund be appropriated to a health care trust fund.\(^{184}\) To be sure, McCoy conceded that even channeling the entire cigarette tax revenue to health care, substance abuse treatment, and tobacco prevention, cessation, and control would fall far short of the estimated $301 million spent by taxpayers in Iowa annually on smoking-related illnesses under Medicaid.\(^{185}\)

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\(^{182}\)Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).

\(^{183}\)Senate Journal 2007, at 1:613-14 (Mar. 7) (S-3084 by Ward) (11 to 37) (only one Democrat voting Aye).

\(^{184}\)http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&menu=false&ga=82&hbill=S3066; Senate Journal 2007, at 1:612 (Mar. 7) (S-3066 by McCoy). One newspaper editorially explained skepticism about the guarantee on the use of the tax revenue against the background of “the history of anti-smoking efforts”:

Iowa’s share of a huge settlement in a lawsuit brought by several states against tobacco companies was supposed to be spent for expenses like tobacco-related illnesses and anti-smoking programs. Most of it ultimately went for other things, including construction projects at the three state universities. Skeptical lawmakers are right to think the same thing might happen to the windfall a higher tobacco tax would produce.

The Senate bill and one of its counterparts in the House...address the issue by directing the new tax revenue to the Healthy Iowans Tobacco Trust, where it could be spent only for Medicare, Medicaid and anti-smoking programs. That is a good provision but far from a guarantee.

The problem is that money is fungible. If the new tax revenue is used to pay for existing health care programs, that would free up for other uses the money from the general fund now used to pay for those programs. The accounting trail would look like the tax money is going to health care when in reality it would be used elsewhere for purposes unrelated to tobacco, for instance general education.

A guarantee on the use of the money may be too much to ask. No matter how tightly written the restrictions, they can be rewritten by future legislators—which is not necessarily a bad thing, as flexibility is needed to cope with changing priorities.


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Following almost four hours of debate ending after midnight,\(^{186}\) the Senate passed the bill by a vote of 34 to 14, six Republicans casting Ayes and only two Democrats voting Nay.\(^{187}\)

In the House

Having lost as expected in the Senate, the cigarette industry saw its last chance in persuading some House Democrats to insist on a smaller tax increase, thus sparing its business in Iowa the fate that befell the oligopoly in Illinois: Iowans, according to RJ Reynolds Tobacco Company, “consumed 105 packs of cigarettes per capita in 2006, whereas Illinois, with a tax of 98 cents per pack, consumed only 52 packs per capita.” To encourage addicted consumers in Iowa to complain about the proposed tax increase, Reynolds set up a toll-free phone number, at which operators connected them with the offices of representatives in the Iowa legislature. Whether the operation was a success seems doubtful since an operator at the call center in Fargo, North Dakota, told the Cedar Rapids Gazette that the office had received around 200 calls since the operation began in February. This modest output may have reflected the jejune criticism voiced by the firm’s communications director that the legislature was “‘just trying to socially engineer the state.'”\(^{188}\)

A week after the Senate’s action, which prompted House Speaker Murphy to “try to do a one dollar cigarette tax increase”\(^{189}\)—despite the fact that 12 days

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\(^{187}\) Senate Journal 2007, at 1:614-15 (Mar. 7). The two Democrats were Hancock, whose votes against public smoking bills have already been mentioned, and Keith Kreiman, who represented a Missouri border district, some of whose tobacco merchants may have induced him to oppose the tax increase. Email from former legislator who demanded anonymity to Marc Linder (July 27, 2008). The Republicans were Boettger, Gaskill, Lundby, Noble, Putney, and Ward.

\(^{188}\) “Some Steamed over Cigarette Tax,” Gazette (Cedar Rapids), Mar. 12, 2007 (3B) (NewsBank).

earlier an unidentified man had called his house after midnight, become upset when Murphy’s daughter told him that her father was not available, “‘shared his displeasure’ about the proposed dollar cigarette tax increase, and then angrily told her, “‘You tell him he better call me back or I’m going to rape his daughter,’”—the House engaged in an six-hour debate of its bill (now H.F. 555) for which it ultimately substituted S.F. 128, which, if passed with minor changes, McCoy predicted the Senate would accept.

Floor manager Pam Jochum, a Dubuque Democrat, opened the debate by laying out some impressive data; of especial relevance was the calculation that Iowa’s annual smoking-related health care costs of one billion dollars worked out to $8.04 per pack—far above its retail price. The toll in human life that the (modest) one-dollar tax increase, which, she admitted later in the debate in passing, Democrats might have set at a higher level had they been able to secure 51 votes for it, was projected to save was inspiring: 20,000 adults would quit smoking; 5,300 adult smokers would not die prematurely; and 12,300 children would be saved from dying prematurely from smoking.

The first Republican amendment to H.F. 555—offered by Jamie Van Fossen, a Mid American Energy Company service representative—would have struck the whole bill and substituted for it a total ban on selling or using cigarettes.

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190 The 20-year-old smoker later arrested and charged with aiding and abetting harassment told police that he had obtained a sheet of paper at a Casey’s General Store with legislators’ names and home phone numbers that urged constituents to share their opinion of the tax increase with their representatives. M. Kittle and Mary Bragg, “Smoker Accused of Making Threats—Police Say Anger over Cigarette Tax Sparks Phone Call,” Telegraph Herald (Dubuque), Mar. 31, 2007 (A1), (Newsbank); Iowa Department of Public Safety, “DCI Makes Arrest After Threatening Phone Calls Were Made to Legislator[‘]s Residence” (Mar. 31, 2007), on http://www.dps.state.ia.us/commis/pib/Releases/2007/03-31-2007_DCI_Arrest.htm (visited Aug. 1, 2008).

191 The audio download lasted six hours, though the press reported eight hours. “Cigarette Tax to Rise $1 a Pack,” Gazette (Cedar Rapids), Mar. 14, 2007 (1A) (NewsBank).


193 "$1 Cigarette Tax Expected by April 1,” Gazette (Cedar Rapids), Mar. 9, 2007 (10A) (NewsBank).

194 Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fihr, Communications Director, House Speaker Pat Murphy); Iowa House Debate on S.F. 128 (Mar. 13, 2007) (audio download furnished by Dean Fihr, Communications Director, House Speaker Pat Murphy).

195 http://www.iowahouserepublicans.com/?page_id=63
Taunting Democrats with their own logic, Van Fossen insisted that if a one-dollar tax would save lives, and if tax revenue was not the purpose of the increase, he could imagine nothing better than banning smoking completely in Iowa. For good measure he tossed in that the state of Iowa was “profiteering” more than Big Tobacco since it took 57 percent of cigarette sales. Interestingly, the bill’s rather feisty floor manager failed to engage Van Fossen’s amendment at all, instead immediately challenging its germaneness. The only response Van Fossen was ever able to elicit from Democrats occurred later in the debate when he rhetorically asked Mary Mascher whether she had supported his amendment to ban smoking. Oddly oblivious of the large and popularly accessible scientific literature on the significant non-volitional dimension of addiction that many millions of smokers contracted as children, one of the legislature’s leading anti-smoking advocates justified her opposition on the grounds that she did not think that smoking should be banned because it was a “choice” just like drinking or eating too much. Then, even more remarkably, sounding like a tobacco industry spokesperson, Mascher incorrectly instructed Van Fossen that his amendment would have been unconstitutional because cigarettes were not illegal in the United States. After Speaker Murphy had ruled this killer amendment non-germane, Van Fossen moved to suspend the rules to consider his amendment, but his motion lost by a vote of 34 to 60, nine of his fellow Republicans voting Nay, while no Democrat broke ranks.

Floor manager Jochum, again, instead of engaging its substance, challenged the germaneness of the amendment filed by Republican Steven Lukan (a tire repair technician at his family’s tire repair store, in northeast Iowa) to increase the legal age for buying, using, or being cigarettes or tobacco to 21. On the motion to suspend the rules to consider the amendment, which the Speaker had ruled non-germane, the vote of 40 to 55 was, again, largely on party lines, with four Republicans voting Nay. In contrast, Jochum did allow as an amendment by assistant minority leader Doug Struyk to exempt from the sales tax any over-the-

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196 Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fiihr).

197 House Journal 2007, at 1:798-800 (H-1089) (Mar. 13). At this point, the floor manager Pam Jochum offered an amendment striking all of H.F. 555 and conforming it to read exactly as did S.F. 128. Id. at 800-805 (H-1116). One of the chief new features of S.F. 128 was the annual appropriation of the first $127.6 million from the cigarette tax to the Health Care Trust Fund. S.F. 128, § 5(1). All of the subsequent Republican amendments applied to this main amendment. After the Republican amendments had all been defeated, Jochum’s amendment was adopted on a party-line vote of 52 to 45 with only two cross-overs (Republican Tomenga and Democrat Huser). Id. at 826-27.

counter smoking cessation or nicotine replacement product was “interesting”; after mentioning in passing that it might be worthy of legislative consideration later in the session, she succeeded in dispatching it by means of another non-germaneness ruling.\textsuperscript{199}

Minority Leader Rants, who had blocked all attempts at increasing the tax when his party controlled the House, but now conceded that an increase was “inevitable” and a “foregone conclusion,” offered a “common ground” amendment limiting the hike to 62 cents (which would have made the tax equal to that in Illinois and which he therefore dubbed that Eastern Iowa amendment):\textsuperscript{200} “Raise that tax, provide that revenue the governor and some people in this body think they need to have available to spend to balance the budget, curb youth smoking, but [do] not destroy a lot of Iowa retailers and force consumers into other areas of [sic] making those purchases.”\textsuperscript{201} After Republican Henry Rayhons had depicted the majority party as taking advantage of poor people’s addiction in order to increase state spending, Mascher explicated the underlying principle of the tax increase: “We are counting on the revenue stream to be reduced. ... We are hoping it will decrease—that is our intent.”\textsuperscript{202} To be sure, as Republican Steven Lukan asked later in the debate without receiving an adequate response: since the governor and the majority party predicated parts of the state budget on estimated cigarette tax revenues, how would various health programs be funded if passage of a local control or statewide smoking ban bill exerted its intended effect of driving down consumption and sales further still?\textsuperscript{203} Significantly, on a non-record roll call, which permitted members to express an opinion without being called to account for it or intimidated by leadership into changing their votes as would happen on a roll call, the minority party’s chief ideolog’s amendment almost prevailed: the 47 to 49 vote revealed just how fragile

\textsuperscript{199}Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fiihr); \textit{House Journal 2007}, at 1:808-10 (Mar. 13) (H-1157). Struyk’s motion to suspend the rules to discuss his amendment lost by a vote of 42 to 53.

\textsuperscript{200}Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fiihr).

\textsuperscript{201}“Cigarette Tax to Rise $1 a Pack,” \textit{Gazette} (Cedar Rapids), Mar. 14, 2007 (1A) (NewsBank). Rants offered the amendment on behalf of a Republican, Charles Gipp, who was absent on account of illness. Later during the debate Rants stated that his preference was a 32-cent increase. Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fiihr).

\textsuperscript{202}Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fiihr).

\textsuperscript{203}Iowa House Debate on S.F. 128 (Mar. 13, 2007) (audio download furnished by Dean Fiihr).
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the Democrats’ majority was on this vital public health and socioeconomic issue was. Republican Scott Raecker sought to embarrass Democrats by offering an amendment that would have used the cigarette tax revenue for tobacco use prevention and control, specifically mandating, inter alia, the amount recommended by the Centers for Disease Control, $10 million for youth programs, and $5 million for enforcement of tobacco laws. This amendment, too, was defeated on a party-line vote of 44 to 52 with only one Republican defection—Representative Walt Tomenga, who had attended Graceland College, which is run by an offshoot of the tobacco-hostile Mormon church, and with whom the floor manager at the end shared her time for concluding remarks, calling him a “statesman.” These types of amendments were accompanied by warnings that the Democrats’ bill lacked assurances that the additional cigarette tax revenue would in fact be used for the statutorily designated health care purposes because it would “flow into the ‘black hole’ of the general fund and could be used for other programs....” In response, the bill’s floor manager, Pam Jochum, while doubting that such a problem would occur, insisted that even if it did, the tax would still “accomplish some of her goals because the higher cost of smoking would discourage people from smoking.” (Her explanation paled in comparison to the radical single-purpose orientation of Dr. George Weiner, director of the Cancer Center at the University of Iowa, who, shortly before the start of the 2007 legislative session, dismissed debates over how the additional tax revenue should be spent by semi-jocularly observing that the imposition of the tax would serve its purpose even if the revenue were thrown into the river.)

After several other similar Republican amendments had been defeated by
similar margins, the Democratic amendment conforming H.F. 555 to S.F. 128 was adopted and the latter formally, by unanimous consent, substituted for the former. A much briefer debate on S.F. 128 then ensued, the most important amendment to which was offered by Heaton; like Raecker’s aforementioned amendment, it, too, was met by Jochum’s assurance that her bill could meet these challenges, and was then promptly defeated on a similar vote. The debate’s unintentional comic high point was delivered by Republican Dwayne Alons, a farmer, church deacon, and retired general in the Iowa Air National Guard, who contended that the tax increase violated smokers’ due process rights because it was intended to be punitive and did punish smokers without affording them any recourse.

The 58 to 40 vote on final passage of S.F. 128 revealed that Majority Leader Murphy had been doubly wrong the previous day when he declared that he was “certain he has 51 votes and doesn’t need any help from Republicans.” In fact, only 50 Democrats voted for the bill because three Democratic women (Huser, Mertz, and Pettengill) voted with the majority of Republicans; conversely, eight Republicans furnished the 51st and seven additional superfluous votes.

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212 House Journal 2007, at 1:830-33 (Mar. 13) (H-1138); Iowa House Debate on H.F. 555 (Mar. 13, 2007) (audio download furnished by Dean Fiihr). The 44 to 50 vote included Tomenga’s defecting Nay. The amendment would have required full funding of the state’s anti-tobacco program up to the level recommended by the Centers for Disease Control.
214 Iowa House Debate on S.F. 128 (Mar. 13, 2007) (audio download furnished by Dean Fiihr).
215 House Journal 2007, at 1:833-34 (Mar. 13). To be sure, the vote as announced by the Speaker was 51 to 39 with 10 absent or not voting. Iowa House Debate on S.F. 128 (Mar. 13, 2007) (audio download furnished by Dean Fiihr, Communications Director, House Speaker Pat Murphy). Eight of these ten presumably availed themselves of House Rule 74 to vote within 10 minutes of the announcement of the vote.
217 The eight were Baudler, Clute, Jacobs, May, Linda Miller, Tjepkes, Schickel, and Tomenga. Significantly, six of these eight Republicans (Baudler, Clute, Jacobs, May, Schickel, and Tomenga) also voted for the Smoke-Free Air Act in 2008 on the final House vote (on the conference committee compromise), accounting for two-thirds of the nine
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The Impacts

At the “raucous” signing ceremony two days later Governor Culver upped the estimates of the tax increase’s impact to 40,000 youths who would not start smoking in addition to 20,000 people who would quit smoking and the prevention of 20,000 tobacco-related deaths. Enactment of the one-dollar increase, which catapulted Iowa from 42nd to 17th place among states, confirmed the validity of Senator Michael Connolly’s floor-debate declaration that “[t]onight breaks a 10-year stranglehold on the Iowa Senate by the Big Tobacco lobby right out there” —a statement whose historical accuracy was, to be sure, marred by the fact (well known to Connolly himself) that the cigarette oligopoly’s control of smoking and tobacco legislation in the Senate had in no way begun with Republican conquest of the majority at the 1996 elections and the advent to power of the wannabe Tobacco Institute vice president, Stewart Iverson. On the contrary, Connolly’s own Democratic party, especially under the protobacco majority leadership of Senators Junkins, Hutchins, and Horn—the former two having formalized their allegiances by becoming cigarette company lobbyists after their departures from the Senate—had for years stymied efforts by Connolly and others even to breathe smoke-free air in the Senate itself, where, as Democratic Senator Robert Dvorsky reminded his colleagues, when he arrived in 1994, “we actually sold cigarettes in [a] machine in the back of the Iowa Senate,” thanks (as Dvorsky did not mention) to the Democratic leadership. Whatever the historical background, the tax increase demonstrated that at the very least there was one exception to the iron law of class legislative supremacy enunciated by former House Speaker and later lobbyist Don Avenson: “We always win. ... We lobbyists for economic interests always win in a capitalist

Republican cross-over votes who compensated by one vote for the eight Democratic defectors. See below ch. 35.

221 See above ch. 32.
222 Iowa Senate Debate on S.F. 128 (Mar. 7, 2007) (audio download furnished by Rusty Martin).
223 See above ch. 32.
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To be sure, the limits on the deterrent impact of the dollar increase and the limits of rationality in the context of addiction were not to be underestimated. Both were visibly on display in the case of Republican Representative Dan Rasmussen, who doubted that the extra $500 a year he would be spending on “cigarette taxes, sales taxes and merchant profits” would be “enough to break his habit of smoking” 20 cigarettes a day: “‘It’s very addictive, and it’s very harmful—we all know the effects.... I think most smokers will tell you they quit smoking every time they smoked their last cigarette.” 225 Nevertheless, Rasmussen did not urge his colleagues to raise the tax even more in order to provide the financial incentive to quit that manifestly his survival instinct had failed to give him.

In contrast, many other smokers in Iowa, apparently valuing their money more than their health or lives, did either quit or reduce the number of cigarettes they smoked in the wake of the tax increase. The biennial prevalence survey conducted on behalf of the Department of Public Health revealed not only that the prevalence of cigarette smoking had declined from 18 percent in 2006 to 14 percent in 2008, 226 but that 32 percent of current smokers stated that they had decreased the number of cigarettes they smoked following the $1.00 tax increase in March 2007. 227 Moreover, in the wake of the tax increase a huge drop in “cigarette packs stamped” in Iowa took place—from 253 million in FY 2006, to 228 million in FY 2007, 172 million in FY2008, and 162 million in FY 2009. 228

224 Telephone interview with Don Avenson, Oelwein (June 28, 2008).
226 G. Lutz et al., Iowa 2008 Adult Tobacco Survey fig. 1 at 7, tab. 5 at 8 (Feb. 2009), on http://www.idph.state.ia.us/tobacco/common/pdf/ATS_2008_Final_Draft.pdf. The rates in 2002 and 2004 were 23 percent and 20 percent, respectively. To be sure, even the authors were skeptical of the reliability of the data indicating a vast decline in prevalence among 18-24 year-olds (from 34.1 percent in 2006 to 6.8 percent in 2008), which may have resulted from a very small sample size. Id. at 8 n. 7. One of the co-authors estimated that using the prevalence rate of 14.8 percent for this age group associated with the upper limit of the 95 percent confidence interval would generate an overall prevalence rate of 15.4 percent (instead of 14.3 percent). Email from Mel Gonnerman to Marc Linder (Apr. 18, 2009).
227 G. Lutz et al., Iowa 2008 Adult Tobacco Survey 11 (Feb. 2009).
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To be sure, although cross-border sales not reflected in these data also rose, the extent to which they compensated for the very considerable decline in in-state sales is unknown.

229 One year after the tax increase went into effect, a survey revealed that 35 percent of smokers in Davenport and 45 percent of smokers in Council Bluffs stated that they bought a smaller (but unquantified) percentage of their cigarettes in Iowa. Gene Lutz et al., Cigarette Purchasing in Selected Cities on Iowa’s Borders: A Multi-Phase Surveys of Smokers 27 (2009).

230 In light of the lack of such data, the claim by Cathy Callaway, chair of the Iowa Tobacco Use Prevention and Control Commission, that the drop in Iowa sales was quantitatively synonymous with a drop in smoking was premature. IDPH, “Cigarette Sales Drop 52 Percent, But Teens Still at Risk” (Mar. 8, 2010), on http://www.iowapolitics.com/index.iml?Article=188024 (visited May 10, 2011). Frank Chaloupka, an economics professor at the University of Illinois at Chicago who specializes in the study of the impact of tobacco taxes on consumption, observed that the drop in Iowa sales “was somewhat bigger than expected, but not completely out of line.” In the absence of hard data on cross-border sales, the “only thing one can guesstimate from is the tax paid sales in the bordering states; while these were a bit higher in MO and IL in the first year of the tax increase, they returned to normal levels soon after, so whatever increased border crossing there was, it didn’t last long. ... Only way to really get at it would be to regularly survey Iowans about their smoking behaviors and ask questions about where they buy but unless this was done in the past, it’s too late now.” Email from Frank Chaloupka to Marc Linder (May 11, 2011). On the specific question of whether the drop in in-state sales in fact should be equated with the same quantitative drop in consumption, Chaloupka noted: “Without a more complete, rigorous analysis, I can’t say that the two are exactly the same, but my sense is that the vast majority of the drop in sales reflects a real drop in consumption.... For what it’s worth, the prevalence data support the drop in sales—prevalence fell from 21.4% in 2006 to 17.2% in 2009—a 19.6% drop; our research generally finds that about half of the decline in sales comes from a drop in prevalence and the other half from a drop in consumption, so the IA numbers are roughly in line with this. Yes, there have been other states that have seen big drops in smoking in short times.” Email from Frank Chaloupka to Marc Linder (May 13, 2011).
Iowa Leaps from Outdated Designated Smoking Areas to a Comprehensive Statewide Ban—Finally, Resistantly, Barely, But Also Boldly: The Smokefree Air Act of 2008

What the hell is Janet Petersen doing?¹

In 2008, 30 years after the Iowa legislature had first passed a very weak bill placing at best minimal limitations on smoking in a limited variety of public places,² it finally joined the large and growing number of states to enact comprehensive legislation prohibiting smoking in the vast majority of indoor public places.³ Whereas other states had, since the mid-1990s, incrementally prohibited smoking outright in restaurants, workplaces, and bars,⁴ Iowa leaped directly from the feckless and obsolete 1970s regime of designated smoking areas to an across-the-board ban. As the authors of a 2004 study of nicotine and particulate matter levels in smoking and no smoking areas in hospitality venues concluded, “the identification of a ‘no smoking’ area within a larger room or space where smoking was otherwise permitted cannot be presumed to result in a

¹Telephone interview with Senator Herman Quirmbach, Ames, IA (Apr. 19, 2008) (describing his astonished reaction in February 2008 to learning that Rep. Petersen was pushing a bill to strengthen the statewide anti-smoking law rather than merely to repeal preemption of local control). Quirmbach later apologized to Petersen.
²See above ch. 25.
significant reduction in exposure to particulate matter [more] than that occurring were an individual to remain in that area where smoking is allowed. [S]imply moving from that [smoking] part of the room to another identified with ‘no smoking’ signs resulted in an almost trivial reduction (17%) in exposure. Indeed...an individual might actually be more heavily exposed to ETS (in terms of particulate matter...) by moving from the smoking to the ‘no smoking’ area.”

Non-smoking sections, as the surgeon general’s 2006 report on involuntary exposure summarized the state of the science, do not “reduce secondhand smoke concentrations to insignificant levels.”

Although Democratic advocates of the bill that became the Smokefree Air Act had the aforementioned cumulative state experiences—as well as the hundreds of prohibitory local ordinances that had in part antedated the first statewide measures—to build on, they lacked the votes in their own caucus to secure a majority for a law that reached, let alone (with three exceptions) pushed, the limits of state control. In the absence of the comfortable majorities that, for example, the 2007 Minnesota Freedom to Breathe Act and the 2007 Smoke Free

5T. Cains et al., “Designated ‘No Smoking’ Areas Provide from Partial to No Protection from Environmental Tobacco Smoke,” TC 13:17-22 at 21-22 (2004). A much earlier study had characterized a 40 percent reduction in respirable suspended particles in designated no-smoking areas of restaurants as a “substantial” protection against exposure. William Lambert et al., “Environmental Tobacco Smoke Concentrations in No-Smoking and Smoking Sections of Restaurants,” AJPH 83(9):1339-41 at 1339 (Sept. 1993). A study that measured exposure in the no-smoking sections of many restaurants but did not compare it to that in the smoking sections concluded that neither ventilation nor partitions were “effective in eliminating second hand smoke in the nonsmoking sections; the concentrations remained higher than the weekly average concentrations found in the homes of smokers.” S. Hammond and Charles Perrino, “Passive Smoking in Nonsmoking Sections of 71 Indiana Restaurants,” Epidemiology 107(4):S-145-46 at 146 (July 2002).


7“More than 110 local ordinances with 100 percent smoke-free provisions had been adopted in the United States before the first state law with such a provision (for restaurants) was enacted in Vermont in 1993.” U.S. Department of Health and Human Services, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General 578 (2006). On the Vermont law, which covered many kinds of public places but not workplaces per se, see 1993 Vermont Laws No. 46, at 77; “Vermont Passes Sweeping No-Smoking Law,” NYT, May 2, 1993 (44).

8The bill in Minnesota (S.F. 238) achieved nearly two-thirds majorities in both houses on third reading: the vote in the Senate was 41-24 and then 43-21 on repassage after the conference report; in the House the votes were 85-45 and 81-48, respectively. https://www.revisor.leg.state.mn.us/revisor/pages/search_status/status_detail.php?b=Se

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Illinois Act\(^9\)—which was enacted as introduced\(^{10}\)—enjoyed, Democratic legislative leaders in Iowa felt forced to dilute the bill in order to gain the requisite votes by accommodating legislators who chose to subordinate their constituents’ health to the demands of casino, bar, and restaurant owners for the smoking status quo. Thus, in addition to continuing to withhold from local governments the power to impose more stringent standards than the statewide law, the Smokefree Air Act, unlike some other states’ statutes, failed, for example, to ban smoking in casinos—tax revenues from which constituted a greater proportion of state taxes in Iowa than in Illinois, let alone Minnesota, in which no non-tribal casinos were located\(^11\)—or in the outdoor space within a specified number of feet of covered indoor public places.\(^{12}\)

Nevertheless, despite the narrow majorities by which the bill passed both houses, the Smokefree Air Act included three outdoor prohibitions that were either unique or on the frontier of smoking control. Its prohibition of smoking “[i]n outdoor seating or serving areas of restaurants”\(^3\) was the most explicit and broadest such statewide ban yet enacted.\(^4\) (To be sure, in 2009, a bi-partisan

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\(^{10}\)http://www.ilga.gov/legislation/BillStatus.asp?DocNum=500&GAID=9&DocTypeID=SB&LegId=28191&SessionID=51&GA=95. See, however, the more nuanced characterization of the majority in Illinois below.

\(^{11}\)See below this ch.

\(^{12}\)The bill that Rep. Janet Petersen initially filed was modeled on other states’ statutes (such as those of Minnesota and Illinois) that did not exclude casinos or preempt stricter local ordinances. For example, the Minnesota Freedom to Breathe Act expressly provided that it did not prohibit cities or counties “from enacting and enforcing more stringent measures to protect individuals from secondhand smoke.” Minnesota Statutes § 144.417, subd. 4 (2008). The Smoke Free Illinois Act prohibited smoking within 15 feet of any entrance to a covered public place or place of employment. 410 Illinois Compiled Statutes 80/15 (2008). In 2006 the State of Washington prohibited smoking within 25 feet of the entrances, exits, openable windows, and ventilation intakes of enclosed smoking-prohibited areas. Rev. Code of Washington § 70.160.075 (2009). On the other hand, unlike the Minnesota Freedom to Breathe Act, the Smokefree Air Act does not exclude actors in theatrical performances. Minnesota Statutes § 144.4167, subd. 9 (2008).

\(^{13}\)Iowa Code § 142D.3(2)(b) (2009).

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majority of 51 House members introduced a bill to repeal this ban.) Precedent setting was the Smokefree Air Act’s total ban on outdoor smoking on the entire campus of every private and public college and university in Iowa. As mysterious as its legislative origins was the fact that this astoundingly capacious prohibition—which covered such an iconic locus of smoking as on-campus tailgating at University of Iowa football games—was never discussed, let alone sought to be amended or struck, during hours of floor debate. (The discontinuity of this breathtaking/breathgiving innovation was in part bridged by the University’s failure to enforce it by means of the $50 penalty that the legislature imposed as a sanction for individual violators.) Equally without precedent was the potentially even more extensive smoking ban on the “grounds of any public buildings owned, leased, or operated by or under the control of the state government or its political subdivisions....” Although this innovation was debated, ironically, its origin as a kind of practical joke designed by anti-regulation Republicans to embarrass Democrats (who instead chose to embrace it without realizing just how radical it was) ultimately boomeranged on its authors by making it tactically infeasible for them to kill their own creature. (In the end, the Iowa Department of Public Health, the agency charged with administering and enforcing the law, promulgated rules that, to the satisfaction of the legislature’s own bi-partisan Administrative Rules Review Committee, deprived the provision of much of its more far-reaching protective promise.)

Continued Tactical Tensions Between Advocates of Local Preemption Repeal and a Statewide Ban

“I hate smoking,” said Carlson, who owns the Court Avenue Restaurant & Brewing Co. “But what I hate more is the government telling me how to run my business.”


15H.F. 211 (Feb. 5, 2009, by Bailey et al.). For discussion, see below ch. 36.
17See below ch. 36.
19See below this ch.
20See below ch. 36.
Following the debacle in 2007, when the Senate local preemption repeal bill was loaded down in the House with exemptions that anti-smoking health advocates rejected, anti-smoking groups’ legislative activity during the interim between the 2007 and 2008 sessions remained intense and focused on repeal of

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\(^{22}\text{See above ch. 34.}\)

\(^{21}\text{According to Brian Meyer, House Majority Leader McCarthy’s administrative assistant and chief counsel, McCarthy met with the health groups during the summer of 2007 to inform them that leadership was going to abandon preemption repeal because it could not pass without the same exemptions that would be attached to a statewide ban bill. Meyer also stated that that summer, in a first-ever discussion, after McCarthy had also explained to the Democratic caucus that leadership wanted to shift support from preemption repeal to a statewide ban, a majority backed the latter approach, but no consensus was reached (nor, as will be seen below, was any in 2008). Moreover, some members brought up the need for exemptions, such as for casinos, age-restricted (21-and-over) bars, and Veterans of Foreign Wars posts. (For example, Philip Wise stated that he needed the casino exemption, whereas Janet Petersen wanted no exemptions.) Leadership agreed to give representatives a free vote on an amendment proposing an exemption for casinos, but not on final passage. Telephone interview with Brian Meyer, Des Moines (May 12 and 14, 2008). Because some of Meyer’s statements were inconsistent with other information, he was interviewed a second time to clarify certain matters. No one else corroborated Meyer’s account of the summer 2007 caucus meeting. For example, Rep. Mary Mascher, while confirming that House Democrats caucused in the summer, not only had no recollection of such a statement by McCarthy, but stated that it made no sense inasmuch as McCarthy opened the 2008 session arguing for local control. Telephone interview with Mary Mascher, Iowa City (Sept. 13, 2008). Rep. Vicki Lensing agreed. Telephone interview, Iowa City (Sept. 14, 2008). Rep. Tyler Olson the floor manager of the bill that passed in 2008, who also attended the caucus meeting in the summer of 2007, confirmed that no such discussion had taken place. Telephone interview with Tyler Olson, Cedar Rapids (Sept. 15, 2008). Based on the contextual implausibility of Meyer’s statement and the weight of the contradictory evidence, it is concluded that Meyer, who may have conflated two different events, was wrong. When confronted with these contradictory accounts, Meyer admitted that if he made those statements, he had been wrong. Nevertheless, he insisted that toward the fall of 2007 McCarthy had already started talking to him about the need to try passing a statewide ban since local control was not working out. Why under such circumstances McCarthy continued to support local control in January 2008 Meyer was unable to explain other than by reference to such a legislative maxim as that leadership never completely drops a bill. Telephone interview with Brian Meyer, Des Moines (Sept. 18, 2008). McCarthy, the only legislator who failed to agree to an interview, directed Meyer to stand in for him. Far from being a typical Iowa legislative administrative assistant, Meyer, who stated at outset that he knew more about the smoking bill than McCarthy, was a political operative in his own right with significant experience in tobacco-related matters. In 2003 he was McCarthy’s deputy director in the
preemption of local control24 in opposition to a statewide public smoking ban, which had made no more progress than during the years of the Republican ascendancy. To some participants at a CAFE statewide tobacco control meeting in the latter half of August it sounded as though a statewide smoking ban was being proposed, but, although Representative Janet Petersen—who had been filing such bills for years25—was meeting with the Democratic leadership on this question, local control was “still the big push for now.” When two members of the Story County Tobacco Task Force who had attended the meeting related this development to their fellow Task Force members, Jim Hutter, a political science professor at Iowa State University, suggested that the group support a statewide ban, including local control as an “addendum” to it.26 However, Herman Quirmbach, the state senator from Ames and former city council member who had successfully argued for adoption of a partial smoking ban there in 2000-2001 (which the Iowa Supreme Court struck down in 2003),27 insisted that “shifting advocacy efforts to a statewide ban” was a “bad idea” because the votes for it were lacking, but were there for a local control bill. Moreover, he regarded it as “confusing to switch from local control to a statewide ban at this point.” Nevertheless, he appeared to leave the door slightly ajar when he added that perhaps the Minnesota and Illinois statewide bans, which would soon go into effect covering bars and casinos, might be a gauge or model for Iowa, especially if some additional Democratic seats were picked up at the next election enabling anti-smoking forces to “make more headway later.”28 (One of Quirmbach’s Ames colleagues suggested that his overprotective attitude toward a local control bill might have had more than a little to do with the fact that as chairman of the

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24Telephone interview with Threase Harms, CAFE Iowa lobbyist, Des Moines (May 14, 2008).

25See above ch. 31.


27See above ch. 33.

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Senate Local Government Committee he would have been the central figure in guiding any such bill to passage.) 29 In the end, Hutter (and others on the Task Force) deferred to Quirmbach’s superior knowledge of the voting blocs in the legislature, 30 but more generally they confirmed their allegiance to local control because, as one of the members put it, “that’s where we were at.” 31

In the latter part of 2007 the Lung-Heart-Cancer coalition lobbied city councils to pass symbolic measures requesting the state legislature to grant them more power to regulate smoking. 32 The city councils of Cedar Rapids and Iowa City were already pushing legislators to repeal restrictions on their power to act in this area. 33 In October Governor Culver made his preference clear: “I’ve been for local control all along, and I certainly think that’s a good place to start.” 34 He was open to discussing a statewide public smoking law, but did not reveal whether he would support it. 35 On May 14, 2008, Cathy Callaway, the head of the Iowa Tobacco Prevention Alliance, revealing that preemption repeal was more opportunism than principle, admitted that “she would love to have a statewide smoking ban in Iowa,” but was unsure whether it had adequate support. 36 Local governments sustained enough momentum for preemption repeal during the first weeks of the 2008 session that by February 5, 20 cities, including Ames, Iowa City, Des Moines, Coralville, Cedar Falls, Cedar Rapids, West Des Moines, and Dubuque, eight counties, including Johnson and Linn, and three county health boards had passed

29 Confidential communication, telephone interview, Ames (Sept. 27, 2008).
30 Telephone interview with Jim Hutter, Ames (Sept. 29, 2008).
31 Telephone interview with Stacy Frelund, Des Moines (Oct. 2, 2008). Frelund, the American Cancer Society’s legislative lobbyist, was one of the two Task Force members who had attended the CAFE meeting. Rep. Petersen was not present at the meeting.
supporting resolutions.\textsuperscript{36} Nevertheless, as Randy Yontz, the advocacy director of the American Heart Association of Iowa acknowledged, not all of these local governments would, if given the power, have actually passed anti-smoking ordinances.\textsuperscript{37}

Typically rigid was the organization Clean Air for Everyone, which in January 2008 informed Iowa City Representative Mary Mascher, a long-time anti-smoking Democrat, that it wanted to devote its resources to passing local control and opposed a statewide ban. Asked why this group had underestimated the strength of sentiment in the legislature for a statewide law, Mascher explained that it had been shut out for so long under the Republicans that it did not see the political possibilities. But, Mascher added, support for a statewide ban did not just begin coalescing in 2008: she recalled that two or three years earlier House Democrat Janet Petersen and her Senate colleagues Jack Hatch and Matt McCoy had held a press conference calling for statewide action.\textsuperscript{38} More generally, however, as Yontz stressed, all the priorities and goals of the anti-tobacco coalition had been directed at overturning preemption because history had demonstrated that proceeding directly to a statewide ban without intermediate experience with local control—only Delaware had successfully navigated that dual legislative track of simultaneously repealing local preemption and enacting a comprehensive smoke-free statewide law—was simply not doable.\textsuperscript{39}\textsuperscript{40} Kerry Wise of the American Lung Association in Iowa took an absolutist position, arguing that: “Every other state that has a strong statewide law started at the local level.” ... She says her organization’s strategy is to let city ordinances that don’t have exemptions proliferate, and then use those to collectively springboard a statewide ban later.”\textsuperscript{41} Perhaps the nearest model was Illinois, which, as already noted, in 2007 passed the rigorous Illinois Smoke Free Act after having

\textsuperscript{36}http://www.smokefreeiowa.org/action.cfm (visited July 5, 2008). February 5 was significantly the day on which the House Commerce Committee approved the statewide ban bill, H.F. 2212, signaling the demotion, if not demise, of local control. See below.

\textsuperscript{37}Telephone interview with Randy Yontz, Des Moines (May 14, 2008).

\textsuperscript{38}Telephone interview with Mary Mascher, Iowa City (Apr. 13, 2008).

\textsuperscript{39}National Cancer Institute, \textit{ASSIST: Shaping the Future of Tobacco Prevention and Control} 187 (NCI Tobacco Control Monograph 16, 2005).

\textsuperscript{40}Telephone interview with Randy Yontz, Des Moines (May 14, 2008).

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dismantled in 2005\textsuperscript{42} and 2006\textsuperscript{43} the local preemption provision, passage of which the tobacco companies had secured in the Illinois Clean Indoor Air Act in 1989,\textsuperscript{44} one year before they successfully lobbied for more comprehensive preemption in the Iowa law.\textsuperscript{45} As a result of this repeal (as well as of the exemption of some cities from the 1989 preemption provision), a significant number of cities, including Chicago and the state capital, Springfield, had adopted no-smoking ordinances, so that with more than half the state’s population covered by such measures by 2007, “the Illinois Legislature was ready to take on the issue at the state level.”\textsuperscript{46} Moreover, the very fact that not all local governments had taken advantage of their newly acquired powers to regulate smoking reinforced the momentum for a statewide law because many mayors, dissatisfied with the existing patchwork system of coverage, strongly pushed for uniformity.\textsuperscript{47}

In fact, although the evolution of Delaware’s anti-smoking legislation was largely asynchronous with Iowa’s and that of many other states,\textsuperscript{48} the principal potentially relevant political difference between the two states with regard to the simultaneous achievement of local control and a broad statewide ban—keeping in mind that Delaware’s starting point, its 1994 Clean Indoor Air Act, was much stricter and more capacious than Iowa’s 1978 law as amended in 1987 and 1990\textsuperscript{49}—was that from 1997 to 2004 the Robert Wood Johnson Foundation

\begin{itemize}
\item \textsuperscript{42}H.B. 672, Public Act 94-517 (2005).
\item \textsuperscript{43}S.B. 2400, Public Act 94-917 (2006).
\item \textsuperscript{45}See above ch. 27.
\item \textsuperscript{47}Telephone interview with Michael Grady, Springfield, director of public policy and government relations, American Cancer Society-Illinois Division (June 10, 2009).
\item \textsuperscript{48}Apart from a World War II-era statute banning smoking in trolleys and buses, Delaware failed to enact any law of statewide applicability until the mid-1990s. 45 Del. Laws ch. 239, at 931 (Apr. 20, 1945). For many years, however, unsuccessful efforts had been made to pass a clean indoor air bill. On R. J. Reynolds’ recording the death of one such bill at the 1986 session, see P. C. Bergson to G. H. Long, Subject: Public Affairs Status Report at 2 (July 2, 1986), Bates No. 50662339/40.
\item \textsuperscript{49}When the Delaware legislature finally did enact a Clean Indoor Air Act in 1994, it availed itself of some of the more advanced prohibitory elements that other states had
\end{itemize}
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already adopted, but in some other respects it remained committed to a pro-tobacco past that the cigarette oligopoly had never even sought to insert into Iowa’s law. For example, the preambular legislative intent sounded as if it had been taken verbatim from a Tobacco Institute accommodationist handbook: “The General Assembly recognizes that a balance should be struck between the health concerns of nonconsumers of tobacco products and the need to minimize unwarranted governmental intrusion into and regulation of private spheres of conduct and choice with respect to the use or nonuse of tobacco products in certain designated public areas and private areas.” 69 Del. Laws ch. 287, § 2901, at 601 (1994). The legislature also enjoined the Department of Labor and State Board of Health, on which it conferred rulemaking powers, to implement this physically impossible harmonization by “balanc[ing] and accommodat[ing] the legitimate health concerns of nonsmokers with the privacy and freedom of choice concerns of users of tobacco products.” Id. § 2906(c), at 604. The heavy hand of the tobacco lobby was unmistakably visible in the CIAA’s preemption provision, which exceeded Iowa’s in its comprehensiveness and stringency: “The provisions of this Chapter shall preempt and supersede any provisions of any municipal or county ordinance or regulation on the subject of this Chapter enacted or adopted after the effective date of this Chapter.” Id. § 2908(a), at 604. On the other hand, more progressive dimensions also abounded in the Delaware law. Whereas the Iowa law prohibited smoking outright only in one public place (elevators), Delaware’s CIAA imposed such a ban in nine categories of public places including public meetings, elevators, government owned or operated mass transportation, the public indoor areas of grocery stores of more than 5,000 square feet, gymnasiums, jury waiting and deliberation rooms, courtrooms, child day-care facilities, and health care facilities (except nursing homes and other residential facilities). 69 Del. Laws ch. 287, § 2903 (a)(1)-(9), at 601, 602 (1994). Designated smoking areas were permitted in other public places, including public meetings, elevators, government owned or operated mass transportation, the public indoor areas of grocery stores of more than 5,000 square feet, gymnasiums, jury waiting and deliberation rooms, courtrooms, child day-care facilities, and health care facilities (except nursing homes and other residential facilities). Id. at § 2903(b). A special rule applied to owners of food service establishments, requiring them to designate a nonsmoking area sufficient to meet customer demand and prohibiting them from determining that no such demand existed. Id. at § 2903(d)(1). The CIAA also required employers to adopt and implement a written smoking policy obligating employers to “provide a work area where no smoking occurs for each employee who requests one” as well as to provide for nonsmoking areas in employee cafeterias sufficient to meet demand. Id. at § 2903(e)(1) and (3).

50 Robert Wood Johnson Foundation, “National RWJF SmokeLess States (R) Program Helps Delaware Develop Comprehensive Clean Indoor Air Act and Increase Taxes on
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the statewide Clean Indoor Air Act of 2002, these resources were, however, in no small part required to counteract the legislative influence that accrued to the cigarette industry by virtue of the fact that five of the seven tobacco companies were incorporated in Delaware and that more than 60 percent of the state legislators (in 1995) accepted contributions from the industry. To be sure, Iowa, like most states, also received funding from RWJF, but the first grant to Tobacco-Free Iowa, in the 1990s, focused on cigarette sales, while a million-dollar grant in 2002 was designed to support local initiatives dealing with secondhand smoke. Even if this grant had not been confined to a local approach, RWJF’s

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termination of its entire SmokeLess States grant program in 2004—when this “[l]ong-time champion[ ] of tobacco-control research...moved on to other issues”55—meant that during the life of the grants, which coincided with Republican control of the legislature, they could presumably never have been successfully used, as they had, for example, in Delaware, to secure passage of a comprehensive statewide smoking ban or repeal of local preemption, let alone both.56

The received wisdom about the impossibility of the leap to a comprehensive statewide law without first engaging in local control activities had been laid out in 2006 in the surgeon general’s mammoth report on the health consequences of secondhand smoke exposure:

In general, advocacy and public health organizations have resisted efforts to seek a statewide clean indoor air law until a state has had a critical mass of local ordinances in place for some time. This position is based on the concern that, in the absence of experience with implementing such ordinances and the grassroots support they generate, the final state legislation adopted is likely to be weak and, in many cases, to preempt stronger local ordinances. Moreover, even in cases where state smoke-free laws are not preemptive, they may lead to a decrease in the enactment of local smoke-free ordinances, perhaps because local policymakers perceive that the issue of secondhand smoke protection has been adequately addressed at the state level.... This concern has been borne out by experience in a number of states. The opposition to what were perceived as premature state clean indoor air laws was also based on the concern that even if a state that lacked pre-existing local ordinances succeeded in enacting a strong, nonpreemptive state law, the public would not be prepared to accept it because of the absence of the intensive public education, debate, and changes in norms that typically occur before the adoption


56According to the American Lung Association of Iowa, the basis of the million-dollar grant disappeared when the Iowa Supreme Court invalidated the Ames ordinance in 2003. Telephone interview with Kerry Wise, Des Moines (June 8, 2009). According to another person involved with the grant: “Before the Supreme Court ruling, Robert Wood Johnson pulled the grant from the Iowa chapter of the American Lung Association. They said they were consolidating all their funding efforts to concentrate on healthcare reform.” Email from Claire Celsi to Marc Linder (June 8, 2009).
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of local ordinances, making it difficult to implement the law....\textsuperscript{57}

Nevertheless, by 2006 the report’s large collective of scientific and medical editors and writers stressed that the path to strong statewide anti-smoking laws did not always and everywhere under all circumstances have to take local control as its point of departure:

Recent progress in enacting statewide smoke-free laws suggests that these concerns, while remaining valid in many cases, may not apply in certain situations.... Several states (e.g., Connecticut, Delaware, Florida, and Rhode Island) that had little or no prior experience with local smoke-free ordinances have recently been able to enact relatively comprehensive statewide smoke-free laws (although in most cases these laws have retained preemption provisions where these provisions were already in place). Other states (e.g., Maine, Massachusetts, and New York) that have recently enacted relatively comprehensive statewide smoke-free laws had had previous experience with local ordinances. With time, the relative success experienced by these two categories of states in implementing their laws will provide insights into the issues described above. The experiences of these states will also shed light on a related question: whether states where local clean indoor air ordinances are preempted can achieve superior public health protections by first seeking to reverse the preemptive provision and pursue local smoke-free ordinances, or by skipping this step and proceeding directly to the pursuit of a comprehensive statewide smoke-free law....\textsuperscript{58}

In the event, experiences in Iowa in 2008—especially the spectacle of local control-beholden anti-smoking health organizations adamantly opposing a strong statewide ban—should have precipitated a rethinking of their rigid lockstep vision of a successful legislative strategy.

And even though many legislators were predicting that differences with the House, whose preemption repeal bill exempted bars and gambling establishments from the authorization of local governments to pass ordinances stricter than the state law, would be resolved in 2008, no one could be heard offering any hope that a majority would support passage of a stronger statewide clean indoor air act, even as neighboring Minnesota in 2007 with its Freedom to Breathe Act became the twentieth state to enact a virtual total ban on public indoor smoking.\textsuperscript{59} By 2008, according to the National Conference on State Legislatures, 22 states, the District of Columbia and Puerto Rico prohibited smoking in all workplaces,

\textsuperscript{59} 2007 Minn Laws ch. 82 (S.F. 238, approved May 14, 2007).
including restaurants and bars, six states exempted bars, and three states exempted bars and restaurants that did not admit anyone under the age of 18 or 21.\textsuperscript{60} But the received wisdom, at least among Iowa anti-tobacco lobbyists, remained that, since most of these states had begun with local ordinances—in Minnesota and California, for example, half of the population had lived under local smoke-free ordinances before statewide bans were passed\textsuperscript{61}—this progression had to be followed in Iowa too. The fact that the anti-tobacco coalition figured the odds of passage of a good statewide ban bill at slim to none\textsuperscript{62} did not mean that some legislators did not support it. For example, Senate Assistant Majority Leader Joe Bolkcom, an anti-smoking activist, informed a constituent in mid-January that although he expected that “we have a good chance at local control,”\textsuperscript{63} he “wish[ed] we could get a statewide ban right now. It is long overdue.”\textsuperscript{64}

A first semi-official indication of which way the legislative winds were wafting in 2008 came a few days before the session opened from House Majority Leader Kevin McCarthy, who had strategically carved out a “front-burner” niche on the agenda for a smoking bill in 2008: “‘When you go into a legislative session without a lot of new dollars, sometimes history has shown that the legislature can get diverted on policy issues such as dove hunting or gambling… We want to make sure that we have some policy discussions that [are] actually productive, that help people and (smoking restrictions are) something that’s been generating a lot of support lately.’”\textsuperscript{65} McCarthy saw local control as “‘overwhelmingly supported by the public’” so that it was “‘just…a question of trying to find the votes.’” His caucus was split between supporters of a statewide ban and preemption repeal, but he did not believe that enough legislators would support the former to pass it, whereas local control was likely to have the most votes. The only way to pass a statewide law was to grant some businesses, such as casinos, an exemption, but McCarthy stressed that “‘we don’t want…some sort

\textsuperscript{60}[Iowa] Fiscal Services Division, Legislative Services Agency, Fiscal Note: HF 2212—Smoking Ban in Public Places (LSB 5743 HV) (Feb. 19, 2008), on http://www3. legis.state.ia.us/fiscalnotes/data/82_5743HVv0_FN.pdf (visited Aug. 5, 2008).


\textsuperscript{62}Telephone interview with Randy Yontz (AHA), Des Moines (May 14, 2008).

\textsuperscript{63}Email from Sen. Joe Bolkcom to Marc Linder (Jan. 13, 2008).

\textsuperscript{64}Email from Sen. Joe Bolkcom to Marc Linder (Jan. 16, 2008).

of state law that ends up looking like Swiss cheese...." Leadership was acutely aware that the Smoke-Free Illinois Act, which had gone into effect on January 1, covered casinos, but after having “mulled [over] that move during private meetings,” House Democrats nevertheless concluded that local control was “the best course of action” for Iowa. McCarthy’s Republican counterpart, Minority Leader Christopher Rants, continued advocating imposition of his market-knows-best ideology on public health decisions: “[Y]ou let people run their businesses and make decisions, and the marketplace decides if it’s a good decision....” Although he especially objected to the balkanization brought about by local ordinances and allowed as “[i]f you are disposed to support a smoking ban, then statewide is the only way to do it,” by the time a statewide ban came up for debate, he would not lack for objections to it as well.

As the session got underway, the governor and the anti-smoking health organizations also weighed in on the side of local control. In his Condition of the State message to the General Assembly on January 15, Culver promised that “if you send me a bill to ban smoking at the local level, I will sign it!!” He also announced that he would push for it “more aggressively” in the spring. In the same spirit, Dan Ramsey of the American Lung Association of Iowa cautioned that any attempt to bypass preemption repeal in favor of a statewide ban would result either in defeat or a watered-down bill at the hands of tobacco industry lobbyists. By his count, city councils in about 20 cities, including Des Moines, had passed resolutions calling on the legislature to authorize them to institute their own smoking bans.

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70Tony Leys, “Culver Wants More Children Covered,” DMR, Jan. 16, 2006 (3B)
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What neither the Lung Association nor any of the other pro-local control groups mentioned was that, just as some business owners preferred government to make the rules so that customers would not blame them, so, too, some city governments may have wanted the state legislature to relieve them of the responsibility—a desire that, ironically, may well have motivated some in the General Assembly to contemplate passing that accountability on to municipal officials so that instead they would be “hounded” by business owners and smokers. Moreover, some local officials, asserting to state legislators that “‘our telephones ring more than yours,’” told them: “‘You deal with it.’”72 In this sense, local governments may have been a stronger force for a statewide ban than for local control. But if the strongest argument for a ban on secondhand smoke exposure was protection of employees, which could no more be regarded as needing localized regulation than any other worker health and safety matter, then, as one Iowa journalist presciently put it at a time when prescience was required only because the Iowa legislature’s backwardness made it difficult to see the present as history: “Many parts of the country are moving toward smoking bans, and it’s only a matter of time before Iowa follows suit... Whether Iowa leaders decided to go halfway with a local control measure or all in with a statewide ban this year, it’s pretty much inevitable that smoking will be outlawed in Iowa’s public spaces in the coming years.”73

House Study Bill 537—Yet One More of Petersen’s Statewide Bans

At the end of the day, Iowa smokers know their days likely are numbered for enjoying a convivial cigarette and cocktail inside any public place. ... Out of curiosity, I called two of my favorite bars in states that now have bans...to see how business was with the bans. Bartenders in both places were too busy at about 3 p.m. to talk with me.74

By the second week of the session a number of bills emerged that would set

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the framework for debate and reveal that a statewide ban had survived. Of overriding significance was House Study Bill 537, proposed by Commerce Committee chair Janet Petersen—who more than once had said that a statewide smoking ban was “the top issue” she heard about from voters, but who was nevertheless unsure whether it would pass in 2008\(^75\)—on January 22 and assigned to a subcommittee chaired by first-term Representative Tyler Olson, a lawyer from Cedar Rapids; Petersen also appointed herself and Democrat Philip Wise, a retired teacher from Keokuk,\(^76\) who, like McCarthy, had also been a high-ranking official in the 2004 Iowa presidential campaign of right-wing (then) Democrat Joseph Lieberman.\(^77\) All three Democrats were strong supporters of statewide anti-smoking legislation.

H.S.B. 537 was structured in the same way as Petersen’s 2007 statewide ban bill H.S.B. 24 (which, in turn, had been virtually identical to her H.F. 2110 of 2006),\(^78\) but differed in several respects. Surprisingly, the new Smokefree Air Act no longer included “Workplace Safety” in its title, although its protection of employees who, unlike most customers, were exposed to smoke many hours a day and in many instances had no practical alternative to this or similar employment, made it much trickier for pro-tobacco forces to assail the proposed law, who as a result wound up often simply evading the issue. One opponent who, at least away from the debate floor, felt no compunction about attacking the law on these very grounds, was Republican Representative David Heaton, who doubled as owner of a smoking-permitted restaurant. Charging that secondhand smoke was merely a tool used by supporters to move the bill—Heaton was so at home in the flat-earth-society-like circles he apparently traveled in as not even to be embarrassed to assert that he had information showing that exposure to secondhand smoke was not that risky—he claimed that their real motive was to leverage a workplace prohibition into a ban on smoking everywhere in Iowa.\(^79\)

The oddness of dropping “Workplace Safety,” which deprived Democrats of


\(^76\)\textit{House Journal} 2008, at 1:90 (Jan. 22); \textit{Iowa Official Register: 2007-2008}, at 69, 82. The two Republicans were Steven Lukan and Jamie Van Fossen.


\(^78\)See above chs 31 and 34.

\(^79\)Telephone interview with David Heaton, Mt. Pleasant (May 10, 2008).
one of their most effective rhetorical and propagandistic arguments, was underscored by Senate Majority Leader Michael Gronstal several months after the bill’s passage: “We tried to keep the focus of that legislation on protecting workers. It wasn’t about changing people’s behavior. Some people think that’s what it was about, but it wasn’t. It was about workers that have little choice in where they work and whether they’re going to be exposed to secondhand smoke.”

This orientation was crucial because it disingenuously sought to divert attention from the fact that the ban was also designed to change behavior—not only in the immediate sense of requiring smokers to stop smoking in places where their freedom to do so had once been uncontested, but also in the longer term by impressing upon them society’s prioritization of the right to breathe tobacco smoke-free air over the right to smoke and disapproval of a suicidal/homicidal addiction toward the end of rendering smoking so inconvenient and contemptible that many smokers would quit. Even more extreme was the denial of textual reality by Burlington Senate Democrat Tom Courtney—a long-time United Automobile Workers local bargaining chair and production safety representative—who insisted in the midst of the debate over the implementing rules issued by the Iowa Department of Public Health in June that the bill was all about protecting the wait staff at restaurants and bars and not about the general public.

In the face of a bill as passed that expressly prohibited smoking in “[o]utdoor seating or serving areas of restaurants,” but not in such areas of bars, Courtney implausibly claimed that legislators had thought that what they were voting for was protecting wait staff and that whatever applied to restaurants applied equally to bars. In contrast, members of the general public were not meant to be protected because they could always go elsewhere. Nevertheless,

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82 Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by ARRC Legal Counsel Joseph Royce).
83 H.F. 2212 § 3(2)(b)/Iowa Code § 142D.3(2)(b).
84 Telephone interview with Tom Courtney, Burlington (Sept. 2, 2008). In blatant contradiction of this equality claim, at the ARRC meeting Courtney proposed defining, for purposes of regulating smoking in outdoor areas, a restaurant as a place where the wait staff went among the tables, whereas a tavern had a food service door. Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by ARRC Legal Counsel Joseph Royce). Waterloo Senate Democrat Bill Dotzler also took the position that since the bill’s purpose was to protect workers, there was no problem if no wait staff was present in outdoor areas where smoking took place. Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008).
since the movement for public smoking bans in Iowa and other states had been driven for years in no small part by customers who deeply resented exposure to tobacco smoke in restaurants, the solicitude for workers suddenly displayed by a legislature now controlled by Democrats whose leadership had made it absolutely clear to unions that there was no chance that it could secure a majority—and therefore it would not push—for repeal of the state’s arch-anti-union “right-to-work” law was odd.

The most far-reaching innovations in H.S.B. 537 vis-a-vis Petersen’s bills from 2006 and 2007 related to the coverage of outdoor areas. Cutting edge was the prohibition of smoking “in outdoor seating or serving areas of restaurants and within twenty feet of such seating or serving areas.”\textsuperscript{85} Unique was the total ban on outdoor smoking on the grounds of all public and private educational institutions at all levels.\textsuperscript{86} The covered “outdoor areas” encompassed “school grounds, including parking lots, athletic fields, playgrounds, tennis courts, and any other outdoor area under the control of a public or private educational facility, including inside any vehicle located on such school grounds, and including the perimeter area of fifty feet beyond such school grounds to which the public is invited or in which the public is permitted.”\textsuperscript{87} In contrast, the study bill also restricted coverage by permitting “designated smoking areas...in perimeter areas at least twenty feet from any seating areas or concession stands” in outdoor sports arenas or other entertainment venues.\textsuperscript{88}

Although they would be exempted almost as soon as they were covered, H.S.B. 537 for the first time banned smoking in gaming facilities.\textsuperscript{89} A new exemption in H.S.B. 537 pertained to private employers’ vehicles “for the sole use of the driver and...not used by more than one person in the course of employment either as a driver or passenger....”\textsuperscript{90} Finally and importantly, the new measure made the Iowa Department of Public Health the law’s enforcer instead of local health boards.\textsuperscript{91} Observers expected that the bill’s repeal of preemption

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\textsuperscript{85}H.S.B. 537, § 3(2)(b) (2008).
\textsuperscript{87}H.S.B. 537, § 3(2)(e) (2008).
\textsuperscript{88}H.S.B. 537, § 3(2)(a) (2008).
\textsuperscript{89}H.S.B. 537, § 2(12)(d) (2008).
\textsuperscript{90}H.S.B. 537, § 4(7) (2008). If the “one person” referred to by this exemption meant one person at a time, it would have subjected a non-smoking employee using the vehicle after a smoking employee to off-gassing of lingering smoke that adhered to various surfaces.
\textsuperscript{91}H.S.B. 537, § 8(1) (2008).
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of local control\textsuperscript{92} would eventually be removed.\textsuperscript{93}

The House Commerce Subcommittee Hearing

“Everybody needs to know, this is headed towards a smoke-free society.”\textsuperscript{94}

The next day, January 23, the subcommittee hearing witnessed the predictable march of statements by various groups favoring and opposing the study bill. For example, the Iowa Restaurant Association’s lobbyist Craig Walter, who as a legislator three decades earlier had had an anti-smoking moment,\textsuperscript{95} but now bombastically described his client’s issue as one of “‘self-determination,’”\textsuperscript{96} asked rhetorically: “‘As long as you make it a legal product, why would you ban a business from the opportunity to get those customers in that chose to go there?’”

Since restaurant coverage had always been at the heart of the consumer-driven anti-smoking movement, IRA would face a very difficult struggle to retain the designated smoking areas regime, which in its virtual non-functionality owners found most congenial.\textsuperscript{97} In contrast, casino corporations much more realistically pursued the objective of being entirely (or partially) exempt from whatever bill was passed as they had been under some other comprehensive statewide laws.\textsuperscript{98}

\textsuperscript{92}H.S.B. 537, § 10 (2008).
\textsuperscript{95}See above ch. 25.
\textsuperscript{97}See above chs. 25-27.
\textsuperscript{98}New Jersey and Nevada exempted casino gaming floors, while Rhode Island required designated smoking and nonsmoking gaming areas on separate ventilation systems. 2005 N.J. Laws ch. 383, § 5(e), codified at N.J.S.A §26:3D-59 (5)(e); Nevada Rev. Stat. § 202.2483(3)(a); Gen. Laws R.I. § 23-20.10-6.1(a)-(b). Rhode Island also required pari mutual facility employers to permit employees to opt out of working in smoking areas. \textit{Id.} § (e). See generally http://www.no-smoke.org/pdf/100smokefree casinos.pdf. Under the law in force until July 1, 2008, casinos in Iowa, not being exempt, were subject to the same feckless requirement as other “public places” such as restaurants (but not bars) not to designate the entire place as a smoking area. Any restaurant within a casino was subject to this requirement; whether the gaming floor itself qualified as a
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but not, to be sure, in Delaware, Illinois, or Colorado.99

The Gambling Industry’s Use of the Economic Impact of Other States’ Casino Smoking Bans and of Accommodation, Choice, and Air Ventilation to Support an Exemption from Any Iowa Smokefree Law

[How much does a smoking ban, in the long run, damage casino revenues? There is no single answer to this question, but only more questions.]

William Wimmer, the long-time cigarette oligopoly lobbyist, now appearing formally on behalf of the Iowa Gaming Association (whose members were 17 licensed commercial riverboat, land-based, and racetrack casinos),101 warned of a “serious economic impact on Iowa’s economy” if gamblers were not allowed to smoke; equally important was the admonition not to destroy the “level playing field” by imposing a ban on non-native-American-owned casinos that would not affect their competitors, the Indian casinos.102 (To be sure, the tribal gaming compliance manager of the Iowa Department of Inspections and Appeals, which has entered into compacts with the three tribes operating casinos in the state, has stated that: “We believe that smoking could be an item included in the compact either on inception or during renegotiation.”)103 Wes Ehrecke, the IGA president

“public place” in its own right and therefore could not be designated a smoking area in its entirety or whether some other area outside the gaming floor could instead be designated a no-smoking area is unclear. Under the Smokefree Air Act, which went into effect on July 1, 2008, the entire casino gaming floor is exempt. In practice, according to the Iowa Racing and Gaming Commission, under the old law: “The casinos typically had areas for both. When the [new] law went into effect, it didn’t appear to change how the casinos handled the gaming floor. We do not have data to quantify this, but casinos still have areas within their gaming floor where smoking is prohibited. It is by choice (our rules do not address smoking), but all that I am familiar with have non-smoking areas on the floor.” Email from Brian Ohorilko, gaming director, IRGC to Marc Linder (June 25, 2009).

99See below this ch.
100Paul Girvan, “Where There’s Smoke...,” Global Gaming Business Magazine 8(6) (June 2009), on http://ggbmagazine.com
101http://www.iowagaming.org/our_members/properties.aspx
103Email from Steven Mandernach to Marc Linder (July 10, 2009). The regional director of National Indian Gaming Commission with jurisdiction over Iowa, who observed that in some Indian casinos the smoke was so thick that he had had to send the
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who had made similar claims in opposition to the local preemption repeal bill in 2007, also presented talking points, perhaps chief among which was the claim that: “Based on what has happened in Delaware, Windsor Ontario, and Australia[,] a smoking ban could cause an estimated 20-35% reductions in Iowa’s gaming tax revenue. This is based on an estimated 20 percent reduction in Delaware; and 33% in Ontario; Iowa’s commercial casinos pay an estimated $300 million in taxes, therefore 20-35 per cent equals $60-100 million in loss [sic]
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revenue.†106 (Gambling revenue for the state of Iowa for 2008 was estimated by the Legislative Services Agency at $268 million or four percent of the state budget.)†107 It is unclear how IGA constructed this prediction,†108 but scrutiny below of a presumably similar methodology used by the Iowa Gaming and Racing Commission, which estimated a 10-percent drop, may shed some light on the robustness of IGA’s prediction.

Integrally woven into Ehrecke’s talking points was unquestioned allegiance to cigarette manufacturers’ favored anti-regulatory market-knows-best trope: “The commercial gaming industry firmly believes that we should strive to accommodate both non smokers and smokers alike; and advocates it should be a business decision and not a legal mandate to ban. Customers have choices of where to spend their entertainment dollars and employees have choices of where to work.” The purported basis for a claim—“Iowa casinos offer a premier...work environment”—that, coming from employers who were collectively seeking a unique exemption from a statewide smokefree workplace law, was on its face highly implausible, was, once again, accommodationism, but this time in the form of a technological deus ex machina: “the Iowa commercial gaming industry is very proactive with new filtration and ventilation systems to accommodate both smokers and non smokers....”†109 The industry’s credibility, which had already shrunk to the vanishing point by virtue of its self-subordination to its massively and discredited cigarette oligopoly ventriloquist,†110 was not enhanced by its claim that “[i]t is the ongoing objective of the commercial casinos to meet or exceed

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†106 Wes Ehrecke, President, Iowa Gaming Association to Members of the Iowa Legislature, “Impact on Iowa’s Commercial Casinos if a Smoking Ban is Implemented” (n.d. [ca. Jan. 2008]) (emailed by Wes Ehrecke to Marc Linder (June 15, 2009)).
†108 Ehrecke stated that this prediction was based on a private study, which he did not identify. Telephone interview with Wes Ehrecke, West Des Moines (June 15, 2009).
†109 Wes Ehrecke, President, Iowa Gaming Association to Members of the Iowa Legislature, “Impact on Iowa’s Commercial Casinos if a Smoking Ban is Implemented” (n.d. [ca. Jan. 2008]) (emailed by Wes Ehrecke to Marc Linder (June 15, 2009)).
acceptable indoor air quality standards as set forth in Standard 62.1 of ASHRAE guidelines,111 since three years earlier the American Society of Heating, Refrigerating and Air-Conditioning Engineers had announced that the only effective way to protect people from the health risks associated with indoor exposure to tobacco smoke was to ban smoking.112 And in the light of ASHRAE’s conclusion that no ventilation equipment could equivalently control the health risks associated with secondhand tobacco smoke exposure113 and of the results of scientific studies of air quality in casinos, the industry’s claim that in connection with “newly-invented technology... recent tests have show the air to be better inside on the gaming floor than outside”114 was risibly preposterous.

Iowa casinos’ focus on “choice” was the centerpiece of their legislative lobbying strategy of carving out an exemption for all “adult” hospitality venues to which minors under 21 were denied access and in which those 21 and over made adult choices. While hesitating to characterize establishments such as bars, restaurants, and VFW lodges as having formed an official “coalition” with the casinos, Ehrecke later indicated that the exemption that the Commerce Committee early in the legislative process had created alone for casinos, may have served to split the hospitality industry apart115—a development that Democratic

111Wes Ehrecke, President, Iowa Gaming Association to Members of the Iowa Legislature, “Impact on Iowa’s Commercial Casinos if a Smoking Ban is Implemented” (n.d. [ca. Jan. 2008]) (emailed by Wes Ehrecke to Marc Linder (June 15, 2009)).

112Ehrecke was aware of this development, but sought to dismiss it on the grounds that ASHRAE had been “infiltrated” by anti-smoking elements. Telephone interview with Wes Ehrecke, Des Moines (June 15, 2009). He may have been referring to the fact that, for example, Dr. Jonathan Samet, a consulting scientific editor of the 1986 and the senior scientific editor of the 2006 surgeon general’s report on involuntary smoking, whom one federal judge called an “expert with extraordinary qualifications,” had been a member of ASHRAE’s Environmental Tobacco Smoke Position Document Committee. United States v. Philip Morris USA, Inc., 449 F.Supp.2d 1, 444 (D.D.C. 2006); American Society of Heating, Refrigerating and Air-Conditioning Engineers, Environmental Tobacco Smoke: Position Document Approved by ASHRAE Board of Directors 1 (June 30, 2005), on http://www.ashrae.org/content/ASHRAE/ASHRAE/ArticleAltFormat/20058211239_347.pdf. As late as June 2009 Ehrecke was still touting the advanced technology in the casinos’ air-handling and ventilation equipment. Telephone interview with Wes Ehrecke, Des Moines (June 15, 2009).

113See below this ch.

114Wes Ehrecke, President, Iowa Gaming Association to Members of the Iowa Legislature, “Impact on Iowa’s Commercial Casinos if a Smoking Ban is Implemented” (n.d. [ca. Jan. 2008]) (emailed by Wes Ehrecke to Marc Linder (June 15, 2009)).

115Telephone interview with Wes Ehrecke, West Des Moines (June 15, 2009). Defending against bar owners’ attacks on casinos’ “big-money lobbying,” Ehrecke stated:
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Representative Geri Huser expressly confirmed. 116

These cigarette industry allies tried to shift the terms of debate away from the indisputable public health effects of smoking and toward individual businesses’ profits, the untrammeled rights of property ownership, and, now, the alleged impact on state government revenues of the alleged decline in gambling, 117 but health organizations appeared at the hearing to plead on behalf of protection for bar and restaurant employees and customers. To be sure, these advocates did not go out of their way to stress that their efforts would also benefit some medically and scientifically benighted secondhand smoke exposees who proclaimed that they did not “mind the blue haze” because “‘[y]ou get used to it’”—precisely the ignorance-based slow-motion suicide that some owners denied was at stake when the government sought to intervene: “‘It’s not a question of smoking being bad for a person. It is bad for you, and everybody knows it. My objection is that the government is trying to take away the freedom of choice currently enjoyed by me and my customers.’” 118

The Principal Financial Group’s Crucial Role in Mobilizing Support for a Statewide Smoking Ban

The pedestrian flow of testimony at the subcommittee hearing was interrupted by at least one surprising intervention that would have been unimaginable some years earlier and the emergence of which now strongly suggested that Iowa had finally caught up with the national and even bi-coastal debate: a representative of the Principal Financial Group (formerly Bankers Life), a global company headquartered in Des Moines and the state’s fifth largest non-governmental employer, 119 “urged lawmakers to adopt a statewide ban, arguing that it would

116 Telephone interview with Geri Huser, Altoona (Aug. 27, 2008). For further discussion of Huser’s position, see below this ch.

117 Even Rep. Geri Huser, at least initially one of the casinos’ staunchest supporters, later expressed skepticism of the magnitude of the losses they had predicted as resulting from a smoking ban. Telephone interview with Geri Huser, Altoona (Aug. 27, 2008).


119 Iowa Department of Administrative Services—State Accounting Enterprise,
make Iowa more attractive to progressive businesses and cut down on healthcare costs.” \textsuperscript{120} The workplace smoking ban that Principal itself had implemented as far back as 1987 in all of its facilities had, its chairman and CEO reported, met with an “overwhelming positive reaction” from its employees. \textsuperscript{121} Merle Pederson, the company’s vice president and counsel for government relations, explained to the subcommittee that it was interested in a smoke-free Iowa for three major reasons. First, in connection with its national employer-sponsored health insurance and wellness improvement businesses Principal knew that smoking was a major cause of increased morbidity and mortality rates, which it wanted to reduce because smoking increased health insurance claims and the cost of insurance paid by its employer-customers, which it also wanted to help them reduce. Second, as a major Iowa employer in its own right, Principal believed that public places should be smoke free because smoking was not good for business, customers, or employees. And third, because the company was interested in “Iowa’s leadership as a progressive state,” it recognized that: both neighboring states and the country as a whole were going smoke free; in order to “recruit employees here, we need Iowa to be viewed as progressive and healthy”; and “economic development efforts are improved for ‘smoke free’ places.” Finally, Pederson informed the subcommittee that Principal was supporting a statewide ban in preference to a local option approach because it: protected all employees; allowed “Iowa to be marketed as smoke free”; was supported by the public; and was superior to “clumsy and confusing” local implementation. \textsuperscript{122} Indeed, Principal, whose group life, disability, and health insurance business  


\textsuperscript{121} Barry [Griswell] to Iowa Business Council Board Members (Feb. 8, 2008) (copy furnished by Merle Pederson).

\textsuperscript{122} Merle Pederson “Iowa Smoke Free” (Jan. 23, 2008) (outline of testimony at House Commerce Subcommittee hearing) (emailed to Marc Linder (Aug. 11, 2008)).

\textsuperscript{123} http://www.principal.com/insurance.htm (visited Aug. 1, 2008). Ironically, in the wake of the passage of the new federal health insurance law, Principal announced in 2010 that it was leaving the health insurance business (purportedly because it lacked the scale to compete in an industry expected to undergo considerable consolidation). Reed Abelson, “Insurer Cuts Health Plans as New Law Takes Hold,” \textit{NYT}, Sept. 30, 2010, on
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was significantly affected by the prevalence of smoking among its policy holders, became so deeply invested in lobbying and mobilizing its employee grassroots advocacy program (Legislative Action Network) on behalf of a statewide ban bill—thousands of contacts were made by Principal employees to their legislators—\(^\text{124}\) that the bill’s floor manager Tyler Olson stated on the House floor that Principal “is behind the bill”\(^\text{125}\) and one anti-smoking health organization advocate ventured the assessment that without its extensive support the bill might not have passed.\(^\text{126}\)

Principal, as Pederson himself later described the firm’s role, “was the primary business leader in coordinating business advocacy with legislators, the Governor and his staff, government agencies, other large and small businesses, and a variety of business trade associations to generate the needed votes to pull the Smoke Free Iowa Law over the line in 2008.” In 2007, as well, Principal had been “a leading business voice” in support of the one-dollar cigarette tax increase.\(^\text{127}\)

The evolution of PFG’s strategy and model sheds important light on the overall maturation of plans for enactment of a ban. A draft of the company’s legislative strategy plan dated August 31, 2007, revealed how modest the company’s goals initially were with regard to the ban’s scope and timeline for action: Principal was “considering spearheading an effort to lobby passage...of a law to prohibit smoking in restaurants and lounges in the state of Iowa,” but, not expecting passage in 2008, an election year, it regarded passage as more likely in 2009. PFG was already trying to identify potential coalition partners, beginning with those groups that had been allies earlier that year in enacting the one-dollar cigarette tax increase, as well as “likely allies” among legislators. At an “appropriate time” PFG would seek additional allies by contacting major business


\(^\text{125}\) House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Murphy).


\(^\text{127}\) Email from Merle Pederson to Marc Linder (Aug. 11, 2008).
group associations, but at this early stage its sights appeared to be set relatively low: it judged that even the Iowa Business Council merely “may be helpful” (although individual corporate members might support a ban), whereas the Greater Des Moines Partnership, Iowa Association of Business and Industry and others “will likely be neutral at best or vocal opponents....” Even the “[p]olitical call” as to whether local control was preferable to a statewide ban was still an open question, though the latter made “more sense.” And, finally, Principal was well aware that it might become necessary to “negotiate in” exemptions, casino and gaming interests being a concern. The tentativeness of the whole project was underscored by the desire not to damage the company’s prestige by going public before PFG had made sure that it had a reasonable chance of success: “We recommend that certain due diligence be conducted prior to Principal publicly announcing its plans to support such an initiative in Iowa. If after due diligence is completed there does not appear to be significant support with legislators, the business community or public health-related organizations, we should reconsider active public support/business leadership for such an initiative.”

In the late summer or early fall of 2007 Pederson met with Representative Petersen and both agreed that a statewide ban was the only way to secure an anti-public smoking law, which Principal’s senior management group had set as one of the company’s advocacy priorities. Later he also met with Governor Culver and Lieutenant Governor Patty Judge, but at that point the governor was still wedded to the same local control approach as the Cancer, Lung, and Heart organizations. Emblematic of the company’s commitment to a ban was its chairman’s discussion of the bill with House Majority Leader McCarthy. It was only after Principal officials had spoken with a number of legislators that it became clear that support for a statewide ban bill “was broader and deeper than first anticipated.”

Principal also worked through the aforementioned Iowa Business Council, an organization of the state’s twenty or so largest employers, which had become a “proactive advocacy group asserting leadership on major business policy

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129 Telephone interview with Merle Pederson, vice president, government relations, Principal Financial Group, Des Moines (Aug. 4, 2008). Pederson stated that he had met with Petersen in August 2007, but such a time frame would not be consistent with the aforementioned draft plan. Jocularly, Pederson, who was a registered lobbyist on behalf of the company, observed that the governor had “dr[u]nk the same cool-aid” as the health advocates on the politics of passing a public smoking bill.
130 Email from Merle Pederson to Marc Linder (Aug. 11, 2008).
initiatives” on which it maintained a “‘big picture’ perspective.”[^131] The Council’s interest in smoking was easy to discern: among the issues having an impact on the state’s “business climate” that the IBC studied was health care,[^132] and among the “[m]any factors affect[ing] costs that threaten the current infrastructure of the Iowa health care delivery system” were “harmful personal habit and lifestyle choices.”[^133] Among the IBC members that actively supported the anti-smoking bill were Rockwell Collins, the state’s fourth largest non-governmental employer[^134] (which Principal helped mobilize its employees), and Wellmark Blue Cross, Blue Shield. In contrast, Pederson failed to “neutralize” the Iowa Association of Business and Industry—on whose board of directors he sat[^135]—which had a larger and more heterogeneous membership, let alone to persuade it to support the bill.[^136]

**Representative Philip Wise Echoes the Tobacco and Gambling Industries’ Tales of Ventilation Technology as an Air Quality Deus ex Machina in Casinos**

Smoking bans [in casinos] are inevitable. When they will be issued is the question.[^137] [House Majority Leader Kevin] McCarthy said the only reason the exception was approved for casinos...is because he could only get 42 or 43 votes for the smoking ban otherwise. He said the exception was added so the House would have 51 votes to pass the ban.[^138]

[^131]: http://www.iowabusinesscouncil.com/content/history (visited Aug. 6, 2008).
[^133]: http://www.iowabusinesscouncil.com/content/health-care#employeewellness (visited Aug. 6, 2008). See also Principal Financial Group, “Healthier Lifestyles—Prevention and Wellness” (n.d. [ca. 2006]).
[^136]: Telephone interview with Merle Pederson, vice president, government relations, Principal Financial Group, Des Moines (Aug. 4, 2008).
[^137]: Paul Girvan, “Smoking Bans Can Be a Drag on Casino Revenues,” The Innovation Group, Client and Company News (Mar. 2006), on www.theinnovationgroup.net/maint/docs/March%202006.pdf (visited June 24, 2009) (Girvan was managing director of The Innovation Group, a consultant to gambling industry).
Several legislators made it clear already at this early point in the legislative process that coverage of casinos and passage of the bill were mutually incompatible. In particular Representative Wise told anti-tobacco advocates that they would have to accept the casino exemption in order to secure passage of the statewide bill. The casinos—whose lobbyist, together with the restaurants’ lobbyist, spoke “in opposition”—did not spring their request for exemption as a surprise at the House Commerce subcommittee hearing nor was the exemption a done deal known beforehand; rather, everyone in the statehouse had known for a long time that the industry wanted to be exempt. Press reports were acutely alive to this development. The Cedar Rapids *Gazette*, for example, not only put the casino exemption in its headline, but led with the statement that “[c]asinos may be the winners in a battle to pass a statewide smoking ban....” In pointing out that both supporters and opponents agreed that passage “would be difficult without significant changes, including an exemption for casinos,” the article focused on Wise, “a former smoker and smoking ban backer,” who insisted that “[i]t’s an issue of ‘competitive fairness.... It’s not fair to put casinos at a further competitive disadvantage’” vis-a-vis smoking-unregulated Indian casinos.

What apparently was fair was to put casino workers at a health and survival disadvantage vis-a-vis those working in covered places of employment. (Some workers at some Iowa casinos were unionized; according to one union representing them, AFSCME Iowa Council 61, which supported a statewide law but took no position on the casino exemption because it was an accomplished fact, its casino members were divided on the issue: some opposed the ban because of rumors it might cause closings and job losses, while others, who hated being


139 Telephone interview with Jeneane Beck, Statehouse reporter for Iowa Public Radio and Des Moines bureau chief for KUNI (May 15, 2008). Beck, who had attended the Commerce subcommittee hearing, furnished this information in lieu of a no longer extant tape. During the House floor debate on H.F. 2212, the successor to the study bill, Rep. Mary Mascher estimated that if casinos were covered, Democrats would lose about six votes and the bill would fail by a vote of 45 to 55. Email from Mary Mascher to Marc Linder (Feb. 19, 2008, 7:28 p.m.).


141Telephone interview with Jeneane Beck, Statehouse reporter for Iowa Public Radio and Des Moines bureau chief for KUNI (May 15, 2008).

exposed to customers’ smoke, supported it.)  Numerous studies of secondhand smoke exposure in casinos had already revealed how abysmal air conditions there were. For example, in one study the level of serum cotinine (metabolized nicotine) in nonsmoking casino employees rose 38 percent when measured before and after their work shifts, these levels being two and three times higher, respectively, than that of a nationally representative sample of those reporting exposure to environmental tobacco smoke at work.  Urinary cotinine levels of nonsmokers, according to another study, rose by 456 percent after spending four hours as customers in a casino, while that of the metabolized biomarker of uptake of the tobacco-specific lung carcinogen NNK increased by 112 percent.  A study of respirable particles and carcinogens in the air at a casino and bars in Delaware before and after a statewide smoking ban went into effect revealed that “smoking indoors generally raised the short-term levels of fine particle air pollution massively” so that “[e]ven huge dilution volumes cannot overcome the high emission rates of toxic and carcinogenic pollutants generated during cigarette smoking.” In the casino, for example, the post-ban levels of respirable particles and particulate polycyclic aromatic hydrocarbons plummeted to 4.6 percent and 2.3 percent, respectively, of their pre-ban levels.

143 Telephone interview with Marcia Nichols, legislative/field director AFSCME Iowa Council 61, Des Moines (June 24, 2009). The director of security at Prairie Meadows Racetrack and Casino, one of Iowa’s largest gambling establishments, claimed that half of its 1,500 workers smoked. Patt Johnson, “Employers Scramble to Obey Smoking law,” DMR, June 23, 2008 (4D) (NewsBank). A study in the late 1990s of 3,841 full-time casino employees at four different locations of a company found that 39.3 percent currently smoked cigarettes (and a further 6.4 percent used other tobacco products). Howard Shaffer et al., “Gambling, Drugs, Smoking and Other Health Risk Activities Among Casino Employees,” American Journal of Industrial Medicine 36:365-78, tab. X at 371 (1999). Nichols noted that casino employees surrounded by smoking customers were not themselves permitted to smoke on the job.

144 In addition to the studies cited below, an important government investigation published later is worth noting: Chandran Achutan et al., “Environmental and Biological Assessment of Environmental Tobacco Smoke Exposure Among Casino Dealers” (National Institute for Occupational Safety and Health, Health Hazard Evaluation Report HETA 2005-0076, May 2009).


147 James Repace, “Respirable Particles and Carcinogens in the Air of Delaware Hospitality Venues Before and After a Smoking Ban,” Journal of Occupational and
Incredibly and all too credulously for an anti-smoking militant, Wise, sounding more like a PR agent for the industry, “invited the bills’ backers to visit new casinos at Riverside and Waterloo to experience the effectiveness of the latest smoke handling equipment.”\(^{148}\) (A study of a smoking and a nonsmoking casino at Lake Tahoe in 2007 found that the former had air particle pollution levels 5 to 17 times higher than the latter’s.)\(^{149}\) Wise’s invitation was astonishing in light of the position adopted three years earlier by the American Society of Heating, Refrigerating and Air-Conditioning Engineers—the professional organization that provides guidance for using ventilation to achieve acceptable indoor air quality and the basis for municipal building codes—putting an end to the debate, sustained by cigarette manufacturers, over the question as to whether ventilation could protect nonsmokers from the health consequences of exposure to secondhand smoke:

• At present, the only means of effectively eliminating health risk associated with indoor exposure is to ban smoking activity. ...
• No other engineering approaches, including current and advanced dilution ventilation or air cleaning technologies, have been demonstrated or should be relied upon to control health risks from ETS exposure in spaces where smoking occurs. Some engineering measures may reduce that exposure and the corresponding risk to some degree while also addressing to some extent the comfort issues of odor and some forms of irritation. ...
• Because of ASHRAE’s mission to act for the benefit of the public, it encourages elimination of smoking in the indoor environment as the optimal way to minimize ETS exposure.\(^{150}\)

In 2006, the surgeon general’s monumental report on *The Health Consequences of Involuntary Exposure to Tobacco Smoke* echoed ASHRAE’s position by concluding that: “Exposures of nonsmokers to secondhand smoke cannot be
Wise’s seal of approval also provoked this immediate response on the website comment page of the newspaper reporting his remarks: “If lawmakers visit the Riverside casino as Mr Wise recommends I doubt they will be impressed by the smoke handling equipment. My wife and I don’t frequent the casinos just because the smoke is so bad. When Riverside opened, we did stop by on the 2nd day so we could try out some of the restaurants. Even though there was no smoking in the restaurants, there was already a smoke stench everywhere in the building. We only walked around for about 10 minutes, never entering the actually gaming areas but our clothes still stunk when we left.”152 A more specific complaint from a casino worker to her state representative spelled out the consequences of Wise’s exemption: “I want to urge you to vote in favor of NOT allowing smoking in a casino. I work in the summer at Prairie Meadows. The smoke in there is terrible. Smokers are very rude by puffing their smoke in my face as they talk and dropping their ashes on my counter. The ‘no smoking’ area is a joke. Smoke filters into this space as well as smoking patrons. I don’t want to be a victim of second hand smoke. If the smoker must smoke, then let the law say that they can do it outside near the track but not in a confined space as the building. Please vote to STOP SMOKING IN ALL PUBLIC PLACES!!!”153 Wise’s whitewash was also contradicted by his colleague, Democrat Polly Bukta of Clinton. Although she had been logged by the American Cancer Society in February 2008 as “Supports casino exemption (new casino in Clinton),”154 in 2009 Bukta commented that, despite the advanced ventilation system, the smoke could be smelled everywhere in that casino.155

Neither Democrats nor Republicans pointed out that since the mid-1990s the tobacco industry, replicating its behind-the-scenes strategy of co-opting the other segments of the hospitality industry as third parties to fight the cigarette manufacturers’ battles for them, had been successfully mobilizing the gambling

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155Telephone interview with Polly Bukta, Clinton (June 2, 2009).
industry by alleging that smoking bans reduced gambling revenue and promoting ventilation as a solution to the problem of secondhand smoke.\footnote{L. Mandel and S. Glantz, “Hedging Their Bets: Tobacco and Gambling Industries Work Against Smoke-Free Policies,” \textit{TC} 13:268-76 (2004).} Ironically, in uncritically acquiescing in or allowing himself to be manipulated by the cigarette oligopoly’s newest ploy, Wise (and his colleagues) had ignored the fact that the gambling industry itself had just in the past few years begun to see the handwriting on the wall for its smoking exceptionalism: in that sense Wise was accommodating what was increasingly a mere straw man of accommodationism.

As late as the beginning of 2005, the American Gaming Association was still aggressively pushing the cigarette oligopoly’s accommodationist line: “We believe that state-of-the-art ventilation systems...can provide a comfortable and safe environment for all our customers and employees.” AGA expressed dissatisfaction with proposed changes to ASHRAE’s air ventilation standard (which formed the starting point for many state and local building codes), which “could be interpreted to make it impossible to achieve healthy air quality levels in buildings or parts of buildings—including casinos—where patrons are allowed to smoke.” Criticizing the ASHRAE proposal for ignoring casinos’ “more sophisticated air-ventilation system” and elevated ceilings, AGA was committed to work with ASHRAE to “emphasize our support of what we see as reasonable, science-based solutions to indoor air quality...concerns.” To this end it had gathered the requisite number of signatures for a petition to prompt a vote by ASHRAE’s full membership on AGA’s proposal to establish a separate standards committee to deal with the hospitality industry’s concerns.\footnote{American Gaming Association, “Hospitality Industry Joins Forces to Clear the Air on Ventilation Standards” (Aug. 2003), on \url{http://www.americangaming.org/insidetheaga/inside_agadetail.cvf?id=81} (visited June 9, 2009).} This vote was the culmination of a years-long effort by the hospitality industry surrogates of the cigarette manufacturers\footnote{L. Mandel and S. Glantz, “Hedging Their Bets: Tobacco and Gambling Industries Work Against Smoke-Free Policies,” \textit{TC} 13:268-76 (2004).} to counter “bad science”:\footnote{“Let’s Clear the Air on Smoking” (Jan. 1, 2005), on \url{http://www.americangaming.org/Press/op_ed/op_ed_detail.cvf?id=320} (visited May 30, 2009).}

In response to pressure by special-interest groups, the American Society of Heating, Refrigerating and Air Conditioning Engineers...abandoned its longtime practical engineering approach to ventilation (Standard 62 “Ventilation for Acceptable Indoor Air Quality”) in favor of changes that would have the effect of a nationwide ban on smoking in all hospitality venues, including gaming, with the possible exception of those establishments located on native land. This zero-tolerance approach disregards the
time-tested HVAC engineering technologies typically used to control exposure to tobacco smoke in gaming facilities, such as dilution ventilation, directional air flow and air cleaning. The changes to ASHRAE Standard 62 now being finalized will make it impossible to achieve acceptable air quality in buildings such as casinos that allow patrons to smoke. ...

“The changes are not about health,” said Elia Sterling, president of Theodor Sterling Associates Ltd. and a consultant to the AGA on indoor air issues. “They are about a social engineering strategy adopted by well-funded activist groups to denormalize smoking.”

However, the tobacco-hospitality industrial complex (energetically aided by the Iowa Gaming Association, which secured the support of the president of the Iowa ASHRAE chapter) sustained a “significant blow” on June 27, 2005, when the ASHRAE membership rejected the proposed (pro-smoking) separate standards committee by the lopsided vote of 1,000 to 4,000. The setback that the tobacco and gambling industries suffered one year later, when the surgeon general issued his aforementioned report rejecting ventilation/filtration as an adequate means of protecting nonsmokers from secondhand smoke, was so severe that even AGA apparently finally began to recognize that it had not allied itself with the winning side of a global public health battle: “There is no doubt that this report is going to strengthen the efforts of those working for comprehensive smoking bans across the country,” said Frank Fahrenkopf, AGA’s president and CEO. “The gaming industry takes the issue of indoor air quality very seriously, and the comfort and safety of our patrons and employees is our number one priority. But this report says the steps we’ve been taking simply aren’t enough. This report should cause us to take a serious look at how we deal with indoor air quality as an industry.”

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By 2007 a transformation in industry attitudes became visible. In the context of proliferating coverage of casinos in ever more comprehensive statewide anti-smoking laws, Judy Patterson, the executive director of the American Gaming Association, which was “courted by the tobacco industry,” conceded that fighting them was “‘an uphill battle.’”\(^{165}\) At the same time, AGA President Fahrenkopf—who had been chairman of the Republican National Committee during both Reagan administrations\(^{166}\) and a Tobacco Institute lobbyist in 1975 before the Nevada legislature, where, in opposition to anti-smoking bills, he echoed the cigarette industry line that “‘[t]he claims that tobacco smoking is hazardous to the non-smokers are...just a facade disguising what is an attempt by one group of persons to write their prejudices into the law’”\(^{167}\)—went even further than Patterson. By May 2007, according to the Associated Press, the gambling industry “appear[ed] to have resigned itself to the wave of anti-smoking measures being passed in big gambling states.... Although casinos in some states have been granted special status, Fahrenkopf said he didn’t expect these exemptions to last long. ‘A year or two down the road there’s not any public facility you’re going to be able to smoke a cigarette in and that includes us.’”\(^{168}\)

Why, in view of the scientific and engineering consensus that ventilation/filtration was definitively not a deus ex machina and of AGA’s dawning acknowledgment that smoke-freedom would soon engulf casinos,\(^{169}\) Wise so cavalierly prioritized the Iowa casinos’ at best short-term profits over the


\(^{166}\) http://www.americangaming.org/About/bios/bio_fahrenkopf.cfm (visited June 9, 2009).


\(^{169}\) Apparently Fahrenkopf’s verbal admission did not conclusively terminate the policy discussion within AGA: two months later the organization, blind to millions of smokers’ demonstrated ability to fly in airplanes for many hours without self-administering nicotine, argued that “we cannot just write off the one-fifth of our customers who smoke, we have to consider their rights—including the right to enjoy their time at our properties. [I]t is important...to keep in mind that the indoor air quality debate is not a black or white issue, which means that a black-and-white approach—such as a blanket smoking ban—is unlikely to be the best solution.” American Gaming Association, “The Changing Face of the Smoking Debate” (July 2007), on http://www.americangaming.org/insidetheaga/inside_agag_detail.cfv?id=440 (visited June 9, 2009).
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health of the nonsmoking 80 percent of their 22.87 million annual visitors and 9,946 employees is unclear. (A study, cited by the Iowa gambling industry itself, revealed that only about 20 percent of Nevada casino-goers smoked—more or less the same proportion as in the population at large, while a later study of Pennsylvania casinos found the same proportion, which was somewhat lower than the statewide average). Petersen implicitly rejected the underlying premise of the question in asserting that Wise in fact cherished no financial concern for the casinos: by “running the amendment” he was merely executing a decision made by Democrats before the committee meeting that coverage of casinos (and local control) had to be jettisoned in order to accommodate four Democratic committee members in whose districts casinos


171 “State Smoking Bill Advances in House,” KWWL.com (Feb. 7, 2008), on http://www.kwwl.com/Global/story.asp?s=8189859 (visited May 12, 2008) (citing Black Hawk County Gaming Association executive director Beth Knipp citing a University of Nevada study and predicting a $60 to $100 million revenue loss for the state in Iowa). The 2006 observational study (which estimated the number of smokers based on a formula according to which smokers smoked two cigarettes for 10 minutes each per hour, thus yielding a total number of smokers three times that of those observed at any one time) found the smoking prevalence to be 21.5 percent at casinos in Las Vegas, 22.6 percent in Reno, and 17 percent at Lake Tahoe. Chris Pritsos, “The Percentage of Gamblers Who Smoke: A Study of Nevada Casinos and Other Gaming Venues” (n.d. [ca. 2006]), on http://www.no-smoke.org/pdf/nevadaeconstudy.pdf (visited Aug. 29, 2008); Chris Pritsos, Karen Pritsos, and Karen Spears, “Smoking Rates Among Gamblers at Nevada Casinos Mirror US Smoking Rates,” TC 17:82-85 (2008). The director of research at AGA, which “has gotten out of trying to estimate the percentage of casino patrons who smoke,” distanced himself from a 2003 newspaper article in which an AGA consultant mentioned two unidentified surveys as indicating that 35-40 percent of casino customers smoked; referring to the aforementioned Nevada study, the research director stated that “we would still argue that smoking bans at casinos do have a negative impact on business. In other words, if...only 20% of our customers smoke, this still represents a very significant part of our customer base, particularly in these very challenging economic times.” Email from Andrew Smith to Marc Linder (July 6, 2009). The consultant was cited by Clarke Canfield, “Would Smoke-Free Casino Succeed?” Oct. 10, 2003, on http://news.mainetoday.com/indepth/gambling/031010casinosmoke.shtml (visited July 6, 2009).

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were located\(^{173}\) — districts in which casinos donated significant amounts of money

\(^{173}\) Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). Although the Iowa report by Glantz et al. correctly pointed to this constraint in explaining the casino exemption, the authors also asserted that: “Additionally, Speaker of the House Pat Murphy (...) Industry Contributions: $1,500) made it clear in caucus conversations at the beginning of the legislative session that he would not allow a clean indoor air law to pass the House without an exemption for casinos.” Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 157 (2009), on http://repositories.cdlib.org/ctcre/tcpmus/IA2009/. For this claim they cited only an interview with non-legislator Cathy Callaway (who could not have personally participated in closed caucus conversations) without revealing her source. Id. n. 14 at 178. The authors appeared not to realize that this alleged additional reason for the casino exemption was not consistent with the first reason: if the House speaker had in fact already laid down the law on this issue, it would have been superfluous for Petersen to justify accommodating four Democratic committee members’ casino-beholdenness since they all would have been aware that Speaker Murphy had given the caucus its marching orders. Additionally, a survey of leading anti-smoking caucus members found no one who could corroborate that Murphy had ever made such a statement. Typical was the observation by the bill’s House floor manager, Tyler Olson: “I do not recall the Speaker making that statement. The decision to include the casino exemption was made after a vote count revealed the bill would not pass without it.” Email from Tyler Olson to Marc Linder (May 10, 2011). Philip Wise, who had offered the amendment to exempt casinos in committee, stated: “I do not remember Speaker Murphy making such a statement in Caucus. I am not aware of Cathy Callaway’s quotation, but I do know that she was never present during Caucus. That means that her information is at best second-hand. I will assure you that the Smoke-Free Air Act would have never been debated and passed without the support of Speaker Murphy and Majority Leader McCarthy. The casino exception was placed into the bill by the three House members most involved with the legislation because that was the only way to secure 51 votes for the bill. None of those three House members preferred that such an exemption be included.” Email from Phil Wise to Marc Linder (May 20, 2011). Even the most damning judgment offered by any of these Democrats absolved Murphy of the charge. According to Iowa City Representative Mary Mascher: “[W]e did not have the votes to pass the Clean Air Act with the casinos in the bill. Too many of the casino legislators resisted and were ‘no’ votes. Pat Murphy was a casino legislator who would have been a no vote but he did not force anyone else to vote no.” Email from Mary Mascher to Marc Linder (May 10, 2011). Finally, the authors attempted to make the existence of Murphy’s ukaz plausible by asserting that the casino industry’s claims that a smoking ban would cause the state to lose tens of millions of dollars of revenue because customers would instead go to Indian or out-of-state casinos “resonated with key legislators, particularly Speaker of the House Murphy.” Tiana Epps-Johnson, Richard Jones, and Stanton Glantz, The Stars Aligned over the Cornfields: Tobacco Industry Political Influence and Tobacco Policy Making in Iowa 1897-2009, at 160 (2009), on
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to local groups and projects, employed a significant number of workers, and contributed to the representatives’ campaigns.\textsuperscript{174} (In contrast, Minority Leader Rants fancifully speculated that Majority Leader McCarthy had told the Commerce Committee to exempt casinos: since he had been able to deliver on the rest of the “garbage” on his party’s agenda such as “fair share” and taxes, he could, had he so desired, also have shoved casino coverage down his members’ throats.)\textsuperscript{175}

Five Democrats on the Commerce Committee represented counties in which casinos were located: Deborah Berry, Doris Kelley, and Bob Kressig (Black Hawk/Waterloo/Isle Casino Hotel), Paul Shomshor (Pottawattamie/Council Bluffs/Ameristar Casino Hotel, Harrah’s Council Bluffs Casino & Hotel, and Horseshoe Casino & Greyhound Park), and Wise (Lee/Ft. Madison/Catfish Bend Casino).\textsuperscript{176} Although none of these five representatives was mentioned on the American Cancer Society’s vote count card as needing or wanting a casino exemption, two of them were recipients of campaign contributions from several casinos, which distributed large amounts of money to the Democratic leadership as well. Shomshor received $500 from Ameristar PAC on January 9, 2008 and another $300 on July 14, 2008, $500 from Harrah’s Entertainment PAC—Harrah’s also owned Horseshoe Casino—on January 8, 2008, and a total of $3,050 in 2003, 2004, and 2006 in addition to $1,000 on December 3, 2007 from Friends of Prairie Meadows (a casino located far from his district, which

\textsuperscript{174}Email from Rep. McKinley Bailey to Marc Linder (Mar. 16, 2008); telephone interview with Merle Pederson, government affairs, Principal Financial Group, Des Moines (Aug. 4, 2008); telephone interview with Sen. David Hartsuch, Bettendorf (Aug. 11, 2008). “[V]oting for business interests in their districts,” as one former House speaker (who demanded anonymity) described legislators’ behavior, “is pretty much the norm.” Email to Marc Linder (June 11, 2009).

\textsuperscript{175}Telephone interview with Christopher Rants, Des Moines (May 12, 2008).

\textsuperscript{176}Joe Benedict, “Great River Acts to Shut Down FM Riverboat,” \textit{Daily Democrat} (Ft. Madison), Oct. 17, 2007, on http://www.dailydem.com; telephone interview with Brian Ohorilko, Des Moines, Director of Gaming, Iowa Gaming and Racing Commission (May 29, 2009). Kressig, while representing Black Hawk county, lived in and represented Cedar Falls, the city adjoining Waterloo. The one riverboat casino in Fort Madison (Catfish Bend) was closed in November 2007, but it had operated six months a year there and six months a year in nearby Burlington. The company (Great River Entertainment) that owned it was planning to build a land-based casino in its stead.
also gave a total of $1,000 to Senate Majority Leader Gronstal on January 13 and June 19, 2008). Kelley received $100 from Ameristar (which was located far from her district). In 2007-2008 Harrah’s gave a total of $3,000 to House Speaker Murphy and $1,000 to House Majority Leader McCarthy (as well as $2,000 to House Minority Leader Rants and $3,000 to Senate Minority Leader Wieck); in 2006 Murphy received $5,000, McCarthy $500, and Democratic gubernatorial candidate Chet Culver $10,000. (In October 2006 Harrah’s even contributed $300 to Representative Janet Petersen’s re-election campaign.) All told for 2008, Ameristar contributed at least $12,400,177 of which slightly more than one half went to the four Democratic legislative leaders—a total of $2,250 on January 13 and October 23 to House Speaker Murphy, $1,000 to House Majority Leader McCarthy on January 8, a total of $1,500 to Senate President Kibbie (who represented Emmetsburg, where Wild Rose Casino was located) on January 12 and October 9, and a total of $1,600 to Senate Majority Leader Gronstal (who did represent Council Bluffs) on January 13 and June 30.178

The Increasingly Precarious Foundations of Local Control and the Link to Exemption of Casinos

Do you understand why (reportedly) suddenly there is momentum for a stricter statewide smoking ban, whereas until recently the votes were not there for anything but repeal of preemption?

It is just one of those things that is hard to explain around here. How an idea becomes hot. Good legislators pushing hard is probably the best reason for action.179

Representative Wise’s apologetics were all the more ironic since he warned that smoking ban advocates who rejected all exemptions were “in danger once

177 The Iowa Ethics and Campaign Disclosure Board website lists contributions totaling that amount under Ameristar, but not the $500 contribution which is listed under what Shomshor received. https://webapp.iecdb.iowa.gov/publicview/ContributionSearch.aspx#ctl00_cph1_gvList (visited May 10, 2009).


179 Email from Marc Linder to Sen. Joe Bolkcom (Feb. 11, 2008) and from Sen. Joe Bolkcom to Marc Linder (Feb. 12, 2008). Republican Whip Kraig Paulsen shared Bolkcom’s sense of the unanalyzable when he called the shift in momentum from local control to statewide ban an example of a bill’s simply taking on “a life of its own.” Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 18, 2008).
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again of ‘allowing the ideal to destroy the good’—a version of Voltaire’s aphorism (“le mieux est l’ennemi du bien”) that would be used ad nauseam during floor debates as a kind of self-fulfilling prophecy to justify opposition to a more stringent law. Perhaps Wise was taking such a hard line so early in the process because he feared that “some groups are willing to get nothing in pursuit of” the ideal. Even Tyler Olson, who was “interested in getting something done this year,” agreed that, as it stood, H.S.B. 537 would probably not be able to secure 51 votes. In any event, a consensus prevailed among subcommittee members that the bill’s expansive local control provision—which, inter alia, prohibited the law from being “interpreted to prevent political subdivisions from adopting ordinances or regulations relating to smoking in places of employment, in public places, or in outdoor areas, which are more restrictive than the provisions of the” law—would probably not pass. Indeed, ironically, soon thereafter political intelligence began circulating that casinos themselves were responsible for the shift in momentum from local control to a statewide ban because now that they had secured an exemption from the latter, they were pushing it inasmuch as it would be much more difficult for them to obtain exemptions from numerous local governments.

Though distinct, this motive was consistent with a broader-based business opposition to local control’s balkanizing impact, especially in the Des Moines metropolitan area, where, owners feared, differing regulations in contiguous municipal jurisdictions would create untoward and uncontrollable competitive

185 When this report surfaced on the local news of public radio stations in Iowa on February 18, Assistant Majority Leader Sen. Joe Bolkcom remarked that it was the first time that he had heard it, adding that “[t]he casinos will most likely get their preemption at either the local level or state level.” Email from Joe Bolkcom to Marc Linder (Feb. 18, 2008). As noted elsewhere in this chapter, Democrats had already explained to health lobbyists that even a preemption repeal bill would need the casino exemption for passage.
advantages and disadvantages. Foreseeing such consequences, bar and restaurant owners, in particular, gave Senate Majority Leader Gronstal and other Democrats “push back” on local control. Ironically, the result, Gronstal noted, was that some businesspeople who would have preferred no law, once confronted with the necessity of accepting some form of public smoking control, came to regard a statewide ban as the lesser evil.\textsuperscript{186} (To be sure, at least in the restaurant and bar industry, owners’ and managers’ preference for a statewide ban over local control was, according to a survey conducted in late 2006, not overwhelming: asked whether, if smoking were to be banned in restaurants, they would prefer a state law or a local ordinance, 45 percent of respondents supported the former and 31 percent the latter, while for bars the proportions were 45 percent and 28 percent, respectively.)\textsuperscript{187} Consequently, the shift in legislative momentum from local control to state action in part reflected the Democratic leadership’s perception that ultimately the latter would face less business opposition.\textsuperscript{188} On a party-line vote the subcommittee approved moving the bill to the full Commerce Committee.\textsuperscript{189}

In spite of the progress of H.S.B. 537, at this point local control bills still appeared viable. On January 22, H.F. 778, which, because of its casino and bar exemptions, had been put on hold in 2007, was, together with S.F. 236, which had passed the Senate in 2007 with an exemption for fraternal organizations,\textsuperscript{190} assigned to a House Local Government subcommittee, chaired by Roger Thomas, its designated floor manager,\textsuperscript{191} with the intent to strip out all three exemptions. The Iowa Department of Public Health called S.F. 236 “the bill to watch for

\textsuperscript{186} Telephone interview with Michael Gronstal, Council Bluffs (May 17, 2008).

\textsuperscript{187} Gene Lutz et al., \textit{Smoking Policies of Food-Serving Businesses in Iowa}, tab. 6 at 20 and tab. 7 at 21 (Feb. 2007), on http://www.csbs.uni.edu/dept/csbr/pdf/IDPH_Business_Tobacco-2007.pdf (based on telephone interviews with 601 randomly chosen owners/managers in Oct.-Nov. 2006). These responses refer to all respondents and not only to restaurant owners in the one case and bar owners in the other. Some outliers also emerged: for example, when asked about bans in restaurants, owners/managers of establishments with sales evenly split between food and alcohol, 27 percent favoring a statewide ban, while 33 favored local control. \textit{Id.}, tab. B at 43.

\textsuperscript{188} Telephone interview with Walt Tomenga, Johnston, IA (July 17, 2008).


\textsuperscript{190} See above ch. 34.

\textsuperscript{191} \textit{House Journal 2008}, at 1:86 (Jan. 22).
supporters of local control," but, in the wake of the shift of momentum to Petersen’s statewide ban bill, it saw no further action. The next day, January 23, Wise filed H.F. 2054, a stripped-down ban, which also excluded casinos. To be sure, Wise’s (sole) sponsorship of the bill is difficult to reconcile with Petersen’s highly credible statement that in “running the amendment” that exempted casinos from H.S.B. 537 at the Commerce Committee hearing on February 5, Wise had not been acting out of concern for casinos’ profits, but had merely volunteered to carry out a task that some Democrat would have had to perform if the bill’s supporters’ strategy was to be implemented. H.F. 2054 simply expanded coverage under the existing feckless law by banning smoking in all restaurants on July 1, 2008, and in all bars one year later. In addition, it struck the exemption for public places with less than 250 square feet of floor space. At the same time, however, Wise’s bill for the first time would have exempted all gambling structures or excursion gambling boats. The following day it was assigned to the same subcommittee that was dealing with H.S.B. 537. Whether the vehicle for smoking control in 2008 turned out to be statewide or local, passage, as Republican Representative Walt Tomenga, a non-voting member reported to the Tobacco Use Prevention and Control Commission on January 25, would require exemptions.

On the day of the Commerce subcommittee hearing the House Human Resources Committee proposed H.S.B. 565, a preemption repeal bill similar to S.F. 236. Petersen was also named chair of the subcommittee to which the bill was assigned, but it never even met on the bill. The day after the Commerce

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193 Telephone interview with Janet Petersen, Des Moines, (Apr. 12, 2008).
197 H.S.B. 565 (Human Resources, Jan. 23), House Journal 2008, at 1:108. The bill contained the same five statewide provisions that local governments “may” make more stringent, but, unlike S.F. 236, did not limit their discretion to “only” these five. On S.F. 236, see above ch. 34. According to Whitney Woodward, “Smoking Ban Moves Forward in Iowa House,” Q-CT, Feb. 5, 2008, on http://www.qctimes.com (visited July 5, 2008), an unidentified House subcommittee approved a local control bill on Feb. 5.
198 House Journal 2008, at 1:120 (Jan. 24); http://www3.legis.state.ia.us/ga/sclist.do?ga=82&start=90. The Republican member of the subcommittee was Linda Upmeyer, a cardiology nurse practitioner and assistant minority leader, whose position on the bill was captured by her statement that “I’m kind of in favor of the ultimate local control, and
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subcommittee meeting, Democrat Ro Foege filed a preemption repeal bill, identical to the one he had filed in 2007,199 which would have empowered a city, county, or local health board to enforce higher standards or stricter requirements than the weak statewide law’s; it non-exhaustively exemplified that authority to include eliminating exemptions, prohibiting the designation of smoking areas, and doing away with bar owners’ discretion not to establish any no-smoking areas. It was referred to the House Human Resources Committee and then to a subcommittee of which the quasi-ubiquitous Petersen was chair,200 but it was quickly overtaken by events and also progressed no further. Foege, who had quit smoking about 20 years earlier, was such a confirmed advocate of (exemptionless) local control that even after the statewide ban had gone into effect he continued to regard the former—which he conceded was just an intermediate step on the way to a statewide ban—as superior, sweeping aside both statements by other Democrats that, in order to pass, a local control bill would also have had to have included exemptions and objections that it would have taken many years for local governments to adopt ordinances. Instead, echoing the claims of the Heart-Lung-Cancer coalition and based on experiences in some other states, Foege implausibly insisted that the “domino effect” would have accelerated the process so that it would have been completed within two or three years.201 (In contrast, the Heart Association acknowledged, at least after the fact, that enactment of a statewide ban had relieved it of the enormous work that it would have taken to convince a thousand local government to pass anti-smoking ordinances.)202 As far as locally imposed exemptions were concerned, Foege found it acceptable for a city council to permit smoking in a casino.203

At this juncture, in the wake of the subcommittee proceedings, local control advocates, seeing the governor and House and Senate majority leaders “on board”


199See above ch. 34.


201Telephone interview with Ro Foege, Mt. Vernon (Aug. 31, 2008).

202Telephone interview with Randy Yontz, state advocacy director, American Heart Association of Iowa, Des Moines (May 14, 2008).

203Telephone interview with Ro Foege, Mt. Vernon (Aug. 31, 2008). Foege’s devotion to local control was so extreme that, asked why the statewide ban bill had supplanted it, he had no answer to what he called a “good question.” In noting that few other House members shared his strong advocacy of local control, he oddly identified McKinley Bailey as one of them despite the latter’s support for bill-killing broad exemptions.

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(but unaware of the traction that Petersen’s bill was about to gain), regarded prospects for repeal in 2008 as rather positive.\footnote{Telephone interview with Threase Harms, CAFE Iowa lobbyist, Des Moines (May 14, 2008).}

Representative Janet Petersen’s Indispensability

“In the hardest thing for me to do was plug my nose and vote to take the casinos out...”\footnote{Tony Leys, “Deal on Ban Irks Opponents of Smoking,” DMR, Feb. 14, 2008 (1A:1-2) (quoting Janet Petersen).}

In order to understand the progress of the statewide ban bill in 2008, it is crucial to appreciate the unique individual contribution of Janet Petersen, without whose “passion” and tenacity\footnote{Telephone interview with Randy Yontz, state advocacy director, American Heart Association of Iowa, Des Moines (May 14, 2008).} the bill would probably not have passed\footnote{The House majority leader’s administrative assistant and legal counsel freely acknowledged that Petersen had been the person most responsible for passage, but added that McCarthy agreed with her 100 percent and hated smoking. Telephone interview with Brian Meyer, Des Moines (May 12, 2008).} or perhaps even have secured leadership’s clearance for floor debate in 2008\footnote{Nevertheless, her commitment to the elimination of smoking had its limits: asked, after the Smokefree Air Act had gone into effect, whether a majority of the Iowa legislature might support adoption of a law similar to an ordinance just passed in San Francisco prohibiting pharmacies from selling tobacco products, Petersen replied that “[a]s a champion of smokefree air...I am not interested in banning a business from selling a product,” although she did not deny that prohibiting a health care institution such as a pharmacy from selling cigarettes reinforced the promotion of smokefree air. When asked whether she would support legislation to prohibit hospitals from selling cigarettes, she failed to respond. Petersen’s surmise that, since she was not interested, she doubted whether the initiative “would have much support from other legislators,” if empirically accurate, might help explain why the Iowa legislature has, in recent decades, been so backward on smoking and tobacco issues. Email from Janet Petersen to Marc Linder and from Marc Linder to Janet Petersen (July 31, 2008). Petersen’s position may be related to her misunderstanding that government lacks the power to ban smoking and tobacco altogether: “I wish we could eliminate it but I don’t think that’s within our jurisdiction to eliminate smoking. You know, it’s a legal product just like alcohol is a legal product....” “Iowa Press,” No. 3527 (Mar. 7, 2008), on http://www.iptv.org/iowapress/transcript_detail.cfm?ipShowNum=3527 (visited Apr. 18, 2008); http://www.iptv.org/video/wvx.cfm?id=1897 (visited Aug. 1, 2008).} at...
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McCarthy’s assistant put it, “the driving force” behind the bill, and there is no other actor of whom it can plausibly be said that he or she was indispensable. Petersen’s key advocacy was, as a former Democratic House speaker admiringly put it, “over the top.” On one occasion, at least, Petersen availed herself of the opportunity to set the historical record straight about her central role. Asked on the television program “Iowa Press” in early March how local control, for which everyone seemed to be headed, had “morphed” into a much stricter bill, she explained: “Well, I guess I probably had something to do with that because last year we weren’t able to get the local control bill out of local government committee in the House. And I had a statewide bill that I had been working on for the past eight years and I said I’d like a shot to run it this year and just see where the votes are. I’ve been talking to business owners in my district and talking to legislators and I thought if people keep talking about local control that I actually think we might have a better shot at a statewide ban.” Her antagonist on the program, Democratic Senator Bill Dotzler, agreed that “Janet probably did have something to do with it...” Petersen had wanted to try to pass such a bill for years, but her efforts had been in vain in the face of the adamant opposition of Republican Majority Leader Rants, whose tobacco industry money, sluiced through his 527 organization,  

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209 Telephone interview with Threase Harms, CAFE Iowa lobbyist, Des Moines (May 14, 2008).

210 Telephone interview with Brian Meyer, Des Moines (Sept. 18, 2008).

211 In this sense, Lieutenant Governor Patty Judge distorted the historical record at the bill’s signing ceremony by singling out for special mention only the bill’s floor managers, Rep. Tyler Olson and Sen. Staci Appel, and passing over in silence Petersen, who was standing next to them. Ironically, Judge’s selection as keynote speaker and the governor’s statement that without her “steadfastness we never would have gotten this bill through” constituted historical distortions in their own right since, according to two anti-smoking Democratic legislators, her contribution had actually been zero. Culver signs statewide smoking ban bill (part 1), on http://www.youtube.com/watch?v=zveJpA1J6pQ (Apr. 15, 2008); interview with Sen. Robert Dvorsky and Rep. Mary Mascher, Iowa City (July 26, 2008).

212 Telephone interview with ex-speaker who requested anonymity (June 13, 2008).


214 527 groups are tax-exempt organizations that engage in activities such as issue advocacy ads that tout or criticize a candidate’s voting record but do not expressly advocate for or against candidates. Such activities do not trigger the State campaign laws...
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exceeded by a large margin any contributions that cigarette companies had previously handed out in Iowa.\textsuperscript{215} Founded by Rants in 2005, the Iowa Leadership Council, “a clear voice...for conservative principles” such as “restraining taxes,” was designed to “push back the concerted efforts” of “Democrat and ultra-liberal independent political expenditure groups.”\textsuperscript{216} Not only did cigarette companies such as Altria ($25,000 in 2005 and 2006), Reynolds American ($25,000 in 2005 and $40,000 in 2007), and Lorillard ($10,000 in 2005 and $5,000 in 2008) contribute plentifully, but so did the larger tobacco-industrial-retail complex, including retailers such as Casey’s General Stores ($5,000 in 2006 and $5,000 in 2008), Kum and Go ($10,000 in 2007 and through the W.A. Krause Revocable Trust $10,000 in 2006 and $5,000 in 2007), and casinos such as Ameristar in Council Bluffs ($30,000 in 2006 and $10,000 in 2007) and Harrah’s ($10,000 in 2006).\textsuperscript{217}

In the wake of the Democrats’ having gained control of the House at the 2006 elections, Petersen’s strategy included her appointment as chair of the Commerce Committee, in which capacity she then signaled her priorities by informing committee members that no other bill would be going anywhere until she got the statewide smoking ban through. Her committee-level power, however, would have been unavailing had she not been able to persuade House Majority Leader Kevin McCarthy—who had not, until after her committee had acted, believed that a statewide ban bill could attract enough votes to pass—to let her try her bill;\textsuperscript{218}

\begin{itemize}
  \item but do require the groups to report to the IRS.” http://www.state.ia.us/government/iecdb/viewreports/527committees.htm (visited July 25, 2008).
  \item Telephone interview with Sen. Michael Connolly, Dubuque (Apr. 29, 2008). Asked after passage of the bill whether she expected tobacco companies to become involved in the rule-making process, Sen. Appel, pointing to Rants’s 527 money, stated that they had been involved all along. Telephone interview with Staci Appel, Ackworth (Apr. 12, 2008).
  \item http://www.iowaleadershipcouncil.org/WhyWeExist.aspx (visited July 25, 2008).
  \item Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). On Petersen’s bills before 2008, see above chs 31 and 34. A later press account stating that McCarthy “could take the credit, or blame” for House passage of H.F. 2212 because, “[s]ensing support for new smoking restrictions was picking up momentum,” he “was one
\end{itemize}
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as she had been unable to do in 2007, when the Democratic leadership “asked her to yield to efforts to pass” a local control measure. 219 Petersen also multiplied her influence by partnering with Representatives Tyler Olson and especially with Philip Wise, the latter and Petersen becoming each other’s closest friend in the legislature. 220 Nor was the majority leader the only unbeliever: the anti-tobacco health organizations all opposed the statewide ban bill in 2007 and at the outset of 2008 because they feared that, since no other state had enacted a statewide ban without first having empowered local communities to pass their own anti-smoking ordinances, Iowa would wind up with a weak statewide law. Indeed, though Petersen herself in the 1990s had worked and lobbied for the American Heart Association, she was unable to persuade even that organization to focus on her statewide approach. More remarkably, even after her bill had begun to “move” in 2008, the health groups still refused to abandon their opposition 221 —or, as her successor at the Heart Association put it, the organization had preferred local control even after it had been served a statewide ban “on a silver platter.” 222 Speaking for many in the movement, the Cancer Society’s lobbyist later observed that “we were kind of floored” that Petersen and her supporters even thought that they had the votes to pass a bill, let alone that the bill this time around would “have legs.” 223 Conversely, Petersen nourished vigorous contempt for the local control bill of 2007, which she bluntly characterized as a watered-down “hunk of


220 Telephone interview with Dan Ramsey, American Lung Association of Iowa, Des Moines (May 14, 2008).

221 Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). If his memory was accurate, the Heart Association’s lobbyist offered a chronological account difficult to reconcile with the main narrative here: Yontz recalled that sometime before the Commerce Committee meeting on February 5 the anti-tobacco groups were called to a meeting with House Speaker Murphy and Majority Leader McCarthy at which the former stated that they wanted local control and the Democratic leadership responded that that was not going to happen and gave them their marching orders. Telephone interview with Randy Yontz, state advocacy director, American Heart Association of Iowa, Des Moines (May 14, 2008).

222 Telephone interview with Randy Yontz, state advocacy director, American Heart Association of Iowa, Des Moines (May 14, 2008).

223 Telephone interview with Stacy Frelund, Des Moines (Oct. 2, 2008).
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Nevertheless, before her bill made its definitive breakthrough, Petersen, according to the Lung Association’s lobbyist, promised that she would support a local control bill if it got “legs” and H.F. 2212 did not (a scenario that did not occur). Telephone interview with Dan Ramsey, ALA, Des Moines (May 14, 2008).


According to an account of the meeting by Jason Clayworth, “Bill Would Ban Smoking in, Near Public Places,” DMR, Feb. 6, 2008 (2B:1-2), the president of the Iowa Gaming Association, Wes Ehrecke, “successfully urged lawmakers...to exempt casinos....” But according to Ehrecke, who was present, neither he nor any other non-legislator was permitted to speak; he surmised that the reporter had conflated this meeting and the aforementioned January 23 subcommittee hearing. Telephone interview with Wes Ehrecke, Des Moines (June 15, 2009).

The House Commerce Committee Meeting of February 5

[I]n the commerce committee I need twelve votes to get it out of committee and the Republicans had decided they didn’t want to play ball on this issue. So, I had to just work with my Democratic members and that was one way for me to obtain the votes to keep the bill alive. 225

The Commerce Committee meeting on H.S.B. 537 on February 5 226 was the crucial step in the legislative process signaling that a statewide ban would prevail over merely authorizing local governments individually to go beyond the meager limits of the obsolete clean indoor air act. Since the Senate was considered the more activist chamber in terms of smoking regulation, the fact that even some Republicans joined Democrats on the House Commerce Committee in recommending the bill suggested that floor passage was a definite possibility. The meeting was also decisive in confirming the aforementioned predictions that passage of a statewide ban would be possible only if casinos were exempt.

The reconstruction of legislative history in Iowa, as in most states, is made difficult (if not impossible) by the lack of a stenographic transcript not only of floor debate, but also of committee hearings and meetings. And although the public can and does attend both plenary floor and committee sessions, audio only of the former has recently begun to be available live (but not archived) on the legislature’s website. Fortunately, however, in the age of www.youtube.com, an
audio-video recording of most of the meeting was posted on the internet.\textsuperscript{227}

\textit{Laying Tracks to a Statewide Ban Jettisoning Local Control and Exempting Casinos}

It is too soon to know the causes [of the decline in Illinois casino revenues]—and it doesn’t really matter. One thing is the same now as when the bill was passed last year: Smoking is hazardous. It is hazardous to the smokers, to other patrons and to employees. A decrease in revenue at casinos or elsewhere doesn’t change that. ... The smoking ban carries costs, but so does smoking.\textsuperscript{228}

Following a brief presentation of the study bill by Tyler Olson, who would become floor manager of H.F. 2212, Representative Wise offered his two amendments—which he had signaled in subcommittee—striking local control and exempting casinos; the basis for the latter he did not explain, but he found local control on top of a statewide ban “most amusing,” with which it was “inconsistent” in addition to being “confusing.”\textsuperscript{229} He thus added insult to injury in rebuffing the local control-oriented anti-tobacco groups.\textsuperscript{230}

(In the event, after the bill had become law without the express provision satisfying the constitutional and codified conditions for lifting the limitations on home rule,\textsuperscript{231} some die-hard advocates of local control did not find its absence

\textsuperscript{227}The nonpartisan but for-profit IowaPolitics.com posted the three-part, 30-minute video, which, however, ended before the final vote. The meeting convened at 3:20 p.m., but recessed five minutes later for 65 minutes for Democratic and Republican caucuses; during these first five minutes other bills were assigned to subcommittees and amendments to H.S.B. 537 were distributed; the meeting then reconvened at 4:30 p.m. and adjourned at 5:25 p.m. [House] Committee Minutes for Commerce (Feb. 5, 2008), on http://www3.legis.state.ia.us/ga/minutes.pdf?minutesID=3602. The Youtube videos thus appear to include about 30 of the 55 minutes devoted to H.S.B. 537.

\textsuperscript{228}“Don’t Carve Out Exemptions to State’s Smoking Ban,” Pantagraph (Bloomington), Feb. 15, 2008 (A6) (edit.) (Lexis).

\textsuperscript{229}House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=sWB5mIeiTD0 (House Commerce Committee approves smoking ban (part 1)) (visited July 5, 2008).

\textsuperscript{230}A lobbyist for one of these groups reported that the elimination of local control at the Commerce Committee meeting had come out of the blue, though the anti-smoking groups had known that it would happen. Telephone interview with Threase Harms, CAFE Iowa lobbyist, Des Moines (May 14, 2008).

\textsuperscript{231}Iowa Constitution art. III, § 38A; Iowa Code §§ 364.1, 364.2(3), and 364.3(3) (2007). See also above ch. 25.

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amusing. Nor was such a power illogical or superfluous, as Wise had implied, especially in the wake of his casino exemption, which was precisely why especially casinos would have opposed local control. Its usefulness would, for example, become glaringly obvious in May, when the Sioux City city council began toying with adoption of an ordinance that would have banned smoking in a casino in the teeth of a law that expressly exempted it from the statewide ban.233

232Cindy Hadish, “Smoking Ban: ‘Awesome’ or Oppressive?” Gazette (Cedar Rapids), Apr. 10, 2008 (1A:1-2, at 6A:4) (mentioning Clean Air for Everyone Johnson County as intending to continue to push for local control to strengthen the ban further). However, the example—crude attempts at evasion in Minnesota of that state’s 2007 Freedom to Breathe Act by bar owners to call all their smoking customers actors in an (exempt) stage performance—that CAFE’s lobbyist used to justify its need was inapt. Telephone interview with Threase Harms, CAFE Iowa lobbyist, Des Moines (May 14, 2008).

233Lynn Zerschling, “City May Try to Ban Smoking at Argosy,” SCJ, May 6, 2008, on http://www.siouxcityjournal.com (visited May 6, 2008). The city attorney, who conceded that “[r]easonable minds can differ and others could interpret the Act in another way,” concluded that it was “likely” that the city “has the power to adopt an ordinance forbidding smoking in areas which are not listed in the Act and [in] those areas which are exempted from the Act.” The city attorney sought to harmonize the ban with the Iowa Supreme Court precedent that an ordinance was inconsistent with, and thus preempted by, a state law when the former prohibited an act permitted by the latter by arguing that the ordinance was merely more stringent than, but not inconsistent with, the Smokefree Air Act. He reached this conclusion by stressing that the statute: (1) repealed the express preemption contained in the old law; (2) did not expressly prohibit cities from adopting smoking ordinances; (3) permitted private businesses (and local governments) in their own buildings/on their own land to prohibit smoking that is permitted by the statute; and (4) “merely exempts certain areas from its own regulation” without expressly stating that smoking shall be permitted or not regulated there. Andrew Mai, Informational Memo: Smokefree Air Act, to Sioux City City Council (Apr. 25, 2008) (copy provided by Andrew Mai). The city attorney’s memorandum was, in turn, based on an analysis furnished by the Tobacco Control Legal Consortium, which argued that the ordinance could be reconciled with the statute because it promoted the Smokefree Air Act’s underlying policy and merely increased the details of the regulation. Letter from Maggie Mahoney to Andrew Mai and Eleanor Dilkes (Apr. 22, 2008) (copy furnished by Andrew Mai). These arguments suffered from their failure to deal with any of the following crucial aspects of legislative history: (1) the House Commerce Committee struck an expansive local control provision from the study bill before passing it out of committee as H.F. 2212, the amendment in question having been filed by Rep. Wise, one of the bill’s strongest supporters, whose amendment included only one other provision—the casino exemption; (2) the Senate voted to strike the casino exemption, but both houses ultimately agreed to retain it; and (3) the main reason that the legislature decided not to pursue any local control bill (i.e., a bill that would have expressly repealed preemption of local control in Iowa Code sect. 142B and
expressly authorized local governments to prohibit what was exempt in the law, but would otherwise have done nothing) was that it did not want to balkanize regulation and create an “unfair playing field,” as a result of which businesses in neighboring jurisdictions would be subject to different rules, thus making it possible to characterize this decision cynically as the legislature’s refusal to permit a race (among the local governments) to the top (of public health).

234 O. Kay Henderson, “Lawmakers React to Proposed Casino Smoking Ban in Sioux City,” Radio Iowa, May 7, 2008, on http://www.radioiowa.com (visited May 15, 2008). Gronstal was wrong both because the new anti-smoking law, H.F. 2212, did in fact repeal the preemption of local anti-smoking ordinances that the cigarette oligopoly had succeeded in having inserted into the old law in 1990 and the aforementioned constitutional and codified limitations on home rule did not expressly prohibit local governments from passing smoking ordinances. According to the city attorney, Governor Culver stated (on television), without offering a reason, that the city had the power to ban smoking at the casino. Email from Andrew Mai to Marc Linder (Sept. 15, 2008).

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power cooperative vice president and the ranking Republican on the committee, asked Wise why he wanted to exempt casinos. Noting that the hospitality industry in other states had generally benefited from smoking bans, Wise observed that casinos were the only area in which he had been able to find any evidence of a negative economic impact; stressing that his information was “very preliminary” and “tentative,” he mentioned that casinos in eastern Iowa were picking up some business from Illinois after that state’s smoking ban (which had just gone into effect on January 1, 2008, covering casinos)—the reversal of which fate he wished to spare Iowa casinos, especially since they would also


237 House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=sWB5meiTD0 (House Commerce Committee approves smoking ban (part 1)) (visited July 5, 2008). How Wise would have gotten the January Illinois data so soon is unclear; according to the Legislative Services Agency senior legislative analyst from whom Wise later requested detailed data: “Illinois and Iowa update their casino websites early in the following month, but February 5th would be pretty early for January data. Also, I am not sure I had discovered the Illinois web site as early as February 5, 2008. Rep. Wise may have just had an Illinois contact with knowledge of the situation. I am not sure of his source put [sic] it probably was not me.” Email from Jeff Robinson to Marc Linder (June 19, 2009). The press reported on February 1 that data from six of Illinois’ casinos during a 10-day period in early January revealed a 20-percent decline, but the executive director of the Illinois Casino Gaming Association expressly noted that “[w]e’re very cautious with the figures because we’ve had some bad weather the first part of the month.” That revenue had declined more than attendance suggested to him that customers were not leaving the state, but spending less time gambling: “Instead of pulling slot machine arms with a cigarette dangling out of their mouths, gamblers who smoke go outside for a puff, leaving machines and seats at card tables unused for longer periods of time.” Jake Griffin, “One Month Later Bars, Casinos Are Feeling the Ban,” Chicago Daily Herald, Feb. 1, 2008 (1) (Lexis). The press did not publish the Illinois Gaming Board’s official January data showing a 17.5 percent drop in revenues until Feb. 9, but even then the ICGA executive director emphasized that: “We’re not saying that the smoking (ban) is causing all of it.” Without explaining how management had disentangled the various causes, Tom Swoik expressed the belief that “a majority of the losses” had resulted from the ban, adding that “[h]ad weather in January also probably contributed to the decline in revenue.” Adriana Colindres, “Casinos Blame Statewide Ban for Majority of Decline in Revenues,” State Journal-Register (Springfield), Feb. 9, 2008 (6) (Lexis).

be subject to a competitive disadvantage vis-a-vis Native American casinos, which would not be covered by the law.239

The smoking ban-related causality allegedly underlying data that constituted the sole empirical basis for Wise’s precedent-setting exemption was so shaky that days after the Commerce Committee vote even the Illinois casino industry was cautioning against overinterpreting the data. For example, the vice president of a casino in Rock Island stated that “a combination of the smoking ban, harsh weather and the current state of the economy make it difficult to blame” the lower revenue on “any single factor....” As for smoking specifically, “the true picture for us is going to have to wait,” but “[e]ven then, we’ve done some things to sort of mitigate the situation by providing smoking areas for our guests, which are being used.” And a Democratic legislator who said that he would consider an exemption if some area in the casino were set aside for nonsmokers, insisted not only that more time was needed to assess the trends and determine the causes of the revenue loss, but that even if revenue declined in all of the state’s casinos, “it could be the smoking ban, or it could be the economy.... I think we’re probably going to have to wait to really see what’s happening there.”240

In the face of all this uncertainty in Illinois itself over the meaning of the drop in revenue—two weeks after the committee’s adoption of Wise’s amendment the executive director of the ICGA still conceded that “some of the drop could be attributed to bad weather”241—Wise neither offered nor was asked to explain why it was necessary to enact a politically explosive exemption (that would, to boot, 

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239House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=sWB5mIeiTD0 (House Commerce Committee approves smoking ban (part 1)) (visited July 5, 2008).

240Kenneth Lowe, “Month into Ban, Casino Numbers Down,” Pantagraph (Bloomington), Feb. 9, 2008 (A3) (Lexis) (quoting Bill Renk and Mike Boland).

241Doug Finke, “House Bills Would Create Smoking Bans Exemption” State-Register Journal (Springfield), Feb. 18, 2008 (5) (Lexis). Indeed, given the “struggling economy” and higher gasoline prices, which probably “lowered the amount of income that consumers felt that they could afford to spend on gambling,” as well as the especially harsh winter of 2007-2008 and historic rains and floods of the spring and summer of 2008, as late as September 2008, the Illinois Commission on Government Forecasting and Accountability still deemed it “impossible to know how much of Illinois’ large decline in riverboat figures is directly attributable to the smoking ban,” which, however, based on comparisons with the adjacent casinos in the bordering states of Indiana, Missouri, and Iowa, which did not ban smoking in casinos, “appears” to be “the biggest factor....” Commission on Government Forecasting and Accountability, Wagering in Illinois: 2008 Update 14 (Sept. 2008), on http://www.ilga.gov/commission/cgfa2006/Upload/2008%20Wagering%20Report.pdf (visited June 27, 2009).
result in the continuing exposure of millions of people to intense secondhand smoke) immediately rather than, at the very least, monitoring the impact of coverage and reassessing the situation after one year. He failed to divulge whatever data he had for the month of January, and no other legislator apparently had the incentive to criticize Wise’s amendment. Democrats, at least in the House, were too committed to the done deal to raise inconvenient and unsettling issues. (As Wise himself later put it: “In the Iowa House, the casino gaming floor exception did bring “yes” votes to the bill. I am not personally aware of any votes that it cost the bill. There were legislators in the Iowa House who also groused about the exemption and threatened to vote against the bill if the exemption was included. None of them did so.”)\textsuperscript{242} In contrast, Republicans, who, by and large, did not support smoking bans anywhere, cried crocodile tears for casino workers only as a pseudo-issue in order to attack Democrats’ inconsistency.

In response to Soderberg’s next question as to whether the casino issue was financial or health, Wise candidly (but self-contradictorily) admitted that it was economic: if health alone were the issue, there would be no exemptions.\textsuperscript{243} But neither Soderberg nor anyone else asked Wise to explain to the members the calculation demonstrating that the potential loss of an indeterminate amount of casino revenue and/or state tax revenue justified enabling the sickness and death of a certain number of casino employees and customers exposed to other customers’ secondhand smoke, and so the committee, on a strictly party-line basis, voted 13 to 9 in favor of Wise’s amendment.\textsuperscript{244}

No one challenged Wise, but had Wise himself or any would-be critic paid as much attention to the political struggle in Illinois that had consciously, intentionally, transparently, and loudly put public health before casinos’ profits

\textsuperscript{242}Email from Phil Wise to Marc Linder (July 9, 2009).

\textsuperscript{243}House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=sWB5mIeiTD0 (House Commerce Committee approves smoking ban (part 1)) (visited July 5, 2008).

\textsuperscript{244}House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=sWB5mIeiTD0 (House Commerce Committee approves smoking ban (part 1)) (visited July 5, 2008); House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=Qw8W3ppSCDc&feature=related (House Commerce Committee approves smoking ban (part 2)) (visited July 5, 2008). The first five Republicans to vote “passed”; after the last four had voted No, the first five changed their vote to No (Amendment 707); [House] Committee Minutes for Commerce (Feb. 5, 2008), on http://www3.legis.state.ia.us/ga/minutes.pdf?minutesID=3602. Republican Doug Struyk explained later that Republicans’ initial passing had been driven by their belief that three Democrats might vote No. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
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and government’s tax revenues as they had to January’s decline in the latter two magnitudes, they would have discovered an alternative framework for a public discourse that might have altered the course of the Iowa debate. And had Wise looked further than just across the Mississippi and examined the policy underlying the casino smoking ban implemented in Victoria, Australia in 2002, a more radical redirection of the Iowa discussion might have taken place. In Victoria the purpose of the smoking ban in gambling venues was twofold—to protect workers and customers from secondhand smoke “and as a measure to reduce the addictiveness of gambling.” In other words, the government did not view the drop in revenues as a trade-off for enhancing public health, but actually intended it as a means of reducing the losses of those afflicted with the dual addictions of smoking and gambling by disrupting—as a market research report prepared for one of the gambling firms, which commissioned the study to assess the new law’s impact on revenue and “customer satisfaction” and to provide “information regarding an explanation of ritualistic behaviour and how it manifests emotionally and physically in individuals exhibiting gambling and smoking behaviour,” put it—smoking as “a powerful reinforcement for the trance-inducing rituals associated with gambling.” These disruptions included: “Wanting to smoke a cigarette is distracting and breaks the concentration with playing the game. Awareness of expenditure (“playing the poker machine is a waste of money”) when leaving the game to having a cigarette. Tempted to go home rather than play on. Effects [sic] concentration, levels of agitation and

See below this ch.


irritability.”

(To be sure, the firm, not sharing the government’s goal of interfering with the synergy between the two addictions, received a long laundry list of suggestions from psychologists—who informed their client that “[c]urrent research considers the behaviour of compulsive gambling and smoking nicotine within an ‘addiction model’”—on “How to Encourage...Smokers to Continue Gambling in Non-Smoking Environments” such as “[t]raining staff with the primary purpose of keeping people at the machines to play continuously,” offering free mints, gum, or hard lollies, and permitting smokers to reserve a machine while they go outside to smoke so that they were required to return to the machines.)

Tobacco control organizations and unions representing gaming employees favored the Victoria ban because of its diminution of secondhand smoke exposure, but with smokers representing 36 percent of electronic gambling machines users but contributing 50% of the revenue, gambling control supporters expected that the smoking ban would help reduce excessive gambling among problem gamblers: requiring smokers to interrupt their activity to go outside to smoke might prompt them to reconsider their gambling and “an earlier withdrawal from the gambling ‘trance.’”

Unsurprisingly, given the disproportionate share of smokers among all gamblers and problem gamblers and the latter’s disproportionate contribution (42 percent) to electronic gambling machine revenue, the fact that smokers, after the ban went into effect, did in fact spend less money on gambling because they gambled less time per hour (because they spent time on smoking breaks) and less time overall (because they left the establishment earlier), meant that industry revenue and government tax

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revenue declined in fiscal year 2003 7.6 to 10.0 percent and 8.5 percent, respectively. Also fostering these declines were additional policies designed to interfere with uninhibited gambling such as limiting access to cash and automated teller machines at gambling sites, requiring display of information on odds of winning, lowering maximum bet limits, and banning gambling machine advertising.

At least for Victoria, investigators have hypothesized that the sudden and long-term reduction in gambling machine expenditures differed from the impact of smoking bans in restaurants: whereas in the latter smokers by and large adjusted by smoking before or after eating and the advent of nonsmokers who formerly avoided smoky locales compensated for the small proportion of smokers who stopped frequenting or lingered less in restaurants, in gambling establishments “each minute away from a machine is money not spent” and nonsmokers failed to increase their expenditures.

Iowa, too, had witnessed the pervasive phenomenon of the dual gambling-smoking addiction. Numerous studies have revealed, for example, that the proportion of so-called problem gamblers in Iowa admitted to gambling treatment who smoked far exceeded that of the population at large: tobacco use prevalence among this subpopulation ranged between 51 and 70 percent. The


258 According to the Iowa Department of Public Health, “problem gamblers,” for whom “gambling has become an addiction...like an addiction to alcohol or drugs,” “find it extremely difficult to stop gambling.” Of adult Iowans 88 percent gamble, while 3 percent are problem gamblers. http://www.1800betsoff.org/problem_gamblers.asp

259 In 2004 the legislature imposed a 0.5 percent tax on casinos’ adjusted gross receipts to fund such gambling treatment. Iowa Code §§ 99F(3)(c) and 135.150 (2008). Ironically, in 2008 the legislature, while excluding casinos from the statewide smoking ban, appropriated $1,690,000 from this fund to IDPH for the benefit of people with addictive disorders and specified that priority be given to those “with a dual diagnosis of substance abuse and gambling addictions....” 2008 Iowa Laws ch. 1187, § 3.

260 Howard Shaffer et al., *The Iowa Department of Public Health Gambling Treatment*

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Victorian program would have been readily available as an initiative that might have united critics of secondhand smoke exposure and the individual and family financial havoc wreaked by gambling in opposition to leaving casino smoking unregulated, but in fact only one Iowa legislator (Republican Scott Raecker) during floor debate on H.F. 2212 objected to the casino exemption in the context of this twofold “addictive disorder.”

The Origins of Iowa’s Unique Smoking Ban on the Outdoor Grounds of Public Buildings in a Republican Ambush that Boomeranged

Iowa certainly hasn’t been on the cutting edge when it comes to smoking laws.

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261 See below this ch. (House debate of Feb. 19).
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After raising the issue of the basis for the proposed casino exemption, Soderberg offered the Republicans’ only amendment, which added the underlined language to the following subdefinition of “public place”: “Public buildings, places of public assembly, and vehicles owned, leased, or operated by or under the control of the state government or its political subdivisions and including the entirety of the private residence of any state employee any portion of which is open to the public.” The amendment also added the following additional outdoor area in which smoking was prohibited: “The grounds of any public buildings and places of public assembly owned, leased, or operated by or under the control of the state government or its political subdivisions, including the grounds of a private residence of any state employee any portion of which is open to the public.”

In statehouse circles it was public knowledge that the Republican amendment (which, according to Democrats, really originated with assistant minority leader Doug Struyk, who had switched parties in 2004, although the latter denied the allegation) was designed as a killer amendment. With the so-called Terrace Hill (governor’s mansion) amendment, Republicans intended to embarrass Governor Culver, whose wife Mari, who “was trying to kick the habit,” would not lawfully be able to smoke on the grounds of the family’s residence.

263 House Commerce Committee Meeting (Feb. 5, 2008), http://www.youtube.com/watch?v=Qw8W3ppSCDc&feature=related (House Commerce Committee approves smoking ban (part 2)) (visited July 5, 2008). The amended language was added to H.S.B. 537, § 2(12)(s), and inserted as § 3(2)(f).

264 Telephone interview with Philip Wise, Keokuk (May 18, 2008).


266 Struyk later stated that the amendment had been discussed briefly during a Republican caucus, but that it had not been his idea and that he was not sure whether it had originated with Soderberg himself or whether he had merely “run” it. As one of the caucus’s three lawyers, Struyk did go over the amendment. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).


268 O. Kay Henderson, “Statewide Smoking Ban Endorsed by Legislative Committee,” Radio Iowa (Feb. 5, 2008), on http://www.radioiowa.com (visited May 12, 2008). Republicans may not have been just guessing: after the law went into effect, Mari Culver’s failure to control her nicotine addiction did embarrass the governor. After a reporter had seen her unlawfully smoking in a state vehicle chauffeured by a state trooper, she was constrained to admit that she had violated the law. Although the trooper failed to issue her a ticket, the following day she requested and received the ticket. Tony Leys, “First Lady Admits Smoking in State Vehicle,” DMR, Nov. 21, 2008, on http://www.desmoinesregister.com (visited Nov. 21, 2008); Tony Leys, “Mari Culver Requests Ticket for Smoking,” DMR, Nov. 22, 2008, on http://www.desmoinesregister.com (visited Nov. 22, 2008).
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official residence. Soderberg later denied that he had any such intention, but Struyk freely acknowledged that embarrassment had indeed been one of the amendment’s purposes in order to point up the “hypocrisy” underlying Democrats’ selective approach to coverage. In introducing the amendment, Soderberg offered three separate reasons, the last clearly being a dig at Culver: (1) “the state really does need to lead by example”; (2) the need to protect historic buildings; and (3) in his condition of the state address the governor had said that “if you’re going to talk the talk, you need to walk the walk.” Tyler Olson, visibly unable to suppress a smirk while putting the minority party in check, announced that “I appreciate that the amendment is offered in the spirit of public health.” All Ayes and no Nays being heard on the short-form (non-roll-call) vote, the amendment carried.

Struyk later insisted that Republicans had not viewed Democrats’ adoption of the amendment as a boomerang: true, his party had tried to box the majority party in by maneuvering it into voting against the expansion of coverage, but Republicans did not feel that they had been saddled with a provision that they actually opposed. Ironically, the very capaciousness of “the grounds of public buildings” language would radically broaden the outdoor coverage of the smoking
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ban, an outcome that could not plausibly have been Republicans’ intention and that would not have occurred had the amendment been literally confined to its original Terrace Hill target. In this sense, Struyk’s claim that the caucus had not realized that the amendment would be interpreted so expansively seems, in light of its unambiguous language, implausible. More likely, however, is Republicans’ failure to foresee that their provision would give rise to sharp and multifaceted floor debate over its meaning, a controversy over ambiguity that would be perpetuated during the drafting of the administrative rules.

For its author, however, the phrase was crystal clear. Asked later what he had meant by “grounds of public buildings,” Soderberg immediately responded that he had intended it to cover the whole outdoor area. When asked about an extreme but real situation, he readily replied that if the only building in a state park were an enclosed bathroom, then smoking would be prohibited on the park’s entire grounds. Asked, finally, whether such a capacious definition was not “pretty radical,” especially since during plenary consideration he had opposed the bill on every vote, Soderberg stressed that “the law needs to be consistent.” This pseudo-justification of consistency would later play the central part in Republicans’ pseudo-opposition to the exemption of casinos.

The third and final amendment was offered by McKinley Bailey, a 28-year-old first-term Democrat, who for five years had been a paratrooper in the 82nd Airborne Division of the U.S. Army, leading a Tactical Signals Intelligence Intercept Team in more than 120 “combat missions” in Iraq and Afghanistan. Despite the fact that the Iowa Democratic Party had contributed more than $100,000 to his election campaign, Bailey’s increasingly prominent opposition

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273 Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
274 See below ch. 36.
275 Telephone interview with Chuck Soderberg, Le Mars (May 16, 2008). Soderberg tentatively confined his capacious self-interpretation to state (as opposed to county and city) grounds, but he was presumably confused: although his amendment did expressly refer to state employees’ private residences, “the grounds of public buildings” did and does refer indiscriminately to the state and its political subdivisions.
277 On three occasions in October 2006 the party contributed a total of $107,675. https://webapp.iecdb.iowa.gov/PublicView/statewide/2006/Period_Due_Date_19-Oct/Candidates/Bailey%20McKinley__1665__scanned.pdf; https://webapp.iecdb.iowa.gov/PublicView/statewide/2006/Period_Due_Date_Fri.%20preceding%20general/Candidates/Bailey%20McKinley__1665__scanned.pdf (visited Aug. 3, 2008). Bailey’s electoral importance derived from his having been one of five newly elected members who gave Democrats control of the House; in contrast, whether he voted with the party was of
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to the anti-public smoking bill eventually created conflict for him within the party caucus. At this point, however, his proposed exemption was limited to posts or chapters of veterans organization with a congressional charter “except when being used for a function to which the general public is invited.” It, too, was adopted on a voice vote with no opposition.

Amendments having been disposed of, the Commerce Committee turned to discussion of the bill. Aside from some desultory colloquies between Republicans and Olson on such topics as the interaction between the 50-foot no-smoking zone outside of public places (later deleted) and the principle of no regulation of private residences where the residence was situated within 50 feet of a public place, a relatively large block of time was devoted to the apparently personal complaints of Republican Steven Lukan, who worked in his family tire repair store in a small town in northeastern Iowa. He felt that Olson as a big city resident did not understand the difficult situation in which the proposed law would put a small-town business owner by making him an enforcement officer vis-a-vis a friend and customer who smoked while chatting in the store. In addition, Lukan took umbrage at the overreaching involved in prohibiting an owner from smoking in his own private office: “By God, you spend $150,000 to create a business, take all that risk, pay your taxes on time....”

At the close of debate, the committee voted 16 to 6 to pass the bill as

distinctly lesser importance since a bill would not even have been debated if Republicans had retained the majority: what counted was who set the agenda and what got debated, and Republicans would not have debated any serious labor, environmental, or similar bills. Email from former House speaker who demanded anonymity to Marc Linder (Aug. 3, 2008).

Email from Mary Mascher to Marc Linder (Mar. 15, 2008). The House Majority Leader’s administrative assistant and legal counsel stated after the end of the session that there was party discipline and might be consequences for a legislator who voted against the party on final passage (such as the inability to get his bills passed). When asked in particular about Bailey, Brian Meyer replied: “You said it, I didn’t.” Telephone interview with Brian Meyer, Des Moines (May 12, 2008). On Bailey’s persistent advocacy of a pro-smoking agenda before the Administration Rules Review Committee in 2008 and during the 2009 legislative session, see below ch. 36.

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Amendments having been disposed of, the Commerce Committee turned to discussion of the bill. Aside from some desultory colloquies between Republicans and Olson on such topics as the interaction between the 50-foot no-smoking zone outside of public places (later deleted) and the principle of no regulation of private residences where the residence was situated within 50 feet of a public place, a relatively large block of time was devoted to the apparently personal complaints of Republican Steven Lukan, who worked in his family tire repair store in a small town in northeastern Iowa. He felt that Olson as a big city resident did not understand the difficult situation in which the proposed law would put a small-town business owner by making him an enforcement officer vis-a-vis a friend and customer who smoked while chatting in the store. In addition, Lukan took umbrage at the overreaching involved in prohibiting an owner from smoking in his own private office: “By God, you spend $150,000 to create a business, take all that risk, pay your taxes on time....”

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amended without recommendation; all 13 Democrats, joined by three Republicans, supported the measure. On February 11, the bill, now H.F. 2212, was placed on the House debate calendar. Despite the startling victory that she had just achieved, Petersen was quick to admit that the bill “isn’t perfect,” but...the exemptions were necessary to advance the plan... ‘I would ideally like no exemptions...but I plugged my nose and voted for it, because this will protect 99 percent of Iowa’s workforce.’” Nor did tacking on the exemptions guarantee passage, which the press immediately reported was “anything but assured,” in part because a legislative majority might instead plump for local control, which itself “could collapse under the weight of business interests.” Moreover, although Governor Culver had just promised in his Condition of the State Address that he would sign preemption repeal, the most that he would say at this point was that he “would have to consider signing off on a statewide ban....”


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nevertheless still gave the bill a better than 50-50 chance of passage.\textsuperscript{284}

In contrast, the Iowa Tobacco Prevention Alliance (composed of the Heart-Lung-Cancer groups and CAFE Iowa CAN), while constrained to acknowledge that H.F. 2212 was an admirable bill, was nevertheless beset with the fear that the anti-smoking movement would wind up with a half a loaf. Indeed, so concerned was ITPA that it was prepared, if the bill was saddled with additional exemptions—such as ones for ventilated public places or time carve-outs for smoking during certain hours of the day—to ask the governor to veto it.\textsuperscript{285}

At the other end of the spectrum, Jonathan Van Roekel, president of the Clinton’s Organized Bar & Restaurant Association (COBRA)—which had been established in early 2006 to respond to City of Clinton ordinances governing bar licensure and under-21 exemptions\textsuperscript{286}—was busy disseminating the disinformation that “a high percentage of businesses in California failed after the smoking ban was enacted there.” The group presumably also believed that it was promoting its plan to secure 10,000 anti-smoking bill petition signatures from food and beverage employers, workers, and customers when it alleged that an exemption from the ban—which one member called “‘legal extortion’”—was being considered that would cost owners $1,700.\textsuperscript{287}

The Debate over the Financial Impacts of Casino Smoking Bans in Delaware and Illinois

The [Illinois] casinos are hoping that, armed with a couple of months of dismal

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\textsuperscript{285}Telephone interview with Threase Harms, CAFE lobbyist, Des Moines (May 14, 2008). Nevertheless, through its lobbyists CAFE declared for the bill on Feb. 13, as did the Iowa Hospital Association, Iowa Health Systems, and AFSCME Council 61; the American Cancer Society declared for it on Feb. 20 and, the American Lung Association on Feb. 27. http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist &Service=DspReport&ga=82&type=b&hbill=HF2212.
\end{flushright}
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revenue figures, they can convince the Legislature to exempt them from the ban.²⁸⁸

To be sure, Wise’s remarks about a potential gambling exceptionalism to the general rule that smoking bans did not reduce hospitality industry revenues were not per se wholly implausible, though the impact of the Smoke Free Illinois Act did not mark the first instance of such allegations, and had he focused on the Delaware Clean Indoor Air Act of 2002, he would have found that not only did that state survive the temporary loss of tax revenue, but the governor, after more than three years of experience with the ban, both praised the cleaner air as its greatest benefit and pointed out that the three slot machine casinos had recorded their highest revenues ever.²⁸⁹ But even if the issue were impermissibly narrowed to the financial impact on private firms to the exclusion of the health care costs linked to the morbidity and mortality caused by secondhand smoke exposure (in addition to the pain and suffering of those whose health is ruined and lives are prematurely terminated), separating out and measuring the contributions of the various possible causes of declining revenues coincident with the implementation of a casino smoking ban would be a complex empirical undertaking. Not the least of the difficulties to be encountered would be determining: (1) what proportion of pre-ban gamblers had been smokers; (2) what proportion of those smoking customers reacted to the ban by: (a) traveling across a border to a casino in another state that did not ban smoking; (b) traveling to an in-state tribal casino that did not ban smoking; (c) ceasing to frequent casinos; or (d) continuing to gamble at the now smoke-free casinos and taking smoking breaks, which resulted in spending less time and money gambling; and (3) how many nonsmokers who had previously avoided smoky casinos began gambling there once the smoke had cleared. In the cases of Illinois or Iowa even on the fundamental first variable of the pre-ban smoking prevalence reliable data were lacking.²⁹⁰


²⁹⁰“State gaming officials contend that unofficial surveys show as many as 60 percent to 70 percent of gamblers smoke in Illinois casinos. Smoking critics say the figures are fiction.” E. Torriero, “Smokeless Casinos Await Fate,” CT, Jan. 1, 2008 (1) (NewsBank). According to ICGA, the “Casino Queen in East St. Louis and Jumers’ Casino in Rock Island did informal surveys on their properties.” Email from Tom Swoik to Marc Linder (June 28, 2009). A Philip Morris memorandum from the latter half of the 1990s on casinos stated that about a third of customers were “assumed to be smokers,” which was above the national average but lower than the gaming industry’s “claim” of 50-90 percent, adding: “There is no primary survey data to support either claim.” “Situation Analysis:
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At the Commerce Committee meeting on February 5 Wise did not divulge the Illinois casino revenue data for January 2008 on the exclusive basis of which he had pressed to exempt casinos from H.F. 2212, but during that first month of the Smoke Free Illinois Act, the adjusted gross revenue and total admission/wagering tax of Illinois riverboat casinos had declined by 17.5 percent and 18.2 percent, respectively, compared to January 2007.\textsuperscript{291} (For all of calendar year 2008, the declines were greater—20.9 percent and 32.0 percent, respectively.)\textsuperscript{292} The Illinois casinos attributed the drop to the smoking ban, which prompted “habitual smokers” to take smoking breaks during which they did not gamble. In contrast, the Illinois Gaming Board took the position, even after the fiscal year’s end, that the “relative importance” of that factor and of the decline in the Illinois and national economies had “not yet been quantified with certainty.”\textsuperscript{293}

Not until February 27—a week after the Iowa House debate, but just in time for the Senate floor debate on H.F. 2212—in a Fiscal Note requested by Democratic Senators Appel and Dotzler, did the Legislative Services Agency report that the Iowa Racing and Gaming Commission, based on data from other states, estimated that a smoking ban would reduce adjusted gross revenue by 10 percent, which LSA calculated as translating into a decrease in gambling losses of $140.5 million and of state gambling tax revenue of $31.7 million.\textsuperscript{294}

\textsuperscript{291}Calculated according to http://www.igb.state.il.us/revreports/january2008statreport.pdf; http://www.igb.state.il.us/revreports/january2007statreport.pdf (visited June 9, 2009).

\textsuperscript{292}Illinois Gaming Board, 2008 Annual Report 14, on http://www.igb.state.il.us/annualreport/2008igb.pdf (visited June 9, 2009). The declines in casino revenues to state and local governments in Illinois from fiscal year 2007 to 2008 and 2008 to 2009 (the smoking ban went into effect in the middle of FY 2008) were the highest among all 12 states with commercial casinos—14.7 and 23.8 percent, respectively; the second highest declines were recorded by Michigan from FY 2007 to 2008 (6.9 percent) and New Jersey from FY 2008 to 2009 (14.1 percent). Lucy Dadayan, “For the First Time, a Smaller Jackpot: Trends in State Revenues from Gambling,” tab. 7 at 14 (Rockefeller Institute of Government, Fiscal Studies, Sept. 21, 2009), on http://www.rockinst.org (visited Sept. 21, 2009).


\textsuperscript{294}Fiscal Services Division, Legislative Services Agency, Fiscal Note: HF 2212 as amended by S-5013 (Feb. 27, 2008). LSA’s estimate was based on the assumptions that 25 percent of the $140 million decrease “will be lost at other gambling facilities where smoking is not banned (such as Native American casinos)” and the other 75 percent “will be expended as any other dollar of personal income by Iowans.” Id. It is unclear how this assumption can be reconciled with IGA’s claim that “an estimated 65% of patrons come
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LSA did not open the black box sheltering IRGC’s methodology, but later Brian Ohorilko, the Commission’s director of gaming, did: “That estimate was made to the LSA based on discussions I had with other regulators in jurisdictions that had passed a smoking ban at that time (I believe Illinois, Colorado, Delaware, Michigan because of Windsor). If my memory serves me right, the request from the LSA was made around March or so. Illinois and Colorado were in the very early stages of their ban and had limited data. From the regulators that I had polled, they all felt the ban had a negative impact on revenue of about 5-15%. They all felt that the economic situation also led to some of the declines.” Asked whether the regulators in Illinois and the other states at that time had been “able to sort out and quantify the impact of the economic recession and the impact of the smoking ban,” Ohorilko succinctly replied: “No, that was and still is the mystery.... I don’t envy the researchers quantifying the impact.”295 Indeed, in response to a question as to whether he would not have expected that, since the Illinois smoking ban had gone into effect on January 1, 2008, by mid-2009 smokers who had abandoned the Illinois casinos would have begun showing up in the Iowa casinos located along the Mississippi River, he observed: “Excellent question. I’m not sure anyone really knows how any of these factors affected the year over year comparisons. I have read many articles in various gaming markets around the country making valid points for each. My only point for the next year maybe being a better indicator is that you have construction finished in Dubuque in the second half of last fiscal year, maybe the economy will settle, you would have a full fiscal year of comparison for other factors like the flood and smoking ban since some of that impact (if any) would also be seen in the first part of the most recent fiscal year.”296 If even a year and a half later IRGC itself was still skeptical of its own methodology and steeped in epistemological humility regarding human ability to discern, let alone untangle, the consequences of the Illinois smoking ban, the alleged financial justification for exempting Iowa casinos from a smoking ban alleged by owners and their legislative backers in early 2008 appears to have been a very thin reed.

Much greater detail about LSA’s Fiscal Note is available because Representative Wise, who was leading Democrats’ efforts to insure casinos’ exemption on the grounds that a bill could otherwise not be passed, himself

295Email between Brian Ohorilko and Marc Linder (June 17, 2009).
296Email between Marc Linder and Brian Ohorilko (June 18, 2009).
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requested from LSA in March “additional background regarding the economic impact assumptions used to complete” the Note. Jeff Robinson, senior legislative analyst at LSA, who informed Wise that in order to determine whether a smoking ban was “likely to reduce gambling activity” at casinos, LSA had reviewed two studies (regression analyses) that had analyzed the Delaware ban’s impact on casinos, “researched the early results of the Illinois smoking ban[,] and contacted” IRGC.\footnote{Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 1-2 (Mar. 17, 2008) (email copy provided by Robinson).} Referring to the Delaware study by Mandel, Alamar, and Glantz—which concluded that that state’s Clean Indoor Air Act had had no negative economic impact on casino revenues, just as smoke-free laws “do not harm restaurants, bars, or bingo parlours”\footnote{L. Mandel, B. Alamar, and S. Glantz, “Smoke-Free Law Did Not Affect Revenue from Gaming in Delaware,” \textit{TC} \textbf{14}:10-12 at 11 (2005).}—Robinson noted that it instead attributed the decline in casino revenue to an economic downturn.\footnote{Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 2 (Mar. 17, 2008) (email copy provided by Robinson).} Of the other study, by Michael Pakko,\footnote{Michael Pakko, “No Smoking at the Slot Machines: The Effect of a Smoke-Free Law on Delaware Gaming Revenues” (June and Dec. 2005), on http://research.stlouisfed.org/wp/2005/2005-054.pdf. It was later published as Michael Pakko, “No Smoking at the Slot Machines: The Effect of a Smoke-Free Law on Delaware Gaming Revenues,” \textit{Applied Economics} \textbf{40}(14):1769-74 (July 2008).} he stated that it concluded that Delaware’s anti-smoking law had resulted in a statistically significant 14.9 percent drop in revenue.\footnote{Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 2 (Mar. 17, 2008) (email copy provided by Robinson).} In an email 15 months later attaching this memo and responding to a telephone request for essentially the same background information that Wise had requested, Robinson summarized the memo’s projection of a 10 percent reduction in casino revenues as originally IRGC’s estimate. He then added that based on his own analysis of the Delaware data, “I think a more reasonable estimate was the 14.9% cited by Pakko.... However, it did not seem that the
debate and decision making would be any different at 10% than at 14.9%, so the less inflammatory 10% was chosen. With the first year’s data for [the] Illinois casino smoking ban now in, I would likely use a number between 15% and 20% now.”

Since Robinson seemed to be unaware that a major controversy had erupted between Glantz and Pakko and between and pro- and anti-tobacco control forces over the interpretation of the Delaware data, he was asked to explain (as he had not in the memo) why he had adopted Pakko’s approach and (implicitly) rejected Glantz’s. Robinson’s initial response was as astonishingly ad hominem as it was based on ignorance of the homines involved, despite the fact he appended links to websites on their backgrounds: “Glantz is a medical doctor working for a cancer research organization. Pakko is an economist working for the Federal Reserve Bank of St. Louis.” Even if these bare facts were true, it is unclear why they would have prompted a legislative analyst to let them tip the scales in favor of Pakko’s analysis. Despite the fact that the website for Glantz, which did not reflect his phenomenal productivity or the fact that his prodigious scholarship and political engagement had contributed crucially to the creation of a smokefree world, made it unambiguously clear that Glantz was not a medical doctor (but had a Ph.D. in applied mechanics), even a quick look at his webpage (even though it was more than 10 years out of date) from one of the other departments (Cardiology) of which he is a member at the University of California at San Francisco would have revealed to Robinson that Glantz was in fact an expert on statistics, who not only taught biostatistics at the University of California, but had written a textbook on biostatistics, which had gone through many editions and been translated into many languages, and another specifically on regression analysis. Robinson also seemed unaware and/or unembarrassed that he had appended as the webpage for Pakko not that of his employer, the Federal Reserve Bank of St. Louis, but rather that of the Show-Me Institute, a right-wing, free-market, anti-government, pro-business think

302 Email from Jeff Robinson to Marc Linder (June 18, 2009).
304 Email from Marc Linder to Jeff Robinson (June 19, 2009).
305 Email from Jeff Robinson to Marc Linder (June 19, 2009).
306 These remarks about Robinson are not meant to cast aspersion on him (especially since he very generously devoted considerable time to explaining his methods and reasoning), but rather to use this unusual opportunity to shed light on the empirical research basis of public policy formation in the Iowa legislature.
307 http://cancer.ucsf.edu/people/glantz_stanton.php
308 http://cardiology.ucsf.edu/people/glantnew.htm
tank—whose staff routinely testify against smoking bans (“Forced conformity...is fundamentally un-American”)\(^\text{309}\) and propagandize against cigarette tax increases (“Saving lives is a worthy goal, but it should not come at the price of personal freedom”)\(^\text{310}\)—of which Pakko was a research fellow.\(^\text{311}\) Pakko’s crude anti-government, market-knows-best ideological basis was unmistakably on display during an interview conducted by the Bank:

The important thing to recognize here is that when you have a smoking ban imposed by a government authority, you’re changing the nature of the businesses in the community in such a way that they could have changed themselves. So...a bar or restaurant always has the option of prohibiting smoking to begin with. And presumably if that was profitable for them to do so, they would do so. So as a starting point...the market-based outcome of business owners selecting their smoking status gives us a baseline and an imposed smoking ban on top of that can’t make anything really better off but only worse off in terms of revenues. ...

I don’t see it as a matter of rights. I don’t think that either smokers’ or non-smokers’ desire to smoke or be away from smoke really rise to the level of rights as enshrined in our Constitution or Bill of Rights for instance. What we’re really looking at are competing sets of preferences. And when you have conflict among preferences...the free-market system is probably the most efficient way of resolving those disputes.\(^\text{312}\)

Pakko’s penchant for trivializing the leading actual cause of death in the United States\(^\text{313}\) went to the extent of characterizing the “smoking environment” in restaurants as just one of many “amenities,” including the color of table cloths, with regard to which owners competed and level-playing-field statewide smoking bans inefficiently restricted entrepreneurial freedom.\(^\text{314}\)

Why this kind of analytic public policy framework should have commended Pakko’s analysis to Robinson he did not reveal, but he later observed that “more important to me” was the graph he had included in the memo indicating that

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\(^{311}\)http://www.showmeinstitute.org/scholar/id.49/scholar_detail.asp


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gambling revenues in Delaware began falling the month the ban went into effect and continued to decline for one year: “I do not believe powerful statistical methods were necessary to illustrate the smoking ban impact in Delaware.”

Asked whether the initial decline in revenue followed by a reversal and subsequent attainment of higher levels than before the ban might not have reflected a common scenario in the hospitality industry under which, after a brief rebellion, smokers returned and nonsmokers who had avoided smoky places began frequenting newly smokefree businesses, Robinson replied: “I can speculate but in no way prove, that by May 2005 [Delaware] would have had a higher AGR [adjusted gross revenue] level without the ban then [sic] they had with it.” He then added this crucial self-reflection for public policy making: “I do not hold out my analysis as cause-and-effect. My job requires me to make conclusions on imperfect knowledge and I do the best I can. However, I am more confident in this conclusion than many I have to draw.”

With regard to the impact of the Illinois casino smoking ban, Robinson informed Wise that although only two months of data were available, Illinois “appears at least initially to be following the path of Delaware” in the sense that of the five monthly decreases (compared to the previous year) in adjusted gross revenue recorded since June 2004, two had been January-February 2008, the first two months of the ban. (He failed to mention that one of those five months was December 2007, the month before the ban began, when AGR dropped by 5.8 percent). Oddly, although Robinson then went on to concede that “[a]dditional months are needed to determine if this trend is related to the smoking ban or is perhaps due to economic, weather, or other factors,” he nevertheless concluded that the “Delaware experience and the early results from Illinois indicate that a

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315 Email from Jeff Robinson to Marc Linder (June 19, 2009); Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) chart 1 at 2 (Mar. 17, 2008) (email copy provided by Robinson). It is noteworthy that one major component of Delaware racinos’ profitability, net proceeds per video lottery terminal, has been in steady decline for each of the state’s three racinos from 1998 to 2009. Graphs, based on official state agency data, constructed and made available by Lucy Dadayan (June 24, 2009); http://lottery.state.de.us/vododata/modist2007.asp. According to one gambling industry consultant, the figure fell from $355.74 per day in 1998 to 200.50 in 2008. Email from Paul Girvan (The Innovation Group) to Marc Linder (June 24, 2009).

316 Email between Marc Linder and Jeff Robinson (June 19, 2009).

317 Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 3 (Mar. 17, 2008) (email copy provided by Robinson).

318 Calculated according to http://www.igb.state.il.us/revreports/
somewhat higher estimate \[\text{than the 10.0 percent decline in gambling tax revenue projected by IRGC}\] would also be reasonable.\footnote{Email from Jeff Robinson to Marc Linder (June 19, 2009).} Moreover, contrary to Robinson’s conjecture, the impact of the Illinois ban proved to take a different course inasmuch as 18 months after the ban had gone into effect revenues continued to decline, thus strongly suggesting that the deep nationwide economic recession was a vital causal factor. But in spite of agreeing that “the decline continued, most likely due in some part to the economy,” he nevertheless expressed the opinion that the January-December 2008 Illinois data “confirm[ ] the decision to accept the Pakko analysis instead of the Glantz analysis” and “also would support using an expected AGR reduction closer to 20% instead of the 10% we used.” Indeed, looking back, he reflected that he “would reach similar conclusions” in mid-2009 even though in March 2008 he had completed the AGR analysis probably in only 48 hours or less.\footnote{Email from Jeff Robinson to Marc Linder (June 19, 2009).}

Robinson’s adherence to his original view of the Illinois ban, despite state legislators\footnote{Email from Prof. Frank Chaloupka, University of Illinois at Chicago to Marc Linder (June 20 and June 23, 2009) (referring to his report to the Illinois Department of Public Health, which examined per capita gaming revenues measures and whose “preliminary estimates show a negative, but not statistically significant effect...of the policy, after accounting for the underlying economic conditions”).} and scholarly\footnote{See below this ch.} findings that the economic recession and not the smoking ban had caused the revenue decline, was as striking as his insistence that that law, whose impact, unlike Delaware’s, was embedded in the deepest economic depression since World War II, nevertheless somehow supported Pakko’s regression analysis. Yet, and even in spite of his failure to explain why Pakko’s model was superior to and generated more robust results than Glantz’s, neither side has unambiguously refuted the other’s analysis, let alone proven its own. But regardless of the ultimate outcome of this empirical controversy, what Wise and the other anti-smoking Iowa (House) Democrats ignored was the possibility of choosing the Illinois alternative of prioritizing public health over private profit and government tax revenue even in the face of calls for repeal of the Smoke Free Illinois Act after the decline in casino revenues and taxes had ceased being a prediction and had become a fiscal reality—even to the extent of deeming such a drop an irrelevancy in the light of the public health gains for
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employees and customers. As a newspaper editorial in Dubuque, a Mississippi River city whose casinos would allegedly benefit from the Illinois casino smoking ban, observed: “Even if there is some revenue shortfall immediately following a ban, repealing it is not a smart solution. Lawmakers would be foolish to sacrifice people’s health in an attempt to recover some lost revenue.”

Counterpoint:
The Smoke Free Illinois Act’s Unique Total Ban on Casino Smoking

[I]n my discussions with national political consultants, it’s the general belief that what the gaming industry wants—the gaming industry gets. They rarely lose. So you might focus on Illinois’ lack of exemption as the unusual feature rather than Iowa’s granting of an exemption.

We were smarter.

One difference in intensity between the Illinois and Iowa laws that expresses the Illinois legislature’s more resolute resistance to calls for exempting casinos can be found in the preambular findings. Whereas from the time of its introduction until enactment Petersen’s bill contained only a brief and perfunctory nod to secondhand smoke and public health (“The general assembly finds that environmental tobacco smoke causes and exacerbates disease in nonsmoking adults and children. These findings are sufficient to warrant measures that regulate smoking in public places, places of employment, and outdoor areas in

325 Email from George Eichhorn (ex-Iowa state legislator and lawyer representing bar owners who challenged Smokefree Air Act’s constitutionality) to Marc Linder (June 15, 2009).
326 Telephone interview with Illinois State Senator Terry Link, Lake Bluff, IL (July 9, 2009) (jocularly answering question as to why the Illinois legislature included casinos in its smoking ban while Iowa’s did not).
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order to protect the public health and the health of employees”), the Smoke Free Illinois Act—which was drafted in the fall of 2006 by American Lung Association official Kathy Drea and Democratic Senator John Cullerton and enacted as drafted without changes—featured three lengthy paragraphs spelling out: the kinds of diseases and number of deaths that secondhand smoke caused; the “massive and conclusive” scientific evidence supporting these claims; and the impossibility of eliminating exposure by separating smokers and nonsmokers or high rates of ventilation. Indeed, the legislature even cited the aforementioned ASHRAE position document for the proposition that “the only means of eliminating health risks associated with indoor exposure is to eliminate all smoking activity indoors.” And finally and most centrally relevant to the issue of casinos, the legislative findings explicitly declared—without, to be sure, having the power to legislate a self-fulfilling prophecy—that “smoke-free workplace policies do not have an adverse economic impact on the hospitality industry.”

In spite (or perhaps because) of the inclusion and retention of this much more rigorous grounding of state intervention in science in the Illinois bill and statute, passage of a total smoking ban in casinos was hardly frictionless or a foregone conclusion. In this respect the Chicago Tribune’s characterization of the votes on the Smoke Free Illinois Act (34-23 in the Senate on March 29, 2007 and 73-42 on May 1, 2007 in the House) as “shockingly lopsided” ignored a number of vital considerations. First, the casino industry opposed coverage very intensely, although the executive director of the Illinois Casino Gaming Association admitted that his organization and members had failed even to come close to securing a casino exemption in 2007, primarily because it would have been difficult to exempt casinos without conferring the same status on bars and restaurants. Second, Senator Terry Link, the chief sponsor of Senate Bill 500, which originally contained no exemption, together with the Lung Association floated a committee amendment to delay coverage of riverboat casinos for three

328 Telephone interview with Kathy Drea, Springfield (June 16, 2009).
329 Email from Kathy Drea to Marc Linder (June 20, 2009).
332 “Going Smoke-Free At Last,” CT, May 4, 2007 (28).
333 Telephone interview with Tom Swoik, Springfield (June 9, 2009). Iowa’s passage of the Smokefree Air Act and its enforcement and judicial aftermath revealed those difficulties, at least with regard to bars. See below this ch. and ch. 36
years because they believed that at the time of the Senate Executive Committee meeting on March 23 the votes were otherwise lacking to pass the bill. Third, the committee recommended its adoption. Fourth, knowing that at that juncture he could count on only 27 votes in the 59-member Senate, Link asked all eight senators with casinos in their districts whether they would vote for S.B. 500 if it exempted casinos for three years, but all of them, believing that he was begging for their votes because he was unable to secure a majority without them, said no. Fifth, seeing that it did not add to the number of Yes votes, Link then withdrew the amendment. Sixth, ALA and the whole anti-smoking coalition would have ditched the bill had it wound up permanently exempting casinos (as the Iowa law did), in no small part because members had become personally acquainted with numerous casino employees with whose health plight, caused by intense and long-term exposure to secondhand smoke, they had come to sympathize strongly. And seventh, right up until the Senate voted it was unclear whether the bill would pass.

But even after the legislature had passed the bill, the Illinois Casino Gaming Association persisted in efforts to secure exemptions. Just three weeks after both chambers had passed S.B. 500, but two months before Governor Blagojevich approved it, Senator James Clayborne, who represented a district that included the riverboat casino town of East St. Louis—which he argued would be

334Senate Amendment 1 to S.B. 500 (Mar. 23, 2007), on http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB0500sam001&GA=95&SessionId=51&DocTypeId=SB&LegId=28191&DocNum=500&GAID=9&Session=

335Telephone interview with Kathy Drea, ALA, Springfield (June 16, 2009). The fact that Link was a very strong supporter of casinos had nothing to do with his proposing this temporary exemption. Id. According to Senator Link, the health organizations reluctantly went along with this proposal. Telephone interview with Terry Link, Lake Bluff, IL (July 9, 2009).


337Telephone interview with Terry Link, Lake Bluff, IL (July 9, 2009).

338Telephone interview with Kathy Drea, ALA, Springfield (June 16, 2009).

339Telephone interview with Michael Grady, Springfield, director of public policy and government relations, American Cancer Society-Illinois Division (June 10, 2009); telephone interview with Bunny, Springfield, Senator Terry Link’s legislative aide (June 11, 2009).

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“financially cripple[d]” by the smoking ban, which would cause the city to lose 10 percent of its annual budget funding—filed an amendment to another bill providing that, if S.B. 500 became law, casinos would be exempt for five years. After the Senate Executive Committee passed the amendment by a vote of 9 to 4, the full Senate defeated it 26 to 31. Later in 2007, another bill (which was defeated in committee) would have exempted riverboat gambling operations for five years or until the state closest to the boat banned smoking in such facilities, whichever came first. Other amendments unsuccessfully sought to achieve the same objective.

Following these failed attempts, in 2008 the cigarette manufacturers, which had acted behind the scenes in 2007, openly announced their intentions. In February, for example, the Chicago Tribune reported that: “Tobacco companies

341 Blackwell Thomas, “Panel Oks Plan to Exempt Casinos from Smoking Ban,” Q-CT, May 30, 2009, on http://www.qctimes.com (visited June 16, 2009). At the beginning of 2008, just as the ban went into effect, East St. Louis city officials stated that the Casino Queen provided $10.5 million annually to the general fund or about half of the city’s income. E. Torriero, “Smokeless Casinos Await Fate,” CT, Jan. 1, 2008 (1) (NewsBank). Senator Link noted that the city government of Rock Island was also heavily dependent on casino tax revenues. Telephone interview with Terry Link, Lake Bluff (July 9, 2009).

342 Amendment 5 to S.B. 890 (May 25, 2007), on http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB0890sam005&GA=95&SessionId=51&DocTypeId=S B&LegId=29022&DocNum=0890&GAID=9&Session=


345 H.B. 4184 (Nov. 28, 2007, by Republican Henry Ramey) http://www.ilga.gov/legislation/BillStatus.asp?DocNum=4184&GAID=9&DocTypeId=HB&LegId=34539 &SessionId=51&GA=95. The bill would also have provided for a much broader set of exemptions for establishments (including bars less than 10 percent of whose revenue came from food, gambling operations, and adult entertainment venues) that had received a smoking license from the local liquor control commission. The House Environmental Health Committee defeated the bill on Mar. 4, 2008.

346 E.g., Amendment 2 to H.B. 2035 (Aug. 9, 2007, by Sen. Clayborne) http://www. ilga.gov/legislation/95/HB/09500HB2035sam002.htm. Ironically, when Sen. Hendon had to take this provision out in order to pass the bill, he characterized it as “encouraging people to not go across the border who have to have a cigarette while they lose their money.” State of Illinois, 95th General Assembly, Regular Session, Senate Transcript at 13 (Sept. 18, 2007), on http://www.ilga.gov/senate/transcripts/trans95/09500096.pdf

347 Telephone interview with Michael Grady, Springfield, director of public policy and government relations, American Cancer Society-Illinois Division (June 10, 2009).
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are dumping thousands of dollars on lawmakers in a revved up effort to chip away at the new statewide smoking ban and ward off efforts to nearly double Illinois’ cigarette tax.” Alone in the four weeks preceding the February 5 primary election “two tobacco giants,” Altria (Philip Morris) and Reynolds American, Inc., contributed $83,000 to 30 legislators, exceeding the monthly pace that the industry had given in Illinois for at least a decade.348 (In 2006, Altria/Philip Morris contributed $347,650 to Illinois political campaigns/party PACs, while R. J. Reynolds contributed $94,000, and four gambling firms contributed a total of almost a million dollars.)349 Unlike his counterparts in Iowa—where, for example, in 2005-2006 tobacco companies contributed only $11,385 to candidates and party PACs, compared to $524,250 in Illinois350—John O’Connell, an ex-legislator lobbying for Reynolds, consumption of whose commodities have led to millions of deaths over the decades, unashamedly declared: “‘We’ve been the whipping boy for a number of [legislative] sessions now...so we decided this year that we are going to participate in the process more heavily.’” He was unable to resist throwing in the industry’s mantra: “‘We are still a legal industry. And it is still a legal product.’” Arthur Turner, the Democrats’ House deputy majority leader, who had voted against S.B. 500 in 2007, was, with $14,000, the biggest recipient of tobacco industry money, and voted in 2008 to move along the smoking exemption bills (which House Speaker Michael Madigan, who took $10,000 from Altria, had already “vetted”), stated that “some members now will feel more ‘comfortable’ debating smoking exemptions” who had been “afraid to vote on these issues prior to the election.”351

The most serious effort to exempt casinos352 took place in 2008, when Republican Senate Minority Leader Frank Watson filed an amendment to Senate Bill 2707, a so-called trailer bill, designed to deal with some problems that had arisen with the original Smoke Free Illinois Act.353 Senate Amendment 4 would

352Telephone interview with Michael Grady, Springfield, director of public policy and government relations, American Cancer Society-Illinois Division (June 10, 2009).
353State of Illinois, 95th General Assembly, Regular Session, Senate Transcript at 218-
have exempted the portion of a riverboat where gambling operations were conducted for five years or until the neighboring state closest to the particular riverboat banned smoking in similar places, whichever occurred first. After the Senate Executive Committee had recommended adoption of Watson’s amendment, on April 16, 2008, not coincidentally the day after Governor Culver had signed Iowa’s Smokefree Air Act, the Illinois Senate debated the amendment, whose operation Watson explained with reference to the Iowa law’s exemption for casinos. Pointing to a chart, he charged that “if you look at...what happened when the smoking ban came on [three and a half months earlier], you’ll see a huge, huge impact on revenues to this State, to the point where they’re estimating it could have a fiscal impact of a hundred and fifty million dollars to the State in taxes from the casinos....” He admitted that gambling was in a downturn “all over the country, but not to the magnitude that we are here in Illinois.” His plea, “let’s be real here,” collided with his undocumented belief that “some sixty percent of the people who go to casinos actually smoke.”

In the battle of the dueling “beautiful charts,” Link’s rebuttal—he strongly insisted that it “is not the smoking ban”—was empirical: there had been a downturn on all the gambling boats in all of 2007 and in 2006 in many states, including Iowa: “It’s the economy. It’s the economy.” (In fact, from March 2007 to March 2008 Iowa casinos’ adjusted gross revenue rose from $122 million to $130 million, while state taxes increased from $25.2 to $26.1 million; a comparison of all of 2007 and 2008 reveals that total admissions fell from 23.4

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19 (Apr. 16, 2008), on http://www.ilga.gov/senate/transcripts/strans95/09500147.pdf. The chief problem had been the lack of a meaningful enforcement/prosecution mechanism. For the text of § 40 of Senator Link’s Senate Amendment 3 to S.B. 2707 (Apr. 11, 2008) dealing with this issue, see http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB2707sam003&GA=95&SessionId=51&DocTypeId=SB&LegId=37168&DocNum=2707&GAID=9&Session=

354Senate Amendment 4 to S.B. 2707 (Apr. 11, 2008), on http://www.ilga.gov/legislation/fulltext.asp?DocName=09500SB2707sam004&GA=95&SessionId=51&DocTypeId=SB&LegId=37167&DocNum=2707&GAID=9&Session=


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to 22.9 million, while adjusted gross revenue rose 1.4 percent and state taxes 1.4 percent; nevertheless, many individual casinos recorded declines in the number of admissions, adjusted gross revenues, and state taxes, the difference in large part being accounted for by the opening of a new casino in Waterloo in mid-2007.)

Link went on to argue that if the smoking ban were the cause of the decline, “Iowa, Missouri should be record numbers, because everybody from Illinois that smokes should be over in those states. They’re not. They’re not going anywhere. They can’t afford the gas or anything to get to those states. It’s the economy. Wake up. It’s not the smoking ban.”

Announcing that in “one of those moments [of] bipartisan cooperation” he was going to vote with Minority Leader Watson, who was his “leader” (but not his “boss”) that night, Democratic Assistant Majority Leader Rickey Hendon taunted the majority caucus chair: “Sincerely, I believe that...if you’re in any gambling institution, if you lose your hundred or two hundred dollars, the least we should do, Senator Link, is let ‘em have a cigarette.”

After characterizing Hendon’s bipartisan comments as “incredible,” Watson, while purporting to be merely “asking for...a level playing field...with...Iowa,” revealed that the casino exemption from the Smoke Free Illinois Act, which he had voted against in 2007, was just “the first step”: “I’d like to have not only the casinos, but the...veterans, American legions, VFWs, local bars—I would include anybody that I could....”

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In the end, however, the Senate handily defeated Watson’s amendment by a vote of 15 to 35.362

Even when confronted later in 2008 with a decline in state casino tax revenues exceeding $100 million, Link “said he doesn’t see lawmakers taking up exemption talk for casinos until other states show much higher takes from the boats. He thinks surrounding states could make the argument moot by going smoke-free in casinos themselves.”363 Discouraged by the failure to have secured any exemptions in 2008 or 2009, even the executive director of the Illinois Casino Gaming Association conceded that no-smoking was the wave of the future.364

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363 Ryan Keith, “Riverboat Revenue Dips by $121 Million,” State Journal-Register (Springfield), Oct. 1, 2008, on http://www.wickedlocal.com/il-springfield/state/x436986266/Riverboat-revenue-dips-by-121-million (visited June 13, 2009). Less empirically Link was quoted as having said: “ ‘Have them look at the national figures, in every other state, of the decline of gaming. You can smoke in all of those states and they’re having a decline. So the economy changes, you will never prove to me that the smoking ban is the effect [sic] for the decline of revenue at the riverboats.’ ” John Patterson, “Economy, Smoking Ban Snuff Casino Profits,” Daily Herald (Arlington Heights) (Nov. 12, 2008), http://www.dailyherald.com/story/print/?id=250230 (visited June 13, 2009). Less absolutely, Link later stated that his mind would never be changed unless and until the decline continued even after the recession was over. Telephone interview with Terry Link, Lake Bluff (July 9, 2009).

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After having heard a concise account of proponents’ stubborn support of the Illinois casino smoking ban despite the alleged fiscal impact, Iowa House Republican Mike May, who had voted for the Smokefree Air Act in 2008 while joining his party in attacking the Democrats for “hypocrisy” in exempting the casinos, laughingly replied: “I appreciate the consistency of Illinois politics.”365

One possible explanation of the differing legislative approaches in Illinois and Iowa was the geographical spread: the much less populous state had 17 casinos in 14 cities,366 whereas the larger state had only nine casinos in eight cities.367 Nevertheless, quantitatively, in the 58-member Illinois Senate six of the eight senators with casinos in their districts (all of whom had rejected Link’s offer of a three-year casino exemption) ultimately voted against the bill,368 whereas Representative Wise did not point to proportionately more in the 100-member Iowa House when he stated that “[t]here were a number of legislators from communities like Davenport, Dubuque, Des Moines, Emmetsburg, Sioux City, and Council Bluffs who made it clear that they believed they were

365Telephone interview with Mike May, Spirit Lake, IA (July 2, 2009).
368Although Link stated that in the end only one of the eight senators (Koehler representing E. Peoria) who had turned down his offer voted for the bill, it appears that Noland (Elgin did as well). Senators Haine (Alton), Lausen (Aurora), Wilhelm (Joliet), Forby (Metropolis), and Jacobs (Rock Island) voted No. http://www.ilga.gov/senate/default.asp?GA=95; http://www.ilga.gov/legislation/votehistory/95/senate/09500SB0500_03292007_073000T.pdf. Noland (and Elgin state representative Ruth Munson, who also voted for the bill) both stated that casino lobbyists never contacted them and they had never been given any information about the possibility of lost tax revenues. Rob Phillips, “Up in Smoke?” Daily Herald (Arlington Heights), May 7, 2007, on http://www.dailyherald.com/search/printstory.asp?id=309995 (visited July 9, 2009). Ironically, Link observed that after the bill had passed, the casinos were angry with the senators who had refused his compromise and thus deprived the casinos of the three-year exemption. Telephone interview with Terry Link, Lake Bluff (July 9, 2009). In the House, Jack McGuire, who represented Joliet, the only city with two casinos (whose government expected more than $35 million in tax revenue from them in 2007) and appears to have been the only other member who voted for the bill, told a similar story: “It's strictly a health issue. I'm not trying to put anyone out of business,” McGuire said, adding later that the casinos never contacted him with their concerns regarding the legislation.” “Some Cheers, Some Boos for State Smoking Ban” May 3, 2007, on http://smokefreeillinois.org/media/050307_State4.pdf (visited July 10, 2009). For the House members and votes, see http://www.ilga.gov/house/default.asp?GA=95; http://www.ilga.gov/legislation/votehistory/95/house/09500SB0500_05012007_02000T.pdf.
representing the economic interests of their communities when they supported the casino gaming floor exemption.\footnote{Email from Phil Wise to Marc Linder (July 9, 2009).}

Another factor determining why state government officials in Iowa may have reacted more sensitively to a decline in casino business volume than their Illinois counterparts (if both actually believed that a smoking ban would or did reduce gambling revenue and tax revenue) was the extent to which state government tax revenues relied on this source. Of the 16 states in which commercial casinos/racinos (i.e., racetrack casinos) generated tax revenues in fiscal year 2008, Iowa ranked ninth with $326 million, while Illinois ranked fourth with $698 million (Nevada ranking first with $925 million). But if these amounts are set in relation to total state government taxes, Iowa ranked fifth (4.7 percent), while Illinois ranked eighth (2.2 percent)\footnote{Total state government taxes for FY 2008 are taken from http://www.census.gov/govs/statetax/08staxrank.html; casino/racino tax revenues were taken from monthly state gaming regulatory agency data and made available (together with the share calculations) by Lucy Dadayan, senior policy analyst, Rockefeller Institute of Government.} — a gap that had widened during the preceding several years as the Illinois share declined and the Iowa share rose.\footnote{Lucy Dadayan, senior policy analyst, Rockefeller Institute of Government, provided the data underlying the Illinois-Iowa comparison from the following sources: http://www.igb.state.il.us/revreports; http://www.state.ia.us/irgc; http://www.census.gov/govs/www/statetax.html.}

Moreover, the real gap was even wider because more than 15 percent of casino tax revenues in Illinois went to local governments in 2008, whereas less than 8 percent of Iowa’s did. As a result, casino tax revenues going to the state government accounted for only 1.9 percent of total Illinois state government tax revenues, whereas the corresponding share in Iowa was 4.4 percent.\footnote{Whereas the IGB data identify the total amounts going to state and local government, these totals have to be calculated from the IRGC data by deducting the sums for city tax, county tax, and county endowment fund. Iowa Racing and Gaming Commission, Annual Report 2008, at 20, 37, on http://www.state.ia.us/irgc. For FY 2008 these three entries totaled $25,476,805 for casinos and racinos; the sums going to the state totaled $300,645,725.} In addition to being more than twice as high as Illinois’ share, Iowa’s gambling tax share of total state taxes was only slightly lower than the second (Indiana, 5.5 percent), third (Mississippi, 5.2 percent), and fourth (Louisiana, 4.9 percent) ranked states (Nevada, at 16.0 percent, far outdistancing all other states).\footnote{Calculated according to http://www.igb.state.il.us/revreports; http://www.state.ia.us/irgc; http://www.census.gov/govs/www/statetax.html. Whereas the IGB data identify the total amounts going to state and local government, these totals have to be calculated from the IRGC data by deducting the sums for city tax, county tax, and county endowment fund. Iowa Racing and Gaming Commission, Annual Report 2008, at 20, 37, on http://www.state.ia.us/irgc. For FY 2008 these three entries totaled $25,476,805 for casinos and racinos; the sums going to the state totaled $300,645,725.}
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However, again, if the considerably larger local shares of total taxes are taken into account, the proportion of Iowa’s state government tax accounted for by state gambling taxes exceeded that of Indiana, Mississippi, and Louisiana, placing Iowa second behind Nevada.\(^{374}\)  Iowa also ranked fifth in terms of commercial casino/racino tax revenue per capita ($108), whereas Illinois ranked only ninth ($44) (Nevada, once again, ranking first ($356)).\(^{375}\)

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These rankings omit Delaware, New York, Rhode Island, and West Virginia, whose racinos “host video lottery terminals...only,” which “are considered part of the state lottery system....” Lucy Dadayan et al., “From a Bonanza to a Blue Chip? Gambling Revenue to the States” at 3 (June 19, 2008), on http://www.rockinst.org/pdf/government_finance/2008-06-19-from_bonanza_to_blue_chip_gambling_revenue_to_the_states.pdf. If these states were included, Iowa would rank eleventh in total casino/racino tax revenues and eighth in casino/racino tax revenues as a share of total state taxes. The shares for Delaware, West Virginia, and Rhode Island were 7.5, 8.8, and 11.0 percent, respectively. However, since the legislature in Rhode Island appropriates the tax revenue from the lottery that goes into the general fund among the states 39 cities and towns, Rhode Island arguably should not rank above Iowa, thus leaving Iowa fourth behind Nevada, West Virginia, and Delaware. Http://www.rilot.com/faqs.asp (visited June 29, 2009); http://www.wvlottery.com/video_lottery/profitsgrea.aspx. Their racino tax revenues are taken from http://lottery.state.de.us/vdodatas/modist2008.asp (visited June 15, 2009); http://www.americangaming.org/Industry/factsheets/statistics_detail.cfv?id=36 (visited May 28, 2009) (overstating the taxes by not distinguishing between state and local taxes). Iowa state taxes alone in FY 2008 totaled $300 million. http://www.iowa.gov/irgc/FYTD08.pdf (visited May 30, 2009). State lottery revenue has been ignored here because consumers’ betting activity takes place elsewhere.

Significantly, of the states that had totally banned smoking in casinos, only two, Colorado and Illinois, had casinos/racinos like Iowa’s. Colorado initially exempted licensed casinos because of their unique constitutional and statutory status in Colorado, because casino gambling has only recently become legal in Colorado, because many of the towns in which casinos are located are dependent on the revenues casinos generate, because casinos face severe competition from Indian Reservation gaming and because Colorado derives direct economic benefit from its licensed casinos. After the state had prevailed in a suit brought by bar owners and others attacking the exemption, inter alia, on equal protection grounds, the legislature repealed the exemption. In any event, legislative support for full coverage of casinos was based in part on circumstances different from those prevailing in Iowa: “The bill is not expected to significantly affect state revenue. Although studies from other states have found that prohibiting smoking in casinos may affect tax collections from those casinos, those studies generally attribute losses to the
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Colorado’s casinos generated only $88 million in tax revenues in 2008 or a mere $18 per capita. Thus, Illinois was an outlier as the only state with large tax revenues from commercial casinos to ban smoking entirely. In Iowa’s other bordering states that enacted comprehensive statewide smoking bans that did not expressly exempt casinos either only unregulated and untaxed tribal casinos were present (Minnesota, Nebraska, and Wisconsin) or a much smaller commercial casino industry (South Dakota), which contributed relatively minimal amounts to state tax revenues. Asked in mid-2009 to explain why Illinois was uniquely resolute in enacting and retaining its complete smoking ban in casino, the bill’s chief House sponsor, Democrat Karen Yarbrough, responded:

Essentially, the surgeon general’s edict that “there is no safe level of second hand smoke” was the tipping point for us coupled with the city of Chicago’s ban a few years ago. It was decided, the timing was right. Legislators in both chambers are still committed to keeping the ban in tack [sic] with no exemptions in public places and casinos. You see we feel the lives of casino workers are just as important as all other workers in restaurants, bars etc. The political will is present in Illinois to keep all workers as safe as possible from the devastating effects of second hand smoke.

The only factor Yarbrough mentioned that distinguished Illinois from Iowa was

proximity of competition in other states where smoking is permitted. Given the lack of competitive options for casino gambling for the bulk of the population in Colorado, no significant reduction in gaming revenues is anticipated.” Colorado Legislative Council Staff Fiscal Note, State Final Fiscal Note: HB07-1269 (June 7, 2007), on http://www.leg.state.co.us/clcis/clcis2007a/clcis2007a.cfm?Open&file=HB1269_r1.pdf.


383 Email from Karen Yarbrough to Marc Linder (June 15, 2009).
that most of Illinois’ population had already begun to experience the public health protection secured by local anti-smoking ordinances before the Smoke Free Illinois Act was debated. This experience may indeed have contributed to the legislative majority’s determination to include the nonsmokers among the casinos’ 7,711 employees and 14.64 million annual visitors\(^{384}\) within the class of public place protectees. And the health benefits flowing from local control were not the only dimension shaping mobilization of public support for a statewide law: the very process of having struggled for 16 years (from 1989 to 2005) to achieve repeal of preemption created considerable momentum toward passage of the comprehensive anti-smoking bill in 2007. Further stimulation arose out of 60 local coalitions that formed in 2005-2006 to press for—and that actually achieved 36—local anti-smoking ordinances in 2006;\(^{385}\) of special and not merely symbolic importance was the adoption of the Springfield Clean Indoor Air Ordinance of 2006 on January 17, 2006,\(^{386}\) by virtue of giving legislators in the state capital first-hand acquaintance with and understanding of smoke-free public places.

This broad-based wave of local enactments surprised even one of the key architects of the entire smoke-free movement in Illinois, Kathy Drea, who had worked for the American Lung Association since 1997 and became its public policy director in Illinois as well as vice president of advocacy for the entire Midwest. She and others in the movement had expected that initially perhaps only one or two cities would adopt ordinances. The unanticipatedly rapid proliferation of ordinances produced the side effect of motivating mayors and other local officials to pass the buck to the state, thus generating additional pressure for passage of statewide regulation, which was reinforced as it converged with deep grass roots support.\(^{387}\)

To the extent that the exercise of pre-existing local control powers had been a key factor in crystallizing the requisite “political will” in Illinois to cover casinos and retain local control,\(^{388}\) the defeated advocates of preemption repeal


\(^{385}\)Telephone interview with Kathy Drea, Springfield (June 16, 2009).


\(^{387}\)Telephone interview with Kathy Drea, Springfield (June 16, 2009).

\(^{388}\)Section 65 of the Smoke Free Illinois Act provides: “(a) Any home rule unit of local government, any non-home rule municipality, or any non-home rule county within the unincorporated territory of the county may regulate smoking in public places, but that regulation must be no less restrictive than this Act. This subsection (a) is a limitation on the concurrent exercise of home rule power under subsection (i) of Section 6 of Article
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über alles in Iowa could have said—though they prudently refrained from saying—of the process and outcome in Iowa: ‘We told you so.’ But an answer to the counterfactual historical question as to whether Iowa’s Smokefree Air Act would have covered casinos (and, for example, 10 or 50-foot distances outside public places) if the legislature in 2008 had expressly written local control into the new law would require an assessment not only of the probabilities of how many years it would have taken for a critical mass of larger (and smaller) cities to adopt rigorous ordinances, but also of whether the ongoing harm inflicted in the interim on the large majority of Iowans who would have continued to be unprotected by the feckless statewide clean indoor air law would have outweighed the marginal benefits that would have been generated by a somewhat more stringent Smokefree Air Act some or many years in the future.

VII of the Illinois Constitution. (b) In addition to any regulation authorized under subsection (a) or authorized under home rule powers, any home rule unit of local government, any non-home rule municipality, or any non-home rule county within the unincorporated territory of the county may regulate smoking in any enclosed indoor area used by the public or serving as a place of work if the area does not fall within the definition of a ‘public place’ under this Act.”

Ironically, the press may have misled some people to comply with (or, alternatively, to believe that they were violating) the law by falsely reporting that “[t]he law prohibits smoking within 10 feet of an establishment....” Katie Hanson, “No Smoke, No Sweat As Ban Looms,” DI, June 30, 2008 (1:2-6, at 3:3). See also Brian Morelli, “Bars’ Longtime Patrons Fret Life After Smoking Ban,” ICP-C, June 28, 2008, on http://www.press-citizen.com (stating that a bar customer “will have to walk at least 10 feet away from the building if he wants a smoke”).

The counterfactual question could also be formulated differently: would city councils, had SAA conferred local control on them from which casinos would not have been exempt, have, for example, passed ordinances banning smoking in casinos? Apart from the fact, as mentioned above, that Democratic sponsors of H.F. 2212 had informed anti-smoking groups that a preemption repeal bill could have been passed only with the same exemptions as the statewide bill, to an optimistic Ehrecke it seemed improbable that many city councils would have risked jeopardizing, for example, the millions of dollars in grants that the casinos gave to local organizations and projects. Casinos are required by Iowa Code § 99F.6(4)(a) (2008) to “distribute at least three percent of the adjusted gross receipts for each license year for educational, civic, public, charitable, patriotic, or religious uses” and make additional non-statutorily required donations amounting to millions of dollars annually. http://www.iowagaming.org/our_members/license_holders.aspx (visited June 16, 2009); telephone interview with Wes Ehrecke, Des Moines, president, IGA and email from Wes Ehrecke to Marc Linder attaching 2008 economic impact statement indicating $35 million in charitable contributions of the former and $10 million of the latter category (June 16, 2009). In addition, Polk County, which owned
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The Run-Up to the House Floor Debate: Amendments to H.F. 2212

The no-smoking movement is a locomotive barreling down a hill. Sophisticated, progressive cities—New York, Chicago, Paris—have set the tone. The rest are sure to follow.

I doubt the no-smoking surge needs a push from the [Iowa] Legislature, but it’s about to get one.391

Today, the danger of secondhand smoke is so well understood that it’s baffling Iowa still is debating whether to pass a statewide ban.392

The Commerce Committee’s action on H.S.B. 537 prompted two other committees to put narrower bills on hold.393 The very next day, February 6, the day after the press had reported that “opponents and advocates alike say there would be little need for House File 2067 if the statewide smoking ban were approved,”394 the House Human Resources Committee’s chairperson announced that it would defer on Foege’s preemption repeal bill.395 And the same day the Education Committee suspended discussion of H.F. 754, the 2007 bill that prohibited all tobacco use in and about schools. Which way legislative winds were blowing in the House was forecast by Majority Leader McCarthy, who

Prairie Meadows Racetrack and Casino, was due to receive in 2009 $28.4 million in rent and profit sharing, while Des Moines, Altoona, and Polk County schools and charities were to receive $11 million. Dan Johnson, “Prairie Meadows Explores Second Polk County Casino,” DMR, Aug. 8, 2009, on http://www.desmoinesregister.com. Nevertheless, even in the wake of the passage of H.F. 2212, the Sioux City city council did express interest in such an ordinance. See above this ch.


392 “For Health’s Sake, Enact Smoking Ban,” DMR, Feb. 16, 2008 (14A) (NewsBank) (edit.).

393 Without explaining the basis of its judgment, IDPH skeptically stated that the bills “were supposedly put on hold to see how HSB 537 fares. It’s uncertain whether HSB 537 has the necessary votes to pass the full house.” IDPH Legislative Update (Feb. 11, 2008), on http://www.idph.state.ia.us/adper/common/pdf/legis/archive/2008/080211_update.pdf (visited July 5, 2008).


judged that H.S.B. 537 was “the most likely to pass.”

That judgment was apparently not yet shared in the Senate, where, as a seeming last hurrah of local control, on the same day that the House Commerce Committee passed the statewide ban bill, 20 of the 30 Senate Democrats, led by Joe Bolkcom and other leading anti-smokers, filed S.F. 2096, which was virtually identical to H.S.B. 565; the Local Government Committee assigned it to a subcommittee, which became its final resting place. That same day saw nine of the same senators file another bill that was identical to H.S.B. 565, which also got no further than a State Government Committee subcommittee.

Even after H.S.B. 537 had passed the Commerce Committee, “key legislative observers and advocates” were still reported in the press to be expecting that a local control bill had “the best chance of becoming Iowa law.” The best that Kerry Wise, an American Lung Association spokesperson, could say for a strong statewide ban was that the group supported it if it restored local control, but ALA continued to favor a local control bill without exemptions, which it still deemed to have a “strong chance” of passing. Its strategy remained the proliferation of exemptionless local ordinances, which it would use “to collectively springboard [to] a statewide ban later.” In contrast, Iowa Restaurant Association President Doni DeNucci may not have claimed to know which bill would pass, but she did predict that “whatever emerges from Iowa lawmakers won’t be good for her 600 members and the 5,000 restaurants and bars in Iowa the association represents. ‘With the Democrats in the majority, we’re going to lose.’”

Finally, during the Democratic legislative leadership’s weekly news conference on February 7, House Majority Leader McCarthy publicly and definitively announced the new direction. Speaking of the statewide smoking ban’s having been moved out of the Commerce Committee, he remarked: “If we have the votes—and we’ll be working on that over the weekend and the first part of next week—that will be something we would try to bring up and pass in the full House....” Asked where the measure was heading, McCarthy, after calling the bill “the biggest single thing” the legislature could do for public health in Iowa, pointed out that there were “two camps in our caucus”: whereas members pushing for local control “seemed to have more momentum a couple of months ago,”
those supporting a statewide ban “seemed to have less votes.” Now, however: “For a whole variety of reasons since the session started the statewide trend if you will has picked up a lot of support, a lot of votes.” Without revealing what any of those reasons might be, he added that, from a public health perspective, the statewide ban, even though it was not perfect because of the casino exemption, would be much better than local control—which would make less sense for business by creating competitive disadvantages for firms in adjacent localities—by virtue of covering thousands more establishments.\textsuperscript{400} ( Minority Leader Rants was all alone in rejecting the premise that the momentum had shifted from local control to a statewide ban in 2008: proceeding from the historically correct statement that Democrats had had trouble passing preemption repeal in 2007 because of its untoward balkanizing effects, he indulged in the wholly undocumented speculative contention that McCarthy and the Democrats had always had in mind to pass a statewide ban in 2008, but that they had prepared it in secret as a tactical surprise.\textsuperscript{401} Finally, in response to a question about Rants’s claim that the casino exemption would send people from bars to casinos to smoke,\textsuperscript{402} McCarthy insisted that it was a “red herring” because people went to casinos to gamble, not to smoke.\textsuperscript{403} Gronstal was somewhat more circumspect in stating that the Senate would probably also take a look at a statewide ban too, but at the same time he made it clear that “[e]verybody needs to know, this is headed towards a smoke-free society.”\textsuperscript{404} In contrast, at this point the governor remained non-committal, stating only that he would take a look at a statewide ban.\textsuperscript{405} As to why the momentum had shifted rather suddenly from local control to

\textsuperscript{400}Statehouse Democrats Discuss Smoking, Road Use Funds, Weekly News Conference (Feb. 7, 2008), on http://www.youtube.com/watch?v=x6MxE_u4uE (visited July 8, 2008).

\textsuperscript{401}Telephone interview with Christopher Rants, Des Moines (May 12, 2008).

\textsuperscript{402}Rants had asserted that the bill “‘makes a real clear point that if Iowans want to go out and have a drink and a smoke, you can’t go [to] your neighborhood bar anymore.... You’re going to have to go to a casino.’” O. Kay Henderson, “House Could Vote on Smoking Ban This Week,” Radio Iowa, Feb. 11, 2008, on http://www.radioiowa.com (visited May 12, 2008).

\textsuperscript{403}Statehouse Democrats Discuss Smoking, Road Use Funds, Weekly News Conference (Feb. 7, 2008), on http://www.youtube.com/watch?v=x6MxE_u4uE (visited July 8, 2008).


\textsuperscript{405}William Petroski, “Culver Supports Local Control on Smoking Bans, Endorses Boswell,” DMR, Feb. 9, 2008 (8B) (NewsBank).
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Sen. Matt McCoy rejected the premise of suddenness: he argued that the “tipping point” had already emerged in 2007 when the legislature increased the cigarette tax by one dollar. Telephone interview with Matt McCoy, Des Moines (May 8, 2008). To be sure, this perspective fails to explain why the House, after voting for that increase, was unable to pass even the Senate’s local control bill. See above ch. 34. Of the scores of legislators and lobbyists who were asked why the momentum shifted—the vast majority of whom spontaneously responded with some variant of “That’s a very good question” or “Yes, that is the question”—only Majority Leader Gronstal, repeating the word “Why?” seemed put off, nonplussed, or exasperated by the question, as if it made no sense. Didactically, he observed that when a shift took place in a legislature, there was usually not just a single reason. Since Gronstal, as mentioned in ch. 34, judged that there had been almost enough votes to pass a statewide bill in the Senate in 2007, he, like some other senators, believed that the overridingly important change that occurred in 2008 was that the consensus in the House had shifted from local control to statewide ban, for which shift he credited his counterpart McCarthy with the greatest responsibility. Telephone interview with Michael Gronstal, Council Bluffs (May 17, 2008).

Telephone interview with Philip Wise, Keokuk (May 18, 2008).

Telephone interview with Tyler Olson, Des Moines (Apr. 15, 2008). Assistant Minority Leader Doug Struyk offered a somewhat different appraisal: whereas the House had long favored a statewide ban because of the business-unfriendly balkanizing impact of local control, the crucial shift in momentum in 2008 originated in the Senate when it finally let go of local control. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
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outcomes that they had praised as the great virtues of that approach would be undercut by the centralized statehouse lobbying power of the same tobacco industry forces that the health groups had intended to circumvent in hundreds of city councils, but that would have to be overcome in order to pass a preemption repeal bill.\textsuperscript{409}

Three days after the House Commerce Committee’s action, Principal’s chairman and CEO urged each Iowa Business Council board member to support the bill when it was considered by the House the following week. In a state that was experiencing a labor shortage, Barry Griswell viewed a public smoking ban as “help[ing] employers recruit and retain talent” by virtue of its enhancing Iowa’s “image as a progressive place to do business, live and work” and its quality of life.\textsuperscript{410} Because the legislature had still not resolved the question of whether local control or a statewide ban was the superior approach, he took special pains to lay out four reasons for Principal’s clear preference for statewide action (the last of which might be especially persuasive to some employers):

\begin{itemize}
\item It impacts all employers and customers in a uniform fashion.
\item It will promote the entire state as a smoke free environment.
\item It provides more efficient and effective means for public awareness and enforcement.
\item It will enable some business owners to implement a restriction that may be unpopular for a few individuals.\textsuperscript{411}
\end{itemize}

By February 12, the nature of the amendments with which Republicans were intending to burden the bill became somewhat clearer. Rants revealed that they would exempt bars (which needed to be protected from exempt casinos to which smokers would otherwise flock) and family farm corporations and scale back the 50-foot no-smoking perimeter around public places in which smoking was prohibited. In particular the casino exemption he labeled as “‘terribly hypocritical.’” An—as events would soon prove—overconfident Majority Leader McCarthy variously predicted that these amendments would be “dead on arrival” and that they “will almost certainly never see the light of day.” His misplaced optimism rested on his judgment that since he had not had trouble mobilizing support for the bill, these new exemptions, “which would theoretically make the

\textsuperscript{409}The American Heart Association’s lobbyist did not recall ever having heard that message from legislators. Telephone interview with Randy Yontz, Des Moines (May 14, 2008).

\textsuperscript{410}Barry [Griswell] to Each Iowa Business Council Board Member (Feb. 8, 2008) (copy furnished by Merle Pederson).

\textsuperscript{411}Barry [Griswell] to Each Iowa Business Council Board Member (Feb. 8, 2008) (copy furnished by Merle Pederson).
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On February 12, 13, and 14, largely Republican representatives filed a total of 15 amendments, some of them rather radical and consequential. The first amendment, filed by insurance agent Lance Horbach and five other Republicans, would have exempted all agricultural real property and any structures located on it (and was voted on and defeated). They were especially incensed that, whereas the bill exempted casinos and thus exposed thousands of employees to secondhand smoke, it “took a slap at farmers” by prohibiting them from smoking in their own combines and tractors if they also had an employee who used them. Although Horbach admitted that enforcement would be difficult on farms and that it was unlikely that farmers would be fined for smoking inside tractor cabs, he feared that the law “could be unfairly used by disgruntled employees or family members who are out for revenge.” For his part, floor manager Tyler Olson agreed that in some instances it might be unlawful for farmers to permit their employees to smoke in a farm vehicle.

Much more damaging to the core purposes of the bill was the amendment filed by assistant minority leader and former Democrat Doug Struyk and five of his new party-mates that proposed to strike all exemptions except for that for private residences, replacing them with one for all “[p]ublic places, places of employment, and outdoor areas to which only individuals twenty-one years of age and older are invited and allowed entrance.” In an effort to understand the motivation underlying this proposal (which was placed out of order) a student of the bill directed the following provocative question to the amendment’s

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413 The only amendment that would have expanded coverage proposed to prohibit smoking in any motor vehicle in the presence of anyone under 18, but its sole sponsor withdrew it before it was considered. H-8018 (filed Feb. 13, 2008, by Lukan); House Journal 2008, at 1:325 (Feb. 19, 2008).
sponsors:

How does exempting bars where people only 21 and older are allowed effectuate the purpose of the Smokefree Air Act to “improve the health of Iowans”? Whose interests are you advancing? Clearly you cannot be advancing the interests of Iowans.

I dare you to spend an evening in a local establishment and not change your clothes for 24 hours. The lingering smoke on your shirt is the same crap that now remains on your lungs. Unfortunately, you cannot run your lungs through the washing machine.\footnote{Email from Amanda Stahle to Doug Struyk et al (Feb. 18, 2008) (forwarded to Marc Linder (May 12, 2008)).}

In defense of his exemption, 24-year-old Representative Matt Windschitl, a Union Pacific Railroad conductor, gunsmith, U.S. Marine Reserves member, and Iraq war veteran from western Iowa,\footnote{http://www.iowahouserepublicans.com/?page_id=50 (visited Aug. 10, 2008).} evaded the overriding public health question altogether:

I am not advocating for any particular establishment in general, but for the freedoms and the rights of all Iowans. I believe it is a choice and a right to smoke or not, as it is also a choice and a right to frequent an establishment that allows smoking or not.

I believe it should be up to the individual business owner to make the choice of going smoke free. I believe it is wrong for the legislature to have an exemption for casinos and not for individual establishments that cater to the same age range of Iowans. ...

I believe I am advocating for every Iowan who cherishes their individual freedoms to govern their own personal lives.\footnote{Email from Matt Windschitl to Amanda Stahle (Feb. 18, 2008) (forwarded to Marc Linder (May 12, 2008)).}

Representative Mike May, a resort owner and retired teacher, bluntly disclosed that he was seeking to hold hostage bar workers’ health: “I will gladly withdraw this amendment if the majority party will pull the exception for casinos.” Wholly ignoring the fact that his Republican party had for years succeeded in refusing to permit the consideration, let alone the passage, of any anti-public smoking measure, May instead accused Democrats of viewing the question as being about state revenue to which they were sacrificing the casino workers’ health.\footnote{Email from Mike May to Amanda Stahle (Feb. 19, 2008) (forwarded to Marc Linder (May 12, 2008)).}

Republican tire repair technician Steven Lukan filed four amendments, two of which proposed to add exemptions for business owners’ private offices (H-8019) and bingo facilities (H-8020) (and were both defeated). Instead of
responding to a question as to whether it was not likely that customers and employees would meet with employers in the latter’s offices and how such exposure to tobacco smoke would effectuate the bill’s purpose of improving Iowans’ health, the day before the House debate Lukan evasively stated to a researcher that “we should...respect the rights of business owners in Iowa to do as they wish on the property they own.”

Lukan himself withdrew the other two amendments, one of which would have reduced by one percentage point every year the percentage of actual value at which commercial property was assessed that was subject to SAA (H-8021); surprisingly, his other (quickly withdrawn) amendment proposed an innovation in tobacco control that was just beginning to be enacted in various states and cities—prohibiting smoking in motor vehicles in the presence of anyone under 18 (H-8018). Lukan had been motivated to file this last amendment, which he believed that Petersen and others had failed to include in the bill because it was modeled after comprehensive state laws that also lacked it, by his belief that children had no choice about being in the back seat of a car in which adults were smoking. He withdrew the amendment after coalitions trying to get rid of the casino exemption and to secure adoption of the 21-and-over amendment had approached him about dropping it because its adoption—which its hard-to-oppose protection of children made not unlikely—would have made it more difficult to “take down the bill” and rewrite it.

Libby Jacobs, who worked for Principal Financial Group, filed an amendment that struck various 20- and 50-foot no-smoking zones (but H-8022 was placed out of order after Tyler Olson’s similar amendment had been adopted). The radical amendment (H-8023) filed by Scott Raecker, who had a history of showing some support for anti-tobacco measures, was presumably designed to test Democrats’ bona fides by striking all exemptions (including that for casinos) except for private residences not being used as a child care facility, but it too was placed out of order.

The amendment that arguably proved to be the most contentious was filed by two zealous opponents of smoking regulation, Republicans Struyk and Cecil Dolecheck, joined by Democrat Brian Quirk. H-8024 conferred an exemption on

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423 Email from Amanda Stahle to Steven Lukan and from Steven Lukan to Amanda Stahle (Feb. 18, 2008) (forwarded to Marc Linder (May 12, 2008)).
restaurants and bars at a specified time during which only people 18 or older were admitted, so long as that time was a regular, single, consecutive period of time and was conspicuously posted at entrances. The involvement of Quirk, who had fought in the U.S. Army in Panama and Iraq, been an American Legion post commander, was a lifetime member of the Veterans of Foreign Wars, and was one of about six so-called six-pack blue-dog Democrats, who thwarted much of their party’s labor agenda in 2008, is worth considering. Quirk—95 percent of whose northeast Iowa constituents who had contacted him opposed the bill (and 80 percent of those did not even smoke)—had voted for the bill in the Commerce Committee after chairperson Janet Petersen had explained to him that he could raise his objections to the bill later, but when he did, she allegedly told him that she no longer needed his vote. He joined forces with Struyk and Dolecheck because he feared that the bill’s restrictions would bring about a vast reduction in bar revenues and “camaraderie.” In order to avoid such outcomes, he proposed various measures to Olson and Petersen, such as permitting smoking in private clubs and reverse local control under which localities could opt out of the law, but when they dismissed the proposals, he never filed such amendments. Interestingly, however, in spite of his ardent opposition to the bill (which he voted against on final passage), Quirk spontaneously acknowledged that the ban would eventually be perceived as a good thing because “it’s something that’s right,” and that as a nonsmoker he personally liked to go to no-smoking places. In the end, his criticism boiled down to the ban’s precipitate introduction: if only it had been phased in over time and/or through local control, he would, he asseverated, have supported it. Interestingly, however, in spite of his ardent opposition to the bill (which he voted against on final passage), Quirk spontaneously acknowledged that the ban would eventually be perceived as a good thing because “it’s something that’s right,” and that as a nonsmoker he personally liked to go to no-smoking places. In the end, his criticism boiled down to the ban’s precipitate introduction: if only it had been phased in over time and/or through local control, he would, he asseverated, have supported it. Interestingly, however, in spite of his ardent opposition to the bill (which he voted against on final passage), Quirk spontaneously acknowledged that the ban would eventually be perceived as a good thing because “it’s something that’s right,” and that as a nonsmoker he personally liked to go to no-smoking places. In the end, his criticism boiled down to the ban’s precipitate introduction: if only it had been phased in over time and/or through local control, he would, he asseverated, have supported it. Interestingly, however, in spite of his ardent opposition to the bill (which he voted against on final passage), Quirk spontaneously acknowledged that the ban would eventually be perceived as a good thing because “it’s something that’s right,” and that as a nonsmoker he personally liked to go to no-smoking places. In the end, his criticism boiled down to the ban’s precipitate introduction: if only it had been phased in over time and/or through local control, he would, he asseverated, have supported it.

An even more radical amendment was filed by Republican Kraig Paulsen, a lawyer and former member of the U.S. Air Force, who felt that smoking

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430 Email from a lobbyist who requested anonymity to Marc Linder (Aug. 13, 2008). The others were McKinley Bailey, Swati Dandekar, Geri Huser, Doris Kelley, and Dolores Mertz. On final passage on April 8 only Dandekar and Kelley voted for H.F. 2212.

431 Telephone interview with Brian Quirk, New Hampton (Aug. 13, 2008). Quirk asserted that during the first month or so of the new law’s operation in his district business had declined 80 percent and many bars had gone out of business, while bars that had gone no-smoking before the law went into effect had experienced no increase in business. He also claimed that employers were losing one to two hours of productivity a day as employees who drove trucks and other company vehicles had to stop and get out in order to smoke instead of smoking while driving.

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policies were a “business matter.” H-8025 would have struck the entire bill and in its stead merely amended the existing statute to prohibit smoking in all restaurants. A much narrower but, in context, bill-killing amendment (H-8026) was filed by Carmine Boal, who would purport until the end of the session to support the bill if only the casino exemption were removed.

Floor manager Tyler Olson himself filed a bipartisan consensus amendment weakening his bill in one very important and another more marginal respect: H-8027 reduced four 20- and 50-foot outdoor no-smoking zones to only 10 feet and also excluded the Iowa Veterans Home in Marshalltown from coverage. The exclusion of the IVH was the work of Marshalltown Democrat Mark Smith, who lobbied Majority Leader McCarthy and Olson (the latter being much more hesitant). The principal basis for his support was the fact that many of the veterans had become addicted while serving their country, whose government had plied them with free or subsidized cigarettes. Yet uniquely perhaps among the legislature’s numerous advocates of exclusions, Smith “felt conflicted” about having pressed for it and troubled by having enabled this smoking; indeed, even after the law was in effect he continued to have “angst” about it daily and was audibly disconcerted when asked whether he would have voted for the exemption had he represented another district.

Another bill killer was filed by Linda Upmeyer, an assistant minority leader and cardiology nurse practitioner, whose position that the whole question of the smoking ban had more to do with property rights than health she herself recognized was “a little incongruous” for a cardiology nurse practitioner and one with which the physicians in her clinic sharply disagreed—but surely no less incongruous than being a “closet smoker.” Upmeyer’s amendment H-8033 (later ruled non-germane) would have struck the entire bill, replacing it with an annual $1,000 smoke-free establishment tax credit—“almost,” as she put it, “a

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434 In contrast, co-sponsor May did actually vote for the bill on final passage.

435 Telephone interview with Mark Smith, Marshalltown (Aug. 21, 2008).


438 Telephone interview with Rep. Mark Smith, Marshalltown (Aug. 21, 2008). Upmeyer’s very gravelly voice was strongly suggestive of long years of smoking.

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random number."

Asked the day before the bill was debated why she favored such a tax credit instead of prohibiting smoking in all public places and whether she had data showing that restaurant owners lost $1,000 a year when they banned smoking, Upmeyer evasively stated that the “incredibly hypocritical” bill wildly exaggerated the effect of the casino exemption as leaving “nearly 30,000 employees unprotected. So is this for health? The exemption is just about the economic impact.” Unknown is the economic impact of the $5,000 campaign contribution that Upmeyer received a few months later from the PAC of a company that owned two casinos.

Finally, Struyk filed two more killer amendments. H-8035, which Tyler Olson described as the cigarette companies’ chief amendment, provided that if any provision of the bill or the application of the bill to any persons or circumstances were ever held invalid, the entire law would be invalidated. H-8036 (which was placed out of order) would have struck all the exemptions (except that for private residences), replacing them with a radically more extensive exemption for all covered public places, places of employment, and other areas in which smoking was prohibited if they used “equipment consistent with the standards established by the American society of heating, refrigerating and air-conditioning engineers, a combination high-efficiency particulate air filtration, charcoal activated carbon and ultraviolet light filtration system, or other filtration system, any of which exchanges the air at least ten times per hour.” Struyk’s amendment did not point out that less than two years earlier the Surgeon General’s report on The Health Consequences of Involuntary Exposure to Tobacco Smoke had concluded that “[e]xposures of nonsmokers to secondhand smoke cannot be controlled by air cleaning or mechanical air exchange,” although “operation of a heating, ventilating, and air conditioning system can distribute secondhand smoke throughout a building.”

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441 Email from Amanda Stahle to Linda Upmeyer and from Linda Upmeyer to Amanda Stahle (Feb. 18, 2008) (forwarded by Amanda Stahle to Marc Linder (May 12, 2008)).
442 https://webapp.iecdb.iowa.gov/PublicView/statewide/2008/Period_Due_Date_19-Oct/PACs/Peninsula%20Gaming%20Employee%20PAC_9774/Peninsula%20Gaming%20Employee%20PAC_9774_B_Expenditures.pdf
443 Telephone interview with Tyler Olson, Des Moines (Apr. 15, 2008).
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Once this series of Republican amendments had been filed, a somewhat more sober McCarthy allowed as “preliminarily Democrats believe there is a majority in support of the statewide ban.” In contrast, the Senate, according to Majority Leader Gronstal, had as yet reached no consensus. As far as Governor Culver was concerned, the press portrayed him as going both ways: whereas the Associated Press now reported that “he would sign a statewide ban into law if the Legislature passes it,” Radio Iowa still had him in the local control camp, but nevertheless open to a different perspective: “Iowa has historically been a local control state, but maybe as we have this discussion and debate... maybe we will learn that Iowans want to go further than that and that they’re ready for a statewide ban.... That is why debate is important up here.”

In part, (House) Democrats’ hopeful attitude may have been based on “internal polling” that revealed that 80 percent of Iowans favored some kind of smoking ban. More importantly, leadership itself was surprised by the polling data’s revelation of the extent to which Iowans wanted a statewide law. One reason for such public support may have been the advertisements promoting the prohibition of smoking in bars and restaurants on which the Iowa Department of Public Health had spent $596,000. Appearing 3,140 times in newspapers and on radio and television since October, the announcements, which originally bore the tagline, “Local control now,” by February ran under the title, “Everyone has the right to breathe smoke-free air.”

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Republicans. For example, House Minority Whip Kraig Paulsen lashed out at IDPH for “‘using taxpayer dollars to...push the Legislature around.’” Even before 2008, however, IDPH had been gauging Iowans’ views on smoking. According to the most recent survey, conducted for the Department between April and July 2006, the overwhelming majority (93.2 percent) recognized the negative health consequences of exposure to secondhand smoke: 55.8 percent of respondents considered breathing other people’s cigarette smoke “very harmful,” while another 37.4 percent deemed it harmful, leaving only 3.2 percent and 1.9 percent to call it not very harmful and not harmful at all, respectively. And almost as many (85.4 percent) thought that people should be protected from such exposure: 32.7 percent agreed strongly and 52.7 percent agreed, while only 8.2 percent disagreed and 1.5 percent disagreed strongly. That 26.9 percent, or more than a quarter, of Iowans felt strongly enough to have asked someone within the previous year to stop smoking in order to avoid having to breathe his smoke suggested personal concern intense enough to risk confrontation. To be sure, more specific questions about governmental smoking bans and locations generated less than quasi-universal assent. For example, when instructed that state law did not require restaurants to be smoke-free and that state law prohibited cities from adopting ordinances to prohibit smoking in them, and then asked whether that law should be retained as it was or changed, a bare majority of 52.7 percent wanted change, while 40.6 percent chose the status quo. Even among non-smokers preference for the local control option for banning smoking in restaurants reached only 60.4 percent, while 32.9 percent wanted no change; 75.7 percent of smokers, in contrast, preferred perpetuation of their freedom to expose their fellow-public diners to secondhand smoke, while only 17.4 percent were willing to accept change. Virtually all respondents wanted to impose some limits on smoking in restaurants: almost two-thirds (64.3 percent) wanted no smoking, while 33.3 percent would allow it in some areas, and only 1.0 percent would permit it in all areas. A total ban in bars and cocktail lounges, in contrast, found much less favor: whereas only 30.3 percent supported it, 47.4 percent favored permitting smoking in some areas and 15.5 percent supported it


454Gene Lutz et al., Iowa 2006 Adult Tobacco Use Survey, tab. E-9 at 122.

455Gene Lutz et al., Iowa 2006 Adult Tobacco Use Survey, tab. E-10 at 123.

456Gene Lutz et al., Iowa 2006 Adult Tobacco Use Survey, tab. F-1 at 131.
in all areas. Interestingly, contrary to later pronouncements by Minority Leader Rants, high levels of support for total bans were not confined to restaurants. Even higher proportions favored them in public buildings (69.2 percent), at indoor sporting events (73.5 percent), and in indoor shopping malls (76.7 percent). In contrast, virtually no one (0.5, 1.2, and 0.7 percent respectively), wanted to permit smoking in all areas at these locations, while allowing smoking in some areas secured the support of 27.6, 23.0, and 21.1 percent, respectively, of all respondents.\textsuperscript{457} Support for bans on smoking in outdoor public areas, however, was a distinctly minority position: while approximately equal numbers strongly agreed (10.2 percent) and disagreed (11.7 percent), twice as many disagreed (48.3 percent) as agreed (24.3 percent), yielding a 60.0 to 34.5 percent negative preference.\textsuperscript{458}

The heterogeneous—and to some extent self-contradictory—attitudes and policies of Iowa restaurant and bar owners/managers, which differed sharply from the general public’s preferences, were vividly on display in a contemporaneous 2006 survey. Almost four-fifths of all respondents agreed (46 percent) or strongly agreed (33 percent) that people should be protected from secondhand smoke, while 44 percent of owners/managers of establishments most of whose total sales were from alcohol disagreed.\textsuperscript{459} When asked for their preferred smoking policy, 12 percent of restaurateurs responded that smoking should be allowed without restriction, 33 percent not at all, and 50 percent in designated areas; among bar owners/managers, the corresponding shares were, unsurprisingly, more pro-smoking: 48 percent, 15 percent, and 28 percent, respectively.\textsuperscript{460} Yet, whereas 34 percent of all owners/managers of establishments, 39 percent of owners/managers of sit-down restaurants, and 65 percent of all without a liquor license had banned smoking, only 2 percent of the bar owners and 18 percent of all with liquor licenses had in fact banned smoking.\textsuperscript{461}

H.F. 2212 was scheduled for floor debate on February 14, but because floor manager Olson had failed to file a "'comprehensive cleanup amendment'" in

\textsuperscript{457} Gene Lutz et al., Iowa 2006 Adult Tobacco Use Survey, tab. F-3 at 133.  
\textsuperscript{458} Gene Lutz et al., Iowa 2006 Adult Tobacco Use Survey, tab. F-5 at 134.  
\textsuperscript{460} Gene Lutz, Smoking Policies at Food-Serving Businesses in Iowa tab. 8 and 9 at 23-24 (Feb. 2007).  
\textsuperscript{461} Gene Lutz, Smoking Policies at Food-Serving Businesses in Iowa at 7, tab. B at 39 (Feb. 2007).
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time, it was not eligible for debate that day\textsuperscript{462} and wound up being delayed five days. The press generally accepted this technical explanation,\textsuperscript{463} but at least one statehouse reporter conjectured that the delay might have resulted from adherents’ failure to have mobilized the requisite 51 votes.\textsuperscript{464} Indeed, as late as a few hours before the debate on February 19, Senate Assistant Majority Leader Joe Bolkcom remarked that the House leadership—which would not allow the bill to go to the floor unless it was certain that it had enough votes for passage—was still working to get sufficient votes to debate it.\textsuperscript{465}

At his press conference on February 14 Rants correctly remarked that “[w]e have members on both sides” of the public smoking issue, but the lopsidedness of the House vote five days later would cast doubt on his further claim that “[i]t’s really not a partisan issue”\textsuperscript{466} as would Janet Petersen’s retrospective judgment that Republicans opposed H.F. 2212 because tobacco companies gave them lots of money.\textsuperscript{467} Rants’s judgment that the bill’s exclusion of casinos was a “little hypocritical” was itself more than a little hypocritical since Rants himself was opposed to supplanting business owners’ decisionmaking power over smoking at all. His kind of hypocrisy was ferreted out almost immediately by a journalist who, after Rants had announced that Republicans would propose an amendment to exempt bars that limited admission to those over 21 years of age—which, unsurprisingly many bar owners supported\textsuperscript{468}—because if the exemption was good for casinos it was good for bars (“if it’s a good idea for one it’s a good idea for all”), asked why Rants stopped at bars and did not apply the same exemption to other locations such as bowling alleys. Rants called it an “excellent question,” but apparently imagined that he was offering an equally excellent answer when he replied: “I’m in the art of the possible.”\textsuperscript{469} Ironically, he seemed oblivious of


\textsuperscript{465}Email from Sen. Joe Bolkcom to Marc Linder (Feb. 19, 2008).


\textsuperscript{467}Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008).


\textsuperscript{469}Rants Addresses Smoking Ban, Economic Stimulus Package, Press Conference,
the fact that Democrats, including anti-smoking leaders Petersen and Olson, were practicing exactly the same art when they held their noses and swallowed the casino exemption—not because they supported it and not because they feared the loss of state tax revenue, but merely because it was the unfortunate price they had to pay to secure the additional votes needed for passage. Moreover, Olson publicly promised that he would be back in 2009 to repeal the exemption.\footnote{Tony Leys, “Deal on Ban Irks Opponents of Smoking,” \textit{DMR}, Feb. 14, 2008 (1A:1-2).} Toward the end of his remarks on smoking Rants hinted that whereas Republicans may have prevented passage of any real smoking bans when they controlled the legislature, now that more radical legislation might actually be passed, they were willing to make one concession: “I think what Iowans are really interested in...and they talk about why can’t we ban smoking, they’re really talking about restaurants.” If the goal were that limited, he argued that it could be accomplished without drafting the bill the way Democrats had written it.\footnote{Telephone interview with Christopher Rants, Des Moines (May 12, 2008).} Later, when asked directly why Republicans had not passed such a bill between 1997 and 2004, when they controlled the legislature, Rants, who stated that he hated smoking as well as drinking and gambling, admitted that the reason had been that he was opposed to interference with private property rights, although he agreed both that a significant change in attitudes toward smoking had taken place in the meantime and that not all employees who did not want to be exposed to secondhand smoke were in a position to avoid it.\footnote{Telephone interview with Lance Horbach, Tama (Aug. 1998).}

Even on the eve of House floor debate on H.F. 2212, when local control bills had been put in abeyance, smoking opponents were still “torn” over a statewide measure, which at this point Petersen was giving “‘excellent’” chances of passing. Those still reflexively wedded to their local control strategy confessed that “they can’t wholeheartedly support” Petersen’s bill.\footnote{Rants Addresses Smoking Ban, Economic Stimulus Package, Press Conference, Feb. 14, 2008, on http://www.youtube.com/watch?v=XyhPjWGKkGk (visited July 8, 2008).} This position was most strenuously adopted by the Lung Association, whose lobbyist, Dan Ramsey, self-ironically conceded that “we’re purists,” who wanted a clean bill with no exemptions. ALA, according to Ramsey, was so purist that, when Wise and

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Petersen called the health advocacy groups to a meeting on the statewide ban, ALA became the “odd man out,” whose leadership in Chicago told Ramsey to kill the bill. ALA agreed to be neutral until the bill got out of the House and then to lobby the Senate. Eventually the Iowa attorney general called the Midwest regional office to request that it support H.F. 2212. Intriguingly, the categorical strategic and arguably even principled divide separating the Lung Association from the other anti-smoking groups in Iowa did not manifest themselves in the course of the struggle for passage of the Smoke Free Illinois Act in 2007. According to Kathy Drea, vice president for advocacy and head of public policy for ALA of the Midwest, the organization opposed the Iowa bill because of the casino exemption, over which the health coalition ultimately broke up. In contrast, in Illinois, the coalition held solidly together on the issue of casino coverage (though it might have fissured if a time-limited exemption for casinos had proved necessary in order to pass the bill) because all members prioritized health over (tax) revenue.

The Lung Association’s militancy—it was, after all, prepared to tolerate a legislative outcome protecting no one in preference to protecting everyone except casino workers, in other words, to allow, pace Voltaire, Wise, Olson, and many others, the perfect to destroy the good—stood in breathtaking contrast to Iowa Democrats’s endlessly deployed mantra that they were willing to acquiesce in the exemption of casinos because protecting 99 percent of workers was superior to the legislative alternative of protecting 0 percent. The starkness of this absolutism was, to be sure, moderated to some considerable extent by the fact that in Illinois 0 was not the alternative since more than half the state’s residents already lived in jurisdictions covered by city and county no-smoking ordinances and the very failure to pass the desired legislation would presumably have motivated even more local coalitions to secure adoption of additional ordinances. Moreover, purism was even less of a luxury when the momentum propelling popular support of an ideal bill and the stability of a propitious statewide party-political constellation made it more than merely plausible that enactment of such a measure loomed just around the corner. In contrast, in Iowa, where 0 percent

474 Telephone interview with Dan Ramsey, American Lung Association of Iowa, Des Moines (May 14, 2008).
475 Telephone interview with Kathy Drea, Springfield (June 16, 2009); email from Kathy Drea to Marc Linder (June 17, 2009); see above this ch.
476 In this context it must not be forgotten that the scope of protection conferred by the Smoke Free Illinois Act was inferior to that of the Iowa Smokefree Air Act in that the former did not cover outdoor restaurants, the grounds of public buildings, or outdoor college campuses.
of the population was protected from secondhand smoke by a local ordinance, Democrats in 2007 controlled both houses of the legislature and executive for the first time in more than four decades, and the loss of either chamber or the governorship to the Republican Party (other than to Branstad) would almost certainly destroy any chance of enacting a strong or perhaps any statewide law, it is difficult to discern the public health justification for insisting that 0 percent of a loaf was better than 99.9 percent of a loaf while waiting an indeterminate number of years for 100 percent.

Ramsey observed of local controllers’ predicament: “‘It puts us in a difficult position because a lot of people say this is a good bill.’” In contrast, anti-smoking activists regarded local ordinances as “less likely to include exemptions.”477 Although this assessment may have been plausible—if for no other reason, then simply because casinos were located in only a minuscule proportion of Iowa cities—it ignored the probability that only a similarly minuscule proportion of local governments would pass (any, let alone exemptionless) ordinances in the near term. Another Lung Association spokesperson continued to argue that a “statewide law should be the floor, not the ceiling. Any statewide bill should also allow for local control, no exemptions. ... A preemptive state, which Iowa is now, is exactly what the tobacco industry, casinos, and bar and restaurant association wants. Without local control, there is always a chance the statewide law will be in jeopardy because of special interest politics.”478 Randall Yontz of the American Heart Association was also still unwilling to forsake local control, which had “been proven to work over and over”; recounting nostalgic memories of how in other states local control smoking bans were taken statewide “after a few years when most communities have adopted restrictions,”479 he presumably must still have nourished hopes of more than 500 Iowa local governments’ joining the movement in short order even though barely five percent of that number had even sent noncommittal petitions to the General Assembly requesting enabling legislation.

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The House Debates and Passes a Diluted H.F. 2212

From a practical standpoint, “this is the vehicle that’s moving.”

I won’t sacrifice property rights for a feel good bill that does nothing after all the exemptions are passed.

And when it came...time to pull the votes together we had to make a couple of exemptions to keep the bill alive and keep it moving.

The almost five-hour House debate on February 19 was the longest and most detailed, substantive, contentious, and consequential of all the debates on H.F. 2212, fleshing out many of the principal controversies and tensions and setting the framework for further conflict and resolution. That a statewide ban bill was finally being debated on the floor at all was an almost astonishing turn of events. Asked (in real time) several hours into the floor debate why the momentum had shifted from local control, Iowa City Democrat Mary Mascher, after confirming that “[m]omentum can shift here on a dime,” mentioned numerous contributing factors: (1) many surrounding states had passed legislation; (2) the fairly lengthy experience in California had built up a record; (3) many legislators believed that a local option approach would create too many conflicts among businesses and among cities; (4) whereas many felt that local control would “take too long,” a statewide law would have an “immediate effect on all Iowans”; and (5) “[l]ots of talking, lots of lobbying, lots of grunt work on the part of our anti-smoking lobby and our anti-smoking legislators.”

Shortly before five o’clock debate began on H.F. 2212 as floor manager Tyler Olson used his opening remarks to emphasize that the bill, which covered 99 percent of workers and public places and had progenitors in 29 other states, would not only improve the health of all Iowans, but also (in his less than

481 Email from Assistant Minority Leader Linda Upmeyer to Amanda Stahle (Feb. 18, 2008) (forwarded to Marc Linder (May 12, 2008)).
483 Email from Mary Mascher to Marc Linder (Feb. 19, 2008, at 8:07 p.m.).
484 Later, in responding to a question from Rep. Soderberg, Olson stated that the more accurate figure was 99.7-99.9 percent of workers and public places.
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felicitous choice of words) “hopefully get rid of those 440 Iowans that are going to die from secondhand smoke exposure...this year.” In order to preempt certain lines of attack by the bill’s opponents he reported that (1) the enactment of similar bans in Minnesota and Chicago had not resulted in mass enforcement actions; (2) many studies had revealed that rather than depressing business, bans had actually led to a rise in economic activity in bars and restaurants; and (3) the ban on smoking by farmers in their tractors would apply only if a corporate entity owned the tractor and someone other than the farmer used it (this last statement being false). 485

After Republicans Paulsen, Upmeyer, and Lukan had temporarily deferred on their amendments, 486 Carmine Boal, in her tenth and last year as a legislator, offered H-8026 to strike the casino exemption. In terms of its effect on the scope of the bill’s coverage and the universe of protected people, it may not have been the most important amendment, but, given the bill’s Democratic supporters’ belief that the bill could not garner the 51 votes needed for passage without the exemption for casino owners because a small but key number of Democrats representing districts with casinos did not believe that they could afford to antagonize the casino owners, the issue remained without any doubt politically the most difficult, contentious, and crucial question for the statewide ban from the day the Commerce subcommittee held a hearing on the study bill on January 23 until H.F. 2212 was passed by both chambers on April 8 and even after the Smokefree Air Act went into effect. Boal’s rhetorically and substantively effective remarks on behalf of the amendment not only created the impression that she was a vigorous supporter of universal coverage—in fact, however, according to her party’s greatest dissident, Republicans such as Boal who claimed that the casino exemption was unfair and that they would vote for a statewide ban with no exemptions were being untruthful 487—but helped maneuver floor manager Olson into a predicament that was partly of his own making when he refused, despite straightforward requests from his Republican interlocutors, to explain forthrightly why he chose to forgo the opportunity to call their bluff—as he had done so successfully in the Commerce Committee two weeks earlier when Soderberg offered the amendment to ban smoking on the grounds of public

485 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Murphy). Olson admitted under questioning by Rep. Paulsen later during the debate that smoking would not be lawful in non-corporate-owned farm tractors if the farmer had an employee who used the tractor. See below.


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buildings—even while he used virtually the same ironic introductory language with Boal that he had on February 5 (“I want to thank Representative Boal for bringing the amendment in the spirit of public health”). In fact, however, as Boal revealed shortly after the vote, protecting public health was not her goal at all; on the contrary: “My first preference is to allow private businesses the freedom to determine their smoking policy—no government involvement. At the time of my vote, 51 percent of my constituents who answered my survey agreed with this stance.” And still later Boal—who would soon call herself a “fan” of Sarah Palin—revealed even more clearly how central the sanctity of private property was to her world view:

I strongly believe our Constitution provides for the protection of property rights for property owners. Government should not abuse its power by taking away the rights of property owners just because a human behavior has been deemed repulsive by many. In this case the property right being forfeited is the bar and restaurant owners’ ability to decide if allowing smoking in their establishment is a good or a bad business model for them.

Proponents of the smoking ban argue that taking away the property rights of business owners is justified because smoking goes beyond being repulsive and affects others because of the damage caused by second-hand smoke.

I would argue that no one is forced to frequent or work in restaurants and bars that allow smoking. [M]y strong distaste for incrementally forfeiting personal freedoms to our government eclipses my distaste of the possibility of having someone smoke next to me in a restaurant of my choice.

Boal, who had previously excelled at taking up the cudgels for employers and against workers in reforming the state workers’ compensation law as well as against same-sex marriage, began her floor remarks by dramatically rehearsing

488 See above this ch.
490 Carmine Boal, “Exempting Casinos from Smoking Ban Permits Unfair Competitive Disadvantage,” DMR, Feb. 29, 2008 (1R) (NewsBank). This piece, which appears originally to have been a communication to Boal’s constituents, referred to the Senate debate as scheduled to take place the next week, but in fact it had already occurred.
her conversations with constituents on smoking:

You know, this issue is something that I’ve heard about for a long time in my district because my constituents have talked to me a lot about it. They said we wanted smoking banned: we’re tired of seeing it in restaurants—we don’t like it. And I said to them, I said, you know, don’t you know that that would mean that the government is getting involved in our lives more dictating to local restaurants what they can and can’t do? And don’t you know that restaurants can already ban smoking if they feel that’s in their best interests? And don’t you know that it’s possible for you to just frequent other restaurants that don’t have smoking? But they said, you know what, Representative Boal, you just don’t get it: it’s about secondhand smoke, it’s about the health of people who go to these restaurants, it’s for those workers who are trapped into [sic] these working places. We want to eat smokefree. 495

At this point Boal decided to ask her bar and restaurant owner-constituents their opinion on the issue and was surprised to hear that they, too, were for the ban. So she engaged them in the same dialog: “Well, don’t you know you can ban smoking if you want to? ... Why would you want me as a state legislator to make that decision for you, for your business?” And like the customer-constituents, they, too, told Boal that she just did not get it, but what she failed to understand this time round was that an individual bar owner’s decision to go smoke-free made it “very unfair” for him if the only other bar in town did not ban it because the former would have an “unfair advantage.” Consequently, Boal’s business owners swore that “[w]e want a level playing field,” which only the state could establish by means of a universally applicable statute. (The rest of the House might also be excused for not understanding this reasoning, which, after all, appeared to reject the quintessence of competitive entrepreneurial freedom.)

Boal then justified her amendment on the grounds that it created that level playing field for owners and protected the health of casino employees, and attacked the casino exemption for hypocritically protecting the state’s casino tax revenue at the expense of bar and restaurant owners’ profits. 496

Astonishingly, Olson evaded all the issues raised by Boal; instead, as if speaking in code, he urged rejection of her amendment solely on the grounds—that he and other supporters would repeat ad nauseam—that H.F. 2212 was “about progress and really not about perfection.” 497

Olson’s studied evasiveness in his colloquy with the amendment’s cosponsor, Mike May, became even more strained and further eroded his credibility. Olson

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495 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiilhr).
496 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiilhr).
497 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiilhr).
the lawyer appeared to view May’s seemingly straightforward questions as just so many traps, as if he were a deponent desperately trying to divulge as little as possible to the other side lest even otherwise positive information might be twisted in unforeseeable ways that he would come to regret. May himself later explained his aggressive questioning as designed, by someone who was going to “lose anyway,” at least to point out the majority party’s inconsistencies.\textsuperscript{498} Thus, when May asked whether any of the 440 Iowans who died annually from secondhand smoke exposure might be casino employees, Olson did not know and would not engage in any guesstimating. Since the secondhand smoke-related state-level mortality data were not disaggregated on an occupational or industry basis, and Olson could hardly be faulted for not being able to answer, May tried to get around this problem by asking merely whether Olson knew, as May did, that the smoke in casinos was “terrible.” Instead of giving May the obvious answer, Olson, who must have been more than clever enough to see several moves ahead and where this not very consequential checkers endgame was heading, begrudged him no more than: “You’re allowed to smoke in a casino, so I would guess.” Having painfully extracted this minimalist concession, May then wanted to know why the legislature would not want to save the lives of whatever number of casino employees and customers were imperiled by secondhand smoke exposure. Manifestly committed to speaking in a pre-arranged Aesopian language, Olson refused to deviate from his circumlocution that the exemption was in the bill to insure that 99 percent of public places and workers were covered and not zero. Audibly relishing the opportunity that Olson was bestowing on him to keep his cat-and-mouse game moving ahead, May, with increased urgency, asked: “You’re not making that connection for me because I still don’t understand why.” Unwilling to budge from his semi-opaque formula, Olson repeated that “Well, I believe that 99 percent is better than zero, and with this amendment I think we end up in the final consideration with zero. ... We all have to make that decision: Is the less than 1 percent more important than the other 99?” Boring in on Olson’s refusal to disclose the missing links in his reasoning, May immediately made the next logical move: “That’s a false choice. Because today we can take care of all of those people, can’t we?” Finally cutting through the shrouded underpinnings of Olson’s argument, May asked him point blank why some people would not support the bill without the casino exemption, but even this bluntness failed to motivate Olson to speak truth to powerlessness. Instead, apparently unconcerned about his credibility rating, Olson came up with a transparent whopper that must have caused every other House member, and all reporters and various other Statehouse hangers-on to snicker: “I’m not one of

\textsuperscript{498} Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008).
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those people—I can’t help ya.” In a vast understatement, May let him off the hook and then supplied the answer that Olson had intransigently refused to utter: “I suspect you know a little bit more than you’re saying to the body today, but I’ll give you that pass, you’ve done a good job and I appreciate...your bringing this bill. And I appreciate the dilemma you find yourself in. Because what we’re talking about is money and lives, isn’t it? We’re talking about revenue and lives. ... If the state treasury takes a dip or my local district casino takes a dip, then maybe that creates some political problems or pressures for me.”

Horbach intensified Republicans’ pseudo-attack on the casino exemption by underscoring the extent of secondhand smoke exposure that it made possible: the Meskwaki Indian casino in his hometown of Tama (which was not subject to state jurisdiction but served as a reference point) employed 1,500 people and was visited by 5,000 customers a day 365 days a year. To be sure, Horbach, went on and on about how “unquestionable principle” had been sold out for the exemption, but his only visible interest as the representative of “Main street business” in small towns around the casinos was that the latter would be “the only place in town for smoking.” When Horbach tried to elicit from Olson the reason as to why the bill exempted casinos and whether the reason was money, Olson kept evasively repeating the mantra that 99 percent was better than 0 percent—even when Horbach observed that “there isn’t a person sitting here who doesn’t know it’s about the money.”

One more effort by Horbach (who later surmised that Olson preferred not to reveal the real reason for the casino exemption because it would have made the bill look weak) to embarrass Olson into abandoning his omertà on behalf of his casino-beholden colleagues

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499House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). May speculated that Olson’s refusal to admit that he knew why some Democrats wanted the casino exemption resulted from his desire not to box his colleagues in when it came time to vote. Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008).


502Matching casino locations with comments on the American Cancer Society’s vote count card about individual Democratic representatives’ positions on the casino exemption identified five members who both represented districts with casinos and expressed varying degrees of support for the exemption: Bukta (Clinton: “Supports casino exemption (new casino in clinton)”; Cohoon (Burlington: “would support casino exemption”); Frevert (Emmetsburg: “Must have casino exemption”); Huser (Altoona: “SW [statewide] with casino and bar exemption”); and Wendt (Sioux City: “Must have casino exemption”). In addition, Republican Rayhons who represented Worth county including Northwood “[w]ants casino exemption.” [American Cancer Society.] 2008 House Vote Count Card 82nd General Assembly (emailed by Stacy Frelund (Feb. 14, 2008). Wendt received a
prompted “the lady from Johnson,” Mary Mascher, to lose her patience and to shout protectively on behalf of her beleaguered first-term colleague, whose only failing was to enable rather than criticize his attackers’ deceitfulness: “Point of order!  Point of order!  Mr. Speaker, he’s already answered the question—he’s just badgering him.”503  (In real time Mascher explained: “I was trying to make the point that Rep. Olson had already answered the question and Rep. Horbach did not like the answer. Get over it and move on.”  Asked why neither Olson nor she nor any other Democrat had instead challenged the Republicans substantively by pointing out that in reality they did not want any bill and had filed the amendment merely in order to kill the bill and not because they wanted 100 percent coverage, Mascher moved on to the more than $100,000 that the tobacco lobby had given Rants’s 527 PAC and replied: “We let you say that and we make the press do their homework.”)505  After Speaker Murphy had summoned the protagonists Horbach and Olson to the well and decided to permit the former to continue questioning the latter, Olson finally relented to the extent that he offered, following passage of H.F. 2212, to co-sponsor legislation with Horbach the next morning to “fix it.”  Rather than pretending that Olson, who had spoken seriously—after all, no one doubted the truthfulness of his later statements that he would try to repeal the exemption in 2009—was bluffing and calling his bluff, Horbach luxuriated in vacuous rhetoric about honor and principle,506 while perpetuating his and his party’s fraud that they were fighting for an exemptionless statewide smoking ban.

A lawyer-to-lawyer colloquy touching on a matter of potentially great consequence for the bill was initiated with Olson by Minority Whip Kraig Paulsen, who worked for a corporation in Cedar Rapids and had already filed an amendment radically limiting the bill’s coverage to restaurants.507  Paulsen’s question (which the two purported to be trying to discuss without putting the

$250 contribution from the Argosy Casino in Sioux City on Oct. 2, 2008; Huser received $100 from Ameristar in Council Bluffs on July 15, 2008.

503House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

504Emailing during floor debates was apparently common.  Republican Jamie Van Fossen was not even embarrassed to state on the floor that while “doing email” he was “kind of listening to the debate off and on.”  House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

505Email from Marc Linder to Mary Mascher (Feb. 19, 2008, 6:13 p.m.); Mary Mascher to Marc Linder (Feb. 19, 6:20 and 7:40 p.m.).

506House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).  In the event, Democratic leadership, fearful lest debate lead to reduced coverage under SAA, refused to allow any amendments to reach the floor in 2009.  See below ch. 36.

chamber’s non-lawyers to sleep) went to the issue of whether a recent Iowa Supreme Court decision—which a dissenting judge characterized as “completely outside the mainstream of equal-protection jurisprudence”—holding a difference in tax rates between land- and water-based casinos to have violated the state constitution’s equality clause because a mere difference in location did not create a rational basis on which to uphold a discriminatory tax, would apply, for example, as between banning smoking in a restaurant across the street from a casino and exempting the same franchised restaurant inside a casino from the ban. Although Paulsen admitted that he would not have predicted the decision in that case, he raised as a “serious question” whether the Iowa Supreme Court would also strike down the casino exemption in H.F. 2212. Olson—who may have feared that, in combination with Struyk’s still pending amendment to invalidate the entire statute if any individual provision were struck down, SAA might be invalidated—argued that the bill would pass constitutional muster on the rational basis test because the gambling license would distinguish the two restaurants, although he failed to explain what relationship the presence and absence of that license bore to smoking regulation.

Whither Olson balked at going, his fellow representative from Cedar Rapids, Art Staed, did not fear to tread and shed light on pro-casino Democrats’ motivations. Opposed to the exemption himself, the secondary school teacher and administrator freely acknowledged that everyone already knew that “enough”

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508 Racing Association of Central Iowa v. Fitzgerald, 675 NW2d 1, 16 (2004) (Carter, J., dissenting). The U.S. Supreme Court had ruled unanimously that because a “plausible policy reason for the classification” underlay the statute, it did not violate the federal constitutional equal protection clause, and reversed the Iowa Supreme Court’s ruling that it did. Fitzgerald v. Racing Association of Central Iowa, 539 US 103, 110 (2003). See below ch. 36.

509 Racing Association of Central Iowa v. Fitzgerald, 675 NW2d 1 (2004) (reaff’g its decision regarding the Iowa equality clause in Racing Association of Central Iowa v. Fitzgerald, 648 NW2d 555 (2002)).

510 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Apprehensions about how the Iowa Supreme Court might rule may have contributed to the decision later to amend the bill to limit the casino exemption to the gambling floor. Paulsen, who later stated that the RACI decision was so bad that he believed that the Iowa Supreme Court would not apply it to the casino exemption, which would pass constitutional muster, argued that confining the exemption to the gambling floor strengthened the bill’s chances. Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 19, 2008).

House members would not vote for the bill without the exemption; in response to a question from Republican Ralph Watts, he also specified that these members were actuated by their interest in casinos in their districts and their concerns that a ban might injure the casinos economically. Moreover, he believed that the amendment was intended to prompt those representatives to vote against and thus to kill the bill.\textsuperscript{512}

In her closing remarks Boal, whose preference was vindicating owners’ private property rights over public health and who had demonstrated her pro-tobacco stance by voting against the dollar cigarette tax increase in 2007,\textsuperscript{513} uttered the debate’s most risibly fraudulent claim: “I don’t choose progress. I choose perfection.” On a non-record vote of 43 to 51, the first big killer amendment failed.\textsuperscript{514}

After Lukan had withdrawn his amendment banning smoking in motor vehicles in the presence of anyone under 18, Jacobs received unanimous consent to defer temporarily on her amendment to eliminate certain outdoor no-smoking zones,\textsuperscript{515} because, being in the minority, she knew that her proposal would not be adopted since the Democrats had the votes to secure adoption of Olson’s more modest amendment (H-8027) on the same subject, which was then immediately debated. Jacobs regarded this procedural jousting as an example of “pure partisan politics” designed to enable Democrats to “take all the credit” for the bill.\textsuperscript{516} Olson described the purpose of the bill’s “separation distances” as protecting people from having to run gauntlets of smoke while entering and leaving smoke-free public places and preventing smoke from blowing back through doors and windows into such buildings. In addition to making a uniform 10-foot distance out of varying 20- and 50-foot zones, the amendment also accommodated some (unidentified) people’s concerns with “overly burdensome” distances.\textsuperscript{517} Olson did not mention whether authorizing the formation of those gauntlets just 10 feet away from doors to smokefree buildings constituted yet another example of choosing progress over perfection or why failure to acquiesce in this imperfection would have resulted in 0 percent coverage. (In contrast, Jacobs, whose position

\textsuperscript{512}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
\textsuperscript{513}See above ch. 34.
\textsuperscript{514}House Journal 2008, at 1:325 (Feb. 19). Democratic Senator Jack Hatch opined that legislators such as Boal who purportedly voted against H.F. 2212 because it lacked universal coverage were being disingenuous. Telephone interview with Jack Hatch, Des Moines (May 19, 2008).
\textsuperscript{515}House Journal 2008, at 1:325 (Feb. 19).
\textsuperscript{516}Telephone interview with Libby Jacobs, West Des Moines (Aug. 16, 2008).
\textsuperscript{517}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
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was ultimately vindicated when, later in the session, even the 10-foot zone was struck, insisted that there was no downside to its elimination because it would have been unrealistic for people to have imagined that, so long as smoking remained legal in Iowa, they would never again have to walk through smoke.\(^{518}\) The exemption for the Iowa Veterans Home included in the amendment meant that the existing no-smoking rules there would remain in effect.\(^{519}\)

Jacobs, who had filed the rival amendment abolishing these zones altogether because she was concerned that they were confusing and cumbersome to people walking by while smoking who would wind up violating the law unintentionally, began questioning Olson rather sharply about the impact of his 10-foot zones. After eliciting from him that owners of covered entities would not be required to mark off these 10-foot distances, Jacobs asked how people would know where the 10-foot zones began or ended and how they would enforce the provision. Unrealistically but apparently not flippantly, Olson replied that “they could get a measuring tape out and measure it off if they wanted to.” In addition, Olson confirmed for her that where such 10-foot spaces ran into other people’s private property or streets or sidewalks, smoking in the latter areas would not be unlawful.\(^{520}\)

Representative May returned to the fray to dwell on a property owner’s responsibility 24 hours a day for any and all smoking that might take place in his 10-foot outdoor no-smoking areas regardless of whether he saw or knew about or had any control of it. (To be sure, May was so preoccupied with the issue of liability that he never bothered to delve into the crucial issue of the provision’s non-self-enforcibility and the improbability that anyone would file a complaint or be able to identify a smoking violator.) Purporting to be flabbergasted and outraged when Olson confirmed this liability (which brought with it a $100 penalty for a first violation), May, histrionically raising his voice, called it “incredible” and “unbelievable” that owners were being held to the “impossible

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\(^{518}\) Telephone interview with Libby Jacobs, West Des Moines (Aug. 16, 2008). Jacobs added that it was “difficult to legislate to the lowest common denominator” in a statewide law, while admitting that constitutional and codified limitations on home rule would preclude local communities from passing ordinances imposing no-smoking zones even to deal with special local conditions. Although Jacobs focused on much more marginal and quasi-trivial oddities of people driving by in motor vehicles or walking into a no-smoking zone in order to avoid a construction obstruction while smoking, she failed to offer any reason as to why it would not have been possible to craft a provision to deal with the core area of concern—for example, being forced to run gauntlets of smoke on entering or leaving a restaurant the grounds of which extended beyond the no-smoking zone.

\(^{519}\) House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

\(^{520}\) House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
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standard” of being 24-hour-a-day monitors of smoking outside their door: “And you [Olson] think that’s reasonable—that’s scary to me.” Although May, laughing, noted that he personally would be voting for the amendment because it was superior to a 50-foot rule, he strongly felt that “the business community out there ought to be screaming to high heaven when this thing moves tonight.” He later offered another reason for such screaming when, in the course of a choreographed Q & A with Republican Jeff Kaufmann, he stated that since at his resort in northwest Iowa he was unable to see perhaps 75 percent of the places on his grounds, he was plagued by the “scary thought” that he might have to hire someone just to enforce the 10-foot no smoking rule in order to avoid $100 a day fines.521

Sensing no doubt that they had finally latched on to some weak spot, Republicans would not let go of the issue. Representative Lukan—who later remarked that no-smoking was where the market was going anyway and that he agreed with that direction522—viewing the bill from the perspective of his family’s small tire shop, asked Olson to imagine that the shoe were on the other foot: if, lucky and successful enough to own his own law firm one day in downtown Cedar Rapids, he were “in the back workin’ hard on some legal proceedings, doin’ justice for the people,” and some client grew tired of waiting in the lobby and went outside to smoke a cigarette within the 10-foot zone, which Olson wouldn’t be aware of, and another client happened to leave and get “a little bit infuriated about this happening” and called the Linn County Public Health Department, reporting that someone had been smoking five feet in front of Olson’s law firm, the result, at least in Lukan’s fertile imagination, was that: “They’re gonna come and they’re gonna fine you a hundred dollars.” Olson, for the purposes of this aspect of the debate, did not need to risk revealing the existence of an embarrassing hole in his bill’s enforcement scheme by remarking on Lukan’s risibly touching faith in the agency’s instantaneous curbside enforcement service—a nightmare over which in the real post-enactment world no owner would ever have to lose sleep.524

521 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
523 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Although in this particular scenario it might actually have been possible to identify the smoker, in the vast majority of cases the smoker, who would be long gone before even a zealous enforcer could be on the scene, would be a stranger.  
524 See below. H.F. 2212, as Lukan himself admitted after the law had gone into effect, “won’t be a hard-enforced law.” Telephone interview with Steven Lukan, New Vienna (Aug. 17, 2008).
affirmation that “I’m obviously responsible for that and if somebody is violating the statute, then I’m gonna pay the $100 fine.” Lukan’s social-psychologically acute insight, which was, as he recognized, suited not to a big city downtown’s anonymity, but to small-town and Main street Iowa, was that “when you know everybody in town, when you work with everybody in town,” the law would put many people in “awkward positions.”

Lukan did not offer Olson the opportunity to discourse on this important issue, which Olson also did not broach during his closing remarks. Had he done so, he might have pointed out that Lukan’s comment had reflected, but failed to reflect on, the coming great cultural struggle and cultural change, which the Smokefree Air Act would bring about and which, in turn, would ultimately make compliance with the law ‘second nature.’ All Lukan could see was the initial short-term interpersonal unpleasantness associated with having to inform his smoking customers that they had been deprived of their decades-old privilege to expose him and others to secondhand smoke; that his legislative colleagues had chosen him to take on the disagreeable role of initial enforcer of the new public health regime to the possible detriment of his business—though as long as his competitors did not countenance violations, it was improbable that customers would stop having their tires repaired solely because they could not smoke in the shop—and of his commercial relations and personal friendships rankled. (In fact, seven weeks after the law had gone into effect, Lukan observed that he had had to remind only a few customers to put out their cigarettes when they came into his service station, none of whom took their business elsewhere.) But unable to see the present as history, Lukan did not understand that Iowa was caught up in the same process that was sweeping the United States and much of the world at the end of which tobacco smoking and use would perhaps be regarded as a uniquely bizarre and (self-)destructive activity. If Olson and other anti-smoking legislators understood and welcomed this transformation, they presumably decided that expedience dictated legislative progress over political perfection; consequently, explaining to the General Assembly and Iowans that they were embarking on a cultural revolution might have interfered with passage of H.F. 2212. From this perspective, conducting the operation on the basis that the whole matter was, instead, legalistic and not one that might plunge society into a (fruitfully) disruptive conflict and (self-)learning experience must have been taken for granted.

Unsurprisingly, at the end of the debate, the House adopted the floor manager’s own amendment on a voice vote, thus placing out of order Jacobs’
related amendment, as well as Struyk’s 21-and-over and ventilation amendments and Raecker’s amendment eliminating all exemptions except that for private residences.\textsuperscript{527}

The House next took up Horbach’s contentious amendment to exempt all agricultural property, buildings, and equipment from the smoking ban, which went far beyond the bill, at least as floor manager Olson had explained it in his opening remarks, insofar as it exempted corporate farms as well as buildings on non-corporate-owned farms. Explaining that his main amendment (H-8016) dealt only with corporate farms, Horbach introduced an amendment (H-8038) to it that went further,\textsuperscript{528} but then, with seeming naivete, wondered aloud whether he really needed this more expansive amendment, and with unwonted deference asked Olson as an attorney to clarify why the bill’s ban on smoking would not apply to non-corporate farmers. Olson confirmed that “if it’s a personally owned vehicle, the vehicle is not owned by the corporation, smoke away! So the reason I gave that analysis at the beginning was that the prohibition on smoking in a tractor only applies if the tractor is owned by a corporation, if the corporation has employees, and more than one employee uses the tractor.” Under questioning by Horbach, Olson also confirmed that if the farmer was a sole proprietor, had two employees, and both of them were in the tractor cab with him, he could lawfully smoke. Summing up, then, Horbach explained how comprehensive his proposed agricultural exemption would be,\textsuperscript{529} the House promptly adopted his second degree amendment, and debate returned to the main amendment.\textsuperscript{530}

Horbach’s oddly deferential request for clarification from Olson was a trap: in caucus the Republicans determined ahead of time that Olson, who, ironically,

\textsuperscript{527}House Journal 2008, at 1:326 (Feb. 19).

\textsuperscript{528}Before debating H-8016, the House on a voice vote adopted Horbach’s amendment (H-8038) to his own amendment, which struck the exemption in H-8016 for real property and any structures on it and any equipment owned or operated by a “business association” (which did not include a sole proprietorship) engaged in agricultural production. In its place H-8038 substituted “agricultural property” (which meant more than 10 contiguous acres owned, leased, or held by a person as well as any residence or other structure on the land and any equipment used on it) “used by a person when actively engaged in farming” including an employee of such a person. House Journal 2008, at 1:327 (Feb. 19). Although H-8016 was not adopted, later, when the legislature did adopt an exemption for farm tractors and vehicles, the coordinate definition of “farmer” was taken verbatim from H-8038. H.F. 2212, §§ 2(9) and 4(9). Since smoking was not regulated in outdoor areas that were not places of employment (unless otherwise specified and farms were not), smoking was not regulated outdoors on farms.

\textsuperscript{529}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

\textsuperscript{530}House Journal 2008, at 1:327 (Feb. 19).
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had been chosen to floor manage the bill because, unlike Petersen, he would be able to explain its technical details, would misinform the House about the (alleged) corporate underpinnings of the agricultural exemption, which, contrary to Olson's claim, was narrow and not broad. (Republican Mike May, who held Olson in high regard, excused, or at least explained, Olson's underperformance on this matter by reference to the fact that a floor manager simply cannot prepare for all questions.) Nevertheless, Horbach did not even bother to point out Olson’s incorrect answer, which may have been a function of having been caught off-guard about one aspect of the bill rather than intentional disinformation designed to mislead potential opponents about the need for an expansion of the exemption. Whether Horbach refrained from pouncing on the misinformation with a ‘gotcha’ because he cynically regarded floor debate as “just for public show” in a system which enables both parties almost always to know in advance whether a bill would pass or for some other reason, Olson’s deconstruction was entrusted to other Republicans.

After Olson in his remarks urging the House to resist the amendment had repeated his misinformation about the limited application of the smoking ban to corporate farming, Soderberg read him the bill’s linked definitions of “place of employment” (which included “vehicles owned, leased, or provided by the employer”) and “employer” (which embraced numerous legal forms including corporations and sole proprietorships), and asked him to explain how this “pretty inclusive” smoking ban on farms was consistent with Olson’s understanding of the exemption as coinciding with a particular legal form of organization. Olson’s initial response was rooted in such a breathtakingly incompetent reading of the bill that it had to inspire speculation that he had become temporarily or nervously so distracted that he was blinded to its blatant incoherence: “Well, well, if a vehicle is not owned, leased, or rented by the employer, it’s not covered.” How Olson imagined, for example, that a sole proprietor would not own, lease, or rent the tractor, and what possible relevance this claim bore to corporate status remained a mystery. After eliciting from Olson

531 Telephone interview with Lance Horbach, Tama (Aug. 17, 2008).
532 Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008). A Republican House leader, who also held Olson in high regard and demanded anonymity, stated as an overall impression that Olson had not prepared carefully for the debate and vigorously rejected any speculation that Olson might have been intentionally misleading the House. Telephone interview (Aug. 19, 2008).
533 Telephone interview with Lance Horbach, Tama (Aug. 17, 2008).
534 H.F. 2212, § 2 (9) (Feb. 19, 2008).

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that he did not know how farms broke down according to legal form of organization, Soderberg—who had forfeited his opportunity to point up Olson’s utter confusion by confusing the debate by exhibiting his own inability to understand the bill’s straightforwardly interlocked provisions—concluded by making the (unsubstantiated) empirical point that since a “high majority” of farms were now organized as corporations, even by Olson’s understanding the smoking ban would be broad.

Upmeyer’s focus was not the extent of the ban in agriculture, but its point: since most vehicles were driven and occupied by one person at a time, the problem was firsthand smoke not secondhand smoke exposure. When Olson tried to defend the ban even in that situation on the grounds that carcinogens could linger for as long as two weeks and therefore other users of the tractor would be exposed to them, he gifted a “Gotcha!” to Upmeyer—whose husband was a farmer—of which she failed to take maximum propagandistic advantage (“I didn’t think that far ahead”). Although she had not intended to question Olson any further, Upmeyer, seeing something of an opening, wondered how, if they were going to be “legislating to that level of secondhand smoke,” they were going to regulate smoke lingering in people’s clothes. Misunderstanding Upmeyer’s question as if it pertained to secondhand smoke on nonsmokers’ clothing (when in fact she meant smokers’ clothing), Olson dismissed that problem as taken care of by the Smokefree Air Act, which would insure that nonsmokers would largely not be exposed to secondhand smoke. Without picking up on this misunderstanding, Upmeyer nevertheless inadvertently posed an interesting question (which she lacked the presence of mind to ask Olson to answer): should someone who smoked in her car on the way to a restaurant be barred from entering the restaurant (or required to change her clothing) lest other customers be exposed to her off-gassed carcinogens? After all, as she failed to add, if the desorption from freshly smoke-infested clothing might be considerably greater

536 Despite Olson’s efforts, Soderberg was unable to grasp that the specific exemption for “[o]utdoor areas that are places of employment” narrowed the coverage of “places of employment.” H.F. 2212, §§ 4(6) and 2 (9) (Feb. 19, 2008).
537 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Murphy).
538 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
539 Telephone interview with Linda Upmeyer, Garner (Aug. 18, 2008).
540 On the relatively recently discovered phenomenon of thirdhand smoke exposure, see above ch. 33.
541 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
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than that from the week-old smoke adsorbed onto the interior of a tractor cab,\textsuperscript{542} why was a smoking ban in the tractor necessary when the Smokefree Air Act did not ban smoky clothing from public places, and presumably even Olson would have agreed, had Upmeyer asked him, that such a step would be too extreme?

The coherence of the discussion of farm coverage advanced somewhat as a result of the lesson in remedial bill interpretation that Minority Whip Paulsen—who experienced the whole floor discussion as “a fun debate” even though, like others, it was primarily “for public consumption”\textsuperscript{543}—administered to Olson, his fellow Cedar Rapidian and classmate (2003) at the University of Iowa Law School. At the outset advising the floor manager that “we’re corporationin’ it up here,” which he was not sure was the relevant point, Paulsen once again led Olson through the interlocking definitions and stressed that the definition of “employer” encompassed a multitude of legal forms of organization, including sole proprietorships.\textsuperscript{544} As he was soliciting Olson’s assent to what by this time must have appeared to Olson as an endgame, the floor manager irrelevantly identified the exemption for “vehicles owned, leased, or provided by a private employer that are for the sole use of the driver and are not used by more than one person in the course of employment either as a driver or passenger”\textsuperscript{545} as the basis for part of his interpretation of coverage. Following this distraction, Paulsen then drove home the point that the comprehensive definition of legal forms of organizations of employers meant that “to limit our discussion to just corporations is not correct. In fact, what we’re talking about is any business structure,” including an unregistered sole proprietorship that had a vehicle that more than one person operated. This simple, straightforward, and accurate presentation of the law, which unanswerably refuted the patently false claims that Olson had been submitting to the House about the limited nature of farm coverage, compelled Olson’s agreement, but not without a face-saving (but just as patently false) claim that he had been offering the same analysis as Paulsen all along: “Yeah, when I am using the word, you know, ‘incorporate’ we’re talking business structure, that’s right, I mean some kind of legal structure to the business.” Even this limited concession did not satisfy Paulsen, who insisted that even if there were no legal structure such as that symbolized by registration with


\textsuperscript{543}Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 19, 2008).

\textsuperscript{544}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

\textsuperscript{545}H.F. 2212, § 4(7) (Feb. 19, 2008).
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the secretary of state or partnership agreement, the smoking ban would also cover “just whoever [is] out farming” with a vehicle that more than one employee used. Although this extraordinarily capacious coverage was inconsistent with Olson’s repeated statements to the chamber, he immediately replied, “That’s right,” without in any way indicating that the proposition to which he had just assented was radically at odds with his previous position. In turn, Paulsen declared that all or at least the overwhelming majority of farms in Iowa would be covered: “This is far more encompassing than just those farms that are organized under some sort of corporate structure.” And, once again, Olson agreed—so long as the farmers had employees. To make sure that the whole chamber and press understood just how discontinuous the new public health regime would be with midwestern farming traditions, Assistant Minority Leader Jeffrey Kaufmann, who taught history and government at a community college, made Olson confirm that a family farmer would not be able to smoke lawfully in his own tractor in the middle of his 160-acre farm if he had a “hired hand” who also used the tractor. Ironically, Kaufmann, who had apparently not been listening carefully as Paulsen took Olson to the woodshed, compounded the confusion and (verbally) diminished the extent of the state’s regulation by adding as a further condition that the farm be incorporated—to which proviso, astonishingly, the unrepentant or incorrigible Olson assented. No wonder that a confused Des Moines Register reporter stated the next day that the “vast majority of farms would not be affected by the ban unless the farm is a corporation.”

Not until Democrat Mark Kuhn, who for 34 years had been operating and managing his family’s 770-acre grain farm, addressed the House did information seep out relevant to health conditions inside farm tractor cabs. He still remembered how thrilled he had been the first time he got into a cab that was air conditioned and kept the dust out. In that same spirit he did not want someone who had driven the tractor the previous day to leave secondhand smoke for him to breathe all day long. Pointing out that farmers sat in enclosed cabs eight to 12

546House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
548House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Murphy).
or 16 hours a day and were protected by carbon filters that filtered out contaminants (including the fungicides and herbicides that they sprayed), Kuhn stressed that they did not want this exemption because “we’re concerned about our health.”

All of this firsthand practical experience was lost on Republican David Heaton, a restaurant-bar owner who in previous sessions purported to be a devoted public health-oriented tobacco controller. In fact, however, as he disclosed shortly after the end of the session, he was perfectly satisfied with the existing law, which needed no change because it was working perfectly alright. Unsurprisingly, he now saw but one issue, which, in a pathos-infused crescendo, he identified as whether the legislature had the “right” to tell a person whether he chooses to smoke a cigarette on his own property, in his own machine. Forgetting, if he ever knew, that his own party whip had just explained that the ban was not limited to incorporated farms, but that it did not apply at all to a farmer who farmed all alone as a rugged individualist, Heaton insisted that “[w]e are trying to preserve the rights of these individual owners, on their incorporated farmland,...to smoke if they choose to smoke. That’s their decision. I don’t think we have any business telling them what they should do...on their own property....” Sputtering in disbelief, he criticized Democrats for failing to make their bill “more fairer.” Losing her patience with Heaton’s property rights absolutism, Mascher asked him whether he complied with OSHA rules in his restaurant. Eliciting a fuzzy answer—he did not “pack the OSHA bible and read it page by page,” but he had never received a complaint from OSHA—Mascher explained that she had asked because Heaton kept asserting that people ought to be able to do what they wanted in their own businesses, but in fact all kinds of laws protected people from various harms in his restaurant and elsewhere and now secondhand smoke was merely being added to the list of such harms from which the legislature would protect them.

This perspective failed to inform Horbach’s closing remarks. After correctly pointing to the quasi-universality of coverage—“[n]ame a farm that has a family

551 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fihr). The exposure Kuhn was warning about was in fact to thirdhand tobacco smoke.
552 See above chs. 31 and 34.
553 Telephone interview with David Heaton, Mt. Pleasant (May 10, 2008).
554 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fihr). Later, Heaton expanded his freedom-to-smoke claim beyond the smoker’s property to include restaurant owners and smokers in general. While denying that he was opposed to health regulations for restaurants, he refused to “debate” the bill on the telephone. Telephone interview with David Heaton, Mt. Pleasant (May 10, 2008).
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that it won’t apply to. You can’t”—he quickly returned to his party’s favored theme of “invasion of property rights,” but then segued into the coming cultural struggle. “[Y]ou’ve got to be kidding me” were the first words out of everyone’s mouth when he mentioned the smoking ban in tractors and combines. That the legislature was taking away a farmer’s right to smoke (in a cab of a vehicle that an employee also drove) defied both “common sense” and what American stood for: “On the farm. Out in the country. It’s what we are.”

These stirring sentiments ushered in the vote on Horbach’s amendment, which would have created an exemption far transcending tractors. After Horbach and Paulsen had requested a record vote, H-8016 lost on a 50 to 50 tie vote with only one Republican (Tomenga) joining 49 Democrats to vote Nay, while four Democrats (Bailey, Huser, Mertz, and Todd Taylor) supported the amendment together with 46 Republicans. The reason for the failure of the amendment—which Paulsen characterized as one of only two about the vote on which there was “a little bit of drama”—was, according to Horbach, that the Democratic leadership had “controlled” the vote: it permitted four members to “slide over,” but as soon as the total reached 50, it stopped the cross-overs to insure that it could get a “clean bill.”

After Lukan had temporarily deferred on his amendment to exempt private offices, the House took up Struyk’s other highly controversial amendment, H-8024—the only other one that Paulsen regarded as having created “a little bit of drama” regarding its passage—to exempt restaurants and bars that admitted only people 18 and older, an exemption that Struyk characterized as similar to that for casinos. Olson tore into the proposal as taking a step back not only from H.F. 2212, but even from the existing law, which at least required restaurant owners to set aside some area for nonsmokers, whereas under this amendment restaurants could be all-smoking. In addition to focusing on the consequences for the 115,000 hospitality industry workers, Olson pointed out that families with children who ate breakfast in such establishments the next morning would be exposed to the lingering secondhand smoke. Republican Dolecheck, who did not

555House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
557Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 19, 2008).
558Telephone interview with Lance Horbach, Tama (Aug. 17, 2008).
560Since under the then existing law the so-called nonsmoking sections could be as small as one table and be fully exposed to all the smoke in the restaurant, Struyk’s proposal might, in some cases, not have constituted much of a step back.

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like going into smoky bars, pleaded on behalf of businessmen-constituents, especially restaurant-bars in small rural towns with only one restaurant in which at some point in the evening the owner stopped serving meals anyway because his customers just wanted to drink beer. Dolecheck gullibly conveyed the assurance of one of these owners that his excellent filtration system would purify the air overnight so that by the next morning there would be no secondhand smoke in the air—“only a little bit of odor...in the fabric—you can’t get rid of that.”

In fact, as one of the leading researchers of indoor air pollutant dynamics and human exposure observed: “The smell itself likely consists of many toxic chemicals present in tobacco smoke residue. Also, there are likely to be other toxic chemicals that you can’t smell that are also present on the surfaces where smoking has occurred, and which are re-emitted into the air over time.”

Moreover, a study conducted at 21 different locations in Iowa from November 2007 to January 2008 found that the levels of particulate matter—smaller than 2.5 microns in diameter—air pollution in bars, restaurants, and casinos that permitted smoking were 17 times higher than in non-smoking bars and restaurants. Full-time year-round employees breathing such smoke-polluted air in their workplaces would, on an annual basis, have experienced an exposure 2.4 times the particulate air pollution standard limit set by the Environmental Protection Agency to protect the public health.

After Davenport Democrat Elesha Gayman had made a personal plea for rejection of the amendment on behalf of her pregnant “little sister” whose employment in a bar exposed her and her child to secondhand smoke, aisle-crossing Democrat McKinley Bailey made common cause on behalf of smoking with Dolecheck. Working off what had all the markers of a jointly rehearsed script, Bailey dutifully submitted his leading questions to his Republican collaborator, whose eagerness to perform was signaled by his response—unique during the entire debate on H.F. 2212—to the Speaker’s pro forma query as to

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561 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Again, both Olson and Dolecheck were in fact referring to thirdhand tobacco smoke exposure.

562 Email from Neil Klepeis to Marc Linder (Aug. 19, 2008).

563 Mark Travers, “Iowa Air Monitoring Study: December 2007 to January 2008” tab. 1 at 7 (Roswell Park Cancer Institute, Feb. 2008) (copy furnished by Mark Travers). Because the three casinos were on average 16 times larger and therefore had less than one-half of the active smoker density despite having 11 times more cigarettes burning at any given time than the 14 smoking-permitted bars and restaurants, they were only five times more polluted than the non-smoking venues (averages calculated based on date in id.).

whether he would yield to the Democrat’s questions: “I would love to.” In reply to Bailey’s question as to whether he had ever talked about the amendment to a tobacco lobbyist, who might have been the “inspiration” behind it, Dolecheck confided that: “Quite frankly, I don’t talk to tobacco lobbyists too much. I am not a smoker and I don’t really approve of it.” Inspired to make a clean breast of his own untainted motives, Bailey confessed that “I don’t talk to tobacco lobbyists either.” After Dolecheck and Bailey—the only Democrat to “voice objections to the bill” during the debate—had assured each other that their concern was to eliminate the competitive disadvantage that the bill imposed on “the little guy” owning a small bar in a small town vis-a-vis casinos, Bailey risibly claimed in a throwaway line suggesting a vague recollection that he was, after all, amending the Smokefree Air Act, that “it also does some good things as far as public health is concerned: it would mean that smoke would be out of the air, no child in the state would have to breathe in secondhand smoke in a public place.”

Democrat Mark Smith forthrightly opposed the amendment because “people do not like the secondhand smoke” and therefore fought to keep smoking bans once they are in place—without explaining why he had neglected the interests of non-smoking residents and employees of the Iowa Veterans Home in the so-called Mark Smith amendment to exempt the Home. Debate continued with May accusing Democrats of disingenuously lecturing the chamber about the dangers of secondhand smoke while enabling it in casinos, prompting Wise to shoot back that the 18-and-over amendment would create a Mack truck-size loophole. In his closing remarks Struyk—who, though a lawyer, a little later in the debate, self-deprecatingly called himself “just a lawn man” (because he owned Struyk Turf, LLC)—tried to refute Wise’s factual statement by cynically and nonsensically blaming the bill drafter for having repealed the current law, including its mandatory provision for non-smoking areas, which would otherwise have required such areas in casinos.

The 49 to 51 record vote (requested by Struyk and Rants) once again revealed

565 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
566 O. Kay Henderson, “Iowa House Votes to Ban Smoking in Most Public Places,” Radio Iowa (Feb. 19, 2008) on http://www.radioiowa.com (visited May 12, 2008). Henderson incorrectly stated that “Republicans were the only ones to voice objections to the bill.”
567 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
568 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
570 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
how tenuous support for a robust law was: with seven Democrats (Bailey, Huser, Lykam, Mertz, Quirk, Schueller, and Zirkelbach) defecting to the pro-smoking position, the House failed to carve out this huge hole in the bill’s protective scheme only because of the Nays cast by five Republicans (Baudler, Clute, Jacobs, Raecker, and Tomenga) who to varying degrees on various issues had supported the bill. 571  May, who would eventually vote for the bill on final passage on three occasions, nevertheless supported the 18-and-over amendment on the grounds that it compensated for the casino exemption. 572

Democrats’ heterogeneity and internal dissension were exemplified by Dolores Mertz and Geri Huser. A representative from a rural district in northcentral Iowa since 1988 and the first woman to chair the House Agriculture Committee, 573  Mertz at 80 was the oldest member of the legislature and took a jaundiced view of the presence of “a lot of do-gooders” in the body. Her allegedly anti-paternalistic opposition to a smoking ban as an “infringement on rights” was prefigured by her opposition to a 1993 bill mandating the wearing of

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571 *House Journal 2008*, at 329-30 (Feb. 19). All of these Republicans except Raecker voted for H.F. 2212 on final passage; all of these Democrats except Bailey and Zirkelbach voted against H.F. 2212. Tom Schueller had worked at John Deere & Co. for 30 years and was a UAW member.  http://iowahouse.org/2008/04/24/member-profile-rep-tom-schueller/#more-354 (visited Aug. 21, 2008). Ray Zirkelbach, a state prison correctional counselor, had missed the 2006 and 2007 sessions while a soldier in Iraq.  http://iowahouse.org/2008/04/24/member-profile-rep-ray-zirkelbach/#more-383 (visited Aug. 21, 2008). He also smoked. Telephone interview with Rep. Mark Smith (Marshalltown (Aug. 21, 2008). According to one of the Democrats voting Aye, the amendment did initially receive 51 votes, but Majority Leader McCarthy kept the voting machine open and persuaded two Democrats (whom the representative refused to identify) to change their votes to Nay. Telephone interview with House member who demanded anonymity (Aug. 27, 2008). Mertz, who indicated that situations in which the majority leader keeps the voting machine open in an effort to persuade members to change their votes were not rare under Democrats or Republicans, was unable to recall this particular event sharply, but believed that it happened. Telephone interview with Dolores Mertz, Ottosen (Sept. 3, 2008). Ironically, in contrast, McCarthy’s administrative assistant, Brian Meyer, in (mistakenly) recalling the 50 to 50 vote on McKinley’s 18-and-over amendment, remembered looking up at the board and thinking that it would pass (“someone must have changed their vote”). He emphasized how unusual it was that leadership had not known which amendments would pass or even whether the bill itself would. Telephone interview with Brian Meyer, Des Moines (Sept. 18, 2008).

572 Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008).

helmets by motorcyclists.\textsuperscript{574} Offended by the treatment of smokers as “second-class citizens” and willing at the very most to concede that any smoking restrictions should have started out much more slowly, Mertz displayed the kind of anti-scientific ignorance that in many instances underpins hostility to tobacco control initiatives when she implausibly asserted that her internist at the Mayo Clinic had told her that he would not urge such measures because radon caused more lung cancer than cigarettes or chemicals.\textsuperscript{575}

Huser, who characterized herself as a conservative Democrat who believed that government control should not be extensive, was content to let the market determine smoking policies, which then in 10 or 15 years, she contended, would have evolved into that underlying H.F. 2212.\textsuperscript{576} Huser, who with Mertz and Pettengill (who then became a Republican) had been one of only three Democrats to vote against the $1 cigarette tax increase in 2007,\textsuperscript{577} had received $1,000 in campaign contributions in 2006 from Altria Group, Inc. a/k/a Philip Morris, more than any other individual Iowa state legislator.\textsuperscript{578} She had also attained prominence in 2007 for her aggressive representation of her constituent, Prairie Meadows race track and casino—which her father and law partner Ed Skinner had helped found\textsuperscript{579} and of whose grant advisory committee he was a member—\textsuperscript{580} in exempting casinos (and age-restricted bars) from and thus killing the bill repealing preemption of local control.\textsuperscript{581} Her consistent votes against H.F. 2212, even though casinos had been exempted before the bill reached the House floor, resulted from the break-up of the casino-bar “coalition”: after the casinos

\begin{itemize}
\item \textsuperscript{574} For Mertz’s Nay on the crucial vote on the amendment that would have made helmets mandatory, see \textit{House Journal 1993}, at 2:1676 (Apr. 26, 1993). To be sure, Iowa remains one of only two or three states without a mandatory helmet law. Marian Jones and Ronald Bayer, “Paternalism and Its Discontents: Motorcycle Helmet Laws, Libertarian Values, and Public Health,” \textit{AJPH} 97(2):208-17 (Feb. 2006).
\item \textsuperscript{575} Telephone interview with Dolores Mertz, Ottosen (Aug. 24, 2008). In fact, according to the National Cancer Institute, radon “represents a far smaller risk” for lung cancer than cigarette smoking. http://www.cancer.gov/cancerTopics/factsheet/Risk/radon (visited May 24, 2009).
\item \textsuperscript{576} Telephone interview with Geri Huser, Altoona (Aug. 27, 2008).
\item \textsuperscript{577} See above ch. 34.
\item \textsuperscript{578} http://www.iowa.gov/ethics/viewreports/vsr_contributions/2006vsr_contributions.pdf. Huser received two contributions of $250 and $750; no other legislator received more than $750.
\item \textsuperscript{580} http://www.ankenyawatch.com/press.htm (visited Oct. 2, 2008)
\item \textsuperscript{581} See above ch. 34.
\end{itemize}
had made a deal with the Democratic leadership to secure their own exemption, they dropped out, leaving bars and Huser to fend for themselves.\textsuperscript{582}

The House then took up another of Struyk’s bill-killers—the amendment that provided that if any provision (or the application of the law to any person) were held invalid, the law in its entirety would be invalidated.\textsuperscript{583} Struyk especially commended his proposal to supporters of the casino exemption because, without H-8035, if the casino exemption were struck down, the result would be coverage of casinos under the ban; with his amendment, the law itself would be invalidated and casinos would remain subject to the existing (toothless) law. Olson warned the chamber that such non-severability clauses could be—and in other states had been—used to “take down” public health statutes like the Smokefree Air Act.\textsuperscript{584}

On a non-recorder roll call a somewhat larger majority apparently recognized the mortal threat that this measure posed to the bill and rejected it by a vote of 43 to 53.\textsuperscript{585}

After Lukan had withdrawn his assessment reduction amendment,\textsuperscript{586} attention turned to Paulsen’s amendment to strike the entire bill and, instead, merely to ban smoking in all restaurants under the then existing law. In his opening remarks on H-8025 Paulsen (a former smoker)\textsuperscript{587} justified his amendment on the grounds that a majority of his constituents had told him that they wanted to be able to go to a restaurant without having to inhale secondhand smoke—a modest demand that coincided with Minority Leader Rants’s view of what Iowans wanted.\textsuperscript{588} Paulsen also intuited that Iowans cared about being able to enter malls and businesses without being forced to run through gauntlets of smoke, but his amendment did not retain the bill’s provision creating a no-smoking zone at entrances. Nevertheless, personally Paulsen would not have supported even such minimalist

\textsuperscript{582} Telephone interview with Geri Huser, Altoona (Aug. 27, 2008).
\textsuperscript{583} Struyk’s amendment was devised to overcome Iowa Code § 4.12 (2008), which provides: “If any provision of an Act or statute or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the Act or statute which can be given effect without the invalid provision or application, and to this end the provisions of the Act or statute are severable.”
\textsuperscript{584} House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
\textsuperscript{585} House Journal 2008, at 330 (Feb. 19).
\textsuperscript{588} House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
\textsuperscript{589} See above this ch.
intervention as his amendment embodied because, as he later stressed, “I’m a free market, property rights guy,” whose opposition to the bill had nothing to do with fears (that he did not share) that bars would be financially ruined by the ban, but was based wholly on property rights. Indeed, if he had had his “druthers,” he would not even have called up H.F. 2212\textsuperscript{590}—precisely the kind of pro-tobacco action taken by his party leadership when it controlled the legislature.

Olson devoted but a very brief and perfunctory effort to opposing the restaurants-only ban, pointing out its obviously massive regress vis-a-vis H.F. 2212. After no other member had expressed a desire to speak on H-8025, unsurprisingly only one-third of the House favored this retrograde, last-ditch effort to stave off a thoroughgoing statewide ban: even on a non-record roll call only 33 representatives were willing to vote for Paulsen’s proposal, while 56 rejected it.\textsuperscript{591}

No debate took place on Upmeyer’s amendment (H-8033) to strike the entire bill and, instead, to confer an annual $1,000 tax credit on any establishment that voluntarily became smokefree because Tyler Olson successfully secured a ruling that it was not germane.\textsuperscript{592} However, before the speaker made that ruling, Upmeyer in her opening remarks praised her own approach as finally giving the House the chance to “remove the hypocrisy and do something straightforward and honest.” She justified the measure as helping to offset the alleged initial small loss of revenue associated with bars and restaurants’ going smoke-free. Upmeyer’s claim that she had filed the amendment at the request of students from Just Eliminate Lies whom she counter-agitated about property rights when they lobbied her to vote for H.F. 2212\textsuperscript{593} seems at best difficult to reconcile with the public personas of these hard-line anti-corporate, anti-tobacco, teenage statists.\textsuperscript{594} Similarly implausible was her insistence that they were astonished to hear that bar and restaurant owners could ban smoking voluntarily, agreed to go home and lobby them to do so, and then asked Upmeyer, for whom the smoking issue

\textsuperscript{590}Telephone interview with Kraig Paulsen, driving on I-80 between Cedar Rapids and Des Moines (Aug. 19, 2008). In the wake of the Republicans’ loss of additional House seats at the November 2008 election, the caucus voted to oust Rants as minority leader and replace him with Paulsen.

\textsuperscript{591}House Journal 2008, at 331 (Feb. 19).

\textsuperscript{592}House Journal 2008, at 333 (Feb. 19).

\textsuperscript{593}House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Upmeyer’s explanation was inconsistent with the language of her amendment in two important respects. First, the amendment did not limit the tax credit to bars and restaurants; and second, the tax credit amounted to $1,000 per year, thus extending far beyond the transition period. H-8033, §§ 1 & 2.

\textsuperscript{594}http://www.jeliowa.org

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Lukan’s amendment (H-8020) to exempt bingo facilities pursued the vital social goal of insuring that casinos were not the only places in which people could gamble and smoke at the same time. Since bingo games could take place in all manner of buildings, Olson pointed out that the exemption would destroy their smoke-free status. Raecker’s opposition to yet another exemption prompted one of the evening’s lighter moments when he urged Lukan to tell the people who originated the amendment that if they refrained from smoking they would have both hands available for the game and could play multiple cards. The quick and clear voice vote against the amendment made as short shrift of H-8020 as the debate—even without any reference to a study finding that there was no association between smoke-free ordinances and bingo profits in Massachusetts, a conclusion that should have undermined the efforts of cigarette manufacturers to use that segment of the gambling industry as a stalking horse to avoid having to rely on their own nonexistent credibility to oppose smoking bans by shifting the issue to the allegedly linked financial declines suffered by such businesses.

More than three hours into the debate the House reached the last amendment, Lukan’s proposal to exempt private offices. Posing as the paladin of “literally hundreds of thousands of small business owners across the state of Iowa who feel like they’ve been kicked around by state government quite often,” Lukan pitched his initiative as being all about what it meant to own private property—namely, having some place “within your private business” that was off limits to government control and where you ought to be able to “do what you’d like” regardless of the health consequences for you and your employees. Going beyond his by now tiresomely repetitive general plea not to weaken the bill’s public health benefits, Olson in his reply stressed that secondhand smoke was recirculated through ventilation systems, which did not make the air safe to breathe. In his closing remarks Lukan, again took up the cudgels for smoking

595 Telephone interview with Linda Upmeyer, Garner (Aug. 18, 2008). Upmeyer, who did not know whether the JEL students did actually speak to the owners, did not purport to have changed the students’ minds.


598 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

small businessmen, literally screaming at the top of his lungs on behalf of a (presumably lung-impaired) body shop owner with two employees who “has paid taxes for 40 years to the state of Iowa, always on time, never late, not once” and whose “legal right” to smoke the legislature was taking away.600

On the record roll call H-8019 was defeated by a vote of 47 to 53, which exactly coincided with the parties’ numerical strength, but hid the fact that six Republicans and six Democrats crossed over, virtually all of whom had been seen on the other side of the aisle on previous ballots.601

Thus, except for the floor manager’s, all amendments were defeated. That all of the minority party’s amendments lost was hardly surprising; on the contrary, the majority party’s control of a legislative body is defined as much by its capacity to defeat the other party’s obstructive amendments as to pass its own bills. As a corollary to the operating principle that leadership does not permit a bill to be debated if it is not certain that the measure will pass, normally leaders would also not permit a bill to be debated if they were unsure whether the minority’s amendments that would seriously weaken it would lose. In the case of H.F. 2212, however, as Representative Mascher observed the next day, “we had people switching votes all over the place. Leadership normally does not allow a bill to be defeated unless they know exactly what people are going to do. It seemed the longer this bill was out there the more skitish people became about supporting it. We definitely knew Olson’s amendment would pass but we were unsure about two or three of the [R]epublican amendments. Those amendments could have killed the bill and they would not have failed if it weren’t for some brave [R]epublicans.”602

When debate on the bill itself finally resumed, the speech with which one of those Republicans, Walt Tomenga, his party’s most steadfast apostate on H.F. 2212, opened the discussion was also one of the most remarkable because he emphasized that this “imperfect” bill’s most important achievement would be a reduction in smoking and prevention of young people from starting to smoke in Iowa. Of the two predominant reasons for quitting and/or not starting, one, price, had been dealt with by the cigarette tax increase in 2007; the other, availability

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600House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
601House Journal 2008, at 334 (Feb. 19). The Democrats were Bailey, Huser, Mertz, Qurik, Schueller, and Zirkelbach; the Republicans were Baudler, Drake, Jacobs, Linda Miller, Raecker, and Tomenga (of whom only Jack Drake was a newcomer to apostasy). Oddly, Lykam, who stated later that he opposed prohibiting owners from smoking in their own offices, voted against the amendment. Telephone interview with Jim Lykam, Davenport (Aug. 24, 2008).
602Email from Mary Mascher to Marc Linder (Feb. 20, 2008).
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(of places to smoke), was being addressed by the statewide ban. Next, Tomenga pointed out that the reduction in smoking would have positive financial and productivity effects by reducing illness and absenteeism. Only in third and last place did Tomenga mention that the bill would improve the quality of life by reducing the effects of secondhand smoke. He thus gave voice to the understanding that the bill’s ultimate rationale was to promote the decline in smoking prevalence: locational smoking prohibitions, restricted opportunities to smoke, and overall reduced smoking all went hand in hand with reduced exposure of nonsmokers. The underlying public health strategy that Tomenga objectively ascribed to the initiative was straightforward: the most efficacious way to reduce secondhand smoke was to reduce smoking.

Party-line Republicans who had no interest in banning smoking resumed their pretense-laden attacks on the bill for its casino exemption. Northwest Iowa farmer Gary Worthan, after asking whether and being told by Olson that the shop where he had his farm trucks repaired would be covered, illogically concluded that this coverage would be “just another hole...in this bill.” Had the bill come to the floor with no exemptions, Worthan claimed, he would have been “hard pressed” to decide based on the (conflicting considerations of) health benefits, what his constituents wanted, and individual businessmen’s rights to run their businesses. But above all the casino exemption was the great spoiler, which he proceeded to explicate by reference to one of his wife’s clients who had been lobbying him for a casino smoking ban since before he entered the legislature (in 2007). This “gentleman” spent all his time in casinos: he drove 130 miles one way to work as a dealer at a casino in Council Bluffs, and then whenever he got three or four days off, he and his wife flew to Las Vegas to gamble there. At first Worthan assured his colleagues that this man was not addicted to gambling, but then expressed some doubt on that point. In any event, the bill as it was did him no good and therefore offered Worthan no reason to vote for it. Having thus revealed the micro-basis of his formulation of public policy, Worthan dredged up again his party’s rhetorical commitment to pure, consistent, all-or-nothing legislation. In contrast, he derided Democrats’ “chest pounding and self-congratulation about all the health benefits” for Iowans while they singled out one group (of full-time addicted gamblers) as unworthy of those benefits. Worthan, whose party had refused even to let an exemptionless bill be debated when they controlled the legislature, would have nothing to do with a bill just shy of universal coverage because Democrats had surrendered “the moral high ground” to casinos in 2008 as they already had in 2007 when they increased the cigarette tax in 2007 instead of enacting a 100-percent ban on cigarettes—“the

603House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
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one moral high ground” if they were really that bad for people, who were unable
to decide for themselves (not to smoke).604

Opportunely, Democrat Mark Smith, who saw H.F. 2212 as “one of the most
profound public measures” in the state’s history, intervened to lambaste
Republicans’ hypocritical anti-hypocrisy laments, pointing out, for example, that
many who opposed the casino exemption nevertheless voted to exempt farmers.605

The next Democrat to address the chamber, Wayne Ford of Des Moines, only the
tenth African-American ever elected to the Iowa legislature,606 gave, by a wide
margin, the most rabble-rousing speech members heard that evening. Recalling,
in colorful language, how he had started smoking at age 17 and continued for 30
years in the quest to be a “cool black man,” the 57-year-old Ford related that
people with his smoking profile took 15 years off their lives. He was also unique
in slamming the cigarette corporations for having lied about their products’
lethality. And as for those who had the “nerve” to be worried about the casino
exemption, he suggested that they start getting “real, very real”: the mortality
caused by smoking “wasn’t about no casinos, y’all.” All fired up, he proposed
that the House deal with the issue by adding an amendment that very night
prohibiting gambling in Iowa. Ford was one of very few legislators who openly
broke with the disingenuous pseudo-libertarian implication (and at times
declaration) that protecting smokers from exposure to secondhand smoke was not
designed to interfere with smokers’ right to smoke: on the contrary, he saw the
battle against first- and secondhand smoking as inseparably interconnected.607

After Republican Soderberg had ludicrously charged that if “you’ve got a
building, you almost need 24-hour surveillance to make sure that someone does
not jeopardize the business” (presumably by smoking within 10 feet of it in the
middle of the night and then being reported or even turning himself in to the
police in order to cause the business a $100 penalty at the expense of a $50
penalty to himself), Representative Wise, who had ‘run’ the casino amendment
in committee and now admitted that the exemptions were “perhaps too broadly
drawn,” dramatically proclaimed the bill to be a “historic piece of legislation”
that would become this General Assembly’s “legacy.” Because, in addition to
being a pro-public health bill, it was also pro-business, pro-quality of life, and
pro-life, anyone who opposed it—and the only lobbyists declaring against it were
R. J. Reynolds and businesses selling cigarettes—would have to put up strawmen

604 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
605 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
606 http://iowahouse.org/2008/02/27/member-profile-rep-wayne-ford/#more-292
(visited Aug. 24, 2008).
607 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
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Paulsen—Olson’s soft-spoken lawyerly nemesis who viewed the bill as not being about smoking and health, but “property rights and fairness,” although in fact it was a “bullying or harassment bill” vis-a-vis small businesses—exceeded the 10-minute limit on remarks trying to extract from the floor manager, whom he regarded as a “true believer” in the anti-smoking campaign, the admission that the wording of the casino exemption (“Any property, including hotel and motel rooms, owned or operated by an entity licensed under chapter 99D or 99F”) literally likewise conferred an exemption on any property owned or operated by the entity licensed to operate a casino, even if it were the entity’s business office far away from the casino or an Applebee’s restaurant for which it had a franchise in another city. Olson’s purported ignorance of the casino licensing code provisions and his reluctance to discuss what appeared to be a far-fetched hypothetical situation combined to draw out the interrogation, though at least once Olson did concede that in theory the exemption might be that broad—a concession that might have prompted some of the bill’s supporters to defect over what would have emerged as an irrationally and embarrassingly expansive exemption. To be sure, Olson added that such an extended exemption was not the provision’s intent, but he did not voice any need to rectify this unintended consequence, in part, perhaps, because he stated that he was unable to understand what problem Paulsen was trying to solve. Ironically, Paulsen’s own professed ignorance of several key legal issues contributed to his failure to lead Olson socratically to an unambiguous confirmation of the answer his interrogator was seeking.

In the first of two potentially important colloquies fleshing out the scope of the coverage of the smoking ban on the “grounds of any public

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609 Telephone interview with Kraig Paulsen, driving on I-80 between Cedar Rapids and Des Moines (Aug. 19, 2008).

610 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr) (floor remarks made during his last speech of the debate).

611 H.F. 2212, § 9 (Feb. 19, 2008).

612 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr). Because the exemption was ultimately confined to the gaming floor, this issue did not have to be resolved.
buildings”—which would become one of the most contested terms for definition when, following enactment, the Iowa Department of Public Health drafted the implementing rules—Raecker asked Olson whether smoking would be prohibited on the entire grounds of public golf courses because public buildings were located on them. Olson began by stating that “the issue is whether it’s defined as a public place of assembly.” Although it was true that the subsubsection of the subsection on “outdoor areas” did (at that time) ban smoking on/in “[t]he grounds of any public buildings and places of public assembly owned, leased, or operated by or under the control of the state government or its political subdivisions, including the grounds of a private residence of any state employee any portion of which is open to the public,” clearly the “grounds of...public buildings” and “places of public assembly” were two different subcategories (which might overlap in some instances). Why Olson instinctively gravitated to the latter as the controlling issue would not become clearer until the second colloquy (with Rep. Jodi Tymeson), but at this point he was confused and confusing—so much so that while Raecker was apparently aware of Olson’s confusion and content, perhaps for tactical reasons, to let them talk past each other, Olson may not have grasped the existence of the gap between them. Olson tried to work his way back from more solidly grounded words by confirming at the outset that such buildings as the pro shop would be covered, but when Raecker pressed him about the golf course itself, his argument turned brittle: “And then the interpretation becomes, moves, I believe, to the definition of, well, when it speaks of outdoor areas and areas of public assembly, I don’t believe a golf course falls under an area of public assembly.” Olson lost touch with the provision he was supposed to be authoritatively interpreting for the House by dropping “grounds of any public buildings” from the text altogether—presumably because, as would be revealed 20 minutes later, he was so fixated on Soderberg’s (and Republicans’) original purpose of covering the governor’s mansion, that he was unable to see his way to attaching any other meaning to “public buildings” than public employees’ private residences open to the public. Though he plumped for “places of public assembly” as deciding the question at hand, it was a non sequitur in the sense that neither the syntax nor the meaning of the provision linked public assembly places to buildings; consequently, he should have either proceeded from the public building to the grounds or skipped over the building altogether and dwelt exclusively on public assembly places. That he conflated the two subcategories but nevertheless failed to elucidate what a place

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613 See below ch. 36.
614 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
615 H.F. 2212, § 3(2)(f) (Feb. 19, 2008).
of public assembly was and why it did not a apply to a golf course was strongly suggestive of his own perplexity, even while his posture as a strong floor manager—Raecker had opened his remarks by complimenting Olson on his responses to questions—precluded him from admitting his bewilderment. In the event, as soon as Olson had uttered his judgment that a golf course was not a place of public assembly, Raecker finished, as it were, Olson’s sentence by tacking on: “But it would be a grounds of public buildings.” Then, without pausing or perhaps even giving Olson time to comprehend that they had just reached diametrically opposite conclusions using different subcategories as touchstones of coverage, Raecker had Olson confirm that under the latter’s interpretation smoking was not prohibited on golf courses. The words in which the audibly harried Olson chose to couch his confirmation let loose a veritable reign of confusion: “My interpretation is that it is not covered by grounds, you know, public assembly, grounds for public assembly.” Rather than commenting on the incoherence of their exchange, Raecker (apparently without the slightest irony) expressed appreciation for his interpretation and suggested that as the bill moved to the Senate they might work on “actually” defining “public buildings” or “grounds of public buildings.” That any of their 98 colleagues, if they were actually listening to the colloquy, had been able to secure the slightest purchase on the meaning of this crucial term for the exceedingly controversial question of outdoor smoking bans seems implausible.

In the end, then, Raecker’s colloquy with floor manager Olson inadvertently did a disservice to the legislative history of “grounds of a public building” precisely because it misled the inattentive to mistake incoherence for conclusiveness; as a result, the Iowa Department of Public Health, the agency charged by the legislature with issuing the rules to administer the Smokefree Air Act, underinclusively defined the term and thus perpetuated the exposure of millions of nonsmokers to tobacco smoke in multitudes of outdoor settings.

The confusion only deepened a few minutes later when Raecker, after having delved into several unrelated exemptions, asked whether smoking was banned on a public walking path behind his house in Urbandale, which was a gathering point for people. Olson, more confidently this time, yet still without offering a
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definition of the key term other than that an “assembly” meant a large number of people, stated that the path would not be converted into a “grounds for public assembly” merely by virtue of being a place where people ran into and chatted with one another. But when Raecker instanced a neighborhood picnic at a public park (at which the city had already banned smoking), Olson did concede that smoking would be banned—if the park was a place of assembly, though he still failed to define such a place.\(^618\)

That such a primitive social analyst as Republican Sandy Greiner, a very conservative farmer who mockingly denied that anyone was forced to work anywhere and projected her anxiety that as soon as cigarettes were banned, “[t]hey’re coming to get us” overweight people,\(^619\) was nevertheless able to force the articulate Olson to turn virtually tongue-tied trying to justify the exemption for limousines under private hire\(^620\) underscored the senselessness of some exemptions that lacked even the political expedience or salience of that for casinos. After Olson had freely repeated that he had said that carcinogens could linger for up to two weeks, the only rationale he came up with for exposing passengers to secondhand (or thirdhand) smoke was that people were “obviously choosing” to use limousines. The irony was probably lost on Olson that he was echoing Greiner’s “It’s about choices” to explain why people were not forced, but chose, to work in smoky places. But before he could try to distinguish the two situations, Greiner asked why the bill did not at the very least require smoking and nonsmoking limousines as a parallel to hotel rooms. For the first and only time during the debate Olson conceded that if the point had been raised the day before (off the floor), he might have filed an amendment “to get that defined,” thus enabling Greiner to fire back as the last word that it was then hypocritical to prohibit farmers from smoking in their tractors.\(^621\)

Picking up where Raecker had left off, Republican Jodi Tymeson, a retired brigadier general and deputy commandant of the Iowa Army National Guard,\(^622\) undertook the second attempt to clarify the scope of the “grounds of any public buildings.” Olson was somewhat more forthcoming when she asked him whether state park campgrounds were covered by the ban than he had been with Raecker; in particular, he shared with the chamber the fact that the language in question had been added in committee by an amendment that was not his. Consequently, with less than full authorial competence he expressed his understanding that the

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\(^{618}\)House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

\(^{619}\)House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).


\(^{621}\)House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).

"idea" behind the amendment was for the law to "get to" residences on public grounds such as the governor’s mansion and the president’s mansion at the University of Iowa. Haltingly, Olson then explained that “[w]hat we’re talking about here is...I don’t think that the language of this section changes anything in the definition of what outdoor spaces are covered, places of public assembly, and that kind of thing”—other than with regard to these special private residences on public grounds, which, unlike all other private residences, would not be exempt. On its face this interpretation was preposterous: had the Commerce Committee wanted to confine the scope of Representative Soderberg’s amendment to Terrace Hill in conformity with what everyone knew to be Republicans’ intent to embarrass the governor, Petersen and Olson could easily have reworded it. But, as Olson’s own scarcely veiled smirk revealed when he surprised Soderberg on February 5 by accepting the amendment, Democrats presumably rejoiced that it was a Republican who had expanded the scope of the outdoor ban. Whatever the majority party’s intent had been, the very wording of the amendment—which expressly made those private residences of state employees a subset of a vastly larger set of buildings—was indisputably irreconcilable with Olson’s effort to ignore the many thousands of public buildings in Iowa and their grounds and focus only on the very few private residences. Whether he actually believed what he was saying or was merely confused, he received a reprieve when General Tymeson, whether inadvertently or intentionally, returned to her question about the state park campgrounds, but this time linked coverage to “places of public assembly.” Olson immediately used the chance to escape the larger interpretive predicament into which he had maneuvered himself by trivializing the potential scope of coverage by insisting that “assembly to me means a large group of people, a large gathering of people.” When Tymeson tried to satisfy his condition by mentioning that her whole family had once been at a state park campground, Olson shut off the dialog by admitting ignorance of the size of her family but lifting the coverage threshold with the invention of a number out of the blue: “I mean [we]’re talking hundreds of people here.” Asked a direct question by Tymeson, he finally stated that by his interpretation campgrounds were not covered. Audibly left almost wordless by Olson’s surprisingly unambiguous one word answer (“No”), the brigadier general could be heard receiving a prompt from a male voice that she should proceed to ask about state fairgrounds. Without even hurling back at Olson the fact that the state fair exceeded his numerical threshold by at least an order of magnitude, Tymeson kept urging the view that the entire fair grounds were a place of public assembly, but Olson refused to go that far or to offer any robust criteria for determining when a “place of public assembly” as a whole trumped the grounds of individual public
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In his last speech, the convivial Representative May, who admitted that “this is a difficult vote for me,” focused on a point that no one else had raised: the allegedly skimpy scientific basis for concern about outdoor exposure to secondhand smoke. “The problem,” as May pithily put it, was “we went outside. If we’d a [sic] stayed inside with this legislation, we don’t have a problem. ... But the problem is, Representative Olson,...that you don’t have any evidence of the impact of outdoor smoking. There aren’t any creditable [sic] studies. They haven’t been done. There’s no research. If there is, folks, I spent a lot of time on the computer for nothing.” The one article that he found (by three researchers at Stanford University) concluded that outdoor exposure could be damaging, but limited the risk zone to a distance of six to eight feet, whereas H.F. 2212 created obligations with which it would be difficult for businesspeople such as May to comply. “Like I [sic],” he assured the House, they wanted to protect their employees, but “this legislation goes too far too fast—it’s way ahead of the research and our ability to decide what would be safe for the citizens of Iowa.”

Whether May’s googling was totally worthless or not is less relevant than the fact that what he had found was merely a summary of the article, which he did not read and misdescribed. The article, as its lead author, Neil Klepeis, explained immediately after its appearance, focused on single-cigarette sources, though even then: “In a few cases, we were able to detect pollution 10 or 20 feet away from a single cigarette but the levels were generally small. If wind or air drafts carry the plume directly from the cigarette to your nose, or you are traveling directly into the plume while running, then...it would be possible for you to experience one of the highly concentrated plumes that we routinely measured within a few feet of the smoker. I too have smelled bits of smoke from a distant single smoker (more than 20 feet away).” However, more relevant to the avoidance of smoke gauntlets, which had formed the basis of the bill’s 50- and then 10-foot no-smoking zone at entrances to covered public places, was the existence in “realistic situations” of “multiple smokers,” which, as Klepeis

623 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
624 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).
627 Email from Neil Klepeis to Marc Linder (May 2, 2007).
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is a different thing. While we did not conduct controlled measurements for multiple smokers, it is reasonable to assume that the levels increase in proportion to the number of active smokers present. So even under mixed-wind conditions, a group of many smokers could generate high levels of pollution more than 20 feet away. We generally found that pollution levels decrease in proportion to the change in distance, and we measured specific average concentrations within a couple feet of a single smoker for 10-minute periods of active smoking (up to 500 micrograms per cubic meter). So it would be possible to estimate levels from a group of smokers by multiplying by the number of smokers and calculating the decrease in concentration for different distances. Roughly, if there were 10 smokers currently active, you could still experience very polluted air at a distance of 50 feet or more."

May’s claim that the article by Klepeis et al. was the first research on outdoor exposure was simply wrong. The article’s authors merely claimed that theirs was “the first peer-reviewed publication of systematic measurements of’ outdoor tobacco smoke concentrations. Neil Klepeis, Wayne Ott, and Paul Switzer, “Real-Time Measurement of Outdoor Tobacco Smoke Particles,” *Journal of the Air & Waste Management Association* 57:522-34 at 522 (May 2007). Previous studies included one by the California Air Resources Board at an airport, junior college, government center, office complex, and amusement park, which found at sites with many smokers outdoor nicotine levels comparable to indoor concentrations. California Environmental Protection Agency, Air Resources Board, Proposed Identification of Environmental Tobacco Smoke as a Toxic Air Contaminant Part A: Exposure Assessment, V-6 - V-17 (2005), on http://repositories.cdlib.org/context/tc/article/1194/type/pdf/viewcontent/ (visited Aug. 30, 2008). An experiment on a cruise ship at sea at 20 knots an hour revealed that outdoor tobacco smoke “in various smoking-permitted outdoor areas of the ship tripled the level of carcinogens to which nonsmokers were exposed relative to indoor and outdoor areas in which smoking did not occur, despite the strong breezes and unlimited dispersion volume. Moreover, outdoor smoking areas were contaminated with carcinogens almost to the same extent as a popular casino on board in which smoking was permitted.” James Repace, “Indoor and Outdoor Carcinogen Pollution on a Cruise Ship in the Presence and Absence of Tobacco Smoking” Presented at the 14th Annual Conference of the International Society of Exposure Analysis (Oct. 17-21, 2005) (summarized in James Repace, “Fact Sheet: Outdoor Air Pollution from Secondhand Smoke”, on http://www.repace.com (visited Aug. 30, 2008).

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628 Email from Neil Klepeis to Marc Linder (May 2, 2007).

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James Repace, a biophysicist, former senior scientist at the Environmental Protection Agency, and one of the world’s leading experts on secondhand smoke, conducted a study in 2005 at the campus of the University of Maryland at Baltimore in which he found that:

These experiments dispel the common misconception that smoking outdoors can be ignored because smoke plumes immediately dissipate into the environment. These controlled experiments with and without smokers show similar results: if a receptor such as a doorway, air intake, or an individual is surrounded by an area source—and this would include an entranceway with a group of smokers standing nearby—then regardless of which way the wind blows, the receptor is always downwind from the source. Cigarette smoke RSP [respirable particles] concentrations decline approximately inversely with distance downwind from the point source, as expected, whereas cigarette smoke PPAH [particulate polycyclic aromatic hydrocarbons] concentrations decline faster, at approximately inversely as the square of this distance.

Based on these measurements, which involve a single ring of cigarettes or smokers, the smoke levels do not approach background levels for fine particles or carcinogens until about 7 meters or 23 feet from the source, which is likely to be the smoke from no more than 1 or 2 smokers. Greater numbers of smokers in the area could lead to higher concentrations. because a crowd of smokers constitute an area source, whose plumes may overlap downwind, potentially causing smoke concentrations to increase locally before dissipating at greater distances. Secondhand smoke causes a number of acute symptoms (eye, nose, and throat irritation, headaches, dizziness, and nausea) and chronic diseases (lung and nasal sinus cancer and heart disease). Students or faculty passing through the cloud of smoke would encounter detectable levels at about 7 meters (23 feet) from a smoker, and irritating levels at 4 meters (13 feet).

Availing himself of the opportunity that Speaker Murphy granted him to speak for a second time, Raecker cast himself in opposition to Olson and Wise as preferring perfection over progress: he was one of those “purists”—but one who expressly denied occupying the “moral high ground”—who were needed from time to time to stand up and say “we can do better.” His animus was directed in particular against the exclusion of casinos, which would now become an even stronger magnet to people afflicted with the dual “addictive disorder” of gambling.

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631James Repace, “Measurements of Outdoor Air Pollution from Secondhand Smoke on the UMBC Campus” at 9-10 (June 1, 2005), on http://www.repace.com/pdf/outdoorair.pdf (visited Aug. 30, 2008). In connection with passage by the New York City City Council of a law prohibiting smoking in 1,700 city parks and along 14 miles of city beaches, city health officials stated that “people seated within three feet of a smoker are exposed to roughly the same levels of secondhand smoke, regardless of whether they are indoors or outdoors.” Javier Hernandez, “Smoking Ban for Beaches and Parks Is Approved,” NYT, Feb. 2, 2011, on http://www.nytimes.com.
and smoking. That he was not contemptuous of the latter addiction he more than intimated in a cracking voice: “I’m a previous smoker. I know the pain and the challenge that it is for an individual to stop this habit.” But whether he would have voted against a bill that he knew would save lives if his vote had been decisive he did not reveal.\footnote{632}{House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).}

After Olson (his tongue seemingly a respectful distance from his cheek) in his closing remarks had declared that “we had a great conversation this evening...discussing the intricacies of the bill,” especially the exemptions, and following four and three-quarter hours of debate,\footnote{633}{House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr).} on final passage H.F. 2212 attracted 11 Republican and lost eight Democratic votes, producing a 56 to 44 outcome.\footnote{634}{House Journal 2008, at 335 (Feb. 19). About 90 minutes before the vote Mascher had predicted that the bill would pass by a vote of 52 to 48 with a maximum of 53 Ayes. Email from Mary Mascher to Marc Linder (Feb. 19, 2008, 8:10 p.m.).} Apart from the unique case of Ro Foege, a strong supporter of local control who registered a protest against the exemptions,\footnote{635}{Telephone interview with Ro Foege, Mt. Vernon (Aug. 31, 2008).} there were no surprises among the Democratic cross-overs.\footnote{636}{Of the eight Democrats who voted Nay on Feb. 19, only two (Huser and Wenthe) also voted Nay on Mar. 12 and Apr. 8. Lykam, Mertz, Quirk, and Schueller voted Aye on Mar. 12 but Nay on Apr. 8. Swaim voted Nay on Mar. 12, but was one of two representatives whom McCarthy persuaded at the last moment to change his vote from Nay to Aye on Apr. 8. Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 19, 2008) (he sat directly behind Swaim and observed the alleged event). Of these seven Democratic cross-overs four (Mertz, Quick, Swaim, and Wenthe) represented rural, largely agricultural districts with a minimal union presence. And finally, Ro Foege, an anti-smoking stalwart, voted against the bill in February and March as a protest against the exemptions, but relented in April.} One reason that the House passed the statewide smoking ban was that, as an astonishing sign of the times reflective of the nationwide sea change that had made it possible for H.F. 2212 to get as far as it had, only two of the 53 members of the Democratic caucus, according to the bill’s author, smoked.\footnote{637}{Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008).} Nevertheless, the lingering hold that the tobacco industry’s meritless chief claim maintained even on some of the bill’s strong backers was embarrassingly on display in the admission by Coralville Democrat David Jacoby that “it wasn’t an easy vote” inasmuch as he saw “some validity to the arguments of those who contend that whether smoking is allowed in a business should be left to the establishment’s ownership and management....”\footnote{638}{Christopher Patton, “State Smoke Ban Draws Fire,” \textit{DI}, Feb. 21, 2008, on 3408}
The larger number of Republican supporters was accounted for by four representatives (Gipp, Hoffman, Rayhons, and Van Fossen), who had not previously voted against the numerous Republican exemptions.639

The strong reservations harbored by some of the 11 Republicans who voted for the bill were revealed a few days later by Mike May at a bipartisan multi-

http://media.www.dailyiowan.com (visited May 12, 2008). Oddly, two months later, swinging in the opposite direction, Jacoby, now favoring a “more purist version of the bill,” argued that passage “sends the message that we want to keep the issue alive.” Shawn Gude, “Smoke Ban Passes,” DI, Apr. 9, 2008 (1A:2-5, at 3A:1-2). Perhaps this attitude explained why, according to the American Cancer Society “Vote Count Card,” Jacoby was initially “trying to add sunset clause, 5-7 yrs.” [Stacy Frelund, American Cancer Society], “2008 House Vote Count Card 82nd General Assembly Bill Number ______ Smoke-Free Policies (n.d. [emailed Feb. 14, 2008]). Jacoby’s difficulty also seemed to be of a piece with his view as a member of the Coralville city council in 2000 that “the city should encourage restaurants to voluntarily ban smoking rather than imposing a law.” Aarti Totlani, “Councils to Discuss Smoking Ordinance,” ICP-C, Nov. 20, 2000 (3A) (NewsBank).

639 House Journal 2008, at 335 (Feb. 19). Six House Republicans (Anderson, Baudler, Clute, Jacobs, May, and Tomenga) voted for H.F. 2212 on final passage on Feb. 19, Mar. 12, and Apr. 8. Henry Rayhons, 99 percent of whose constituents wanted the best bill possible, voted Aye on Feb. 19 and Apr. 8, but voted Nay on Mar. 12 because the Senate had struck the casino exemption. He reported that once the law went into effect, it worked out excellently in his district. Telephone interview with Heny Rayhons, Garner (Aug. 23, 2008). Linda Miller, Chuck Gipp, and Jamie Van Fossen voted Aye on Feb. 19 and Mar. 12, but opposed the bill on Apr. 8. Miller a registered nurse who nevertheless wanted to permit smoking in 21-and-over bars if casinos were exempt, changed her vote after the conference committee merely retained the casino exemption. After the law went into effect she did not receive complaints from bar owners in Bettendorf, although two of her constituents were bar owners involved in the lawsuit challenging the new statute. Telephone interview with Linda Miller, Bettendorf (Aug. 24, 2008). Gipp, who purported to have personally welcomed a smoking ban in bars and restaurants enthusiastically, changed his vote once it became clear that the “unfair” casino exemption would not be struck. Telephone interview with Chuck Gipp, Decorah (Aug. 24, 2008). After voting Aye on Feb. 19, Clarence Hoffman, who stated on the floor in the last speech before Olson’s closing remarks that the overwhelming majority of his constituents supported the bill, voted Nay on Mar. 12 and Apr. 8. Hoffman had voted Aye originally because the Democratic leadership had told him that the bill would return to the House and that he could have input toward improving the bill, but once it became clear to him that his preference for permitting smoking in bars 75 percent or more of whose sales were from alcohol would not be adopted, he changed his vote. After the law had gone into effect, some bar owners in his district suffered revenue losses, while others’ business picked up. Telephone interview with Clarence Hoffman, Denison (Aug. 24, 2008).
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Email from Merle Pederson to Marc Linder (Aug. 11, 2008).

S. Dinnen, “Griswell’s $11.8 Million Tops,” DMR, June 8, 2008 (1D) (NewsBank).


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doing employees grassroots communications to their Senate members....” For the
“executive level grasstops messages to their Senator members” presumably more
intimate forms of communication were planned along with “executive
management lobby visits....”

The Senate Passes H.F. 2212 Covering Casinos

“I want to put the casino impact into some context,” added [Republican] Sen. [David]
Johnson. “You’re talking between 9,000 and 10,000 employees at the 17 state-licensed
casinos and you’re talking between 22 and 25 million visitors to those 17 casinos every
year. ... If you take the 17 together, they have to be the largest private-sector employer in
the state. They also happen to be our most consistent source of revenue in the state
treasury. It goes up a little bit every year.”

Sometime[s] things don’t seem like they actually are here.

There are very very few people that smoke anymore. I don’t even know of a smoker in this
entire Senate.

Despite House passage—which surprised anti-smoking Senate Democrats—when asked whether it was a foregone conclusion that H.F. 2212
would also pass the Senate, Assistant Majority Leader Joe Bolkcom replied two
days later: “No, we have work to do in the senate to pass the house bill.” That
he literally meant the bill as it passed the House became clear later that same day
when the center of power in the Senate, Majority Leader Gronstal, predicted that
the “‘odds of something passing over here approach 100 percent.’” Without

645 Email from [Merle] Pederson to Government Affairs and Business Community
Thought Leaders (Feb. 22, 2008) (furnished by Merle Pederson).
646 Kris Todd, “Area Legislators Hear Constituents’ Concerns About Proposed
spencerdailyreporter.com/story/1314038.html (visited May 12, 2008). Johnson voted
against H.F. 2212 on final passage on Feb. 27 and Apr. 8.
647 Email from Sen. Joe Bolkcom to Marc Linder (Feb. 26, 2008).
648 Senate Debate on H.F. 2212 (Feb. 27, 2008) (remarks by Democratic Senator
Dennis Black) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and
audio file provided by Rusty Martin, communications director, Iowa Senate Democratic
Research Staff).
649 Telephone interview with Jack Hatch, Des Moines (May 19, 2008).
650 Email from Marc Linder to Joe Bolkcom (Feb. 19, 2008) and Joe Bolkcom to Marc
Linder (Feb. 21, 2008).
promising that “the House’s version would pass the Senate, he said some form of
tobacco control will.” The press interpreted Gronstal’s caution to mean not that
opponents had questioned the health consequences of exposure to secondhand
smoke, but that they regarded some definitions as unclear or inconsistent with
other provisions in the bill. One such question they raised was whether the
prohibition on smoking in “‘entertainment venues where members of the general
public assemble to witness entertainment events’” applied to outdoor paths inside
the Iowa State Fair. Others wondered whether it covered state campgrounds,
adding that it would be “‘silly’” to be permitted to build a fire but not light a
cigarette next to a campfire. While acknowledging that some clarifications might
be needed, Tyler Olson urged that such details not be permitted to derail
achievement of the historically important ultimate goal. Conveniently, IDPH
propagandized on behalf of the measure’s reasonableness by emphasizing that
enforcement would focus on education rather than citations.651

On February 20, H.F. 2212 was referred to the Senate State Government
Committee652 whose chairman, Michael Connolly, a long-time anti-smoking
militant, the next day assigned it to a subcommittee composed of himself, Staci
Appel (chair), and Republican Mark Zieman.653 Appel, who would become the
bill’s floor manager, was only in her second year in the Senate; a self-described
“full-time mother” of five children and community volunteer (and Methodist
Sunday School teacher in Indianola and wife of an Iowa Supreme Court justice),
she had previously been a financial consultant at Merrill Lynch and USB Paine
Webber.654 Unsurprisingly, the same day Connolly and Appel signed the
subcommittee report recommending passage, while Zieman, complaining that the
rush was preventing the public from examining it, refused.655 Connolly
(mistakenly) expected the House bill to emerge from his committee without
change, but he was uncertain as to what floor debate would bring, though he did
express the opinion that the Senate would “pursue a statewide ban with
exemptions” instead of the local control approach that it had passed in 2007.656

651Jason Clayworth, “Smoking Ban Seen as Likely to Pass,” DMR, Feb. 21, 2008, on
652Senate Journal 2008, at 1:305 (Feb. 20).
653Senate Journal 2008, at 1:337 (Feb. 21).
655Ron Boshart, “Senate Ban Could Be Debated in Iowa Senate on Wednesday,”
Gazette (Cedar Rapids), Feb. 21, 2008, on http://www.gazetteonline.com (visited May 12,
2008); Committee Minutes for State Government (Feb. 25, 2008), on http://www3.
legis.state.ia.us/ga/minutes.pdf?minutesID=3831.
656Ron Boshart, “Senate Ban Could Be Debated in Iowa Senate on Wednesday,”
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Gronstal himself expressed strong support for a ban at a legislative leadership press conference on February 21. Personalizing public policy, he emphasized that the bill was about worker protection by pointing out that pregnant waitresses at one of his favorite “hang-outs” in Des Moines “don’t like working in a place where they’re exposed to lots of smoke.” To be sure, the Senate majority leader’s insistence that the ban was “not about dictating personal choices” barely captured the full complexity of the conflict: as long as the state was unwilling to prohibit smoking and tobacco altogether, and continued to regard self- and other-destructive nicotine addiction as one “personal choice” among many others that was legally permissible to exercise in some places but not in others, then it was disingenuous to deny that the legislature’s decision to have public health considerations trump the “personal choice” to smoke in restaurants did not constitute a governmental dictation. That such public smoking may have been more pervasive and inveterate than drinking alcohol while driving and may also have been regarded by more people as less irrationally dangerous (to others) presumably reinforced the publicly proclaimed perception by smokers (and their profit-seeking abettors) that government dictation or suppression of “personal choice” was indeed taking place and should have made it even more incumbent on the legislature to admit that the ban was about both protecting nonsmokers’ health and (partially) suppressing an activity that, as the statistics adduced during the floor debates revealed, had been found to be one-eighth as lethal homicidally as suicidally.

In fact, on February 25, the State Government Committee approved the bill, recommending that it do pass with an amendment, on an almost perfect party-line vote, all Republicans voting “present.” Although they purported to have passed

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658 With the increased estimate of deaths attributed to secondhand smoke exposure to about 50,000 in the United States the ratio rose from about one-twelfth to one-eighth. Between 2000 and 2004 total annual average smoking-attributable mortality was 443,595, of whom 49,400 died as a result of secondhand smoke exposure. B. Adhikari et al., “Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000-2004,” Morbidity and Mortality Weekly Review 57(45):1226-28 (Nov. 14, 2008), on http://www.cdc.gov/mmwr/preview/mmwrhtml/mm5745a3.htm.

659 The amendment itself was approved on a perfect party-line vote (the nine Democrats voting yes and the six Republicans voting present), but on approval of the bill with the amendment one Democrat (Dennis Black, who ultimately voted against the bill on final floor passage) joined the Republicans in voting present. Committee Minutes for
on the vote because they had not yet seen the new amendment, “[t]he real reason,” according to the American Cancer Society’s lobbyist, was they were “not sure how to vote now that the new amendment took out the casino exemption which is what many were saying is the reason they would not support the bill.”

In other words, when Democrats called their bluff, Republicans were trapped by their own mendacious rhetoric into voicelessness lest they offend their pro-tobacco base by voting Yes or unmask themselves as liars by voting No.

The amendment, offered by Appel, both watered down and strengthened the bill. The most significant weakening changes struck the 10-foot no-smoking zone at the entrance to any public place in which smoking was prohibited as well as the 10-foot no-smoking area around “outdoor seating or serving areas of restaurants,” and the 10-foot perimeter beyond school grounds, and exempted “farm tractors, farm trucks, and implements of husbandry when being used for their intended purposes,” thus permitting farmers and their employees to smoke in those vehicles. Coverage was also restricted by striking the smoking ban in “places of public assembly.” At the same time, the amendment expanded coverage by undoing the House’s controversial comprehensive exemption for casinos (“Any property, including hotel and motel rooms, owned or operated by an entity licensed under chapter 99D or 99F”) and covering “[g]ambling structures, excursion gambling boats, and racetrack enclosures.” In words that bar owners would hurl back at her, Appel justified casino coverage on the grounds that it was as important to protect those working there as anywhere else: “‘I think it was only fair—if you can’t smoke at a tavern, why should you be able to smoke at a bar at the casinos?’” Deprived of their pet pseudo-peeve, Republicans invented others. Zieman, for example, hypothesized that he could cause an owner to be ticketed by simply walking into his business with a cigarette in hand. How he could


Email from Stacy Frelund to Marc Linder (Feb. 26, 2008).

HF 2212.513 82; S-5013 (2008). The amendment’s definition of “farmer” included “an employee of such person while the employee is actively engaged in farming.” In addition, Appel’s amendment replaced the ban on smoking in “[o]utdoor sports arenas, stadiums, amphitheaters and other entertainment venues where members of the general public meet to witness entertainment events, except in designated smoking areas which may be established in perimeter areas at least ten feet from any seating areas or concession stands with “[t]he seating areas” of those outdoor locations without the designated smoking areas. Finally, in the enforcement and penalty sections the amendment inserted coverage of those with custody or control of outdoor areas where smoking was prohibited.

Whitney Woodward, “Will Casinos Be Included in Iowa’s proposed Smoking
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possibly produce this outcome when the owner’s only relevant obligation was simply to inform him that he was violating the law.\textsuperscript{663} Zieman failed to explain. Instead, he rushed on to the punch line: “‘Why do we as a body think it’s a business’s responsibility to regulate my bad habits?’”\textsuperscript{664} Similarly, his fellow Republican, David Hartsuch—an emergency room physician whose nagging “basic libertarian instincts” undermined his firsthand knowledge of smoking’s lethality to the extent that he still wondered whether people should have “a right to choose their own poison”—sought to convince his constituents that the bill’s enforcement “strategy is to turn all of these business owners into paranoid snitches who rat out those who are smoking on their premises.”\textsuperscript{665}

Back in the House, despite the fact that a week earlier “‘the political reality’” had been that “‘the casino exemption had to be in there,’” floor manager Olson expressed optimism that the Senate committee’s action striking the exemption would increase rather than reduce support for the bill: “‘A lot of representatives stood up on the floor last week and said, but for the casino exemption, they would vote for the bill. So I plan on going back through and listening to the tape and approaching those members and hopefully securing their vote.’”\textsuperscript{666} In the event, if Olson was not speaking tongue in cheek, his hopes would soon be dashed: as anti-tobacco advocate Republican Walt Tomenga later observed of his own party-mates, not a single one of them had been speaking truthfully.\textsuperscript{667}

Despite press reporting that H.F. 2212 was “awakening a strong pro-smokers’ rights contingent,”\textsuperscript{668} two days before the bill reached the Senate floor the Register published the results of its Iowa Poll indicating that Iowans supporting a statewide smoking ban in almost all public places outnumbered those opposed to any kind of ban. Specifically, whereas 43 percent favored a statewide ban,
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almost one third preferred local government control, and fewer than one quarter opposed all bans.669

The day before the Senate debated H.F. 2212 Governor Dave Heineman signed into law the Nebraska Clean Indoor Air Act, which contained far fewer (indoor) exemptions than the Iowa bill even as amended by the Senate State Government Committee.670 With Iowa flanked on its western (Nebraska and South Dakota) and northern (Minnesota), and much of its eastern (Illinois) border by states with anti-public smoking laws, it was fast becoming an anomaly even in the Midwest.

On the eve of full Senate consideration of the bill, part of the press may have been reporting that because most Democrats supported it and their party held 30 of 50 seats, there was no suspense about the outcome,671 the chamber’s leadership did not share that view publicly or privately. For example, Senate President Jack Kibbie told constituents in Spencer on February 23 that his caucus was evenly split on the issue: “One-third doesn’t [sic] want anything done; one-third want to do the local option; and the other third want a complete ban with no exemptions.” His personal (and, as it turned out, prescient) opinion was that the casino exemption would probably remain, but would apply only to the casino proper and not to the hotels, restaurants, and lobby, which would be smoke-free. The bill would undergo change, but Kibbie did believe that “we will pass a smoking ban bill before we go home this year....” 672 And as late as the afternoon of February 26, the day before floor debate, Assistant Majority Leader Joe Bolkcom observed unambiguously: “We do not have the votes at this time to pass the bill that came out of committee. We need more Dems on-board. We continue to work on this.”673


673Email from Joe Bolkcom to Marc Linder (Feb. 26, 2008).
The day before the Senate debate witnessed “a frenzy of lobbying...at the Statehouse.” The quality of the arguments deployed by the “smoking rights” lobby was indicated by a Davenport bar owner who saw no reason for a ban because he doubted whether secondhand smoke was a “serious factor in causing cancer,” thus lending more than a patina of accuracy to the Lung Association lobbyist’s plaint about the unbelievable amount of “disinformation” being disseminated at the Capitol. Nevertheless, even Majority Leader Gronstal himself was not sure whether a “consensus” had coalesced yet; if he determined that one was still lacking, he would “probably wait a while.” Connolly, the State Government Committee chair, revealed that even with his party’s 30-20 majority, it was “six to eight Democrats short of passing the bill without help from Republicans,” of whom the requisite number might or might not vote for H.F. 2212.\textsuperscript{674} According to one Republican who eventually voted for H.F. 2212, since it would have been political suicide for some rural Democrats to vote for the bill, the Democratic leadership—which nevertheless froze Republicans out of the majority party’s strategizing on the bill—decided that some Republicans would have to vote for it.\textsuperscript{675} Three Democrats who would probably defect from the leadership’s position (and all of whom in fact did): Tom Hancock, Dennis Black, and Keith Kreiman. Hancock, who hated being around cigarettes, would have found it personally easy to vote for the bill, but the “loud outcry from his constituents that a statewide ban would be too much government intervention” had prompted him to be leaning against it. One of the potential Republican crossovers, Dave Mulder, said he would vote for a statewide ban with no exceptions, but not if it exempted veterans organizations (he wound up voting for it despite that exemption); another, Thurman Gaskill, had been close to voting Yes, but in the meantime was undecided and leaning toward local control. Minority Leader Wieck was definitely in no danger of supporting the bill, which he called an “‘intrusion on my personal rights,’” but since some members of his caucus did not share his viewpoint, he was monitoring their position on several other versions of a ban, including one that would exempt age-restricted bars and casinos, which Gronstal immediately dismissed as off the table, though his caucus might consider an exemption for the gambling floors of casinos.\textsuperscript{676}

At 6:39 a.m. on February 27, Bolkcom observed that H.F. 2212 “will be debated if have the votes to pass it. We currently do not have the votes in the

\textsuperscript{674}Jennifer Jacobs, “Future of State Smoking Ban Grows Hazy in Iowa Senate,” \textit{DMR}, Feb. 27, 2008 (1B:1-4, 2B:2-6).
\textsuperscript{675}Telephone interview with Pat Ward, West Des Moines (Aug. 18, 2008).
\textsuperscript{676}Jennifer Jacobs, “Future of State Smoking Ban Grows Hazy in Iowa Senate,” \textit{DMR}, Feb. 27, 2008 (1B:1-4, 2B:2-6).
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senate. We will know more later this morning on whether we will debate or not today.\textsuperscript{677} Shortly before noon the Cancer Society’s lobbyist was not counting on Republicans to pass the bill for the Democrats: “I think there are some R’s that do just want to kill the bill but I do think some do not like the casino exemption and will vote in favor of the bill. If we get the 26 Democrats votes to pass the bill, possibly 6 or more Republicans will vote for it. They are hearing from their constituents who want it to pass. I think we are getting really close and the vote will probably happen today.”\textsuperscript{678} The only point on which the protagonists agreed was that, just hours before debate, the voting dynamics were “too fluid” to predict whether a “bipartisan” strategy would be successful.\textsuperscript{679}

Even moments after the Senate had taken up H.F. 2212, Bolkcom, asked whether there was a majority for the bill, emailed in real time from the chamber that “we will find out. I think we have 25 votes,”\textsuperscript{680} adding four minutes later: “I think that we will get this done.”\textsuperscript{681} He then underscored that it was “very unusual” for leadership to have gone ahead with debate not knowing whether it had a majority.\textsuperscript{682}

The Senate floor debate, which began a little after five o’clock in the evening and, apart from two interruptions for Republican caucuses, lasted about an hour and a quarter, was both much briefer and less contentious than the House debate. In particular, oppositional senators, by and large, did not engage the floor manager in lengthy colloquies that (might have) served in the House to flesh out ambiguities in the bill’s definitions and interconnections, in part because Senator Appel manifestly lacked Representative Olson’s willingness (and/or ability) to immerse herself in the details. Indeed, whether from nervousness resulting from never having floor managed such an important bill before, lack of self-confidence, or for some other reason, even in her opening remarks Appel read her brief speech haltingly and stressed words inappropriately. The most important point that she

\textsuperscript{677}Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008).
\textsuperscript{678}Email from Stacy Frelund, American Cancer Society, director of Field Government Relations, to Marc Linder (Feb. 27, 2008).
\textsuperscript{680}Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008, 5:13 p.m.).
\textsuperscript{681}Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008, 5:17 p.m.).
\textsuperscript{682}Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008, 5:30 p.m.). While agreeing that it would have been very unusual and stressing that he had not been privy to Gronstal’s inner thoughts, the minority leader later expressed great doubt that the majority leader would have risked the show of weakness associated with losing a vote. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).
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made referred to the more than 100,000 workers in Iowa employed in the food service industry, who had a “50 percent greater chance of dying from lung cancer,” who, others suggested, could “simply seek other jobs if they don’t wish to inhale secondhand smoke while they work.” However, as Appel noted, no one should have to risk unemployment just because he or she feared the 63 carcinogens in such smoke. Appel’s glibbest and most misleading comment, which fell comfortably within the range of disingenuous denials of which anti-smoking activists availed themselves, asserted that H.F. 2212 was “not a divisive tool for discriminating against those who have chosen to smoke, but an avenue to a healthier Iowa.” It is unknown whether Appel had ever tried out her non-divisiveness lecture on those who had “chosen to smoke” (at, say, age 13) and in the intervening decades had become addicts, ostracized and banished as pitifully irrational humans to stand outside in sub-zero temperatures so that the wafting garbage products of their suicidal and homicidal addiction would not harm the 80 percent of Iowans who chose not to smoke. Presumably, the bill’s supporters found it more congenial in terms of coalition-building to deny that the law was in fact part of a larger strategy designed to discriminate against smokers in order to encourage them to quit.

Appel then explained that her amendment (S-5035), which incorporated the State Government Committee amendment, struck the House bill’s glaring exemption for casinos because “[i]n one eight-hour shift the typical casino employee will inhale the equivalent of 16 cigarettes in secondhand smoke; that makes a pack a day smoker outta everyone working in casinos even if they aren’t smokers themselves.” Appel did not explain what public health benefits would

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683 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin, communications director, Iowa Senate Democratic Research Staff).

684 Contrast the refreshing frankness of a Johnson County supervisor, who stated that “part of the rationale” of a Public Health Department proposal to ban all smoking on any county property was “to make it so miserable for people that they eventually quit.” Minutes of the Informal Meeting of the Johnson County Board of Supervisors at 2 (Apr. 25, 2006), on http://www.johnson-county.com/auditor/min/060425eo.htm (visited Oct. 23, 2008).

685 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin); Senate Journal 2008, at 1:410 (Feb. 27). The scientific basis of Appel’s unsourced claim quantifying secondhand smoke exposure in terms of cigarette equivalents (which Senator McCoy repeated later for bars) is unclear. At the very end of the floor debate, Republican David Hartsuch, a physician, asked Appel for her source, but received only an unembarrassed “I’d have to get back to you on that information.” Senate Debate on H.F. 2212.
result from the amendment’s elimination of the 10-foot no-smoking zones around covered public places or its conferral of an exemption on farm vehicles being used for their intended purposes. Oddly, however, she failed to mention that her amendment went beyond the committee amendment by also adding exemptions for posts of veterans organizations and the Iowa Veterans Home. Then in a simultaneously filed amendment (S-5036) to her own amendment, Appel corrected a “drafting error” to “make sure you can smoke outside” at fairs. The second amendment also struck the exemptions for the just introduced veterans home and posts. Again, she failed to mention that this second amendment would result from the amendment’s elimination of the 10-foot no-smoking zones around covered public places or its conferral of an exemption on farm vehicles being used for their intended purposes.

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The exclusion, according to an annoyed Senator Dennis Black, was prompted by a request by Republican Senator John Putney, whose full-time employment was as the executive director of the Iowa State Fair Blue Ribbon Foundation. Telephone interview with Dennis Black, Newton (July 30, 2008). In turn, Putney, who proudly declared that he was for “property rights” and had always voted against the bill, denied that he had had anything to do with the exemption or that his organization had lobbied for it; indeed, he also stated that he was not even sure where the exemption had come from or which legislators had advocated for it. Telephone interview with John Putney, Gladbrook (Aug. 20, 2008).

Procedurally, before Appel’s amendment(s) could be considered, the Senate had to take up Senator Dotzler’s amendment to S-5035, to which the chamber turned following a brief Republican caucus, which Bolkcom described as devoted to “trying to figure out how to trip us up.” S-5038 proposed adding a new exemption, which would have applied to all establishments that restricted access to persons 21 and over, provided that they posted signs at all entrances declaring both the age restriction and the absence of a smoking restriction. Discussion of this bill-killer, which Gronstal had already rejected, consumed about half of the entire debate time. As primitive as Dotzler’s arguments were—and, given his antediluvian goals, mindless of the public health consequences, even nimbler minds would have been hard pressed to come up with more sophisticated ones—he did contest Appel’s claim that the bill did not discriminate against smokers, albeit superficially and without recognizing that the bill’s supporters never acknowledged, let alone, engaged his position, in large part for the same reason that Appel had programmatically denied the existence of such discrimination—namely, that they possessed such overwhelmingly powerful public health arguments that it was simpler just to ignore the discrimination claim than to antagonize smokers further by adding verbal insult to physical-psychological-cultural injury and admitting the obvious fact. After falsely

[689] S-5036, §§ 3(2)(e) (2) & (3) (filed Feb. 27, 2008), on http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&hbill=S5036&ga=82. These two provisions, which were exceptions to the ban on smoking on the grounds of public buildings, specified “that smoking on the grounds shall be limited to designated smoking areas.”

[690] Email from Joe Bolkcom to Marc Linder (Feb. 27, 2008, at 5:31 p.m.).


[692] Asked point-blank why Appel would not admit that the bill discriminated against smokers, Dotzler suggested as a possible reason that she had taken his giving her a hard
contending that his 21-and-over amendment would not apply to any covered public place except bars—in fact, as Senator Black later had to explain to Dotzler\textsuperscript{693} (who spent the Vietnam war in U.S. Army military intelligence with a “top secret cryptographic security clearance”),\textsuperscript{694} it would apply to any place with a liquor license including casinos and golf clubhouses—Dotzler grounded his proposal in the right that smokers ought to have to a place where they could socialize and not be treated like third-class citizens. To generate sympathy for these outcasts he instanced a state employee who had been standing outside the statehouse in a wind-exposed area in 10-degree weather “trying to have a cigarette to take care of probably a very severe medical addiction” to nicotine, which was even more addictive than cocaine. In viewing this heart-rending scene of slow-motion suicide, Dotzler was unable to shut out the thought of “how we treated her like a secondhand [sic] citizen because she had a medical condition and she couldn’t kick it.” Dotzler may never have explained how his strict apartheid regime in bars for 21-and-over nicotine addicts would come to the rescue of the state employee struggling to smoke in the cold and wind, but he did allow as no nonsmoker would ever have to be exposed to smoke in these bars since she could just read the “smoking” sign on the door and walk away. And, more importantly, given the workplace orientation of the whole bill, so could all employees because “this is America and you can choose where you want to work.” In addition to being able to “go somewheres [sic] else,” workers in Iowa were advantaged by a labor shortage in the state; and even if they did ever run into unemployment, “we got programs where they can get help and be upwardly mobile.” Dotzler even conducted a secondhand survey in his district of bar owners, who claimed that almost all of their bartenders smoked and were “alright with where they were at.” Remarkably, he passed over in silence the nonsmoking bartenders and servers, though he insisted that “the individuals that are in there—that’s their choice, they want to do it.”\textsuperscript{695} Here his agenda may have become somewhat more transparent as he touched upon his mother’s smoking time personally. He may have been confusing Appel with Gronstal when he added that she was personally involved in the issue because her parents had been heavy smokers. Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008).

\textsuperscript{693}Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin). Bizarrely, after having made it clear to Dotzler and the chamber that the exemption’s reach was much more capacious than Dotzler had let on, Black turned around and declared his support for the amendment as addressing all his concerns about the bill.

\textsuperscript{694}Http://www.iowasenatedemocrats.org/dotzler/default.htm (visited Aug. 7, 2008).

\textsuperscript{695}Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
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bar, managed by his sister, in Waterloo, where “our employees are happy with it.” His mother, however, was “very concerned about [sic] the business she worked her whole life to put together will disappear and I’m afraid that that’s gonna happen.” Finally, Dotzler reached the high point of his ten-minute peroration with his insistence that the debate was “about fairness. It’s about treating about one-fifth of Iowans with respect”—or as Dotzler later phrased it even more audaciously: “You have to respect individuals who are addicted to a legal product,” albeit a “dangerous, debilitating drug” that “society has got to get rid of.”

Ironically, the lawyer for the bar owners who later challenged the SAA’s constitutionality used the same argument: “I think it’s indisputable that some businesses have gone out of business and jobs have been lost due to this legislation. Unfortunately, these are jobs of people who probably don’t have a lot of options.” Email from George Eichhorn to Marc Linder (July 14, 2009).

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697 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
698 Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008).
699 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin). Ironically, the lawyer for the bar owners who later challenged the SAA’s constitutionality used the same argument: “I think it’s indisputable that some businesses have gone out of business and jobs have been lost due to this legislation. Unfortunately, these are jobs of people who probably don’t have a lot of options.” Email from George Eichhorn to Marc Linder (July 14, 2009).
“right for people to smoke a deadly cigarette doesn’t give them the right” to make nonsmokers pay for treating the health consequences because the burden of such costs meant that society was unable to pay for the health care of nonsmokers. Engaging in the brutal bluntness for which his Democratic colleagues had no electoral stomach, Hatch declared that the current debate “would be a good beginning for us to decide that no longer should we be treating and paying for someone’s bad behavior that we know is a deadly disease.” In the immediate wake of this unvarnished counterblast Minority Leader Wieck announced that Republicans would caucus, as they did for three quarters of an hour.\footnote{Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).}

While the Senate was standing at ease, Assistant Majority Leader Bolkcom conveyed to a constituent his sense that three or four Democrats would vote for Dotzler’s amendment; if it passed, leadership would stop the proceedings, caucus and try to change votes. His estimate, just a few minutes before the roll call, that 25 Democrats would vote for the bill along with two Republicans who would buck their leadership revealed that counting, even within a leader’s own caucus, was not yet a science. The uncertainty as to the other party was more easily understood, since Bolkcom was aware that perhaps six or eight Republicans would also vote Nay if they knew that Democrats controlled a majority, but they would not want to buck leadership. As for the grounds for Republicans’ floor behavior, Bolkcom noted that in part they were just trying to “mess with” the majority party because, as a minority, they had nothing else going for them, while some members disliked government intervention, were being lobbied by bar owners, or wanted money from tobacco companies or casinos.\footnote{Telephone call from Joe Bolkcom, Des Moines to Marc Linder (Feb. 27, 2008 at 6:05 to 6:25 p.m.).}

When the proceedings resumed, Dotzler, during his closing remarks, apparently lost control of the self-discipline that had enabled him to suppress the incoherence underlying his position. To the tough questions posed by Democrats about the reality of the labor market that prevented many thousands of workers from escaping from smoky workplaces all that Dotzler could counterpose was the irrelevant question as to what would become of the rights of the many smoking bartenders.\footnote{Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).} His profound inability to understand that the monumental public health issues at stake made a mockery of any effort to construct mirror-image demands for constitutionally protected equal “rights” to pursue “happiness”\footnote{Iowa Constitution, Art I sect. 1.} as
between nicotine-addicted smokers and clean air-seeking nonsmokers was spectacularly on display in his assertion: “It’s not fair to me as a person with asthma that if my friends smoke cigarettes and they want to go into this bar, I can’t go in there. Well, how’s that different in reverse?” Finally, he trivialized tobacco-related morbidity and mortality by charging that the Smokefree Air Act was “ridiculous” “in the same way” as a proposal to require NASCAR-like full harnesses, helmets, and fire suits for all vehicles in order to save lives on Iowa highways.\(^{704}\)

That Dotzler’s bill-killing amendment, which would have radically undermined a core component of H.F. 2212 and was antithetical to the bill’s underlying scientific and public health consensus was defeated by the narrowest of margins (24 to 26) suggested just how fragile the majority was, even in the chamber reputed to be more sympathetic to a statewide ban, for joining what had become a nationwide trend toward ridding the United States of the leading cause of preventable premature death. (Indeed, Dotzler later charged that Majority Leader Gronstal just an hour before the vote had thought that the vote would be 25 to 25, but that leadership had bought off or persuaded two senators to switch their votes by promising to run their bills.)\(^{705}\) Especially troubling for the bill’s prospects was that seven of 30 Democrats broke ranks, of whom five represented the larger cities of Cedar Rapids (Horn), Davenport (Seng), Dubuque (Hancock), Sioux City (Warnstadt), and Waterloo (Dotzler). The amendment lost only because three of 20 Republicans, two of whom (Lundby and Mulder) were retiring after the 2008 session, had been willing to cross over.\(^{706}\)

Although Lundby—a former smoker who in 1990 had played an important role in amending the weak clean indoor air law to preempt local governmental

\(^{704}\)Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).

\(^{705}\)Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008). Dotzler did not identify the senators by name, but stated that one of them had been pushing a local option educational tax bill, that, as part of the deal, House Majority Leader McCarthy also promised to run in his chamber; it then passed the Senate but died in the House. The only such bill identified was a House measure.

\(^{706}\)Senate Journal 2008, at 1:410-11 (Feb. 27). Senate Rule 23 was invoked requiring all senators present to vote unless they expressed a conflict of interest. The other two Democrats were Black and Kreiman, both of whom voted against H.F. 2212 on final passage in April. The other Republican was Noble. Pat Ward, who voted for the bill on final passage, lamely explained her vote for Dotzler’s amendment on the grounds that it was better than no ban. Telephone interview with Pat Ward, West Des Moines (Aug. 18, 2008).
power to pass stricter ordinances but in 2005 was diagnosed with cervical cancer, which would soon recur and prompt a prognosis of death within one year—supported H.F. 2212, she nevertheless offered a bizarre amendment on behalf of a single (named) constituent who employed 15 in an engineering business and wanted an exemption for two separately ventilated smoking rooms through which no employee had to pass. Appel’s opposition on the grounds that ventilation did not eliminate toxic and carcinogenic substances from the air, thus rendering such an exemption unacceptable, swiftly led to the amendment’s defeat on a voice vote.

Amendments to the amendment having been disposed of, Appel explained that S-5036 struck the exemptions for casinos, posts of veterans organizations, and the Iowa Veterans Home, but added an exemption for farm vehicles and also struck the 10-foot no-smoking zone at entrances to covered public places. Finally, in astonishing ignorance of a crucial component of the bill she was floor managing, Appel incorrectly stated that her amendment “clarifies that anything outside is exempt from the smoking ban.” In fact, huge swaths of outdoor areas—including outdoor sports arenas and entertainment venues, all school grounds and the entire campuses of all colleges and universities, and the grounds of all public buildings—remained smoke-free under the amendment. Without discussion, S-5036 was adopted by a vote of 30 to 20, the three Democratic defectors from the party line being matched by an equal number of Republicans. After adoption of the duly amended main amendment (S-5035) on a voice vote, the chamber was back on H.F. 2212.

The most aggressive attack on the bill was launched by Republican Larry McKibben of Marshalltown, who interrogated Appel as to why she had eliminated the House exemption for the Iowa Veterans Home in Marshalltown.

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707See above ch. 27.
709Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin); Senate Journal 2008, at 1:410-11 (Feb. 27) (S-5037).
710Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
711Senate Journal 2008, at 1:411-12 (Feb. 27) (S-5036). The three Democrats were Black, Dotzler, and Hancock; the three Republicans were (the conflicted anti-government physician) Hartsuch, Lundby, and Mulder.
Although Appel knew nothing about the specific situation there, she replied that everyone, including the employees, deserved to be protected from secondhand smoke and that “[n]o ventilation system makes a difference.” Disregarding the floor manager’s assessment, McKibben claimed that by establishing airport-like sealed and ventilated areas for smoking, the IVH had created “the best of both worlds.”

Instead of explaining to the chamber whether these contraptions—into which some ex-soldiers had been lugging their oxygen tanks, thus creating a grave risk of fire and explosion—totally protected nonsmokers from exposure to the smoke, he seemed to undermine his own position by stressing that most of the resident veterans were old and in “fragile health,” which he hesitantly conceded that “maybe it [smoking] doesn’t particularly help,” as he ambled on to the punch line, “Shame on you, Democrats” for cutting off the veterans cold turkey.

What McKibben did not share with his colleagues—if he had even bothered to find out for himself—was that long before 2008, but also even as the Senate was debating, the Veterans Home was internally embroiled in controversy over indiscriminate smoking in violation of state rules. Smokers, as one resident wrote in the IVH monthly paper in March 2008, “rule the roost when it comes to smoking anywhere they please.”

Interestingly, as Marshalltown’s Democratic
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representative, Mark Smith, who had originally secured the exemption in the House, later pointed out, smoking prevalence among the Home’s employees mirrored that of the general public, while even the residents’ was only slightly higher.\footnote{717} Although even McKibben, the smoking vets’ most belligerent paladin, in a moment of weakness mentioned the possibility of phasing in the ban at the Home,\footnote{718} when Democrats in both chambers ultimately relented, they struck the exemption altogether instead of taking him up on the offer.

In desultory remarks apparently designed to serve no purpose other than to provide him with an extra seven or eight minutes to decide how to cast his vote, Democrat Dennis Black, without having laid a factual predicate, intoned that “[m]any among us will view this as truly a totalitarianistic act—in fact, it is probably the epitome of totalitarianism.”\footnote{719} Heady words, indeed, for any speaker, but especially outlandish coming from a non-smoking, non-drinking Mormon, whose only use for bars was as a locus for chatting up constituents.\footnote{720} The only discernible nexus of Black’s accusation to H.F. 2212 was the tag line that “[g]overnment should not be all things to all people”\footnote{721}—an all-purpose market-knows-best and/or libertarian shibboleth that could just as well have applied to the legislature’s increase in the minimum wage, but that connection did not deter Black from voting for that piece of rank paternalism.

Republican emergency room surgeon David Hartsuch, who openly admitted that he was considered “ultra right”\footnote{722} and opposed increasing the minimum wage and protecting homosexuals’ civil rights,\footnote{723} launched the final assault on the bill, which seemed to suggest that, Houdini-like, he was no longer “tied up in knots about how to vote” because he had resolved the tension between his skepticism of state intervention and his physician’s understanding of the consequences of

\footnote{717}Telephone interview with Mark Smith, Marshalltown (Aug. 21, 2008).
\footnote{718}Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
\footnote{719}Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
\footnote{720}Telephone interview with Dennis Black, Des Moines (July 30, 2008).
\footnote{721}Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).
\footnote{722}Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008).
\footnote{723}http://www.votesmart.org/voting_category.php?can_id=57127 (visited Aug. 9, 2008).
firsthand smoking. Hartsuch began by asking Appel to explain what “legal action” meant in the provision stating that an “employee or private citizen may bring a legal action to enforce this chapter.” Once again revealing that she was not even vaguely familiar with the mechanics of H.F. 2212, all that Appel could recall was discussion about people calling the Public Health Department: “I don’t remember about a legal action.” When Hartsuch pushed further and asked whether such a legal action would be brought in a court of law, Appel was so nonplussed that initially she was unable to utter anything more than a very perplexed “Well.” After she had regained her bearings somewhat and began “guessing” that a nonsmoking employee might bring such an action if smoking were unlawfully going on at his or her workplace, Hartsuch moved on in the sentence to ask what kind of “private citizen” she envisioned as bringing an action, but succeeded in eliciting only the bewildered response: “Well, isn’t an employee a private citizen? I think it’s the same thing.” Apparently sensing from Appel’s lack of preparation that he could have some party-line fun at the expense of a floor manager (and an Iowa Supreme Court justice’s spouse) who manifestly neither had studied the bill nor, at least on the spur of the moment under the pressure of the public spotlight, was able to interpret even a very straightforward phrase, Hartsuch, who was hardly a legal scholar himself, pointed out that the provision “distinguishes an employee versus a public [sic] citizen,” but when even this confused prompt failed to trigger any response at all, he dismissed her as if she were an unprepared law student who had disgraced herself before the whole class under mild-mannered Socratic interrogation: “Okay, thank you, Senator Appel...you can sit down.” The colloquy did nothing to diminish Hartsuch’s “reputation,” as he put it, for “harassing Appel,” although he denied the charge while conceding that in general during debate “I kind of tend to go for the jugular.”

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725 Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin). Although his appraisal may have been biased as a party-line criticism, Hartsuch stated later that during his two years in the Senate many other floor managers had also been poorly prepared. Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). Minority Leader Wieck recalled Appel’s poor performance as floor manager, which he speculatively ascribed to a lack of preparation and conjectured members would not forget. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).
726 Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). On Hartsuch’s earlier infamous treatment of Appel on the Senate floor, when he questioned her about her Methodist Sunday school teaching in connection with an amendment he had
Having discharged his foil, Hartsuch proceeded to lose any credibility he might have had as a medical expert by claiming that the Pub Med literature review he had done over the weekend had led to his discovery that there were only eight case control studies of secondhand smoke, which revealed “at best” such a weak association with cancer and heart disease that they “call[] into question causality at all.” In fact, contrary to Hartsuch’s ignorant claim, two years earlier the Surgeon General’s mammoth 700-page double-columned synthesis of the state of research on The Health Consequences of Involuntary Exposure to Tobacco Smoke, which cited more than 40 case-control studies alone on the relationship between secondhand smoke exposure and lung cancer, concluded that the evidence was “sufficient to infer a causal relationship between secondhand smoke exposure and lung cancer among lifetime nonsmokers” and “increased risk of coronary heart disease morbidity and mortality....” It estimated the latter risk at 25 to 30 percent; the increased risk of cancer associated with living with a smoker was estimated at 20 to 30 percent. Asked a half-year later about his floor remarks, Hartsuch, who had no research expertise in the matter of secondhand smoke, cocksurely boasted: “My analysis of the medical literature is quite correct regarding a lack of causal link between second hand smoke and the risks cited [sic] by the Public Health Department in their very misleading advertisements. Unfortunately, liberals feel morally justified in lying about the science in order to sway public opinion to achieve their ends.” Pursuing this pooh-poohing in a favored political direction, he thought “it interesting that the Liberal establishment in Public Health would choose to go after second hand smoke which has little if any established health effect, and at the same time would ignore the established causal link between abortion and breast cancer....” In response to a question as to the discrepancies between his floor remarks and the Surgeon General’s report and whether he was accusing the physicians and scientists who authored it of lying, Hartsuch admitted that he had “not seen the Surgeon General’s report so I certainly am not calling anyone a liar [sic],” but nevertheless felt compelled to “contend that the Surgeon General position is a political position and as such is prone to following political science over natural

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727Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).


Hartsuch concluded his floor remarks by expressing his concern about the “huge avenue for litigation” and asserted, without any empirical or any other basis whatsoever, that the provision “is opening a Pandora’s box of a magnitude that is absolutely unimaginable.”

Having survived this embarrassing encounter with her composure intact, Appel in her closing remarks characterized the bill as “our way of grooming a healthier state” than the promotion of which senators had nothing better to do. The 29 to 21 vote on final passage meant that the bill secured one fewer vote than on adoption of the identical S-5036, but the composition was somewhat different: three more Democrats, or a total of six, opposed the bill, while two more Republicans or a total of five supported it. A press assessment two days before the debate that a 30-20 Democratic majority with most Democrats supporting the bill meant that there was no “suspense” about the outcome was not shared by all senators. Hartsuch, for one, believed that H.F. 2212 did represent the rare occasion when the outcome was in doubt because Dotzler’s group of eight Democrats who would vote No might bring the bill down—provided that no more than three Republicans voted Yes.

That Hartsuch himself, after having harshly attacked both the bill and its medical underpinnings, nevertheless voted for it was a function of a number of

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731Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).

732Senate Debate on H.F. 2212 (Feb. 27, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file provided by Rusty Martin).

733Senate Journal 2008, at 1:412-13 (Feb. 27). Among Democrats, whereas Black switched to Aye, Horn, Kreiman, Seng, and Warnstadt switched to Nay. The other additional Republican was Ward. Bolkcom did not know why Horn had reversed his vote. Email from Joe Bolkcom to Marc Linder (Feb. 28, 2008).


735Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). Hartsuch stated that there had been much less suspense about the outcome of the final vote on Apr. 8.

736Minority Leader Wieck confirmed that voting for a bill that a senator has spoken against was unusual. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).
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factors, at the core of which lay his self-understanding that he was not a “pure libertarian” because as a doctor he was not always able to agree with his non-medical belief that people should be able to choose their own poison. A fourfold irony attended his decisionmaking process: (1) even as a physician he ignorantly denied that research had demonstrated that secondhand smoke exposure was a significant risk; (2) but he did believe that a smoking ban would reduce the prevalence of smoking by virtue of making it less practical or convenient to smoke and of stamping smokers as pariahs; (3) in fact, he (again incorrectly) believed that a statewide ban would cause a greater reduction in smoking than did a cigarette tax increase;\textsuperscript{737} and (4) unlike even the bill’s strongest Democratic supporters, who would not even touch the issue because it undermined their (disingenuous) claim that the ban was designed to protect nonsmokers and not to alter smokers’ (alleged) right to smoke so long as it did not interfere with others’ right to breathe clean air, Hartsuch, as a doctor who did know of the ravages of smoking on smokers, welcomed above all the indirect impact of protecting nonsmokers on smokers. Moreover, unlike his rigid market-knows-best Republican colleagues and Democrats like Dotzler, after receiving numerous calls from constituents who worked on casino boats and complained that they hated being exposed to all the tobacco smoke but were trapped in their jobs, Hartsuch was persuaded that—unlike casino or bar customers, who were not forced to go into such environments—workers had no practical alternative. Despite being weighed down more by these communications than by any other and despite knowing that his rather affluent anti-tobacco constituency had weighed in three to one for the bill, when the moment for voting finally arrived, he initially voted Nay, and only after he had seen that the bill already had 28 votes for passage did he change his vote and cast a symbolic Yea. And even then, he later admitted, had his vote been decisive, he would have stayed with his No vote and explained to his constituents that he had been unable to accept the unfairness of the disparate treatment of bars and casinos.\textsuperscript{738}

\textsuperscript{737}Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). One synthetic study concluded that in the United States the per package cigarette tax would have to be raised by 47 percent (from 76 cents to $1.11) in order to generate the 4.5 percent decline in cigarette consumption in the total population that would be achieved by banning smoking in all workplaces. Caroline Fichtenberg and Stanton Glantz, “Effects of Smoke-Free Workplaces on Smoking Behavior: Systematic Review,” \textit{British Medical Journal} 325:188-91 (July 27, 2002).

\textsuperscript{738}Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008). Hartsuch’s Minority Leader, Wieck, who noted that Hartsuch had told him several times that he did not believe that the medical data showed a negative health impact of secondhand smoke, speculated that Hartsuch may have voted for the bill after having spoken against it because
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Senate Democrats’ “jubilation” was tempered by Gronstal’s prediction that “‘there will be compromises along the way.’”739 Calling passage of the Senate version of the bill “‘great news,’” House floor manager Olson immediately declared that it “‘totally changes the discussion’” because the elimination of the casino exemption meant that some of the members who on February 19 had, based on that exemption and its allegedly unfair impact on bars, voted against H.F. 2212, might change their position.740 One potential complication involved the Senate’s removal of the Veteran Home’s exemption, which Marshalltown Democrat Mark Smith said he “‘had worked very hard’” to secure; although he was willing to support the bill without the casino exemption, his opposition to H.F. 2212 based on its coverage of the IVH might prove to be crucial if casino coverage wound up eroding what had already been a narrow margin of victory.741

The House Undermines H.F. 2212 by Authorizing Bars and Restaurants with a Liquor License to Permit Smoking Whenever They Deny Admission to People Under 21

The Restaurant Association, casinos, and the tobacco industry have really locked arms to prevent us from moving forward and I think we’ve finally been able to break through that this year.742

Drinkers at Frick’s [in Davenport] say the proposed ban attacks their beer-and-a-cigarette way of life and is the action of a tyrannical government. Robert J. Waddington sits at the bar with a drink in front of him and a cigarette in his hand. He said he’s been smoking since he was 7 years old. “Is this a free country? ... Why can they tell me what I can and can’t do? I’m 82, and I’m not going to quit. If you start telling people what they can’t do, that is communism.”743

as a physician he may have believed that the bill would reduce the prevalence of smoking. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).


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Are you debating [the] smoking bill now? Do you have votes for casino coverage?
Yes, we are debating...it gets worse...the 21 year old bar amendment is on the floor
for debate and will probably pass. ... It is a long story with lots of drama and emotion.
...

Is it wrong to assume that the 51 who voted for the >21 amendment wouldn’t mind
if no bill at all were passed and the law just stays the way it is?
Sometimes I don’t know what to think. We have some members who have gotten
cold feet. While many of us were really upset about the vote today, we also know the
conference committee will be made up of people who support the original House and
Senate versions. We are very confident that the bar and restaurant amendment will be
stripped out of the final conference committee recommendations.

How did Bailey get the 51 votes for the amdmt?
Some of our spineless democrats who got scared. They are in marginal districts and
represent many small towns. They are worried about re-election.

The day after the Senate had passed a much stricter ban, House Speaker
Murphy and Majority Leader McCarthy held a press conference in the course of
which they assessed the new situation. Surprisingly, they offered differing
evaluations without remarking on them. Murphy “frankly” admitted that the
difficulties that the House had getting the bill passed even with the exemptions
both made it difficult to determine the eventual outcome and would be a concern
for the bill’s original supporters. Murphy’s more pessimistic account may have
been colored his own personal attitude, which was much less intense than
McCarthy’s: “I was always sort of a local control guy, but because the votes were
there to do this, that’s where I’m at. And quite frankly I was comfortable with the
House version the way it passed.”

(Murphy was also the sort of guy beneath
whose dignity it was not to accept a $500 campaign contribution in July 2008,
October 2007, and October 2006 from Altria Group, Inc. a/k/a Philip Morris.)
In contrast, McCarthy was an ardent anti-smoker, whose statement, “[m]y personal feeling, I would outlaw smoking everywhere if I had the right,” prompted a smiling Murphy to inject: “Remember, his previous job was with the attorney general’s office suing tobacco companies.” Confirming that he had been litigation compliance counsel for governments in the national tobacco settlement agreement, McCarthy added that “I don’t have a lot of respect for Big Tobacco.” McCarthy then provided this rather upbeat perspective on the bill’s progress:

Look at where the momentum has come on this issue. It was our best guess that local control, which would mean a few hundred jurisdictions probably would move in that direction and a few hundred jurisdictions wouldn’t move in that direction, would be the state where the law would move. Local control seemed to be it. When we first started discussing it this year, it seemed to be 17 votes for a statewide ban, and then I found out there was [sic] 25 votes, and then I found out there was [sic] 40 votes. And then lo and behold we were able to actually for the first time debate a bill on the floor of the House since the mid-90s that was a statewide ban…. Major momentum.

Then after the Senate had stripped out the casino exemption and created a “new equation,” McCarthy saw this momentum continuing to build, and even though it was “emotional and tenuous” and H.F. 2212’s future was “unpredictable,” he was willing to predict that if the legislature could agree on a bill, “it would be probably one of the single biggest public health measures Iowa has ever passed.” In any event, he was confident enough that passing a local control bill as a “safety net” was, for the time being, not on the agenda. Murphy then tried to reinforce this more optimistic view by insisting that “regardless of what people believe, this is a pretty non-partisan bill,” because 10 to 14 Democrats had problems with the bill a lot of whom voted against it, while “we had [some] Republicans who were very supportive of it.”

After Murphy had offered his personal declaration in favor of a less radical
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approach, McCarthy intervened to paint the transformation of the historical sweep of public smoking since the 1970s as he had personally experienced it over his lifetime and as no one, in either chamber, ever presented it during the entire debate. Why this poignant panorama, which, apparently spontaneous and unrehersed, effectively demonstrated that social developments and attitudes were malleable and even opened up the perspective of the present as history, which is crucial for motivating people to overcome passivity and fatalism, was reserved exclusively for the press, which did not report on it, is unclear (though McCarthy’s own reason may have been his and Murphy’s decision that the less they interjected themselves into the debate, the less partisan it would be):751

Look at where our culture has changed with regard to smoking. I remember taking a tour of the state capitol as a child and [here McCarthy pointed upwards] you couldn’t see the top of the dome because there was so much smoke here. I remember visiting my mother who worked in the cardiology wing in Methodist Hospital and you walked into the waiting room and the people in the waiting room were smoking, the nurses were smoking, the secretary was smoking, the whole doctor’s office was full of smoke. I remember visiting my father [the Des Moines chief of police] at a police station as a child—you couldn’t see the ceiling because every officer smoked. That was our culture back in the 1970s. Could you imagine having that sort of occurrence now, walking into the rotunda and not being able to breathe and see the top of the dome? ... We’re recognizing that someone shouldn’t have a right to put toxic substances in my body that include arsenic. I should have a right to breathe non-toxic substances. So I think that’s the direction our culture is moving and that’s why I’m supportive of it.752

As far as casinos were concerned, McCarthy explained that the smaller size of House districts created a different politics per district, so that “[e]ven though hardly anyone spoke on the floor of the House regarding the casino exemption,

751Democratic Leaders Address Immigration, Smoking (part 2) (Feb. 28, 2008), on http://www.youtube.com/watch?v=9maC8EefFGM (visited July 30, 2008). McCarthy did concisely repeat his statement during his end of session remarks: “That has been a cultural shift and I said this before, I remember coming in for a tour of the Capitol as a child and everyone in the House smoked. Everyone in the Senate smoked, and everyone in the rotunda smoked. And I remember looking up to see that wonderful dome and I really couldn’t because it was full of smoke. Who would believe that three decades later that would seem strange to look back and have that sort of environment.” House Journal 2008, at 2:2115 (Apr. 25).

752Democratic Leaders Address Immigration, Smoking (part 2) (Feb. 28, 2008), on http://www.youtube.com/watch?v=9maC8EefFGM (visited July 30, 2008). Whether Murphy’s broad smile during this part of McCarthy’s remarks was one of recognition of his own childhood is unclear.
believe me—there were a number of people that needed that in there to vote for it because their constituencies locally involve nonprofits, chambers of commerce, and businesses, and hotels, and others who form a pretty potent political force for some of these legislators locally. So that’s why that was in there to get some votes to pass it out.” But now that the Senate had altered the dynamic by covering casinos, McCarthy announced that he intended to confront those House members, including several Republicans, who had complained about the exclusion of casinos and declared that they would vote for a statewide smoking ban (although he had had them down as No votes for any ban), with the transcript of their floor statements to see whether they were people “of their word.” Whether McCarthy was merely seeking to embarrass them before the press for what he apparently took to be their disingenuousness or seriously believed that, despite the local tobacco/smoking business pressures on them that he had just cited, they could be persuaded to change their votes is unclear. The Senate’s action, however, had sufficiently buoyed House militants’ spirits that Mary Mascher imagined that “we are very close to getting the votes we need to pass the senate version. As soon as we have the 51 votes needed we will bring it up for debate and pass the bill. I think we are one or two votes short now.”

The day before the House took up the Senate version of H.F. 2212, Speaker Murphy had concluded that casino coverage lacked the 51 votes needed for adoption. With regard to the amendment to permit smoking in bars when no one under 21 was admitted, Minority Leader Rants predicted that the two chambers would have to compromise. At the same time, anti-ban forces were intensifying their message that the market and its authoritative interpreter, the business owner, know best. Iowa Restaurant Association President Doni DeNucci, still following the Philip Morris playbook, insisted on the “right” to “accommodate” both smokers and nonsmokers—and if the latter were uncomfortable with the resulting (smoky) environment, they would have to go to a smoke-free restaurant. Republican Senator Jerry Behn—a farmer with such impeccable pro-employer credentials that he was one of only eight senators to vote against increasing the

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753Democratic Leaders Address Immigration, Smoking (part 2) (Feb. 28, 2008), on http://www.youtube.com/watch?v=9maC8EefFGM (visited July 30, 2008). Since there is no official verbatim transcript of floor debate, it is unclear whether McCarthy planned to have one made from audio files that the Democratic caucus creates to make sound bites available to the news media and then at some point destroys. Some of these files are cited in this chapter.

754Email from Mary Mascher to Marc Linder (Feb. 29, 2008).

755Iowa Public Radio News, WSUI (Iowa City) (Mar. 11, 2008, at 8:08 a.m.). A Democrat dismissed Rants’s comment on the grounds that “[h]e has no control over this at all.” Email from Mary Mascher to Marc Linder (Mar. 10, 2008).
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minimum wage in 2007—one-upped IRA by asserting both that “the market has already solved the solution [sic]” and that workers know ahead of time that they will face smoke (and can decide to work elsewhere), just as neither they nor anyone else has to go into a restaurant. Amusingly, when a caller to the radio program on which Behn made these comments asked whether workers were entitled to retention of unemployment insurance benefits if they refused a job because the workplace was smoky, Behn did not know the answer.\footnote{760\textsuperscript{7}}

House debate on the Senate amendment on March 12 lasted only about one hour, but was intensely contentious, in large part thanks to Representative Wise, who, throwing off all the customary shackles of legislative courtesy, with brutal bluntness accused proponents—including one in his own party—of a killer amendment of lying their heads off about its real impact. Before reaching that issue, the House dealt with a two-part amendment (H-8079) filed by Democrats Mark Smith of Marshalltown and McKinley Bailey: Smith’s proposed reinstating the exemption for the Iowa Veterans Home in Marshalltown, which the Senate version had struck from the House bill, while Bailey’s would have delayed the bill’s effective date until January 1, 2009.\footnote{757\textsuperscript{7}} Smith’s sponsorship of an amendment to perpetuate smoking among ex-soldiers was ironic since he was director of special projects at the Substance Abuse Treatment Center of Central Iowa\footnote{758\textsuperscript{7}} and was personally aware of complaints about smoking at the IVH, having written in the residents’ newsletter that “there are a number of people who are concerned about smoking etiquette and having more outside area that is smoke free.”\footnote{759\textsuperscript{7}} Following bifurcation of the amendment, which floor manager Olson urged the chamber to resist, Smith’s passed 51 to 30.\footnote{760\textsuperscript{7}} Representative Petersen then attacked the attempt to delay the law’s effective date—which Bailey, who remained procedurally confused during his hour of fame, did not even bother to explain, let alone to justify—by pointing out that delay was uncalled for inasmuch


\footnotetext{757\textsuperscript{7}} For a detailed overview of the amendments, see House Democratic Research Staff, “Amendment Summary: HF 2212 Smoke Free Air Act Senate Amendment H-8054 (Mar. 11, 2008).

\footnotetext{758\textsuperscript{7}} http://iowahouse.org/2008/04/08/member-profile-rep-mark-smith/#more-359 (visited Aug. 3, 2008). Smith did, however, later support Wise’s amendment to kill the 21-and-over exemption for bars, restaurants, and casinos.


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as it had been 18 years since legislators had had a chance to debate the issue or to improve the clean indoor air act. The amendment’s fate was sealed when Minority Leader Rants rose to inform Petersen that they had finally found something they could agree on: he opposed the bill, but if it was going to go into effect, there was no reason to delay it. On a voice vote, no one having been heard to shout Aye, that part of the amendment lost.761

In contrast, Bailey did at least make an effort to justify the debate’s principal amendment (H-8084), which was also co-sponsored by 11 other Democrats.762
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The proposal, which Democrat David Jacoby later characterized as so “goofy” that its adoption made the whole bill “worthless,” would have added to the areas where smoking was not regulated restaurants, bars, hotels, motels, clubs, pari-mutuel racing tracks, excursion gambling boats, gambling structures, and racetracks if they both held a liquor control license for on-premises consumption and allowed “smoking only at a specified time during which only individuals twenty-one years of age or older are invited or admitted; the specified time is a regular, single, consecutive period of time; and the specified time is conspicuously posted on all major entrances of the licensed premises.”

Bailey’s amendment was thus both broader and narrower than Struyk and Dolecheck’s H-8024, which had lost by a vote of 49 to 51 on February 19, and applied only to bars and restaurants, which were not formally required to hold a liquor license, but were eligible for the exemption only during times when persons under 18 were not admitted. With regard to H-8056, which Bailey and Dolecheck had filed on February 28 (but later withdrew) and was like H-8024 except that it applied to all establishments, Representative Mascher did not think that the House would go backwards and adopt it after it had already been defeated in both chambers. As to why members nevertheless kept pushing such an amendment she explained: “Some of them can’t help themselves. They have a bar owner back home who is a friend and has convinced them they will go belly up if this law passes. They don’t look at the data from other states that proves this is wrong. They think they are just trying to help a friend.” House leaders, who had found out late the night before the debate that the 21-and-over amendment would pass, regarded it as a message by its supporters to the Senate that they objected to the other chamber’s having amended the House bill, especially to the striking of the casino exemption.

adults were making a “voluntary choice,” also reflected on employees’ exposure to tobacco smoke by insisting that, given advance notice, they could choose to work elsewhere. Telephone interview with Rick Olson, Des Moines (June 2, 2009).


See above this ch.


Email from Mary Mascher to Marc Linder (Feb. 29, 2008).

Email from Stacy Frelund, field government relations, American Cancer Society, to Marc Linder (Mar. 12, 2008). To be sure, this account is difficult to reconcile with Frelund’s statement that the Democrats who voted for Bailey’s amendment and were mostly from rural Iowa had “said they did not want to hurt their small town businesses....”
In a contemporaneous newsletter to constituents, Bailey tried to justify his 21-and-over amendment, which would have exposed everyone in participating restaurants, bars, and casinos to tobacco smoke:

Initially, a statewide smoking ban that exempted casinos passed the House. A number of Representatives, including myself, voted for the bill despite its imperfections. We hoped to see some form of ban turn into law. In order to pass the first bill, the casino exemption was necessary in order to get 51 votes. After this vote, I heard from a good number of constituents who felt that it was unfair to exempt casinos but not bars and restaurants. That is a sentiment I share.

The Senate removed the casino exemption and designated smoking areas at the Iowa Veterans Home. The bill came back to the house where it became apparent that once again we would not be able to pass a statewide ban without exempting casinos. The bill would be rejected then sent to a conference committee. Then, party leaders would put a casino exemption back into the bill. Unfortunately, most of these political decisions are beyond my control.

However, a number of Senators have taken public positions that they will not vote for a bill that provides these exemptions for casinos, because it puts the small businesses around them, which also serve food and drink at a serious competitive disadvantage. There are enough Senators who feel this way to make passage of the bill impossible. Taken on the whole, the House will not pass a ban without a casino exemption and the Senate will not pass anything with a casino exemption. This disagreement has led to a stalemate.

This was not acceptable, because an overwhelming number of you have expressed a wish for some sort of restriction. In response, I crafted an amendment that I felt was a compromise between a number of positions, which could get the votes to pass in both chambers. With this compromise, we could have a meaningful step forward on the issue. It would remove 93% of Iowa’s workers and all of Iowa’s children from exposure to second hand smoke. It offered some protection for small businesses and exempted the casinos. All the involved groups got something and it passed the house.

It is not a perfect solution. If you are a smoker who thinks you should be able to smoke in every restaurant you will not be able to anymore. If you think you should be able to go anywhere in the state without exposure to second hand smoke there will still be a few establishments in the state where that won’t be the case. The owners of bars and restaurants with liquor licenses will have to decide whether they want to allow smoking or be open to children. No one walks away from the table with everything they want and no one walks away without something they wanted. Such is the nature of compromise.

Bailey was motivated to put a gloss on his newsletter “to the outside world”
in order to salvage his reputation after “I won the vote but got butchered in the press.” The day after the Senate vote (rejecting the bill as amended by H-8084) Bailey asserted that the Senate was unable to muster a majority for a bill exempting casinos “because it creates an unequal playing field” (vis-a-vis small restaurants and bars). As in the newsletter, Bailey distorted the situation in the Senate, where a majority opposed a casino exemption not because of its impact on bars, but because of its impact on the health of workers and customers in casinos. In any event, he insisted that the Senate had rejected his amendment, which “created an equal playing field...but this is all being driven by out of state activists who will take nothing before getting exactly what they want and the Senate Majority leader twisted arms until he got what he wanted.”

Bailey’s rather loose grip on political reality was further highlighted by his statement that the “out of state activists” he had in mind were “the heart lung and cancer associations but mostly C.A.F.E.” Ironically, in spite of his distaste for the role of these advocacy groups, he expressed a preference for their long-time preference, local control, “so we can ease consumers and business into this change” over a few years. Little wonder that an anti-smoking Democrat called Bailey “off the reservation on this one” and advised not to “believe anything he says. He is really in the minority in our caucus.”

After Bailey had quickly presented his argument from expedience—that the amendment was needed in order to obtain a majority for the bill—he resorted to the considerably less than forthright rhetoric that triggered Wise’s ferocious counterattack. Bailey asserted that his proposal would expand protection for workers and the public while providing some protection for small businesses. “In many communities,” according to Bailey, “the bar-restaurant is the only business in town and an important part of the community.” Indeed, he even romantically restylized such profit-seeking businesses “community centers.” Making effective use of ambiguity, Bailey swore that his amendment, which would make sure that “no child will have to spend time in a smoke-filled public place,” represented “a giant leap forward for the health of Iowa’s children.” And as for adults, H-8084 would remove smoking permanently from non-alcoholic restaurants and tens of thousands of workers from smoky workplaces.

With admirable probity, Wise forthrightly stated that, “in the interest of

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770Email from McKinley Bailey to Marc Linder (Mar. 14, 2008).
771Email from McKinley Bailey to Marc Linder (Mar. 16, 2008).
772Email from Mary Mascher to Marc Linder (Mar. 15, 2008).
773House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr, communications director, House Speaker).
honesty, of truthfulness,” his amendment (H-8088) was designed to gut and kill Bailey’s amendment, which, contrary to Bailey’s claims, was “a huge step backward” for protecting the health of children, customers, and workers, designed to gut and kill H.F. 2212. Wise’s amendment confined the exemption to the same establishments, but only if they admitted “at any time only” people 21 or over, thus mooting the exemption for practical purposes by forcing them either never to admit those under 21—a practice that would presumably have been economically injurious—or to admit them and thus to forfeit the exemption. Wise forcefully charged that it was an “absurd assertion” that an establishment could be smoking at night and nonsmoking the next morning because in fact the chemicals in tobacco smoke linger for up to two weeks (as a result of desorption of particles deposited on walls, fabrics, furniture, and other objects, rooms in which smoking is permitted are a “continuous source of exposure to toxic substances in tobacco smoke even when no smoking is currently occurring”). Consequently, such a regime would not protect anyone even during the allegedly smoke-free hours of operation, and it was therefore a “lie” that an age-restricted smoking establishment was ever nonsmoking. In short,

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774House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).


776Presumably this deterrent would not have served its purpose with regard to bars in towns in which people under 21 were lawfully permitted in bars.

777House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr). Although there is evidence that such desorption goes on for weeks and, at decreasing levels for months, in the context of bars and restaurants in which smoking takes place daily and thus deposit/sorption of compounds is replenished daily, it is less important whether desorption takes place over weeks or months so long as the sorption/desorption process simply lasts into the next daily no-smoking period, of which, according to a leading researcher, there is “absolutely and without question” no doubt. Email from Brett Singer to Marc Linder (Jan. 5, 2009). See also above ch. 33.

778Bundesverfassungsgericht, 1 BvR 3262/07 at 79 (July 30, 2008) (finding of the German Cancer Research Center cited in a decision by the German Federal Constitutional Court in a case dealing with the validity of the several states’ statutes with exemptions similar to those in H.F. 2212). See also U.S. Department of Health and Human Services, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General 87 (2006): “Volatile components such as nicotine are adsorbed and degassed by materials. As a consequence, the smell of cigarettes emanates from clothing, carpets, air conditioners, and other surfaces without the presence of active smoking, as previously deposited or adsorbed material is re-emitted by air currents.”
Bailey’s amendment was a “fraud.”\footnote{House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).} Bailey evasively responded that no one could look him in the eye and say that it was not a step forward for people not to be actively smoking for some hours or in children’s presence. (In fact, his opponents would soon point out that his proposal was a step backward compared to H.F. 2212 and even to Iowa’s then existing toothless law.) Republican David Heaton, who owned a restaurant-bar and permitted smoking in the latter, complained that supporters of H-8088 and H.F. 2212 were seeking to “take away choice” of businesspeople like himself, who could not imagine having to ban those under 21 from his establishment.\footnote{House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).} (More baldly, his Republican colleague Steven Olson later called a smoking ban in bars an “‘invasion of private property rights...’”)\footnote{Rebecca Boysen, “Smoking Ban Possibility Draws Mixed, But Strong, Reactions,” \textit{Clinton Herald}, Mar. 28, 2008, on http://www.clintonherald.com (visited Sept. 14, 2008).} Republican Dolecheck, whose 18-and-older amendment had narrowly failed three weeks earlier, seemed confused in his complaint that supporters of the Wise amendment were now complaining about carcinogens in establishments eight hours after smoking had stopped and no one was breathing secondhand smoke—a position Wise characterized as a “scientific-medical absurdity.”\footnote{House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).} 

Wise then moved his amendment and asked for a division; an unnamed male representative from Polk County requested a record vote, but (on the audio file) the Speaker could be heard telling (presumably the clerk) that “there’s been no second,” and only after Speaker Murphy had announced the amendment’s solid defeat by a vote of 32 to 59 (with nine absent or not voting) and the debate of Bailey’s underlying amendment had resumed, did he belatedly inform the chamber that the request for a record had not been seconded and that therefore the names had not been recorded.\footnote{House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).}
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The (non-)decision not to record the vote was contentious and continued to prompt controversy for several days. The following “condensed version” of the “[l]ong story” was provided by Democrat Mary Mascher, a strong supporter of H-8088 who had become increasingly depressed during the debate, 12 hours later:

I went to leadership and asked if we could have a record roll call on the Wise amendment. I was told no.

In our caucuses it is an unwritten rule that only leadership can determine if a record will be called on an amendment. This can be good, because it prevents members from putting up votes that could hurt them back home. It is bad because it protects members who should be held accountable.

I was furious when I was told no, we couldn’t get a record on the vote so I said fine, I will get a republican to ask for the record. I asked Walt Tomenga to ask for the record but of course I thought Walt would get someone to second it in his caucus and no one would.

So no record, just a voice vote that failed.

I had some rather heated words with my leadership today. I think the vote makes us look weak.

I know this is far from over but we missed a golden opportunity today. 784

Without the record vote, Mascher lamented, it would be “hard to hold people accountable....” 785

The next day at a press conference, when asked why there had been no record roll call on this vote, McCarthy replied that there had been no second—“an error.” When the pesky reported pressed McCarthy as to why he had not personally seconded the request, he stated that there had been no reason to do so because leadership thought that it was “extremely, extremely likely” that the bill would go back to the Senate amended and then to a conference committee. Under those circumstances, McCarthy argued, a record vote that might not have accurately reflected where “everyone is at” would “not necessarily” have been “productive.” In addition, as Senate Majority Leader Gronstal observed, although record votes sometimes “help you identify the places where you need to go and work,” sometimes they just needlessly locked legislators who were struggling with an issue into a position. 786

784 Email from Mary Mascher to Marc Linder (Mar. 12, 2008).
785 Email from Mary Mascher to Marc Linder (Mar. 12, 2008).
786 Smoking, November Elections on Democrats’ Minds (Part 2) (Mar. 13, 2008), on
After Wise’s amendment had been disposed of, the debate on Bailey’s amendment resumed. Floor manager Olson opened the attack on it by stressing that H-8084 represented a step back vis-a-vis current law inasmuch as “it gets rid of the requirement that restaurants of a certain size set aside a percentage of their seats as nonsmoking.” 787 (To be sure, the existing clean indoor air law contained no such requirement other than that the percentage be > 0; Olson thus failed—as did supporters throughout the floor debates—to convey fully the feebleness of the then existing law, which, in fact, merely required a restaurant, seating more than 50, not to designate the entire restaurant a smoking area; moreover, since the law did not require a restaurant to shield nonsmokers in any way from secondhand smoke, it was virtually useless.) 788 Dolecheck’s assertion that H-8084 was a “good property rights amendment, individual rights amendment” triggered another ferocious response from Wise, who characterized H-8084, which would have enabled 20 percent of the population to “dictate” to 80 percent, as “the most internally contradictory and wrongheaded amendment” of the 2008 session: “With all due respect, with all due respect! A property rights issue? An individual rights issue? Give me a break! There is not now nor has there ever been a property right to smoke around other people and other people’s children. Do not invent new rights that do not exist.” Wise then went on to administer a stern civics lesson to Dolecheck and other opponents by observing that although the Iowa House of Representatives always balanced the public good and individual liberties and “in most cases” the latter won out, “there are instances when the public good is so overwhelming that we say to the individuals: ‘You must modify the behavior for the public good.’ We know clearly that secondhand tobacco smoke rises to that level.” 789 Wise’s intervention was remarkable because it objectively refuted various misleading and/or false statements by Democratic supporters that the bill was about public health and not about individual rights. Wise, who drew the parallel to earlier debates about seat belts, was the only supporter with the intellectual integrity to concede the existence of a conflict even if he failed to identify the right at stake after he had denied the existence of a

787 House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html (visited Mar. 12, 2008), and audio file furnished by Dean Fiihr).


789 House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file furnished by Dean Fiihr).
property right to assault others with smoke.\textsuperscript{790}

In his closing remarks Bailey predicted that no bill would pass unless it exempted casinos; consequently, he offered the chamber the option of exempting only casinos or treating fairly other businesses that stood to lose by exempting them as well; the only nonsmoking beneficiaries of his amendment were children—he did not even bother to assert that adults would benefit.\textsuperscript{791}

The result of an initial voice vote having been unclear (though the Nays certainly sounded louder), a division was requested, but, again, not a record vote. The 21-and-over amendment prevailed by a vote of 51 to 44 (and five absent or not voting).\textsuperscript{792} In his closing remarks on Senate amendment H-8054 Olson expressed his disappointment in the outcome of the amendments, but nevertheless urged the body to concur in order to keep the bill moving on its way to a conference committee.\textsuperscript{793} Following a voice vote for concurrence the vote on final passage was 59 to 40: 47 (or 89 percent of) Democrats voted for and only six against H.F. 2212, while 34 (or 74 percent) Republicans voted against and only 12 for the bill.\textsuperscript{794}

Anti-smoking militants regarded the new House bill, whose passage Senator

\textsuperscript{790}Even if there was no judicially vindicated right to smoke in specific public places, there was for many years a virtually uncontested privilege to do so.

\textsuperscript{791}House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file furnished by Dean Fiihr).

\textsuperscript{792}House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file furnished by Dean Fiihr); House Journal 2008, at 1:616 (Mar. 12).

\textsuperscript{793}House Debate on H.F. 2212 (Mar. 12, 2008) (streaming audio on http://www.legis.state.ia.us/Audio/Audio.html and audio file furnished by Dean Fiihr).

\textsuperscript{794}House Journal 2008, at 1:617 (Mar. 12). The six Democrats were Foege, Hunter, Huser, R. Olson, Swaim, and Wenthe, of whom Ro Foege was a “purist,” who had voted against the bill on Feb. 19 because of the casino exemption and voted against it on Mar. 12 because of 21-and-over exemption. Email from Mary Mascher to Marc Linder (Mar. 12, 2008). Mertz, who voted against the bill on Feb. 19 and Apr. 8, supported it on Mar. 12 in order to protect an exemption for bar patios. Telephone interview with Dolores Mertz, Ottosen (Aug. 24, 2008). Of the six, only Huser and Wenthe voted against H.F. 2212 on final passage on Apr. 8. The 12 Republicans voting for the bill were Anderson, Baudler, Clute, Dolecheck, Gipp, Jacobs, May, Linda Miller, Schickel, Tomenga, Van Fossen, and Wiencek, of whom only Dolecheck, Gipp, Miller, and Van Fossen failed to vote for the bill on final passage on Apr. 8 and presumably voted for it on Mar. 12 because, like Bailey, they wanted to gut the bill. Lykam, a non-smoker who had a small business background and voted against the bill on Feb. 19 and Apr. 8, voted Aye on Mar. 12 only to keep it alive so that it could be amended later. Telephone interview with Jim Lykam, Davenport (Aug. 24, 2008).
Bolkcom attributed to bar owners’ intense statewide lobbying, as a “devastating blow,” in part because it would weaken even the current toothless law by rendering nonsmoking sections of restaurants unnecessary. The Lung Association’s lobbyist called the bill “‘pretty much useless at this point,’” while Representative Petersen was sufficiently alarmed by this “‘step backwards’” to urge supporters who might have been lulled into a false sense of inevitable victory in 2008 to start calling and emailing their legislators. The Iowa Restaurant Association had already encouraged its 650 members to do so, but President Doni DeNucci denied that its lobbyists had put “intense pressure” on the legislature. To be sure, the casino exemption put IRA, whose membership was composed of restaurants, bars, and casinos, in something of a bind, because, as its president conceded, “‘we wouldn’t want to oppose an exemption that would benefit one segment of the industry, but...could be to the detriment to [sic] another segment...’” DeNucci perceived a similar structural problem with the 21-and-over amendment: it aided bars, but exert a negative impact on small independent restaurants in rural areas. Despite the improvement represented by the amendment, perhaps in order to avoid such internal organizational fragmentation, she stated publicly that she preferred that the bill fail regardless of whether it included H-8084—and why would she not since the current law conferred an exemption on bars and a quasi-exemption on restaurants?

Front-line legislative and lobbying advocates of the broadest possible smoking ban may have been disheartened by the House vote, but at a press conference the day after the House had adopted the 21-and-over amendment, Majority Leader McCarthy stated that he was “kind of proud”—though disappointed in the substantive outcome—of what he regarded as not a partisan debate on a “very emotional, passionate subject...on both sides.” In particular he extolled the “legitimate debate where the outcome is not necessarily determined in advance” in contrast to the typical situation in which leadership has an “exact

796 Jason Clayworth, “House Flips, Weakens Smoking Ban,” DMR, Mar. 13, 2008, on http://www.desmoinesregister.com. Whether IRA considered the $8,000 that it spent on state campaign contributions in 2007 as part of whatever pressure they did exert is unclear. Id. The total number of restaurants owned by the 650 members was in excess of 5,000. Douglas Burns, “Ban Smoking Statewide or Let Locals Decide?” Iowa Independent (Feb. 6, 2008), on http://www.iowaindependent.com (visited Aug. 1, 2008).
McCarthy illustrated this unusual phenomenon of the leadership’s loss of control by reference to the 21-and-over amendment: the first time it was debated, he had been convinced that it would pass, but in fact it garnered only 47 votes; on March 12, based on his vote count he had predicted in excess of 63-65 votes, whereas in fact it received only 53 or 54. Nevertheless, given the very “narrow margins” of the vote and the way members were reacting differently based on which constituents contacted them—some representatives were hearing exclusively from anti-ban bar and restaurant owners, while others received nothing but support for an exemptionless statewide ban—McCarthy still deemed House passage of a bill without the 21-and-over amendment possible.

The Senate Rejects the House Amendment

What kind of pressure does the house passage of this ridiculous >21 amdmnt put on conference ettee?
It is a new game if we get to conference.

In the unlikely event that the Senate accepted the radically watered-down bill that the House had passed, the anti-smoking initiative’s fate would lie with the governor. If, however, the Senate rejected the House amendment, it would return to the House, which could either insist on its amendment or “rescind [sic] from” it; if it took the former course, the bill would then go to a conference committee. The next day, March 13, the Senate took up H.F. 2212 as amended by the House in amendment S-5087—which exempted both restaurants, bars, hotels/motels, and casinos with liquor licenses that denied access to those

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801 Email from Marc Linder to Joe Bolkcom and from Joe Bolkcom to Marc Linder (Mar. 12, 2008).
under 21 on a regular basis and also the Iowa Veterans Home—to Senate amendment H-8054, but the debate was very compressed and perfunctory. Floor manager Staci Appel argued that the House amendment went against the bill’s intent and that in particular secondhand smoke, unlike Bailey’s amendment, did not discriminate on the basis of age. After about two minutes, Minority Leader Wieck announced that Republicans would caucus, and an hour later Democrats followed suit. When the Senate finally resumed session, Appel had nothing more to say; while a handful of other senators also spoke very briefly to no great effect. Deviating from their usual minority tactics, Republicans made no effort to drag out their inevitable defeat. On a record roll call vote the Senate then voted 27 to 23 to refuse to concur in the House amendment. Of the 30 Democrats, 25 voted against the House plan; joining them were only two of 20 Republicans, including Mary Lundby, the only minority member who would later voted for the bill on final passage. Conversely, five Democrats voted Yea; three of them (Black, Dotzler, and Hancock) would later vote against passage of H.F. 2212. The inter-chamber stalemate meant that a conference committee would have to be appointed to work out the differences between the two houses.

Following the Senate’s action, both chambers’ leaders were still confident, at least for public consumption, that they could achieve a compromise, but at the same time “they acknowledged that the disagreements could end in the proposal’s death.” Senate Majority Leader Gronstal felt comfortable predicting that his chamber “would not approve an overriding exemption for bars and restaurants,” but even he found it premature to venture a prediction as to the substance of the compromise to be reached. But he was, semi-jocularly, willing to imagine a compromise—between the original House bill, which covered 99 percent of workers and the Senate bill, which covered 100 percent—encompassing 99.5

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805 Senate Journal 2008, at 1:619 (Mar. 13). The other Republican was retired college economics teacher Dave Mulder; the other two Democrats were Wally Horn (who as majority leader in the early 1990s opposed restrictions on smoking in the Senate chamber) and veterinarian Joe Seng.
percent, which “would be kind of halfway.”

McCarthy, his House counterpart, also felt that a compromise (of indefinite content) was within reach: “‘It’s so close, so narrow but I still think it’s still possible to get a pretty good strong bill.’”

Petersen, too, remained sufficiently sanguine that she would have accepted local control as a “fallback” “[o]nly if I absolutely had to. I think the way the bill is now either the House or the Senate version is way better than local control,” under which “maybe only a handful of cities would take action.”

Carrying considerably less authority was Representative Bailey’s opinion. Nevertheless, it was impossible to gainsay his success in having secured a House majority for his 21-and-over liquor-license-linked exemption, and so the Register found his prediction of H.F. 2212’s death newsworthy and extended his fame (and infamy) somewhat beyond his allotted 15 minutes: “‘Nothing is going to happen now. I really firmly believe that.’” Whether he also regretted its demise—as logically he must have since he had purported to offer the amendment as a way of salvaging rather than killing the bill—he did not say, but the Nay he cast on the bill’s final passage three weeks later suggested otherwise. Regardless of Bailey’s hopes, the University of Iowa Comprehensive Cancer Center, whose director had testified before the legislature earlier in the year that “[a] ban on tobacco use is the best for the people of Iowa,” used the perfectly timed release, the day after the Senate’s action, of its annual Cancer in Iowa Report “to express the hope that the Iowa Legislature can salvage a statewide tobacco ban, despite conflicts between House and Senate versions.”
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The Conference Committee Achieves Even More Progress by Attaining Even Less Perfection

A state lawmaker who’s been pushing for a ban on smoking in public places...[.]

"Most babies, you know, come out crying and screaming. He came out screaming: ‘No smoking!’ Olson says. ‘...It was kind of interesting, but the doctors loved it.’"

"Legislators have told me that this is the issue they have heard the most about from their constituents in the last 10 years."  

We’re not trying to decide what you can do by yourself when you’re not affecting anyone else.

In the days immediately after House and Senate majorities had revealed the Democratic leadership’s temporary inability to prevent the chambers from being at loggerheads, staunch House rank-and-file supporters of a rigorous statewide ban were seething. As one of their number put it: “We will have to have some serious conversations about next steps in our caucus. I am so mad at some of our members right now. It could be a pretty ugly caucus. If they try to kill this bill now, all hell will break loose. I heard that is Rant[s]’s goal, so all the more reason to go to conference committee and shove it down his throat.”  

In the event, opponents failed to kill the bill, but they also did not get everything stuffed down their throats that the militants wanted to send hurtling their way. The latter were, however, already weighing in with the House leadership on the conference committee’s composition: “If they appoint the wrong people all hell will break out.” The anti-smokers’ prediction that the Democratic members would probably be Olson, Petersen, and Wise both represented their preference and proved to

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814 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr) (statement by Tyler Olson).

815 Email from [Mary Mascher] to Marc Linder (Mar. 15, 2008).

816 Email from [Mary Mascher] to Marc Linder (Mar. 15, 2008).
be two-thirds accurate. Whether their presence on the committee signaled a last-ditch radicalization and effort to engineer a majority after all for joining the Senate in covering casinos remained to be seen.

Several days before the House met on constituting the conference committee, House Majority Leader McCarthy had stated that leadership was “looking for lawmakers who have a history of cooperation rather than confrontation. ‘This is not a partisan issue.... It’s very passionate, but not partisan, so it’s about...picking the right mix of people.’” The consistently largely party-line voting record and Republicans’ often mendacious and vitriolic floor-debate rhetoric may have belied McCarthy’s account, but he signaled that he did not intend to use his power to select a committee that would stuff a compromise down the Republicans’ throats that lacked a floor majority: “McCarthy suggests there will have to be a true compromise rather than a ‘pure’ statewide ban on smoking in all public places. ‘It doesn’t do any good to come out with [a] perfect bill...if it gets 49 votes.... We’re going to strive to be practically perfect, but we might not be perfect in every way.’” In the event, the Republicans appointed to the committee remained partisan and uncooperative, but the Democrats—two of whom, Petersen and Olson, were themselves militants and wound up dominating the proceeding—did execute McCarthy’s compromise strategy, which manifestly weathered the militants’ storm.

The House met on March 19 for a few minutes but then stood at ease for caucuses for almost five hours before reconvening in the afternoon. Bill floor manager Olson then moved that the House insist on its version and asked for a Yes vote. No discussion ensued and the Ayes were declared as having it (there being no audible No votes). The Speaker, pursuant to the Joint Rules of the Senate and House, then announced the appointment of the House members of a conference committee to consider the differences between the House and Senate versions of H.F. 2212, consisting of Democrats Olson (chair), Petersen, and (Assistant Majority Leader) Mike Reasoner, and two Republican opponents, Cecil Dolecheck and Chuck Soderberg. The entire deliberation lasted but three minutes.

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818 Live audiocast of debate on http://www.legis.state.ia.us (Mar. 19, 2008).
820 Live audiocast of debate on http://www.legis.state.ia.us (Mar. 19, 2008); House Journal 2008, at 1:710 (Mar. 19). The Republicans, as Representative Mary Mascher explained the previous day, could have moved to recede from the House version; had they done so, Olson would have asked the Democratic caucus to vote No. But, from her
Less than three hours after the House action the Senate followed suit, leadership appointing floor manager Appel chair, along with Democrats Bolkcom (a fervent anti-smoker) and Dotzler, and Republicans Minority Leader Wiecek and Zieman, 821 who both rejected the whole basis of the bill. Although Dotzler opposed the bill and would eventually vote against it on final passage, leadership appointed him with the understanding that he would sign the conference report. 822

Tyler Olson, who identified the casino exemption, the 10-foot no-smoking zone around public places, and the Veterans Home in Marshalltown, as the chief sticking points for a compromise, optimistically predicted that more people wanted a bill rather than no new law in 2008. Gronstal’s hopefulness was more tempered: “I think there are two possibilities—we will come up with a good bill or we will walk away from it.” Although he was opting for the former approach, the challenge posed for the conference committee lay in the constantly shifting consensus on the smoking ban as each exemption picked up some votes and lost others. As a result, the Senate majority leader was compelled to calibrate his own chamber’s ability to pass a compromise before letting the committee vote on its final conclusion. As a fallback position, some began bruiting the option of having the conference committee return to a local control bill. 823 In contrast, the press reported that legislators other than the Democratic leaders were much more skeptical on the grounds that “the differences are so great that it will be difficult to find a plan that both sides may agree upon.” 824

At its first meeting on March 20 the conference committee accomplished nothing but temporarily substituting Philip Wise for Olson, who had returned to

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Cedar Rapids for his child’s birth. The considerable public interest that built up about the outcome was merely intensified by the committee’s failure to convene.

During the interim before the committee reconvened, momentum for enactment of the anti-smoking initiative was reinforced by the announcement by the Iowa Department of Revenue that during the first year’s operation of the higher cigarette tax (which went into effect on March 16, 2007) the number of cigarettes sold in Iowa had plummeted by 36 percent from five billion to 3.2 billion. Senator Herman Quirmbach admitted that several reasons may have underlain this decline, but insisted that “clearly the most important is the increase in the cigarette tax.” Buoyed by the news, he encouraged his colleagues to “repeat the ‘triumphant success’” of the one dollar tax increase by passing a statewide smoking ban: “We have made more progress on this terrible public health problem in one year than in decades and decades and decades of work.” Although a Register columnist (with a suspect animus against the tax increase and H.F. 2212) collected somewhat more than anecdotal evidence that significant numbers of Iowans were buying large volumes of cigarettes in Missouri (where the tax was only 17 cents) and illegally importing them back into Iowa, an academic expert estimated that the largest component (almost half) of the sales decline represented “real reductions in smoking by Iowans, followed by reductions in cross-border shopping by non-Iowans who used to buy in Iowa when taxes were lower...followed by the tax avoidance described in the [Register] article and other tax avoidance....

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826See above ch. 34.


828Telephone interview with John Carlson, Des Moines (Apr. 11, 2008).

829John Carlson, “Indeed, Cigarette Sales Went South (to Missouri),” DMR, Apr. 6, 2006, on http://www.desmoinesregister.com (visited Apr. 8, 2008). When asked why his agency was not attempting to intercept those cigarettes illegally imported into Iowa, the director of the Iowa Department of Revenue pointed to a small decline in annual cigarette sales in Missouri as “evidence that Iowa is probably not seeing many people go to Missouri to purchase cigarettes....” Email from Mark Schuling to Marc Linder (Apr. 10, 2008).

830Email from Prof. Frank Chaloupka, U. Illinois at Chicago, to Marc Linder (Apr. 13, 2008). Chaloupka estimated that based on a 35 percent increase in cigarette prices and the usual elasticity estimates, sales would have dropped by about 14 percent. Email from Prof. Frank Chaloupka, U. Illinois at Chicago, to Marc Linder (Apr. 11, 2008).
On April 4, interviewed on the television program “Iowa Press,” Gronstal himself declined to predict the contours of the eventual compromise between the Senate and House, but did “think it’s clear that there will be probably some pull back from the original Senate position of essentially no exceptions. So, I think there will be some exceptions but certainly nowhere near what was in the second House version or the first House version.” Gronstal’s reluctance to speculate derived in part from the “interesting equation, one you don’t often see in the legislature. On the Senate side the more exceptions you have the fewer votes you get. On the House side the more restrictive it is the fewer votes you get. So, whichever direction the conference committee goes, more exceptions or less exceptions, they lose votes in one chamber or the other. So, it really is an interesting dynamic that I’ve not seen very often in the legislature. [T]his is one kind of for the record books. I’m not sure because you go one direction and one chamber has difficulty finding the votes, you go the other direction and the other chamber [sic].”

When asked whether local control was a possible fallback position, Gronstal finally offered an expansive public policy perspective:

I believe this issue has reached a tipping point. I think it has, in fact, passed the tipping point and I think if we don’t pass something this year next year we will come back and...pass something much tougher than anything we’re considering this year. I think the public mood on smoking has dramatically changed just in the last year. A year ago oh local control is fine, let’s let a few communities figure this out. And then after four or five years and what may be something statewide, between last year and this year it just moved dramatically and it’s time to stop smoking.

And on the morning of the day on which the conference committee met, Gronstal reinforced and extended these insights in a radio interview: “The amazing observation I have is that a year ago [there was a] very broad deep consensus: ‘Let’s do [a] local control effort.’” But during the intervening year the mood had changed “pretty dramatically” to: “Let’s not fool around with local control. Let’s not have a patchwork quilt of different rules and regulations around the state: Let’s do something statewide.” I suspect in another year the mood will continue to be stronger and stronger against smoking.” In contrast, Rants was standing pat in opposition to a ban, but insisted that he would not ask

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When the conference committee finally convened on April 7 to deal with the inter-chamber “stalemate”\footnote{834}{Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr) (term used by Sen. Joe Bolkcom).} and reached a compromise among the six Democrats (the four Republicans voting against the outcome),\footnote{835}{On Democratic Senator Dotzler’s formal agreement despite his substantive disagreement, see below this ch.} neither the proceedings themselves nor the result was surprising. Although the meeting was open to the public, only legislators were permitted to speak, and press accounts were sparse.\footnote{836}{Asked how the conference committee meeting had gone, committee member Senator Joe Bolkcom wasted no words but also shed no light: “It went well.” Email from Joe Bolkcom to Marc Linder (Apr. 8, 2008).} The description by Iowa Restaurant Association President Doni DeNucci may not have been that of an objective attendee, but, since her frustration over the result for her members did not prompt her to exempt her Republican paladins (or Senator Dotzler) from her criticism, her account, though not fully reflective of the proceeding’s nuances, did capture some of its desultory, if not chaotic, features: “The meeting lasted until around 7 pm, but that is deceptive because they didn’t start until 5:20 pm, and every five minutes either the house or the senate was voting so half the committee would get up and walk out. There was no agenda, no procedure outline, the co-chairs Sen. Appel and Rep. Olson did not seem to know how to proceed or what to do. Mostly the committee members spoke the same rhetoric for the media that that [sic] did on their respective chamber floors.”\footnote{837}{Email from Doni DeNucci to Marc Linder (Apr. 9, 2008) (responding to a question emailed a few minutes earlier asking whether members had said anything interesting or surprising).}

Staci Appel, the bill’s Senate floor manager and committee chair, self-deprecatingly and truthfully admitted at the outset of the session—which ran from start to finish about 65 minutes minus several interruptions for floor votes—that “I’m not sure about the procedure.” This understatement of her level of ignorance of the rules governing the conduct of a conference committee meeting applied to several of her colleagues as well; only occasionally did the Republican opposition, vainly seeking to stop the majority steamroller, inject knowledge of the pertinent rules. After the meandering discussion had begun with Republican
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Soderberg’s programmatic but unexplicated and incoherent declaration that any exemptions had to be consistent across the board “so that we don’t put any person or any business at a disadvantage,” Republicans, led by Senate Minority Leader Ron Wieck, a State Farm insurance agent for 35 years, demanded to know whether there was any truth to rumors that the Democrats had been meeting informally “behind the scenes” for three weeks making decisions and—as Democratic Senator Dotzler, who believed his colleagues that there had been no “secret meetings” but had also heard the same rumors, put it—a “deal.” After Appel had gamely denied that there had been any “formal meetings or anything,” though she acknowledged that “informal discussions with all kinds of members” had taken place to see in what directions they wanted to go, and concluded that “concerns” having been adequately “aired,” the committee should proceed to “content,” House floor manager Tyler Olson offered some recommendations to “get the conversation started,” which Republicans doubtless imagined to be the very agreement worked out at the very meetings whose existence Appel had just denied. Olson’s list included: (1) “split[ting] the difference” on casinos by limiting the exemption to smoking on the gaming floor; (2) dropping the 10-foot rule, which the House version had contained but the Senate version had dropped; (3) keeping the Senate tractor exemption; (4) the status quo in prisons; (5) keeping the Senate’s clarified language concerning fair grounds; (6) moving back the bill’s effective date to December 31, 2008, as a way of addressing some concerns about the full casino exemption or the House restricted-age exemption; and (7) keeping the House exemption for the Veterans Home in Marshalltown. The Democratic leadership’s judgment of the bill’s prospects was presumably faithfully indicated by the fact that every one of Olson’s recommendations weakened rather than strengthened the Smokefree Air Act. Olson argued that his proposed ban on smoking in casino bars and restaurants

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838 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
840 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr). Assistant Minority Leader Struyk later repeated the same complaint. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
841 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr). Dotzler later took credit for having eliminated the 10-foot rule in conference, while admitting that Petersen had rejected his other proposals on the grounds that there was “no satisfying” him. Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008). In contrast, the Smokefree Illinois Act, which had gone into effect in 2008, included a 15-foot non-smoking zone at entrances to and exits from buildings in which smoking was prohibited. 30 ILCS/sect. 70 (2008).
would get rid of the issue of the competitive disadvantage stemming from a total casino exemption about which bar owners had complained. Soderberg indirectly attacked this conclusion by asking whether it assumed that alcohol would not also be served on the gambling floor, but Olson and Bolkcom sought to evade the criticism by stating that Olson’s proposal did not address that issue, which was outside the scope of the conference report.\(^{842}\) (In fact, as Democratic Representative Polly Bukta of Clinton later remarked of the new casino in her city, smoking took place in the bar that was built right on the gambling floor.)\(^ {843}\)

No one, however, raised the public health issue, which was not the export of alcohol from bars and restaurants to the gambling floor, but the “secondhand smoke wafting over from the casino”\(^ {844}\) into the restaurants. In case anyone needed to be reminded that it was precisely the farcical designated smoking areas regime that had prompted mass demands for the Smokefree Air Act in the first place, a study in Nevada casinos operating under the arrangement proposed by Olson\(^ {845}\) revealed that “the open air floor plan of casinos creates a shared air space, resulting in secondhand smoke migrating from the gaming floor into the restaurants” such that “three-quarters of them contained air pollution levels exceeding the...EPA’s recommendation for indoor air quality....\(^ {846}\)

 Asked by Petersen, the bill’s chief sponsor, about the rationale for changing the enactment date—which had apparently not been discussed previously\(^ {847}\) —Olson mentioned the lead time for the transition in order to deal with the negative economic impact about which bar owners had complained.

\(^{842}\) Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fihr).

\(^{843}\) Telephone interview with Polly Bukta, Clinton, June 2, 2009).


\(^{847}\) Whitney Woodward, “Democrats: No Plan to Delay Smoking Ban Enactment Date,” WC, Apr. 12, 2008, on http://www.wcfcourier.com (visited July 23, 2008). Olson’s support for this proposal was surprising in light of Senator McCoy’s revelation of the tobacco lobby’s “secret plan” to delay enforcement until January 2009 so that it could get a second shot at amending the law to fight for exemptions for 21-and-over clubs. Not only was there, McCoy (correctly and incorrectly) predicted, no chance that such an amendment would succeed, but the legislature would repeal the casino exemption. Telephone interview with Matt McCoy, Des Moines (May 8, 2008).
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With barely suppressed sarcasm Wieck asked for some help in understanding what an owner would use this time for—perhaps finding a new business plan, product, or consumer? After underscoring that the bill’s purpose was to protect workers from being “assaulted” by carcinogenic secondhand smoke, Bolkcom unresponsively admitted that bar owners had “legitimate concerns” (without identifying them) and asserted, again without explanation, that whereas a six-month delay was acceptable, one or two years was not. At this point Petersen—who, interestingly, later referred to herself and her allies on the one hand and opponents on the other as occupying “extremes”—remarked that she would hate to see the effective date pushed back beyond July 1, but, ironically, urged the committee, if it decided that it wanted a “longer stretch,” not to set it on New Year’s Eve, because, although she had never smoked, she assumed “people are probably going to puff away that night before the next day when their New Year’s resolution kicks in.”

Republican representative, farmer, and smoker Cecil Dolecheck then elaborated a justification for his preference for committee adoption of the House’s exemption for establishments denying admission to anyone under 21. Dolecheck praised the provision “get[ting] us to the same place where the State of Iowa becomes nonsmoking, but we bring private enterprise along with us so we don’t disenfranchise them and make them angry at us as legislators...for forcing them to do something.” The amendment prevented restaurant owners from feeling “oppressed” or being forced out of business by prompting them to declare their businesses no-smoking because they would not kick out families and children, but they would be able to make the decision as to what was best for them. To be sure, Dolecheck failed to explain how or why an owner would feel less angry because he had made the key entrepreneurial decision when Dolecheck himself conceded that—given the alleged profit-maximizing constraints—the proprietor was “not really going to have a choice.” Rather than engage Dolecheck’s self-contradictory argument, Olson attacked its empirical

848 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr). Olson later explained the proposal as designed to “‘allow for a more orderly changeover.’” Whitney Woodward, “Democrats: No Plans to Delay Smoking Ban Enactment Date,” WC, Apr. 12, 2008, on http://www.wcfcourier.com (visited July 23, 2008). Petersen’s proposal, geared as it apparently was to promote quitting, differed from the donative intent underlying congressional action in prohibiting cigarette advertising on radio and television beginning January 2, 1971, so that the tobacco, advertising, and broadcasting industries could profit from the college football ads on New Year’s day. Act of Apr. 1, 1970, Pub. L. No. 91-222, 84 Stat. 89, § 2.

849 House Debate on H.F. 2212 (Feb. 19, 2008) (audio file provided by Dean Fiihr, communications director, House Speaker Pat Murphy).
underpinning by insisting that exempting over-21 establishments would not get Iowa to the same point.\footnote{Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).}

As Soderberg and Olson were thrashing out the interpretive details of the exemption of fairgrounds, almost half an hour into the meeting, Petersen finally bestowed procedural enlightenment on the committee by reading Joint Rule 13.3: “The authority of the first conference committee shall cover only issues related to provisions of the bill and amendments to the bill which were adopted by either the senate or the house of representatives and on which the senate and house of representatives differed.” Applying the rule, she then concluded that because the House had accepted the Senate amendment on fairgrounds, it was not a point on which the chambers differed. More generally, she pointed out that there were not many points on which they did differ. Apparently reluctant to rely on the collective reading comprehension of the committee—whose members included three assistant majority leaders, a minority whip, and a minority leader, and had served in the legislature for a total of 70 years—Bolkcom asked Patty Funaro, the long-time Legislative Services Agency bill drafter, one of whose subject areas was tobacco and who was attending the entire conference committee meeting anyway\footnote{Telephone interview with Patty Funaro, Des Moines (July 21, 2008).}—to clarify the situation. After Funaro had confirmed that Petersen’s interpretation was correct, Petersen proceeded to enumerate the provisions on which the two chambers had differed as well as those that the committee had discussed even though the houses agreed on them: they differed only on casinos and the Veterans Home; they did not differ on the 10-foot rule, tractors, prisons, or fairgrounds. In addition, Petersen called the bill’s effective date a “gray area,” apparently because the House had debated and voted down a different date, but this interpretation was surely incorrect. No sooner had Petersen narrowed the debatable provisions to casinos and the Veterans Home than Olson expressed a desire to discuss the effective date because “it relates to the differences” without offering any justification as to how such a basis fit within Joint Rule 13.3. Clearly within that rule was, as Dolecheck quickly pointed out, the House provision on age-restricted establishments, which was such a huge, dysfunctional, and spectacularly well-known exemption that the failure by Petersen—no one less than the bill’s \textit{spiritus rector}—to mention it (together with her momentary misrecollection that the House had agreed with the Senate on the exemption for
the Veterans Home underscored the slapdash if not chaotic procedure. Ironically, this disorganization may have constituted the strongest refutation of Republicans’ accusations that Democrats had finalized the outcome in secret ex parte meetings.

The discussable issues having apparently been sorted out, Olson once again proposed splitting the casino exemption “down the middle.” (Olson in fact exaggerated: as the Iowa Racing and Gaming Commission later pointed out, “some casinos have a central bar in the middle of the gaming floor, and...those would allow smoking since they don’t have any ceilings or walls around them.”) Unenclosed restaurants on the gaming floor would also be exempt.) Seeing the endgame looming because he was deprived by arithmetic of any possibility of thwarting the majority party’s will, Wieck sought to delay the inevitable by raising the eminently reasonable procedural concern with reliance on individual members’ personal memories of how the two chambers’ versions differed and proposing that the committee staff compare the two and compile a list of the issues on which they clearly differed. Petersen’s response that, since their staffs had already pulled that information together for anyone who had requested it, there was no reason to delay the discussion, could, in light of Democrats’ palpable confusion as to how the two versions of the bill differed, have been interpreted as a subtle critique of staff’s incompetence, but presumably she did not so mean it and Wieck failed to comment on the unintended irony. Instead, Olson made a formal motion to exempt the gaming floor and the Veterans Home as well as to delay the enactment date to January 1, 2009. Dolecheck opposed it as inequitable, while Zieman specified that as far as many bars in rural Iowa were concerned that would be put out of business the proposal amounted to “hang me slow or hang me fast.” Then Dotzler killed any hope that Republicans cherished that he would turn on his caucus leadership. While agreeing with the minority party that the bill was flawed—he had voted for the House bill and favored the over-21 exemption, but accepted the committee’s proposed compromises—he also recognized “why I’m on this committee”: because over two-thirds of Senate Democrats preferred a stronger bill than he did, “I made a commitment to the majority leader that I wouldn’t be an obstructionist on this committee. ... And if I voted with the opposition I could stop the work that you’re doing right now.

853 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
854 Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
And it’s not my intent to do that.” Instead, he would vote against the conference committee report on the Senate floor. Among the few additional exemptions that he believed were still needed was one for construction workers operating cranes in a cab a hundred feet high who took their lunch and even a “urinal bottle” up there. Dotzler was already looking forward to a second conference committee, which would be free to visit this issue and all others. Sensing an opportunity, Dolecheck gave voice to Republicans’ pipe dream that Dotzler would vote against the report, which would then be rejected, opening the way for the same members to be reappointed to a second conference committee, which would then thresh out all the issues.856

For Wieck, apparently dead-set on restoring a kind of pristine ruthless rugged individualism unknown even to the nineteenth century, “[t]his is all about people’s rights....” The rights-holders whom the Republican Senate minority leader had in mind were, in the first instance, business owners and, secondly, consumers, who should have the right to decide “what door they want to walk through and what environment that [sic] they want to frequent.”857 Workers and their rights Wieck did not even bother mentioning. He may, however, have been opaquely and dismissively alluding to workers’ right not to be sickened and killed by secondhand smoke at work when he expressed his disappointment that “this is the beginning of many many rights that the nanny government will push down the throats of the people of Iowa and the businesspeople in Iowa.” Wieck’s and Republicans’ incoherence was on display in his further plaint that business owners “pay their taxes to the state of Iowa, they follow the laws, they do what society asks them to do and I think they ought to have the right to be able to decide what goes on, as long as it’s legal, inside the walls of their business.”858 Most restaurant owners presumably follow the law by washing plates and utensils in between uses by different customers rather than offering a filthy environment in which generations of customers would drink from disgustingly unhygienic unwashed glasses coated with their predecessors’ saliva. If owners

856Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr). Dolecheck’s fantasy was doubly unrealistic: if Dotzler had breached his commitment to the majority leader, Gronstal would not have reappointed him to a second committee.

857Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).

accept society’s mandates in this area of public health, why did Wieck suddenly perceive the collapse of the republican form of government in applying the same principle to the far greater health hazard emanating from toxic and carcinogenic cigarette smoke?

After reasonably raising the procedural issue of whether the change in the enactment date was properly included in the motion since the chambers had not differed on the matter, Soderberg returned to the wholly fabricated issue that Republicans never tired of flogging—that it was apparently not as important to protect the health of casino workers. For the first and last time during all the legislative debates a Democrat finally confronted this lie directly instead of dancing around it with cliches about “progress over perfection.” On at least this one occasion, Petersen, who had not taken part in the House floor debates, heatedly told Soderberg, “I take offense to [sic] your comments,” and recounted that when the bill had come to the Commerce Committee, “I didn’t want to exempt casinos,” but the exemption originated in the necessity of finding the votes to get the bill out of committee. She then hurled the hypocrisy accusation back at Republicans by reminding them that: “I’ve brought this bill forth for the past eight years and under your party’s leadership not once did the bill get out of a committee or a committee chairman’s desk drawer.” Petersen went on to reveal that after the Senate had removed the casino exemption, she went back and listened to the tape of the House debate in order to identify those who had stated that they wanted a “completely clean bill” and to determine whether the bill’s proponents could get 51 votes if casinos were covered: “I went back to people in your party that said that they would vote for the bill if it was a completely clean bill” and asked them whether they would vote for the bill if the casino exemption were struck: “I do [sic] not have one person say they would vote for the bill.”

No Republican having come forward to undertake the fruitless mission of trying to refute Petersen’s charge of hypocrisy, Dolecheck then asked for a “ruling” from Funaro as to whether they could include a different enactment date in the motion than that to which the Senate and House had already agreed. Olson began to argue that while they could ask for unanimous consent to consult, Funaro could not “bind the committee,” when Dolecheck drew out the consequences of proposing a new enactment date: “If we’re gonna follow the rules like we talked about doing,” then the committee needed a ruling on whether it was permissible to change a provision on which the two houses did not differ, and “if we’re gonna start allowing other things that weren’t in either one of the bills, then let’s open it up.” This prospect was apparently too unsettling for

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859Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
Assistant Minority Leader Reasoner, who, finally speaking up, moved to strike the effective date from Olson’s motion.\textsuperscript{860} Seeing that his initiative—which Rants later denounced as a hypocritical move to keep bar owners and customers from being angry on election day—had outlived its welcome, Olson stated that he was amenable to that motion, which then carried on a voice vote.\textsuperscript{862}

After Olson had moved his now truncated motion, he responded to Soderberg’s (rhetorical) question as to why the exemption covered the casino floor only and whether it was designed to protect state revenue with yet another recitation of the unspecific image of “progress over perfection.” Soderberg’s expression of disappointment that the bill was concerned only with the state’s—to the exclusion of private businesses’—revenues and Wieck’s demand for an answer to Soderberg’s question prompted a frustrated Bolkcom to mix his idioms: “We’re trying to split hairs between what we think can get 26 votes in the Senate and 51 votes in the House.” Wieck, suffering from the double debility of never having articulated a reasoned counter-position and of lacking the votes to prevail, manifestly unchastened by the history lesson that Petersen had tried to teach the Republicans, and suddenly discovering his heart for the Iowa proletariat, retreated to an amended version of his party’s tired, tiresome, hypocritical, and mendacious mantra: “So the workers that are working on the casino floor don’t count.” Summoning up his last reserves of patience (“Senator Wieck, I think we’re going in circles”), Bolkcom tried one last time to talk sense to nonsense: not only did he think that those workers counted, but in 2009 some of the anti-smoking advocates in the room would return together with casino floor workers to “get after us to finish our work on this issue.” Bolkcom also sarcastically expressed surprise that he had not heard Wieck, who had been talking about owners and consumers, “say a word about workers until now.” Continuing in the same ironic vein after Wieck had repeated his mendacious claim that the majority party had all of a sudden decided that it was important to protect all workers in Iowa except those in casinos, Bolkcom assured Wieck that “[o]ur work is not done until we provide protections like you want to for those workers.”\textsuperscript{863}
Wieck and his fellow Republicans having exhausted their meager repertoire of vacuous obstructionist rhetoric, both the Senate and House members of the committee voted 3 to 2 in favor of Olson’s amendment.864

In the immediate aftermath of the committee’s action, Gronstal appeared to turn somewhat less optimistic. Declaring that a majority vote “‘is not guaranteed,’” he added that the Senate would not vote on the compromise until he believed that he had the needed majority.865 On the morning of the floor vote, his House counterpart, McCarthy, stated that since support for the bill was only “tepid,” the compromise “could yet die.... ‘It’s going to be very, very close. I don’t know if we’re going to have the votes or not.’” Since H.F. 2212 did not have the requisite 51 votes within his 53-member caucus, passage hinged on Republican support. If those Republican votes were not forthcoming and the House did not adopt the report, McCarthy noted, the legislature would reappoint a committee in order to try to reach agreement.866

Although apparently not requesting specific freedom to offer toxins in the atmosphere beyond the many already generated by the cigarette smoke they demanded the continued right to force their nonsmoking customers to breathe, business groups declared that they would urge their membership to lobby against the compromise. In particular, restaurant owners were already nostalgic for the short-lived House provision that would have allowed smoking in places that prohibited admission to those under 21. In a reaction bordering on chutzpah, the casino industry, whose unique exemption had caused such an uproar among rival industries, was allegedly “only slightly more pleased” than the restaurant owners.867 Casino owners’ “mixed emotions” resulted, on the one hand, from

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864Conference Committee Meeting on H.F. 2212 (Apr. 7, 2008) (audio file provided by Dean Fiihr).
866Jason Clayworth, “House Leader: Smoking Compromise Could Fail,” DMR, Apr. 8, 2008, on http://www.desmoinesregister.com. If a conference committee failed to reach agreement, its members were required to be discharged immediately and a new one had to be appointed. Joint Rules of the Senate and House 13.7 (Sen. Concurrent Res. 3, 2008). A second committee’s authority “shall cover free conference during which the committee has authority to propose amendments to any portion of the bill” so long as they were within the bill’s subject matter. Id. Rule 13.8.
867James Lynch, “Legislators Agree on Limited Smoking Ban,” Gazette (Cedar
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their discontent with having been deprived of total control over where they would permit smoking, and, on the other, from gratification that smoking would continue to be permitted on the gambling floor, which was “the most critical portion.”

Whereas bar owners complained that the bill conferred a competitively intolerable advantage on casinos, the latter, in turn, purported to prefer the over 21 age restriction or a provision making smoking rules a business decision instead of a mandate.

On the morning of April 8, before the House or Senate brought up the conference committee report, Brian Froehlich, owner of a bar in the small eastern Iowa town of Wilton and spokesperson of the newly formed Iowa Bar Owners Coalition, sent all the state legislators (and cc’d Doni DeNucci of the IRA) a brief email expressing his disgust with and outrage over the conference committee meeting, which he had attended. While in the statehouse to lobby against bar coverage, he availed himself of press coverage to boast that he would not enforce the ban in his bar: “My people—I take care of my people,” 70 percent of whom smoked. Froehlich also proposed to his own members that they file a suit charging discrimination vis-a-vis exempt casinos. With the “state...already hurting for money,” he envisioned an action for damages as bringing the state government to its financial knees. The bathetic plaint was rooted in a child-like understanding of law: whereas Froehlich saw fit to run his life by the state flag motto (“Our liberties we prize and our rights we will maintain”), he sarcastically wondered whether his addressees’ flag said: “Your rights are controlled by us and your liberties mean nothing so get over it.” Although he purported to “have been in this fight since the beginning,” Froehlich had manifestly given little thought to the impossibility of societal life without regulation and to the attendant loss of the liberty to drive a couple of thousand pounds of metal through a red light at 120 miles an hour or to serve beer in unwashed glasses in order to avoid profit-reducing costs. The rights and liberties that he had in mind presumably reduced to the one point that he claimed the conference committee was supposed to


870 Email from Brian F[r]oehlich] to Ray Zirkelbach et al., Apr. 8, 2008 (forwarded from Mary Mascher to Marc Linder, Apr. 8, 2008).


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decide—“the future of smoking in Iowa....” To be sure, the conference committee’s charge did not even remotely extend to the question of universal prohibition, but Froehlich, though neither a meteorologist nor any other kind of scientist, may nevertheless have intuited which way the public health winds were blowing and that such a generalized ban would inevitably be propelled onto the agenda by passage of H.F. 2212 regardless of whether casinos were temporarily exempted.

The House Narrowly Approves the Conference Committee Compromise

This is the strongest bill that can pass the House. ... This is it.

Under the Senate and House Joint Rules, a conference committee “report of agreement is debatable, but cannot be amended.” Consequently, any and all amendments recommended by a bill were automatically adopted by a chamber in adopting a report. Once a chamber adopted a report, “there shall be no more debate, and the bill shall immediately be placed on its final passage.”

Following a prayer and the pledge of allegiance, House proceedings on April 8 opened propitiously with the filing by Democrat Marcella Frevert of a petition by 66 of her constituents in northwestern Iowa favoring H.F. 2212. Toward noon, with Speaker Murphy in the chair, the House took up consideration of the conference committee report, which surprisingly—given the bill’s monumentality and contentiousness—lasted little more than 20 minutes. Given his own disingenuous refusal to disclose the open secret as to why some members of his caucus were insisting on an exemption for casinos and failure even to inform the House accurately about the scope of the coverage of farms and the grounds of public buildings, Tyler Olson, chair of the House committee delegation, seemed to lack standing to dish out such praise, but he nevertheless celebrated the “transparent” process that had brought about this historic piece of legislation. As

872Email from Brian F[roehlich] to Ray Zirkelbach et al., Apr. 8, 2008 (forwarded from Mary Mascher to Marc Linder, Apr. 8, 2008).


far as the committee’s compromise was concerned, he pointed out that it had dealt
to some extent with bar owners’ concerns by eliminating the 10-foot no-smoking
buffer zone outside covered public places. (Olson did not make it clear that this
concession to bar owners would not only perpetuate the gauntlets of secondhand
smoke that nonsmokers had been forced to run to enter buildings since indoor
smoking bans had prompted smokers to stand right next to entrances smoking,
but, would, since the House Commerce Committee had struck the grant of local
control, also prevent local communities from passing ordinances to prohibit such
smoking in privately owned outdoor areas.) The committee had also relieved bar
owners of the perceived competitive disadvantage by banning smoking in casino
bars. Overall, Olson declared, the bill covered 99.9 percent of public places and
99.9 percent of workers in Iowa.876

The two House Republicans who had refused to sign the committee report
outlined their objections. Dolecheck urged rejection on the grounds that the bill
as embodied in the report could be very detrimental to small bars and restaurants
in rural Iowa. By his lights, bar owners should have the right to determine what
clientele they wanted—keeping in mind that some of his constituents had told him
that 75 to 80 percent of their clientele smoked, although they did not like the
smoking—and to post the bar accordingly. He was especially partial to the legal
age-restricted approach that the Senate had rejected. Soderberg argued that, on
account of the exemptions, the legislature was not even protecting Iowans’ health.
Nor was he having any of Olson’s claim that the ban on smoking in casino bars
eliminated bar owners’ competitive disadvantage: since drinking alcohol and
eating would still be lawful on the gambling floor, the bill de facto exempted
casino bars and restaurants.877

McKinley Bailey, who had been one of the most prominent Democratic
defectors to the pro-tobacco forces, complained that the report provided an
exemption for casinos owned by out-of-state corporations, but not for mom-and-
pop Iowa bars. Philip Wise, a former smoker both of whose parents’ lives had

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(audio file furnished by Dean Fiihr, communications director, House Speaker Pat Murphy).
See also Jason Clayworth, “Smoking Compromise Passes House,” DMR, Apr. 8, 2008, on
http://www.desmoinesregister.com. Olson’s figure was an exaggeration: the approximately
10,000 employees at the 17 non-tribal casinos accounted for more than 0.1 percent of
Iowa workers. Even the 5,333 employees in Iowa in casinos excluding hotels accounted
for 0.43 percent of 1,240,335 employees in all industries. http://data.bls.gov/
LOCATION_QUOTIENT/servlet/lqc.ControllerServlet (data for 2006) (visited July 22,
2008).

(audio file furnished by Dean Fiihr).
been shortened by tobacco, predicted that the 2008 session would be defined more by H.F. 2212—which he called one of the most significant public health measures in the state’s history—than any other. He admonished his fence-sitting colleagues who allegedly could not abide less than a perfect exemptionless bill that the choice at this point was between protecting the health of the overwhelming majority of Iowans and doing nothing (which latter was precisely what these legislators apparently wanted). The “real philosophical problem with paying homage to casinos,” underscored by Republican Mike May, who deemed the bill much better than the one that the House had originally sent to the Senate, was only exacerbated after Olson had conceded that smoking would be permitted in a casino bar or restaurant if gambling machines were present in it. In his closing remarks Olson introduced the new and interesting argument that such high-profile Iowa employers as Principal Financial Group and Rockwell Collins were pushing for passage of H.F. 2212 because of its importance for their efforts to recruit workers to and retain them in Iowa.\footnote{House Debate on the Conference Committee Report on H.F. 2212 (Apr. 8, 2008) (audio file furnished by Dean Fiihr, communications director, House Speaker Pat Murphy).}  

Because a less threatening “non-record roll call was requested”\footnote{House Journal 2008, at 1:1099 (Apr. 8).}—both parties favored an unrecorded vote because they feared that recording might prompt a few members to vote against the leadership’s position\footnote{Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).}—the party composition of the 52 to 48 vote is not known.\footnote{House Journal 2008, at 1:1100 (Apr. 8).} Much attention was paid not only to the closeness and highly unusual uncertainty of the vote on the conference committee report, but also the means by which the 51st vote was obtained. As the Aye votes became stalled at 50 on the large vote board, but the voting machine remained open, Majority Leader McCarthy patrolled his caucus’s seats looking for a prospective convert.\footnote{Petersen, the bill’s chief sponsor, confirmed both that McCarthy had had to walk around the chamber persuading a couple of members to vote for it and that the outcome had been unclear until the vote went up on the board. Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). Republican Lance Horbach, who opposed the bill, stated that the voting machine had stayed open for 15 or 20 minutes while McCarthy was looking for the 51st vote. Telephone interview with Lance Horbach, Tama (Aug. 17, 2008).}  

This procedure prompted Rants to wonder: “‘I’m just curious what the going rate is for a legislator today.’” McCarthy finally lighted upon Paul Bell, a former 31-year policeman and president of the statewide Drug Awareness and Resistance Education (DARE) association. McCarthy later stated that he had simply asked Bell to vote for the report: “‘I patted Bell’s back
and said: ‘Could you put up your yes vote?’ Calling this account only half right, Bell himself later insisted that although he did change his vote from No to Yes, he had already decided to do so before McCarthy spoke to him. The casino exemption, which he regarded as unfair to small bar owners, had caused him to struggle with his vote until his daughter, who was also his clerk, persuaded him that “you have to start somewhere”; he had already concluded that in this matter something was better than nothing by the time McCarthy came by and merely asked him whether he was comfortable with his No vote. Bell agreed that this vote had been one of the rare ones on which leadership had not known in advance what the outcome would be. McCarthy’s administrative assistant and legal counsel, Brian Meyer, without mentioning any possible quid pro quo, admitted that the majority leader had had to ask for a favor to secure the deciding vote. For good measure McCarthy also secured a 52nd vote in the person of Kurt Swaim, a lawyer and Judiciary Committee chair representing a rural district in southern Iowa along the Missouri border. Swaim, who had voted against H.F. 2212 in February and March because he preferred local control despite knowing that some local governments might not adopt anti-smoking ordinances and that it might be a long time before a large number of local governments got around to passing them, changed his vote at the literal last minute when it became apparent both that the choice was between this bill and no bill and that passage depended on his vote in particular. The reason that this constellation of events became apparent to him was, to be sure, that “leadership” alighted on him when it went around scaring up that last vote. The reward that he earned for his efforts was a sign posted at a bar in his small town thanking “Kurt Swaim and his communist friends” for the ban. Just a few minutes after McCarthy had succeeded in corralling the deciding vote(s), Representative Mary Mascher observed: “A little tense getting to the 51 but we did it.” Looking back, May characterized the “really close” vote as one

884Telephone interview with Paul Bell, Newton (Aug. 1, 2008).
885Telephone interview with Brian Meyer, Des Moines (May 12, 2008).
886Telephone interview with Kurt Swaim, Bloomfield (Sept. 4, 2008). Swaim insisted that leadership had used the same kinds of substantive arguments made during floor debate, rather than promises or disciplinary threats, to persuade him to vote Aye.
887Email from Mary Mascher to Marc Linder (Apr. 8, 2008). Republican Assistant Minority Leader Struyk agreed that suspense had attended the outcome because the votes of two or three fence-sitters in both parties had been in doubt who had been vacillating for weeks. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).
example of the “consternation” that it might not pass after all. 888

Once a majority, albeit a narrow one, for the conference committee compromise had been established, the vote on final passage of H.F. 2212 attracted two more representatives. The 54 to 45 vote 889 —Republican Linda Upmeyer, the lone member not voting, stated afterward that she had intended to vote No, “but had problems with her voting machine” 890 —approximated the Democrats’ 53 to 47 control of the House, but only by coincidence. Without the nine Republican cross-overs 891 to compensate for the eight Democratic defectors, 892 the bill, as McCarthy had correctly predicted earlier that morning, would not have passed. In the event, 45 (or 83 percent) of 53 Democrats voted for H.F. 2212, while 37 (or 80 percent) of 46 (voting) Republicans voted against it. Thus, while the vote was far from party-line, the Republican party’s traditionally overwhelmingly pro-tobacco and pro-smoking orientation was as unmistakable as Democrats’ anti-stance. Ominously for any efforts to strengthen (or, for that matter, to resist repealing parts of) the Smoke-Free Air Act during the 2009-2010 session, however, whereas all eight Democratic opponents were re-elected in November 2008, four of the nine Republican supporters retired and one was defeated. 893

In a post-mortem on “Iowa Press” a few days after the governor had signed H.F. 2212 into law, McCarthy and Rants presented diametrically opposed political prognoses. Whereas Rants spoke his lines from the antediluvian cigarette company playbook that pretended that smoking was a normal activity deserving of societal protection and respect, denial of which would cost Democrats votes among the middle and working class, McCarthy, with considerable passion, stressed that Iowa was entering the new public health and cultural world that much of the United States (and de facto if not de jure Iowa itself) had already created. Hypocritically perpetuating the exposure to secondhand smoke of all workers, customers, and visitors in all other venues, Rants pretended that Republicans would have been willing to override the business decisions of thousands of small restaurant owners:

888 Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008).
891 Anderson, Baudler, Clute, Jacobs, May, Rayhons, Schickel, Tomenga, and Wiencek.
892 Bailey, Huser, Lykam, Mertz, Quirk, Schueller, Thomas, and Wenthe.
893 Clute, Jacobs, Schickel, and Tomenga were not candidates, while Wiencek lost her race.

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I think they [Democrats] overplayed their hand. I think most Iowans, in fact, if you were to put up a bill that said we’re going to ban smoking from restaurants, going to your Applebee’s or TGI Friday’s or whatever, that bill probably would have gotten 90 votes in the House, maybe 95 votes in the House but they overplayed their hand. I get an e-mail every week from a Vietnam veteran who, as he says, he [sic] paid for his membership at the VFW in blood and he can’t go in there and smoke any more. We have gone too far. We tell private business owners you can’t smoke in your own office in your building even if you are the only employee. I’ve got a UAW worker, lifelong democrat who has now become a republican over this issue, wants to run for the general assembly. I think it’s symptomatic of where the democrats have lost touch with frankly middle class Iowans and blue collar Iowans, not just in terms of sort of their tax and spending issues but this is part of their larger social agenda, they just got carried away. And I think frankly that’s going to cause them some problems at the ballot box.894

In contrast, McCarthy argued that the his party had caught the wave of the future:

Every single survey that I’ve seen both our internals and those public surveys that have been put in the news show that it is [sic] overwhelmingly popular movement to smoke free places. I have a right as a citizen of this state not to have smoke and cancer causing chemicals including arsenic put in my body. And this has been a cultural shift. And I’ve said this before but I remember visiting the Capitol for a tour as a child and it was culturally acceptable that everyone could smoke in the House, in the Senate, in the Capitol rotunda and I couldn’t see the dome when I looked up there. And I remember that. I remember visiting my mother at a hospital where she worked and everyone in the waiting area smoked, the nurses smoked, the doctors smoked and it was acceptable. That has changed. And we have moved to where the majority of states are moving, to smoke free places, not a perfect bill but it was designed to get the votes for passage but we used various conferences we attend with our colleagues from other states. Those states have enacted legislation similar to this, it becomes more and more popular and then people wonder why did we ever wait to do this.895

Rants concluded with the mendacious mantra that his party had been chanting for the previous ten weeks: “Why is it okay to smoke in a casino? ... That is the hypocritical nature of this bill in that we have decided to protect people, that you can’t smoke in a bar but we’re going to let you smoke in a casino. Nobody can explain that one to me.”896 ‘The reason no one could explain anything to Rants

was that there was nothing to explain because pro-smoking Republicans had fabricated the entire hypocrisy myth: (most) anti-smoking Democrats detested the casino exemption, acquiesced in it only out of expedience in order to garner enough votes to pass some bill, and had repeatedly announced that they intended to try repeal the exemption the following year. Asked about the accuracy of Republicans’ constant attacks on Democrats’ alleged hypocrisy, when they were fully aware that the militants were forced to acquiesce in the casino exemption as the price for passing any bill, at least one Republican, Assistant Minority Leader Doug Struyk, surprisingly acknowledged the cynicism underlying these baseless charges: “This is politics...and a lot of angles are played.” In contrast, the pro-tobacco Republican leadership had for years prevented the passage of any anti-smoking bill and voted against it at every turn in 2008, while hypocritically charging Democrats with hypocrisy.

The Senate Narrowly Approves the Conference Committee Compromise

“It’s like a tsunami,” Craig Walter, who represents the Iowa Restaurant Association, observed as the Senate took up the bill. “It hits you and you’re part of it.”

Was 26-24 as close as it looked or was it always clear you’d get 26? If not, what did you have to do to get those last votes?

It was extremely close. We just hoped that a couple of people would at the end of the debate see the value of the bill.

The Senate had its anti-smoking “purists,” but, according to Jack Hatch, after he had reminded his Democratic colleagues in caucus that “we can lose it,” the

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897 Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008). It seemed as though Struyk was describing one of these “angles” when he explained his party’s opposition to H.F. 2212 on the grounds that it was very hard for Republicans to tell owners how to run their businesses. Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008).

898 James Lynch, “Smoking Ban Passes,” *Gazette* (Cedar Rapids), Apr. 9, 2008 (1A:5-6, 6A:1).

899 Email from Marc Linder to Joe Bolkcom and from Joe Bolkcom to Marc Linder (Apr. 8-9, 2008). In contrast, Democrat Senator Dennis Black later stated that passage had been a foregone conclusion because leadership rarely permitted a bill to come to a vote unless it had already secured a majority.
party coalesced.\textsuperscript{900} Two hours after H.F. 2212 had passed the House, the bill was taken up in the Senate, where debate was much longer and more contentious and the rhetoric, especially among opponents, pyrotechnical. This greater intensity may have been driven by the knowledge that this proceeding was literally the last-ditch defense against passage. It was also reflected in a rumor circulating among Democrats that the tobacco industry had promised Rants’s aforementioned Iowa Leadership Council $500,000 if Republicans could block the ban.\textsuperscript{901} No sooner had floor manager Appel called up the conference committee report than Minority Leader Wieck announced that Republicans would caucus and the Senate stood at ease for more than an hour.\textsuperscript{902} When consideration resumed, a succession of largely Republican opponents rose to lambaste the bill with a series of narrow-gauge arguments that evaded the realities of public health. For Zieman the issue was the personal rights of and fairness toward owners and smokers. He was willing to concede that the public has a right to clean air, “but we also have the right to walk away from it”—the key was taking “personal responsibility.”\textsuperscript{903} To launch his incoherent fantasy world of atomistic monads, Zieman proclaimed: “Okay, this state is a smoke-free state, but every business owner could declare that they’re not a smoke-free environment and post it...and then hoping that everybody learned enough in school to be able to read what the message is on the entrance of the building. That gives you the right to decide whether you want to go in or out of the building...”.\textsuperscript{904} Zieman’s utopia may not have been smoke-free, but, by and large, it would merely have perpetuated the reality of secondhand

\textsuperscript{900}Telephone interview with Jack Hatch, Des Moines (May, 19, 2008). As the vote on the conference report and final passage demonstrated, not all caucus members held together, but those who defected were definitely not “purists.”

\textsuperscript{901}Rep. Pam Jochum asked Rants “point blank” whether the rumor was true: “He said ‘no’ and that he’s had no conversations with any of their lobbyists or officials. If nothing else, he knows the rumor is out there.” Email from Pam Jochum to Marc Linder (Apr. 9, 2008).

\textsuperscript{902}Senate Journal 2008, at 1:999 (Apr. 8); Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin, communications director, Iowa Senate Democratic Research Staff). Later Wieck stated that no suspense attended the outcome of the debate regardless of how close the vote. Telephone interview with Ron Wieck, Sioux City (Aug. 10, 2008).

\textsuperscript{903}Presumably Zieman meant that people have the right to walk away from unclean air and go somewhere to breathe clean air; however, it is possible that he meant that people have the right to expose themselves to secondhand smoke and risk illness and disease. Although Zieman’s oratorical style was even sloppier than that of most of his colleagues, in this particular case both interpretations probably reduce to the same point.

\textsuperscript{904}Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
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smoke exposure in Iowa under the 30-year reign of the feckless clean indoor air law.

Following Zieman’s comedic opening, a Democratic opponent of the bill managed to insert himself into the queue of Republican denouncers. As a Mormon—who even cited his religion’s Word of Wisdom and its prohibition of smoking and drinking—and a natural resources analyst with a master’s degree in natural resources economics who billed himself as an “advocate for Iowa’s environment,” Dennis Black appeared to be an improbable candidate for ally of the pro-tobacco forces. The 26-year legislative veteran himself noted that since he really did not like smoking, and since a casino, which, under the conference committee compromise, would be privileged to permit its customers to smoke while gambling, was located in his district, he might have been expected to support H.F. 2212, but in fact he was leaning towards voting against it. The attempted grounding of his incongruous decision in moral philosophy was hardly surprising in light of his opening remark that he thought that the day’s conversation would be “even more philosophical” and already reminded him of the “tone” and “quiet” of the chamber’s death penalty debate. Convinced that “[g]ood debate can change minds,” he made his contribution by explaining that the aforementioned Mormon injunction against smoking was “never an issue with me as it relates to other people because people do what they do because they have free agency.” Presumably Black did not bring the same radical laissez-faire approach to bear on his efforts to “clean up Iowa’s air and water.” It seems implausible that he would have acquiesced in free agency run wild vis-a-vis those wishing to defecate in a city’s water supply or burn toxic chemicals downtown. Why he was willing to make an exception for the generation at close indoor quarters of the toxic and carcinogenic garbage products of highly profitable tobacco commodities he did not explain. Instead, he posed several questions to Appel concerning the applicability of the ban to certain locations not expressly mentioned in H.F. 2212. In response to Appel’s answer that a public employee would be prohibited from smoking on a tractor while mowing a public right of way, Black insisted that such a result went beyond the legislature’s intent. However, in spite of the fact that Appel then responded that smoking would be permitted in an unwalled park shelter and on a boat on a lake in a public park,

905 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
907 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin). Later Black stated that this particular debate had not changed votes. Telephone interview with Dennis Black, Des Moines (July 30, 2008).
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Black nevertheless made an Olympic-class jump to the conclusion that, because he believed so much in what the United States was about as it related to the wars that had been fought and the people who had lost their lives for the preservation of democracy, “[w]e are approaching totalitarianism without question” and passing the conference committee report “makes us all criminals just waiting to be arrested” (a conclusion made possible by Black’s ignorance of the Smokefree Air Act, which was not criminal and did not provide for arrest). To be sure, asked about his totalitarianism charge, he later conceded that it had been a “spontaneous knee-jerk statement” that in retrospect he should perhaps not have made, but that nevertheless correctly denoted the government’s taking away a right of the people. However, he recognized how deeply “inconsistent” his position was when he realized that his hypothetical support for a ban without the discriminatory exemptions to which he objected would have generated even greater “totalitarianism.”

After brief comments by Democrat Matt McCoy stressing the political fact of life that half a loaf was better than nothing, Republican Brad Zaun, a hardware store owner from the Des Moines suburb of Urbandale, resumed his party’s freedom-loving assault on protecting nonsmokers from assault by carcinogenic secondhand smoke. The only sense that Zaun was apparently able to discern in the whole initiative was that the legislature was “addicted to gambling revenue”; though he bridled at the casino exemption, he “might even have went [sic] along with” it if only the Democrats had accepted the 21-and-over bar exemption. In the event, he took the opportunity to vent his resentments at “big government [which] knows best.” In particular, his lamentations focused on the Senate’s passage just the day before of a bill that (non-mandatory) provided health care coverage for tens of thousands of children by raising the income limits of eligible parents. Deserted by even most of his own caucus, Zaun was one of only six senators to vote No. Laconically excoriating the beginning of the end of the world—“[w]e got socialized medicine yesterday”—he envisioned the next outrage as the bill’s ban on smoking in day care homes, which would prohibit

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910 Telephone interview with Dennis Black, Des Moines (July 30, 2008).
912 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
“grandma and grandpa” from smoking in their own home while watching their grandchildren. Having dismissed “government intrusion” in principle, Zaun handily identified an already existing substitute for it: “We have local control right now. ... All Iowans have two feet underneath their body and they get to figure out where to patronize what business.”

The next Republican focused his attack on enforcement. In response to farmer David Johnson’s question as to whether additional money had been appropriated to enable the Public Health Department to hire enforcement agents, Appel replied that the smoking ban would be self-enforcing in Iowa. As astonishing as was her mistaken belief that the bill she was managing criminalized smoking, it paled beside her touchingly platitudinous image of Iowa’s apparently uniquely law-abiding population: “People here in Iowa do not on purpose do criminal activity, especially like this to be smoking.”

With Larry McKibben, a lawyer from Marshalltown, a high point in the Republican onslaught was reached. A non-smoker who frequented smoking bars, he freely conceded that “it doesn’t bother me that I inhaled a little smoke and...I probably shortened my lifetime [sic] by a few hours every time I go” there, but “frankly I don’t care—something’s gonna get me at some point in time, probably

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914Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
915Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
Verbatim Appel repeated this shibboleth shortly after passage. Telephone interview with Staci Appel, Ackworth (Apr. 12, 2008). It is unknown whether, after the law went into effect, Appel bothered to put herself in a position personally to experience hundreds of violations committed knowingly, intentionally, and belligerently by smokers whose scofflawdom was made possible by a lack of enforcement. Appel’s performance as floor manager was emblematic of the make-believe and substantively uninformative character of the debate as a whole. For example, when Senator Zaun read aloud a provision—which surely did not, as litigators love to oraculize, “speak for itself”—under which an employee whose “employer allows smoking does not waive or surrender any legal rights the employee may have against the employer or any other person” and asked Appel to explain what it meant, she preposterously replied: “I think it states exactly what it means as you read it.” That Zaun did not even bother to point out (and seemingly did not even notice) the nonsensical nature of Appel’s statement merely completed the charade. Later, when Sen. Johnson asked Appel whether the casino exemption violated the guarantee of equality in the state bill of rights, instead of explaining why the suggestion made a mockery of the legislature’s power to make rational distinctions, she proudly, triumphantly, and evasively repeated the vacuous saw: “We make the laws, we do not interpret the laws.” Later, when Republican Paul McKinley asked Appel whether expediency had driven the conference committee report, she self-contradictorily replied: “I don’t believe it’s expediency—we needed 26 votes in the Senate and we needed 51 votes in the House.” Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty).
my weight....” Instead of reflecting on whether it was appropriate for such a fatalistic dare-devil to be making public health policy for Iowa, McKibben mocked the nanny-state Democrats’ alleged attitude: “To heck with the Neanderthals in the rest of the state who don’t know what’s good for them.” Implausibly claiming that “I would vote for a 100% ban,” he targeted the unfairness associated with the death penalty that the ban would allegedly impose on hundreds and hundreds of small businesses because the exemption would “herd” into casinos “smokers who have this disease we have no cure for....” In an inspired explosion of madcap fantasy, McKibben envisioned the need to fund an expansion of Gamblers Anonymous to deal with all the factory workers who, instead of having a beer and a cigarette when they got off the line, would now be pulling one-armed bandits “because we drove every single smoker in the state of Iowa to all 17 casinos.” And despite the inordinate amount of debate time in both houses allotted to the bill over a period of almost two months, McKibben implausibly insisted that “[t]hese are the outcomes you get when you rush crap through the legislature.” No wonder that Democratic assistant majority leader Jack Hatch confessed that he “got lost at about two minutes into” McKibben’s speech.916

Masterfully combining incoherence and oral illiteracy, James Hahn, a Republican real estate and insurance salesman from Muscatine, regaled the chamber with an email that legislators had received allegedly embodying a study published in the British Medical Journal that found that “secondhand smoke is 2.6 [sic] safer than the occupational workplace.”917 While his colleagues were doubtless still scratching their heads over yet another piece of tobacco-industry financed and peddled obfuscation,918 Hahn went on to boast about his fund of oncological wisdom: “I know what lung cancer is all about, and I’m especially concerned that we don’t have some other way to blame lung cancer on anything except smoking, especially secondhand smoke.” Picking up the disinformational cigarette company playbook of yesteryear, he insisted that “we’re barking up the wrong tree” because mildew, mold, pet dander, and chemicals in fabrics and carpets in houses “all add up too.”919

Democrat Dotzler, a non-smoker920 who boasted of having “a kind of a

916Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
917Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
919Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
920Dotzler stated on television that he did not smoke, but a blogger claimed that she
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to go into that establishment and that takes care of everybody’s problem that has
an issue with secondhand smoke ‘cause they don’t have to go into that facility.” Dotzler’s approach thus would essentially have retained Iowa’s existing toothless law.923

Toward the end of the debate, two Democratic supporters weighed in. Joe
Bolkcom, returning from the men’s rest room where, however, he had “heard
everything,” wanted to “back up to about 50,000 feet” and talk about tobacco as
a unique cause of disease and mortality in Iowa. Bolkcom sought to make it clear
to the chamber that secondhand smoke had to be treated as an occupational
pollutant subject to the same principles for which “we have decided for a long
time that we don’t let employers expose their employees to things that can kill
them.” He attached special importance to the proposed law precisely because the
Occupational Safety and Health Act/Administration had not been attending to
problems in such “new workplaces” as restaurants, bars, and bowling alleys to
which H.F. 2212 would apply. Moreover, contrary to opponents’ claims, in the
real world of work, if a hundred thousand workers decided one day that they were
tired of their smoke-exposed jobs and workplaces, they would not all be able to
find alternate employment. In a final conciliatory gesture to senators such as
Dotzler, Bolkcom—who acknowledged that there was “nothing too scientific
about” the conference committee report, which was merely designed to secure the
requisite number of votes in each house—conceded that there were problems with
the imperfect bill (such as coverage of crane operators) on which he and they
could work after passage.924

In a speech that oddly melded the coolly dispassionate with the intensely
personal, Majority Leader Gronstal repeatedly urged what was presumably his
target audience of fence-sitters that H.F. 2212 was as good a bill as could be
passed, that throwing away the coverage of 95,000 workers because 5,000

922 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
Dotzler had already offered this proposal—that people who were “bothered by that
smoke...can choose not to go in there—a month earlier on a television news program.
cfm?id=1897.

923 Dotzler’s preference for toothlessness and his contempt for the smoking ban were
nicely captured by his comment a month earlier with regard to reporting smokers who
violated the law that “I don’t think that’s what our country should be about, that we’re

924 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
remained unprotected made no sense, and that expecting a better bill to emerge from a second conference committee triggered by voting down the current version contradicted all legislative experience. Then invoking his parents, who had both died of cancer, Gronstal expressed the wish that the legislature had passed the bill 50 years earlier because neither had been able to witness his political career. Lest his audience resent him for self-absorption, he quickly observed that the bill was not about him and his family and self-mockingly added that as conservative Republicans his parents might even have voted against him. Stressing the dimension that Republicans’ monomaniacal focus on bar owners’ alleged right to make public health decisions and smokers’ alleged right to smoke regardless of the public health consequences, Gronstal closed with an appeal to instantiate workers’ rights to a safe workplace.925

Becoming the only senator to speak twice, Dotzler sought to deflect and deflate his fellow Democrats’ workplace orientation by implying that the bill was perfectionist, after all, because it imposed zero tolerance for tobacco smoke in contrast to permissible levels for chemicals under OSHA—a message that he immediately contradicted by asserting that OSHA “isn’t tough enough.” Seeking to refurbish his own credibility tarnished by his insistence on a 21-and-over proposal that would perpetuate infliction of secondhand smoke exposure on bar workers, Dotzler irrelevantly pleaded: “I fought my whole life for working men and women in this state.” Ironically, in this particular fight he appeared to be pleading for employees’ right to smoke in bars, regardless of the health consequences for customers, when he cited letters he had received from cigarette-addicted workers that taverns (and outdoor painting) were the only places they could work.926

The final Republican speaker, assistant minority leader and media consultant Jeff Angelo, chiding Democrats for regarding the 10,641 casino workers as an “acceptable level of casualties in our war on smoking,” pretended that his party was champing at the bit to cover casinos if only the report were voted down and a second conference committee appointed. At the same time, he inconsistently charged that it was unrealistic to expect that, given the importance of casino revenue for the state budget, casinos’ influence would wane, thus permitting the legislature to repeal the exemption in 2009.927

In an emotional appeal, floor manager Appel used her closing remarks to

925 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin). It is unclear why, with Iowa’s labor force at well over a million, Gronstal used the figure of 100,000.

926 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).

927 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
invoke her grandmother, a lifelong nonsmoker who had died of secondhand smoke exposure before the age of 60 and thus never lived to see her grow up or her children. In a voice audibly cracking, Appel challenged her colleagues to do anything better with their votes than to save the lives of workers and constituents.\footnote{Appel did not identify the source(s) of the secondhand smoke that killed her grandmother.}

The 26 to 24 vote adopting the conference committee report was as close as possible.\footnote{The 26 to 24 vote adopting the conference committee report was as close as possible. Only one Republican “maverick” (Lundby)\footnote{Lundby, according to Dotzler, had even stopped attending Republican caucus meetings, referring to her party-mates as “assholes.” Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008).} joined Democrats in favor, while five Democrats (Black, Dotzler, Hancock, Bill Heckroth, and Keith Kreiman) crossed over to join the pro-tobacco Republicans. Heckroth, a financial consultant, who did vote for H.F. 2212 on February 27 when it lacked the casino exemption, voted against the report because of the casino exemption, even though he believed that the result would be a tie vote and probable death of the bill—he later stated that he had preferred its death to passage with the casino exemption intact,\footnote{Telephone interview with Bill Heckroth, Waverly (Aug. 4, 2008).} while Kreiman, a Lutheran church Sunday School teacher, in addition much preferred local control.\footnote{To be sure, Kreiman’s claim about unfairness was inconsistent with his vote against passage of H.F. 2212 on Feb. 27, when it included no casino exemption. He denied that his votes had in any way been influenced by the fact that his district bordered on Missouri or the possibility that some constituents might cross the border to frequent bars or restaurants. Telephone interview with Keith Kreiman, Bloomfield, IA (July 27, 2008).} On final passage of H.F. 2212, two more Republicans (Noble and Ward) joined Lundby, while the same five Democrats defected again, producing a 28 to 22 vote.\footnote{Senate Journal 2008, at 1:999-1000 (Apr. 8).} Ward’s vote was dictated by her perception that most of her constituents were progressive, educated, did not want to be exposed to secondhand smoke, and accepted regulation.\footnote{Ward stated that she had voted against the conference report because she was hoping for}
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his heavy-smoking parents who had died of cancer, reinforced by the pent-up pressure of many years of failure to pass comprehensive anti-smoking legislation at the hands of the cigarette oligopoly, burst forth in an extraordinary display of personal emotion by Majority Leader Gronstal, who, on the verge of crying, prefaced his routine motion to adjourn with “For Mom and Dad.”

Some Supporters’ Reactions to Passage of H.F. 2212

You take a half a loaf of bread and you move on down the road. That’s what we do in politics.

Joyful tears appeared to be less prevalent among some anti-smoking lobbying groups. For example, the president of the Iowa Tobacco Prevention Alliance, Cathy Callaway, deemed the compromise, in spite of the casino exemption, “acceptable,” but vowed to continue pressing for greater rigor. With something less than grace and historical accuracy, a lobbyist for the American Cancer Society, one of the health advocacy groups applauding passage, declared that the “push to get a statewide smoking ban has lasted eight years”—thus suppressing the fact that during all but the last few weeks of those eight years it had been so preoccupied with local control that it had not been supporting Janet Petersen’s lonely push. Similarly distorted in the disappearing act that it performed on Petersen and her agency and the inflated stature it conferred on his co-leader was the account issued by House Speaker Murphy in his “Inside the Iowa Legislature” for that week: “When the legislative session began, I suspected that we might have the votes to give local communities the option to enact smoking restrictions tougher than state law. Sometime in February it became apparent that there was support for a broader measure to protect public health. Much of the credit for the ban goes to House Majority Leader Kevin McCarthy, an attorney who worked in the nation’s capitol fighting big tobacco

936 Senate Debate on H.F. 2212 (Apr. 8, 2008) (audio file provided by Rusty Martin).
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companies on behalf of public health interests, prior to his election to the Legislature."940

One organization that did not propagate these distortions was the Heart Association, whose advocacy director, Randy Yontz, was, at least after the fact, ecstatic about the new law and praised Petersen—who had formerly occupied his position—for having stuck to her guns. Asked what lesson could be learned from the passage of H.F. 2212, Yontz, with a measure of humility, replied: “Never predict what can be accomplished.” His probity was also capacious enough to enable him to acknowledge that although the local control coalition had misjudged history, the Democratic leadership, which had boldly made history, nevertheless gave the health organizations the credit for passing the bill.941

The key to understanding the advent in Iowa of the nationwide wave of comprehensive and effective anti-smoking enactments after so many years of failure was, as backers and enemies agreed, the change and legislators’ perception of change in public opinion, which Representative Wise characterized as a “massive cultural shift”:

“It would have been utterly impossible to do this in the past because of the culture of this place,” Wise said, gesturing to the House chamber. “It’s an example of the elected officials being behind the public. We wouldn’t have considered this even a half dozen years ago.”

Make that two years—before Democrats took control of the Capitol, according to Rep. Janet Petersen....942

To be sure, the seismic repercussions were neither instantaneous nor all-encompassing. As soon as the day after the final passage of H.F. 2212, legislative Democrats were constrained to announce their plan to cut the Public Health Department’s anti-smoking advertising budget by $590,000 “in an attempt to calm

940 “Statewide Smoking Ban,” Legis. News: Inside the Iowa Legislature (Apr. 11, 2008), on http://www.bvdems.org/news/LegisNews%204-11-08.pdf (visited July 21, 2008). Murphy’s account of the final bill incorrectly stated that “[o]utdoor areas are exempt from the ban, except for outdoor entertainment venues and restaurant seating areas.” In fact, smoking is prohibited in all outdoor areas of schools and universities as well as on the grounds of public buildings.

941 Telephone interview with Randy Yontz, Des Moines (May 14, 2008). Olson’s characterization of the relationship between the legislators and health advocacy groups as one of “trust” was an example of leadership’s magnanimity. Telephone interview with Tyler Olson, Des Moines (Apr. 12, 2008).

Republican anger over the same amount of money that IDPH had spent for ads promoting a ban on smoking in bars and restaurants that Republicans claimed constituted an improper use of state revenue by an administrative agency to put pressure on the legislature. The cuts, which would cause a reduction in assistance to Iowans trying to quit smoking and in the number of “Just Eliminate Lies” anti-tobacco ads, were part of a larger two million dollar budget bill cut in funding for smoking prevention programs.  

The Smokefree Air Act’s Nationally Unique, Most Radical, and Least Noticed Provision of Unknown Provenience: The Total Indoor and Outdoor Smoking Ban on All Public and Private College and University Campuses

“You’ll never find an academic who’ll allow his Ph.D. students to do a study on secondhand smoke outside…. And I know a lot of lu-lu academics.”

Iowa City is full of doctors and athletes—of course this smoking ban is not going to have any effect on that city. OK? Ames the same way.

The Smokefree Air Act’s most startling prohibition, which was also discontinuous with regulation in Iowa or elsewhere, has not been discussed yet.

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945Administrative Rules Review Committee Meeting (Dec. 9, 2008) (statement by Brian Froehlich, bar owner from Wilton, IA) (audio tape provided by Joe Royce, Committee legal counsel).
946In 1931 the Nebraska Senate debated at length and, by a vote of 24 to 7, passed S.F. 82, which, subject to a fine of $25 to $100, made it “unlawful for any person to smoke cigarettes, pipes, and/or tobacco in any of its forms, in any buildings owned and/or operated by the University of Nebraska or State Normal Schools, or in dormitories leased or owned for school purposes, or in any public or high school building or appurtenances thereto in this state.” Legislature of Nebraska, Forty-Seventh Session, Senate File No. 82 (Jan. 26, 1931) (copy furnished by Nebraska State Library); Senate Journal of the Legislature of the State of Nebraska: Forty-Seventh Session…1931, at 208, 797-98 (Jan. 26, Mar. 20). The press reported that the bill also banned smoking on the campuses or grounds of those educational institutions. “Would Prohibit Campus Smoking,” BDS, Mar. 11, 1931 (1:5); “Senate Votes Ban on College Smoking,” OW-H, Mar. 18, 1931 (1:7). However, this claim, at least as applied to the University of Nebraska and state normal
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because, startlingly, the legislature itself never discussed it—in the House Commerce Committee, during floor debates in either chamber, or in the conference committee. Petersen’s House study bill opened up new vistas for limiting outdoor exposure to secondhand smoke by prohibiting smoking “[o]n

schools, may have been based on a misunderstanding that an amendment, expressly extending coverage to school campuses or grounds, sorority and fraternity houses and grounds, and private, parochial, and church schools and grounds, had passed, when in fact it failed by a vote of 6 to 26. Senate Journal of the Legislature of the State of Nebraska: Forty-Seventh Session...1931, at 731 (Mar. 17); “Income Tax Accorded a Hearing in Senate,” NSJ, Mar. 17, 1931 (7:1-2); “Smoking Bill Moves Up Minus Amendment,” NSJ, Mar. 18, 1931 (1:7); “Find Demand for No Smoking Bill So It Is Revived,” NSJ, Mar. 12, 1931 (17:1-2) (noting that no senator pointed out that the bill did not refer to grounds). Alternatively, some senators contended that “appurtenances” applied to the university and stadium. “Senate Approves No-Smoking Bill by 24 to 7 Vote,” NSJ, Mar. 21, 1931 (15:1). Before final passage the Senate defeated an amendment confining its applicability to people connected with those institutions (though no such amendment appeared in Senate Journal). “Senate Votes Ban on College Smoking,” OW-H, Mar. 18, 1931 (1:7). Attacks on smoking, especially at the state university, “kept the senate in an uproar....” “Smoker Measure Back on Floor,” BDS, Mar. 17, 1931 (9:7). Unlike SAA, it was intended not to limit secondhand smoke exposure, but to deter young people from smoking. At a public hearing held by the Senate Education Committee, the head of the Lancaster County Federated Women’s Clubs testified that “at the University of Nebraska, ridicule and scoffing made it impossible for a boy to attend without smoking” or “for a girl to go out with a group of students and not smoke cigarettes.” “Women Ask Ban, School Smoking, but Bill Tabled,” OW-H, Mar. 12, 1931 (25:5). The introducer, Republican Senator C. Johnson, claimed that advocates of his bill numbered more than 50,000 voters. Pointing out that the University of Nebraska chancellor had explained to the legislators that no regulation prevented smoking, Democrat Henry Pedersen urged passage on the grounds that university authorities should be given the opportunity to “‘combat the smoking evil on the campus.’” The lengthy debate focused on the controversy over student control and efforts to legislate morals and habits and taxpayers’ right to say what was done at the university. “Would Prohibit Campus Smoking,” BDS, Mar. 11, 1931 (1:5); “Find Demand for No Smoking Bill So It Is Revived,” NSJ, Mar. 12, 1931 (17:1). One of the chief objections to the bill was its enforcement at the university football stadium, although senators themselves were certain that the stadium was covered. “Ban Is Proposed in Nebraska on Smoking at Grid,” REG, Mar. 18, 1931 (1:4); “Find Demand for No Smoking Bill So It Is Revived,” NSJ, Mar. 12, 1931 (17:1-2). For House discussion, see “Bans Smokes and Gin at Schools,” BDS, Apr. 16, 1931 (1:3). The House indefinitely postponed the bill after the Miscellaneous Subjects Committee had recommended putting it on general file with amendment. House Journal of the Legislature of the State of Nebraska: Forty-Seventh Session...1931, at 1193 (Apr. 17), 1682 (Index); Senate Journal of the Legislature of the State of Nebraska: Forty-Seventh Session...1931, at 1443 (May 2).
school grounds, including parking lots, athletic fields, playgrounds, tennis courts, and any other outdoor area under the control of a public or private educational facility, including any vehicle located on such school grounds, and including the perimeter area of fifty feet beyond such school grounds to which the public is invited or in which the public is permitted.\footnote{H.S.B. 537, § 3(2)(e) (2008).} This provision was enacted intact except for the 50-foot perimeter, which the legislature eliminated together with several other such outdoor no-smoking zones.\footnote{Iowa Code § 142D.3(2)(d).}

That such a radical spatial expansion of the law’s prohibitory scope had slipped through without any public discussion or scrutiny at all was especially intriguing in the light of the results of opinion surveys commissioned by IDPH. They revealed that the proportion of Iowa adults who said that smoking should not be allowed in outdoor public places had reached 40 percent in 2002, fallen to 31 percent in 2004, and then risen somewhat to 35 percent in 2006 and 36 percent in 2008. (The corresponding figures for current smokers were 16, 5, 11, and 9 percent, respectively.)\footnote{Gene Lutz et al., \textit{Iowa 2009 Tobacco Control Progress Report} fig. 17 at 31 (Jan. 2010).} The finding that only little more than one third of respondents supported outdoor bans—compared, for example, to the two thirds who favored not allowing smoking in indoor dining areas of restaurants\footnote{Gene Lutz et al., \textit{Iowa 2009 Tobacco Control Progress Report} fig. 14 at 28 (Jan. 2010). The corresponding figure for current smokers in 2008 was 30 percent.}—was not in itself so interesting as the fact that, although by 2008 a roughly equivalent 39 percent of adults (up from 27 percent in 2004 and 32 percent in 2006) said that smoking should not be allowed in bars and cocktail lounges,\footnote{Gene Lutz et al., \textit{Iowa 2009 Tobacco Control Progress Report} fig. 15 at 29 (Jan. 2010). The corresponding figure for current smokers was 8 percent.} legislative discussion of that locational ban had been virtually omnipresent. (To be sure, since the survey question did not ask specifically about outdoor college and university campuses, it is not known whether more or fewer adults would have expressed support for banning smoking there than in other, unspecified, outdoor public places.)

Curiously, shortly after the bill was passed neither Petersen,\footnote{Telephone interview with Janet Petersen, Des Moines (Apr. 12, 2008). Indeed, when asked more specifically about the provision, Petersen confused it with Republicans’ amendment to ban smoking on the grounds of public buildings. After realizing her error, she guessed that it was taken from “the model legislation I received,” but the bill drafter stated that it had not been. Email between Janet Petersen and Marc Linder Apr. 14, 2008.} nor Olson,\footnote{Olson, who also incorrectly recalled that it had been taken from other states’ laws,}
nor the Legislative Services Agency bill drafter\footnote{Email from Patty Funaro to Marc Linder (Apr. 14, 2008); telephone interview with Patty Funaro, Des Moines (May 5, 2008). Although Funaro was unable to find the source of the actual language, she did recall conversations with Petersen and Olson (but no specifics) about the school grounds language. Email from Patty Funaro to Marc Linder (July 29, 2008).} was able to reconstruct the provenience of this remarkable provision, which prohibited smoking everywhere, indoors and outdoors, on all private and public college and university campuses and appears not to have been adopted from any other state’s statute or regulation. Finally, the Board of Regents’ lobbyist also did not know how or why the total campus smoking ban came to be included in H.S.B. 537, but, he reported, the Regents had been aware of its presence and consequences from the beginning and never asked him to lobby against it; in particular, they understood and did not object that as a state law it would be enforceable by monetary penalties.\footnote{Telephone interview with Mark Braun, State Board of Regents lobbyist, Des Moines (Apr. 15, 2008).}

Remarkably, a number of legislators who were deeply engaged in the debate over the bill had not even understood that H.F. 2212 contained such a ban. Most prominently, Michael Connolly, the Senate’s most passionate and long-standing anti-smoking militant, who, in addition, chaired the committee that recommended passage, was, even two weeks after the governor had signed it, unaware that it banned smoking on college campuses.\footnote{Telephone interview with Michael Connolly, Dubuque (Apr. 29, 2008).} Senator Joe Bolkcom, another anti-tobacco stalwart, knew that the ban covered public colleges and universities, but did not think that their private counterparts were included.\footnote{Telephone interview with Joe Bolkcom, Iowa City (May 8, 2008); email from Marc Linder to Joe Bolkcom (May 8, 2008); email from Joe Bolkcom to Marc Linder (May 9, 2008).} And more than a month after the law had gone into effect, Senator Hartsuch, who had exhibited such passion about the bill during debate, was unaware that it included such a provision.\footnote{Telephone interview with David Hartsuch, Bettendorf (Aug. 11, 2008).}

Some legislators, especially Republicans who opposed the bill, did know about the outdoor campus ban,\footnote{Republican Representative Chuck Soderberg (incorrectly) stated that legislators had been told in subcommittee and committee and in floor debate that the ban on smoking on} but never raised the issue on the floor.
Democratic Senator Bill Dotzler later stated that tons of email had been received from campuses against the provision and that he had raised the issue of the total ban on smoking on college and university campuses, in particular at the University of Iowa football stadium, in the Democratic caucus, but had been told that the ban would not be enforced. Republican Whip Kraig Paulsen from Cedar Rapids, who was acutely aware of the provision as the bill was going through the legislature, nevertheless, even seven weeks after the law had gone into effect, incorrectly believed that it did not apply to private colleges or to dormitory rooms at public colleges. Paulsen recalled a meeting before the bill’s passage at which University of Iowa President Sally Mason told Minority Leader Rants that the university was going to go smoke-free anyway. Paulsen also reported that Mason had been “visibly agitated” when told that the university’s athletic department had mollified a big donor from Cedar Rapids who had complained, in disbelief, that he would no longer be able to smoke in his recreational vehicle in the tail-gating area next to the football stadium by assuring him: “‘We’re not gonna enforce it.” Right-wing Republican Representative Linda Upmeyer not only was aware of the provision while the bill, which she opposed, was being debated, but distinctly recalled one informal discussion among her colleagues in which one jocularly suggested that Iowa State University students might unlawfully smoke en masse at the football game at the University of Iowa football stadium. Republican Representative David Heaton had to be corrected at an Administrative Rules Review Committee meeting when he stated that, as he read the rule, smoking was prohibited immediately adjacent to the football stadium on the University of Iowa campus unless those in custody/control permitted it. (The rules drafter explained to him that the scope of the smoking ban on school grounds was broader than that on the grounds of public buildings.) That the University of Iowa administration itself did not immediately grasp the fundamental difference between a proposed university rule that the university had publicly announced would not be enforced and a state law backed up by a $50 penalty became clear when the co-chair of the group charged with putting the ban into place stated that the main steps in the implementation
process would remain the same.\textsuperscript{964}

The misunderstanding and ignorance surrounding the campus bans may have reached their high points at Iowa’s richest and most prestigious private college, Grinnell, whose president, Russell Osgood, a former law professor no less, incorrectly asserted after the House and Senate had passed H.F. 2212 in February that: ‘‘If the state makes something applicable in public places, we wouldn’t have to follow it.... This is the home for about 900 students; they aren’t public buildings.’ Osgood said that since Grinnell is a private college, any such state law would only affect the college if it explicitly gave money to the college to implement any similar regulation.\textsuperscript{965}

Despite the lack of debate on the outdoor campus ban—or, perhaps, precisely because many legislators had been unaware of what they had approved—already two weeks after the governor had signed the bill into law, the press was mistakenly lumping college campuses together with parks as places in which the new law’s applicability was unclear.\textsuperscript{966} The press was hardly alone. No less an authority than House floor manager Olson erroneously told a radio news program that, like local governments, universities and community colleges were empowered to create more stringent rules on their campuses. In fact, however, whereas H.F. 2212 expressly prohibited smoking everywhere indoors and in the outdoor areas of schools and educational facilities, leaving those institutions nowhere else to ban smoking, the new law did not expressly ban smoking in all outdoor areas owned by municipalities. Consequently, although Olson correctly observed that local governments had always had the authority to prohibit smoking, for example, in building-less parks that they owned—a ban that the law’s prohibition of smoking on the “grounds of any public buildings” did not impose—his aforementioned remark about institutions of higher education was wrong, either because the legislature, by virtue of imposing a total ban on campuses, afforded them no opportunity to do more or because he, too, was mistakenly lumping them together with “grounds of any public buildings.”\textsuperscript{967}

\begin{footnotesize}
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\item[967] Iowa Public Radio News (May 12, 2008) (audio file made available by the interviewer, Jeanene Beck). A few weeks later, when IDPH issued its draft rules, which empowered those in control of exempt outdoor areas of public buildings to declare them nonsmoking, Senate Minority Leader Wieck protested that ‘‘the intent of the bill was not to leave it up to local governments.’’ IDPH, Rule 641—153.2 (May 29, 2008); Jason
\end{itemize}
\end{footnotesize}
Both a public radio interviewer and the president of the University of Iowa subscribed to Olson’s error—if they did not pick it up from him. Immediately after relating Olson’s view, the interviewer stated that: “In fact, the University of Iowa is moving ahead with a campuswide smoking ban that even included the parking lot of Kinnick Stadium.” President Sally Mason then added that “even if the state’s definition of public grounds would allow smoking on some parts of the campus,” it was unlikely that she would change the school’s smoking policy. Like Olson, Mason and the interviewer manifestly did not understand that a separate provision in H.F. 2212 governing schools and educational facilities covered the University of Iowa, whose campus could not have become totally smoking-free based solely on the mandate imposed by the “grounds of any public buildings” provision. The university’s own policy would have been implemented on July 1, 2009 and would also have prohibited smoking everywhere on campus indoors and outdoors. The difference was that the

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968 Iowa Public Radio News (May 12, 2008) (audio file made available by the interviewer, Jeanene Beck). Mason did allow herself some wiggle room, for example, with regard to the university golf course: “Let’s see what the legal experts say and whether we have any leeway and whether we have enough demand or outcry that we want to make any exceptions at all. Right now I’m not thinking about any exceptions and that’s not the direction we’re heading.”

969 Even when Mason apparently did understand that the university was governed by a special statutory provision, her understanding of the weight of public attitudes toward smoking was bizarre. Interviewed on public television on May 9, she was asked by a reporter, who was misinformed, whether the university would exercise the discretion that the law conferred on it to permit smoking in and around its football stadium and at tailgating. Although she correctly replied that she did not think that the university had such discretion, she added in a throwaway line: “I think our fans would be happy” (if the university did permit such smoking). Iowa Press, Iowa Public Television, #3536 (May 9, 2008). It is difficult to imagine that a biologist actually believed that (all) the “fans,” the vast majority of whom, if they were even remotely similar to Iowans in general, did not smoke, would have been “happy” to continue to be exposed to carcinogenic smoke. When apprised of the president’s statement, her senior associate stated: “I don’t think she meant that, and I’m sorry she said it. More like ‘some fans’ would be happy, but some would not—I agree with you.” Email from Jonathan Carlson to Marc Linder (May 9, 2008).

970 Smoking Policy Review Committee, “Final Recommendations” (University of Iowa, Nov. 16, 2006); email from President Sally Mason to The UI Community (Subject: Smoke-free Campus) (Feb. 4, 2008).
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university’s policy was merely “‘aspirational’” and, unlike the state law, did not impose monetary penalties on violating smokers or—much more importantly—on the university itself for failing to enforce its own policy. ⁹⁷²

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⁹⁷¹ Erin Jordan and Mason Kerns, “U of I Set to Ban Smoking on Campus by July 2009,” DMR, Feb. 5, 2008 (1A:1). The University of Iowa spokesperson stated that “[t]he intent is not to say to our police department, “Go get ’em.”... The emphasis is on civility and respect. We hope people will honor that.” Id. The spokesperson confirmed that he had been quoted accurately. Email from Steve Parrott to Marc Linder (Feb. 6, 2008).

⁹⁷² On the uncertainty that attended formulation of the IDPH rule concerning college campuses, see below ch. 36.
Administrative Rules for, Bar Owners’ Unsuccessful Constitutional Challenge to, Enforcement of, and Abortive Efforts to Amend the Smokefree Air Act

In places like New York City or California where bans have been in place for years, new customers flowed into the smoke-free bars. But in the sparsely populated and aging small towns of much of rural Iowa, there isn’t a non-smoking effete professional demographic around to slide in and replace the hardened blue collar smokers.¹

Like but even more so than most laws, Iowa’s Smokefree Air Act did not begin its life the moment a majority of both houses of the legislature solemnly agreed on its text. Not only did an administrative agency have to draft rules to define crucial terms in order to administer and enforce it, but the enforcement agents and the public had to be educated as to where the law prohibited smoking, what rights nonsmokers now had to smokefree air, who was responsible for enforcement, and what the consequences of noncompliance were. In light of the possibility that a relatively small but belligerent proportion of the affected population composed of smoking tobacco addicts might engage in individual or organized violation of the public smoking ban, the question of the optimum enforcement approach, especially at the outset, assumed great importance. In the event, this issue was raised most explosively in discrete areas of the state by bar owners who concertedly and publicly violated the new law in a (misguided and unsuccessful) effort to provoke its judicial invalidation.

The Governor Approves—But Some Others Don’t

“Gov. Culver ain’t nothing but a communist.... He...raised (the tax) $1 a pack on cigarettes, then allowed cigarettes to be banned in the bars.”²

“Pretty soon, they’ll be telling us that we can’t (smoke) in our own home, or in our yard, or with our children. We might as well move to Germany or China....”³


²“Smokers Bemoan Ban, Light Up Last Time in Bars,” Gazette (Cedar Rapids), July 1, 2008 (1A) (NewsBank) (quoting a bar customer in Cedar Rapids).

No sooner had the Senate passed the bill than the governor’s spokesperson announced that he looked forward to signing the bill. In the meantime, however, the debate—merging at times into post-mortems—continued unabated, the local press finding no shortage of point/counterpoint. Republican Gary Worthan from Storm Lake, who had voted against the bill, allowed as he had “‘no problem with a smoking ban in public places...where people are forced to go to do business, like a courthouse.’” But, revealing that he had learned nothing about public health from 10 weeks of intense discussion, he insisted that “‘when it comes to restaurants, bars and those kind of things, we’re just stepping on people’s toes here....’” One of his bar owner-constituents revealed just how brittle that view was by conceding that “‘inhaling secondhand smoke can kill a person,’” while lamenting that “‘from a business standpoint I think it will damper [sic] the crowd.’” In Iowa City one owner of numerous restaurants and bars that had purportedly been nonsmoking for 10 years called the bill’s passage “‘the greatest news that could possibly come,’” adding, in disbelief, that Iowa as a state had held on to its public smoking regime for as long as it had. (To be sure, this pseudo-anti-smoking enthusiast did not share with the press the fact that he had bought a cigarette sales permit for his organic food store cum bakery, soup and salad bar.) Another optimistic bar owner confided that “‘smoking costs a lot of


[4] In fact, Mondanaro had played a reactionary role in opposing passage of a no-smoking ordinance in Iowa City in 2001-2002; see above ch. 33.

[5] Shortly after he had opened this store he disclosed to a stranger that he had bought a cigarette permit and cigarettes, but had not yet decided whether to sell them. When
money for a bar or restaurant” in terms of cigarette burns and smoke damage to stereos and electronic equipment. An owner of one restaurant-bar with live music that had a well-deserved reputation for smokiness admitted as he was “sort of glad” for the “inevitable”; unlike many of his competitors, he not only eschewed the “business-rights” perspective for that of individual rights, but defined the latter as not having to “endure secondhand smoke.” The student newspaper at the University of Iowa, which for years had been a reliable nattering nabob of negativity on any regulation of smoking, called the law “an overweening public-relations stunt” that “might look good on a travel brochure or recruiting website,” adding the same knee-jerk defeatist prediction that it had offered regarding earlier university anti-smoking policies and that had been refuted by reality: “it’s largely unenforceable and overreaching.”

Some legislative opponents still nourished hopes of amending the bill in the waning days of the session. Three days after final passage Senate Democrat Bill Dotzler was prognosticating a 50-50 chance that leadership would “discreetly” push back H.F. 2212’s effective date, but this dream proved to be as little realistic as his plan to file a series of amendments in the last-minute grab-bag standings bill, which he was forced to withdraw because he lacked the votes. In case that parliamentary ploy failed, the Clinton Organized Bar and Restaurant Association (COBRA) began soliciting donations to collect the $50,000

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asked why he would even consider selling in, of all places, an organic food store commodities that kill half their long-term consumers, he pleaded that he hated cigarettes, but that he did not want to give up even one sale to supermarkets or convenience stores. Interview of Jim Mondanaro at Bread Garden & Market, Iowa City (Mar. 1, 2008, 5:00-5:15 p.m.). Later, after being told that if he sold cigarettes his store would face a picket and boycott, and that his state representative, Mary Mascher, wanted to speak to him, he ultimately relented and promised not to sell cigarettes. He did not renew the permit when it expired a few months later. Information from Iowa City City Clerk’s office (Sept. 3, 2008).


10Shawn Gude, “Culver Signs Smoke Ban,” DI, Apr. 16, 2008 (1A:1-4, at 3A:3) (quoting Marty Christensen, co-owner of The Mill). On the previous owner’s tale to the city council in 2001 that live music was not possible without smoking, see above ch. 33.


14Telephone interview with Bill Dotzler, Waterloo (Aug. 20, 2008).
necessary to retain a lawyer to seek an injunction against the law.\textsuperscript{15}

Anti-smoking advocates packed into the statehouse rotunda on April 15 to cheer Governor Chester Culver wildly before, while, and after he signed H.F. 2212 into law. On what all present agreed with him was “a monumental day,” no one audibly took umbrage at his puzzling concession—given all the enormous health benefits that he listed as resulting from the new law—that “I understand there are compelling arguments against this bill.” Before the governor took the podium, Dan Ramsey, the programs director and lobbyist for the American Lung Association of Iowa, had spoken for many in affirming that the day and the law had been “a long time coming.” The governor sounded the same theme when, dating efforts in Iowa back to an anti-public smoking bill that legislator Jim Wells (who was briefly feted at the ceremony) had filed in 1975, he noted that “33 years is a long time to wait.” It was very unlikely that the governor was impolitically alluding to the health organizations’ initial opposition to the statewide bill enactment of which they were now passionately applauding when he called the anti-smoking law “a tough, tough issue, very difficult.” The governor may have thanked Senator Lundby and Representative Tomenga and “many other Republicans” for their bipartisan efforts,\textsuperscript{16} but Senate Minority Leader Ron Wieck was having none of the signing ceremony’s good cheer as he continued to press his party’s jeremiad against creeping nannyism: “‘This is a bad, bad, bad day for Iowa as far as I’m concerned.’”\textsuperscript{17}

Among those who shared Wieck’s assessment some hoped that it would not even be necessary to wait until next year: “Even before Culver signed the smoking ban and passed out souvenir pens, there was grumbling from critics who vowed to seek changes in the law in the final days before the session adjourns.” Senate Democrat Bill Dotzler, claiming that “many people didn’t realize the extent of the smoking ban,” still held out hope for “‘some clarification.’” To be sure, his desire appeared to founder immediately on the implacable opposition of his majority leader, Gronstal, who insisted that “all sides” had understood the


law. In particular, after jocularly suggesting that anyone in Des Moines who wanted to smoke under a roof be invited to do so on the balcony behind the Senate chamber, Gronstal made it absolutely clear that he would stop the smoking, even though that move, taken together with the new ban on smoking on the grounds of public buildings, meant that anyone using the Statehouse would have to go to a sidewalk to smoke.

Gronstal’s assurance to the contrary notwithstanding, the scope of the statutorily covered “public places” was already being contested. Some legislators asserted that their own handiwork had left it an open question whether, for example, smoking would be prohibited in parks, on boats on park lakes, and on the entire grounds of university campuses. Dotzler worried that under “the grounds of public buildings” definition no one would be permitted to smoke in “a park with any kind of building on it.” In particular, he divined that the law would prevent those reserving public park campsites or cabins from smoking around a campfire, even though he did not believe that it was legislature’s intent to do so. Astonishingly, Senate floor manager Staci Appel, who, as noted above, when asked by a colleague to explain the meaning of a provision, unhelpfully replied that the legislature made but did not interpret the law, agreed with Dotzler that “clarification may be needed.”

**Some Bar Owners Feel Freedom Move Under Their Feet and the Iowa Constitution Tumbling Down**

“You’re taking away the rights of the bar owners. It’s communism.”

Senate Minority Leader Paul McKinley...said he’s a reformed smoker who’s opposed to smoking, but what most bothered him is how the new law has affected businesses, including his wife’s.

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21 See above ch. 27.
“We have absolutely trampled over individuals’ freedom to do as they wish with their private property.... We have told them, you cannot have anybody in your place of business (smoking).”

During the House debate a week earlier, floor manager Tyler Olson had responded with a mock surprise “Really?” when Republican Mike May observed that “folks out there are already thinking about how we can get around this.” By the time of the governor’s signing ceremony the circumvention charade was already in full swing. Dozens of bar and restaurant owners, according to the Register, were “looking for loopholes, even though some state officials say the attempts are futile.” Two of the subterfuges they favored were turning their businesses into private clubs and creating a “retail smoking [sic; should be tobacco] store in the middle of their bar.” One bar owner in a small town in southern Iowa—photographed by the newspaper assiduously ministering to her own nicotine addiction—who purported to be “researching” the former ploy, had apparently led an almost hermetically sheltered ethico-moral life from whose perspective coverage of bars and exemption of casinos was “the stupidest, most unfair thing I’ve ever seen.” Her research, according to Lynn Walding, the administrator of the Alcoholic Beverages Division, would do her precious little good since “Iowa’s legislation is written so tightly that loopholes will be extremely difficult to find.” In this regard he instanced: private clubs, which qualified for an exemption only if they had no employees and had been granted federal tax exemption status; and retail tobacco stores, which qualified for an exemption only if the smoke did not infiltrate into smoking-prohibited areas. Walding, like some other state officials, described this type of hyperactive resentment as “just the knee-jerk reaction to change,” which would fade away as smokers once again accommodated what they were in various phases of

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24 Lynn Campbell, “Legislative Leaders Say Gas Tax Hike Unlikely in ‘09 Session,” IowaPolitics.com, Dec. 9, 2008, on http://www.iowapolitics.com/index.iml?Article=143149. When asked about a county attorney who refused to enforce the Smokefree Air Act until it applied to all businesses, McKinley opined: “I think each one of those officeholders has to judge whether they’re doing the right thing. I would not pass judgment on them one way or the other.” In contrast, House Minority Leader Kraig Paulsen stated: “The law’s the law and a county attorney, especially, has taken an oath to uphold the law....” Jennifer Jacobs, “Dissent Dilutes Iowa’s Smoking Ban,” DMR, Jan. 7, 2009 (A1) (NewsBank).

25 Iowa House Debate on H.F. 2212 (Apr. 8, 2008) (audio file furnished by Dean Fiihr, Communications Director, House Speaker Pat Murphy).

understanding was the inevitability of sequentially more stringent societal restrictions of their self- and other-destructive addiction.

In the meantime, in the process of casting about for a lawyer, bar owner Brian Froehlich of the IBOC appeared to have been tutored by the Philip Morris playbook: “It’s got nothing to do with smoking anymore.... This is a rights issue.” 27 At the same time, Jonathan Van Roekel, a former bar owner who by this time co-owned Mr. G’s Frozen Pizza in Clinton 28 and was president of COBRA, swore that he and his members were bitter-enders who would not let their rights be violated: he was gearing up to collect enough money “to fight the new law all the way to the Supreme Court.” Polly Bukta, the Democratic House member from Clinton, cautioned that bar owners would eventually see that they had overestimated the impact of the ban, which would work out in Iowa “because it has in other states.” 29 Van Roekel, however, was having none of it. He was convinced that the Iowa legislature’s agenda was obviously “anti-small business, anti-grassroots, anti-bars, and anti-restaurants and that’s kind of been shown.” Because they were savers, investors, risk-takers, entrepreneurs, employers, and tax payers, “by God it should be our right to make our choice, make [sic] choice that we feel would best benefit our businesses.” He took special umbrage at the legislature’s usurping their entrepreneurial role by thinking it was so market-savvy that it could predict that the elimination of smoking would cause sales to go up: “because, I tell you what, if I thought that eliminating smoking...would increase my profit by one percent, I would have done it 20 years ago.” 30 Van Roekel did not reveal whether he would have eliminated smoking 20 years earlier if he had thought that the cleaner air would have increased his employees’ health by one or even 100 percent. 31 (In fact, Van Roekel, donning his other hat as

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31 Likewise, Norma Duncan, the wife of another high-profile bar-owning scofflaw, Larry Duncan, in asserting that the “government has got to realize they cannot save us from ourselves,” overlooked the health of the nonsmokers among their bar’s 42 employees and numerous customers. Christinia Crippes, “Otis Campbell’s Owner Keeps Fighting,” Hawk Eye (Burlington), Jan. 9, 2009 (1A) (NewsBank). On the number of employees, see Affidavit of Larry A. Duncan at 3-4, Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, Oct. 28, 2008).
oncologist, alleged that no studies had shown that workplace exposure to secondhand smoke increased the incidence of cancer.) In contrast, Froehlich—who was both an amateur scientific pollster who knew that IDPH’s data showing that 80 percent of Iowans were opposed to smoking were wrong and self-interestedly ignorant of the empirical refutation and statutory abolition more than a century earlier of the specious Adam Smithian employer claims and judicial rulings that workers freely assumed the risks of hazardous employments—made it clear that that whole line of questioning was made moot by the workings of the free labor market: “[E]mployees who face second-hand smoke know the environment they face when they apply for a job at a bar.” To be sure, this perspective raised the question, in light of Froehlich’s assertion at the Administrative Rules Review Committee meeting in June that H.F. 2212 was not about the general public, but only about employees’ health, as to whether the Smokefree Air Act was supposed to protect anyone at all.

By the last week in April, when COBRA and IBOC met in Clinton to merge their efforts to overturn the law, the chairwoman of the Republican county committee showed up to urge Iowans to vote out of office those who had voted for H.F. 2212. Van Roekel had visions of collecting enough money to hire “the ‘best constitutional attorney’” in Iowa, while Froehlich imagined that the legislature’s vote had woken a “sleeping giant,” though that colossus’s heroically noble goal was merely “to make this state a better place to own a bar.”

33Administrative Rules Review Committee meeting (June 11, 2008) (audio tape provided by ARRC Legal Counsel Joseph Royce).
36Administrative Rules Review Committee meeting (June 11, 2008) (audio tape provided by ARRC Legal Counsel Joseph Royce).
37The joint COBRA-IBOC website (“ChooseFreedomIowa: The Official Site of the Effort to Eliminate Iowa’s Smoking Ban”), which was almost devoid of information, contained such false factual claims as that “the government of Iowa has decided to deny the people of Iowa the right to choose which restaurants or pubs they want to visit.” Its core demand was that “[b]usiness owners should have the ability to allow smoking for their employees or [sic] customers if they choose.” http://www.choosefreedomiowa.org (visited Sept. 14, 2008).
early June, Froehlich and his fellow “advocates of public smoking” were insisting that smoking was “‘just a catalyst,’” which had finally galvanized rights-starved Iowans into grasping that “‘every day and every session they take something else away from us.’”

Having latched onto and begun cultivating a group of resentful and disaffected small business owners on whose behalf they allegedly had tried to kill the Smokefree Air Act, Republicans would not let go. For example, at a meeting in Burlington, Representative Thomas Sands, who boasted that he had voted against H.F. 2212 every time it came up, (incorrectly) warned them that the Administrative Rules Review Committee might “tweak[ ]” vague provisions (of the as yet unreleased regulations) stricter; if it did not, he was not sure that the law was enforcible.\(^\text{40}\) By the end of May, Van Roekel, abjuring his status as a one-issue candidate, declaring himself the spokesman for small business, and promising to try to put an end to “the increasing amount of legislation ‘that has been shoved down our throats,’” became the Republican nominee to unseat Clinton House Democrat Polly Bukta, who had supported the ban bill.\(^\text{41}\) The Des Moines Register quickly uncovered his criminal past: in 1996 he was “convicted of a felony for driving while intoxicated”—his third such offense—and sentenced to five years in prison, but served his time in a halfway house. Van Roekel may have believed that it did not reflect on his ability to be a legislator, but House Majority Leader McCarthy had a partisan field day with the news: “‘I know the Republican Party has been...looking for a different breed of legislative candidate for this fall’s election, but I didn’t think they’d resort to recruiting convicted felons.’” Even Minority Leader Rants felt blindsided, not having been aware of the convictions before Van Roekel’s nomination and still unsure as to how voters


\(^{41}\)Christina Crippes, “Bar Owners Joining Forces,” Hawk-Eye (Burlington), Apr. 30, 2008, on http://www.thehawkeye.com (visited July 16, 2008). The news account was itself confused, stating that Sands had said that ARRC might make the legislation itself stricter. The committee has no power to amend a statute, but it also has no power to amend administrative rules, though it is authorized (by a two-thirds vote) to delay a rule’s effective date until the adjournment of the next general assembly. Iowa Code § 17.8(9) (2008).

would react to the news.\textsuperscript{43} (It is unclear whether a high positive correlation obtains between bar ownership and drunken driving, but Van Roekel’s fellow freedom fighter, Froehlich, in 2007 pleaded guilty to OWI, was fined $1,250, and sentenced to 92 days’ jail, 90 of which were suspended, and 18 months’ probation from which he was not discharged until October 2008.)\textsuperscript{44}

Saying that she understood why some bar and restaurant owners were upset, a contrite Bukta was running scared: “If I did hurt any business, I’m terribly sorry.” Explaining that she had actually preferred casino coverage, but that the legislative process created a dilemma for her that she believed her constituents would appreciate, Bukta—at least recognizing that no matter what the pro-smoking Republicans claimed, they were in fact one-issue candidates—did not think that the Smokefree Air Act “would be the issue in the campaign. ... If people take a look at my whole voting record, I don’t think they would vote just for or against me on this one issue.”\textsuperscript{45} Democrat Cindy Winckler of Davenport, opposed by Joe Sturgis,\textsuperscript{46} owner of the Rusty Nail, was not apologetic: in the end she voted for what by her lights did “the most good for the most people. It was in no way an effort to trample on people’s right to smoke. It’s about breathing clean air.”\textsuperscript{47} Republican Sturgis, another barkeep who in his spare time had mastered oncology, was not at all reluctant to share the fruits of his learning with untutored Iowans: “I don’t think there is any scientific proof that I’ve read to prove that secondhand smoke causes cancer.... Basically, it’s a virus. Some people get it and some people don’t.”\textsuperscript{48} Whether the electorate was passing judgment on the Smokefree Air Act or not, in November, Bukta trounced Van Roekel 8,351 to 4,834 (36.7 percent), while Winckler crushed Sturgis 7,645 to 3,370 (30.6 percent).\textsuperscript{49} (Bar-owning Republicans were not the only ones unsuccessfully to campaign against incumbent Democrats on the issue of the smoking ban. Senator Thomas Courtney, who favored a “complete and total”

\textsuperscript{43}Jason Clayworth, “Candidate for House Has Felony Conviction,” \textit{DMR}, May 31, 2008 (B1) (ProQuest). For other problems that Van Roekel had with the legal system, see “What Court Documents Show,” \textit{DMR}, Oct. 5, 2008 (A10) (ProQuest).

\textsuperscript{44}http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm (Case 07701 OWCR036739 (Muscatine County) (visited July 17, 2009). The fine was reduced to $625 for a temporary restricted license.


\textsuperscript{46}For biographical information, see http://www.demwebs.com/smoke/leaders.html (visited July 7, 2009).


\textsuperscript{48}http://www.sos.state.ia.us/elections/results/2008GeneralResults.html
ban, received about 60 percent of the vote against a Republican challenger who supported the law’s repeal.\(^\text{19}\)

Unable to contain their glee over Republicans’ desperation-driven misjudgment, the Democratic legislative leaders encouraged the Republican party to make their day. Senate Majority Leader Gronstal could only “‘hope that Republicans run against us, because they think the 80 percent of the population that doesn’t smoke would buy into their arguments that smokers deserve public smoking.’” House Majority Leader McCarthy went a step further, predicting that by election time even voters upset by the ban would have adjusted to it: “‘I want to see a candidate come up in October with a mailer and say, “Vote for me, I’ll get smoking back.” They’d be laughed out of town.’”\(^\text{50}\)

Another group of disgruntled bar (and perhaps other business) owners stylizing themselves a bulwark of all Iowans’ constitutional rights was Iowans for Equal Rights—organized by one Randy Stanford, who (or whose wife) owned a tavern in Des Moines—which was established to collect money to hire a lawyer to contest the new law’s validity. Like other bar owners in this movement, he swore allegiance to a childish image of statutes with universal coverage: “‘They didn’t put a smoking ban into effect. You can’t have a smoking ban if you have exemptions.... You can’t have it both ways. If you find that smoking or breathing second-hand smoke is bad for 99 percent of the population but OK for the other 1 percent, there’s just no common sense there. ... If they want to have a true smoking ban, then there should be no exemptions.’” Where Stanford had picked up his notion of “true” laws he failed to reveal. How, for example, thousands of labor protective laws in the United States that excluded/exempted huge numbers of workers/employers had nevertheless all managed to remain on the statute books was not even a question for him. Realistically, he recognized that invalidating the law itself was a pipe dream: “‘There’s nothing I can do about the ban. No one has been able to overturn it in any state where they’ve tried, so why try?’”\(^\text{51}\) So, like his fellow anti-ban bar owners, Stanford, too, at this point was


focused on just getting the casino exemption overturned, which he regarded as hurting bars. However, he was unable even to state the basis of that exemption correctly: nowhere did Democrats claim that exposing casino employees or gamblers to secondhand smoke was “OK”52: on the contrary, from the very moment in which Representative Wise presented his amendment in the House Commerce Committee he admitted that the exemption had nothing to do with protecting the health of those in the casinos, but was, rather, designed to protect revenues.53 In other words, the exemption served some extraneous purpose, which was at odds with the bill’s purpose (just as various labor-protective laws excluded farmworkers in order to protect farm employers).54 Oddly, Stanford did not even believe that overall bar revenues would decline as a result of the ban, though some bars might close.55

Later, however, Iowans for Equal Rights, while denying that it either was affiliated with any tobacco company or accepted donations from “Big Tobacco,” propagated the cigarette manufacturers’ quarter-century-old voluntary (that is, non-governmentally imposed) program of pseudo-“accommodation” showering “hospitality” on non-smokers and smokers alike.56 (That IER was in fact nothing but a pro-smoking group was strongly confirmed by its heavy reliance on its “consultant” Norman E. Kjono, a leading member of FORCES [Fight Ordinances and Restrictions to Control and Eliminate Smoking] International.)57 For

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53See above ch. 35.


example, when its leaders met with the IDPH director on October 7, 2008, the group’s president, the owner of a bowling alley in Council Bluffs, who insisted that in eight years no one had ever complained to him about smoking, expressly declared that “small business owners must be able to accommodate every customer they can to keep their doors open.” In this reincarnation of the tobacco industry’s goal of retaining as much free space for smoking as possible in the face of increasingly adverse public opinion and government intervention, Iowans for Equal Rights advocated on behalf of “members of the small business community coming together to define smoking rules” and—yet another cigarette

index.php?post_id=386284 (visited Aug. 9, 2009). Much light is shed on Kjono’s state of mind by a letter he wrote in March 1998 to the Philip Morris CEO, to which he attached an op-ed piece he had (apparently unsuccessfully) tried to publish in a newspaper that culminated in the assertion that: “Opposing anti-tobacco is not an agenda, it is a responsibility, a duty for all parents who love their kids.” He closed his letter to Bible with: “I would like to be of assistance to Philip Morris, should the opportunity extend itself.” Norman Kjono to Geoffrey Bible, Mar. 5, 1998 (enclosing Normal Kjono to Sara Solovitch, San Jose Mercury News, “Follow-up ‘When Smoking Becomes Child Abuse,’” Mar. 5, 1998), Bates No. 2070381610/1. A month later he requested Bible’s help in getting the story out to the public that: “Anti-tobacco is a massive front for drug companies.” Norman Kjono to Geoffrey Bible, Apr. 7, 1998, Bates No. 2070381413. The expertise that Kjono, who had been smoking since the age of 15, brought to bear in evaluating the health consequences of secondhand smoke exposure can be gauged by the fact that he “does not feel much threat to himself from nicotine. ‘It could be (dangerous). But I did four tours in ‘Nam. I could get hit by a truck.’” Norman Kjono, “A Better Way to Talk to Teenagers About Smoking,” in Teen Smoking 90-93 at 92 (2000 [1997]), Bates No. 522775621/3; Scott Sunde, “One Boss Comes Out Smoking,” SP-I, Sept. 29, 1994 (B1) (Lexis) (quote).

58Scott Lea, “IA Bars to Fight Smoking Ban,” KPTM Fox 42, May 24, 2008, on http://www.kptm.com/global/story.asp?s=8350048&ClientType=Printable (visited Aug. 9, 2009). He complained that the law took away his customers’ right to smoke: “You’re telling them you can’t go to the place you usually go and do what you usually do just because we don’t like that.” Id.

59Iowans for Equal Rights Meets with State Health Department,” PRNewswire, Oct. 9, 2008, on http://www.reuters.com/article/pressRelease/idUS257159+09-Oct-2008+PRN20081009 (visited Aug. 9, 2009) (quoting Todd Shanno). A few days earlier on a radio program Shanno had waxed even more accommodationist by proclaiming that there was a way to “make an environment so that smokers and nonsmokers can live in harmony.” The very first example he offered after stressing that his group wanted to “feed off” the existing exemptions was an exemption for 21-and-over establishments; the next example resurrected the tobacco industry’s longstanding propaganda on behalf of ventilation. “Mickelson in the Morning,” WHO 1040 AM, Sept. 30, 2008, on http://www.mickelson.libsyn.com/index.php?post_id=386284 (visited Aug. 9, 2009).
oligopoly fraud—"genuine Indoor Air Quality." Considerably more discontinuous with its earlier position, but in unmistakable conformity with its pro-tobacco stance, the group suddenly not only abandoned its campaign to repeal the casino exemption—to the point of expressing its concern that the American Lung Association of Iowa was trying to persuade the legislature to extend the ban to casinos—but executed an about-face and now began to “support casinos in their efforts to stop the removal of their exemption for gaming floors” and, for good measure, “oppose[d] any efforts to remove current exemptions...for any other business such as farming, limousine services, and heavy equipment” as well as the smoking ban on outdoor restaurant patios. \(^{60}\) Little wonder that by the end of July IBOC, in a pot-kettle duel, announced that: “We have distanced ourselves from Iowans for Equal Rights. We believe their motives are self serving and do not coincide with our objectives.” \(^{61}\)

The bar owners’ bathetic struggle reached another high point on September 8 when prominent scofflaw Larry Duncan, who had “recently made headlines across the state by blatantly refusing to abide by the new state law,” announced the formation of Freedom Fighters for All Citizens of Iowa, whose goal was “urging Iowa residents to vote against state politicians who supported” that law. Far from seeking assistance in avoiding his own self-inflicted legal problems, he swore that “[t]his meeting is not about Larry Duncan. ... It’s about everybody that sits in this room who believes in the Constitution.” How his group was “standing up for the rights of all Iowa residents” by virtue of advocating for

\(^{60}\)Iowans for Equal Rights, “About Us” (n.d.), on http://www.iowansforequalrights.org (visited Sept. 8, 2008). Indicative of the group’s incompetence to evaluate the Public Health Department’s rules, against which it vituperated ad nauseam, but of no further interest here, was its gross inability even to understand the interlocking relationships of several regulatory definitions/statutory uses of such terms as “entrance” and “grounds of public buildings,” which misled it to assert that the latter definition “eliminates patio or outdoor smoking for bars....” See also Marilea David to Thomas Newton, Re: Definitions of “public place,” “grounds,” “entrance” and other terms (Aug. 11, 2008) (copy furnished by IDPH). On the version posted on the group’s website, this letter is labeled “Iowa Department of Public Health Inquiry No. 5”; http://www.iowansforequalrights.org/five.pdf (visited Aug. 14, 2009). This public comment was one of eight submitted by several members of Iowans for Equal Rights, which appear in fact to have been written by one person, who may not have been any of the signatories. Mapes correctly responded that there was no conflict between “public place” and “public building,” the latter being a specific category of the former. Bonnie Mapes to Marilea David (Nov. 24, 2008), on http://www.iowansforequalrights.org/pdf/IER%20Response%20to%20Department%20Communications0001.pdf (visited Aug. 14, 2009).

business owners’ “right to decide whether to allow smoking” when “80 percent of Iowans were in favor of the ban” he failed to explain.62 (How Duncan would have reacted to the revelation that the 1857 constitutional convention which wrote his beloved constitution had unanimously adopted a resolution, offered by one of the state’s leading alcohol prohibitionists, prohibiting smoking in the convention chamber is amusing to imagine.)63 His professed selflessness to the contrary notwithstanding, his hometown newspaper reported that “Duncan started the Freedom Fighters [t]o raise money for legal costs....”64 That Duncan was pursuing a non-existent constitutional right was visibly on display in “Our Mission Statement,” which proclaimed that the organization was “dedicated to...upholding the Iowa Constitution and seeing that all citizens are treated fairly and equally with no exceptions or immunities.”65 That Duncan’s objective was not establishing parity between bars and casinos, but the resumption of unimpeded smoking in public places was inscribed in “Our Goal”: “We want to preserve our individual liberties that our forefathers envisioned and that only our Creator can take away. We will not quit! HF2212 must be repealed as it infringes on our individual liberties. The state of Iowa...is interfering with the interstate commerce of a legal agricultural product.” With that tobacco-loving God on his side, “Larry knew he could raise an army to challenge the constitutionality of this new law. It was a way to unite the voices of all citizens of Iowa, a common bond for a common good for Iowa.” Within a year Duncan’s Freedom Fighters allegedly numbered several thousand and held hundreds of meetings.66

Not that all bar owners were feverishly hatching plans to evade the law. On the contrary, some welcomed it. In Iowa City, for example, several viewed it positively as increasing sales in the long run; others regarded it as sales-neutral or as a cost-saver in terms of reducing maintenance costs from cigarette burns or damages to equipment caused by smoke; another echoed sentiments voiced by many business owners over the years who “embrace[d]” the law because it made

62Nick Bergin, “Smoking Ban Sparks Activists,” Hawkeye (Burlington), Sept. 9, 2008 (1A) (NewsBank).
63See above ch. 18.
64Christinia Crippes, “Otis Campbell’s Owner Keeps Fighting,” Hawk Eye (Burlington) Jan. 9, 2009 (1A) (NewsBank).
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mandatory what they had been trying to accomplish voluntarily.67

The Iowa Department of Public Health’s Proposed and Final Rules

[Johnson County Supervisor Terrence] Neuzil...said that he is in support of the smoking ban, but doesn’t want employees to be standing on a public sidewalk smoking, since he doesn’t like this image. [Supervisor Pat] Harney asked who was going to clean up cigarette butts, since it is a dirty job. He said that if they are going to designate a smoking area, they have to make the employees accountable for cleaning up the area.

[Supervisor Mike] Lehman said...that they also have to respect the rights of individuals who are addicted to tobacco.... [Public Health Department Director Ralph] Wilmoth reiterated that there is no safe level of exposure to tobacco smoke. Neuzil said he is just saying that there needs to be a place for people who are addicted. Wilmoth said that they have cessation programs which is the preferred choice to help people get beyond this addiction.68

[B]ut a little common sense here now and then don’t hurt a thing.69

The legislature conferred extensive administrative and enforcement powers on the Iowa Department of Public Health:

This chapter shall be enforced by the department of public health or the department’s designee. The department of public health shall adopt rules to administer this chapter, including rules regarding enforcement. The department of public health shall provide information regarding the provisions of this chapter and related compliance issues to employers, owners, operators, managers, and other persons having custody or control of a public place, place of employment, area declared a nonsmoking place pursuant to section 142D.5, or outdoor area where smoking is prohibited, and the general public via the department's internet site.70

IDPH’s release on June 2 of the initial 13-page draft of its implementing rules (in time for the Administrative Rules Review Committee and State Board of Health meetings on June 11) had been preceded by a flurry of interagency

69Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by ARRC Legal Counsel Joseph Royce) (remark of Senate President Jack Kibbie).
70H.F. 2212, § 8(1)/Iowa Code §142D.8(1) (2009).
activity, especially in collaboration with the Attorney General’s Office, which
drafted the rules together with IDPH.\textsuperscript{71} The AG and IDPH appear to have focused
attention on a relatively small number of especially contentious issues, some of
which were on the agenda and/or discussed at the Smokefree Air Act
Implementation Discussion held under the auspices of the Division of Tobacco
Use Prevention and Control on May 6. Division Director Bonnie Mapes informed
invited officials from the Alcoholic Beverages Division, Professional Licensing
Division, Iowa State Fair, Secretary of State, Iowa State University, the
Departments of Revenue, Natural Resources, Economic Development, Public
Safety, Human Services, Inspections and Appeals, Administrative Services, and
Elder Affairs, and the bill drafter from the Legislative Services Agency that the
meeting was designed to “solicit questions, concerns and suggested definitions
or clarifications about specific stipulations of the law (in writing, if possible) so
we can add these to the list of issues that need to be addressed as the rule is
developed. Finally, if you are aware of any state or federal laws, rules or
regulations which might conflict with language in the Smokefree Air Act, please
bring these to our attention, as well.”\textsuperscript{72} (Not included in this invitation but in
attendance at the meeting were representatives of the State University of Iowa and
University of Northern Iowa as well as several non-state officials such as an
attorney from the legal department of the City of Des Moines and the Iowa
League of Cities lobbyist).\textsuperscript{73} The agenda for the two-hour meeting allotted 15
minutes to a progress report (including a review of the proposed enforcement
process), 10 minutes to requirements of agencies that issued business licenses, 20
minutes to the involvement of agencies performing inspections, and 30 minutes
to the definition of “grounds of any public buildings...under control of the
state...,” in addition to 40 minutes to agencies’ presentation of additional matters
for further clarification.\textsuperscript{74} The very fact that one-fourth of the entire meeting was
to be devoted to defining “grounds of public buildings” suggested how thorny the
determination of the extensiveness of this part of the Act’s outdoor smoking ban
was, which both was nationally unique and originated in a kind of legislative
practical joke or bluff that backfired on its Republican sponsors.\textsuperscript{75}

\textsuperscript{71}Email from Bonnie Mapes to Patricia Funaro et al. (May 1, 2008) (forwarded by
recipient to Marc Linder).

\textsuperscript{72}Email from Bonnie Mapes to Patricia Funaro et al. (May 1, 2008).

\textsuperscript{73}See below for mention of their roles.

\textsuperscript{74}Iowa Department of Public Health, Smokefree Air Act Implementation Discussion
May 6 [2008], Agenda (attached to email from Bonnie Mapes to Patricia Funaro et al. May
1, 2008).

\textsuperscript{75}See above ch. 35.
One issue that was not on the agenda but was discussed involved the scope of the provision banning smoking on “school grounds, including parking lots, athletic fields, playgrounds, tennis courts, and any other outdoor area under the control of a public or private educational facility, including inside any vehicle located on such school grounds” and in particular whether it applied to college and university campuses. (A set of surviving notes taken by an IDPH official did not list it among the “3 big issues”—namely, bars vs restaurants, infiltration, and grounds—but more than one-third of his notes were devoted to this subject.)

Among the divergent views expressed by attendees the argument was voiced that if “school” included a state university, it would be the only such use of the word in the Iowa Code, in which it otherwise meant exclusively kindergarten through high school. On the other hand, the opinion was also expressed that since the provision used both “school” and “educational facility,” it would be hard to differentiate between K to 12 and universities. A representative of the University of Northern Iowa, who was concerned that the assembled officials were underestimating the (volume of) complaints that the law would generate, was concerned about the butt disposal and environmental issues and worried about the university’s turning into a “bad neighbor” by pushing (smokers and) the problem across the street (and off campus).

The day after the meeting Mapes discussed the issue with someone whom she had not invited to the meeting who later summarized their conversation and added some policy context for interpreting the statutory provision:

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[Aaron Swanson], SAA Meeting n.p. [at 2] (May 6, 2008) (copy furnished by IDPH).

Email from Jonathan Carlson to Marc Linder (Sept. 10, 2008). Carlson, a law professor who was senior associate to the president of the University of Iowa and co-chair of its smoking policy implementation team, represented it at the meeting. The university’s commitment to a thoroughgoing implementation of the law can be gauged by its having chosen as chief implementer someone who stated that he was not interested in reducing the number of places where people were lawfully permitted to smoke and that he had opposed the university’s proposed campuswide smoking ban policy before it was preempted by the statewide law. Telephone interview with Jonathan Carlson, Iowa City (Aug. 22, 2008).

[Aaron Swanson], SAA Meeting n.p. [at 3] (May 6, 2008) (copy furnished by IDPH).

[Aaron Swanson], SAA Meeting n.p. [at 4] (May 6, 2008) (copy furnished by IDPH). One of the less weighty issues raised by a University of Iowa representative was whether the president’s residence was to be posted. *Id.* Moreover, the statute expressly covered such a public building and legislators expressly mentioned the UI president’s house as covered. See above ch. 35.
Email from Marc Linder to Bonnie Mapes (May 8, 2008). Mapes quibbled with the use of the word “interpret,” but opaquely confirmed the accuracy of the view attributed to her: “I did not say that I interpreted section 3(2)(d), to cover only elementary and secondary schools, but not colleges and universities. I am not a lawyer or a legislative analyst and I, myself, am not interpreting any sections of the law. What I did say to you was that in our meetings with representatives from several institutions, including representatives from the universities, there has not been unanimity of opinion about the interpretation of that section.” Email from Bonnie Mapes to Marc Linder (May 8, 2008).

It was unclear why Mapes believed that (governmental) regulatees’ opinions as to whether they were covered by the statute were relevant to determining statutory meaning and/or legislative intent.

81Email from Marc Linder to Bonnie Mapes (May 8, 2008). Mapes quibbled with the use of the word “interpret,” but opaquely confirmed the accuracy of the view attributed to her: “I did not say that I interpreted section 3(2)(d), to cover only elementary and secondary schools, but not colleges and universities. I am not a lawyer or a legislative analyst and I, myself, am not interpreting any sections of the law. What I did say to you was that in our meetings with representatives from several institutions, including representatives from the universities, there has not been unanimity of opinion about the interpretation of that section.” Email from Bonnie Mapes to Marc Linder (May 8, 2008).
Informed later that same day that H.F. 2212’s chief sponsor, Janet Petersen, had not only agreed with McCoy that section 3(2)(d) covered colleges and universities, but that she would be in touch with IDPH about the issue, Mapes forwarded the information to the Attorney General’s office. 

Although the time for IDPH to publish its proposed rules was fast approaching, the interpretive contest over the word “school” and the dispute over the new law’s sweep had still not been resolved by May 22, when Tom Newton, the IDPH director, in the course of discussing on a radio broadcast what he described as the huge task his agency was facing in writing the rules for the Smokefree Air Act during a short period of time, revealed that, despite his claim that the legislation was “very explicit,” one gray area of legislative intent was “schools”: because some people were saying that the term meant only grade and high schools, IDPH was talking to the bill drafters in order to be able to define the scope of coverage. Nevertheless, with the legislature’s Administrative Rules Review Committee scheduled to meet and consider IDPH’s proposed rules in less than three weeks, the principal administrator of the University of Iowa’s smoking policy stated that “[w]e’ve made the decision to go forward with our campus-wide ban, regardless of how the law is interpreted,” although he suspected that the agency rules would interpret the school and educational facility provision to cover universities, and the University of Iowa had informed the IDPH that it would prefer that outcome.

As late as the day on which IDPH released its proposed rules, the state’s foremost newspaper reflected and reinforced public confusion: once again conflating coverage under the school/public or private educational facility provision and that under the grounds of public buildings provision (or perhaps ignoring the former altogether), the Des Moines Register reported that a narrow interpretation of the latter “could prevent the health department from enforcing the ban in areas of the U of I, such as Hubbard Park, on which no buildings sit.” Consequently, the university was purportedly “still unsure whether the statewide ban covers the entire campus....” In fact, such uncertainty would have been appropriate only if IDPH defined “school”/“educational facility” to exclude

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82 Email from Marc Linder to Bonnie Mapes (May 8, 2008).
83 Email from Bonnie Mapes to Marc Linder (May 9, 2008).
84 “The Exchange,” Iowa Public Radio, WSUI, Iowa City (May 22, 2008, 10 a.m.). Newton also mentioned “grounds of any public buildings” as a unique feature of the Iowa law, which could designate a large or small area.
85 Email from Jonathan Carlson to Marc Linder (May 23, 2008).
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In the event, the agency’s draft rules released on June 2 did in fact adopt the broad interpretation: “‘School’ and ‘public or private educational facility’ means a public school and a nonpublic school as defined in Iowa Code section 280.2, a community college as defined in Iowa Code section 260C.2, an accredited private institution as defined in Iowa Code section 261.9, and an institution governed by the board of regents pursuant to Iowa Code section 262.7.” The decisive circumstance prompting rejection of the narrower K-12 interpretation was, according to Mapes, a clarification of the legislature’s intent based on contacts with “[s]pecific legislators involved with the legislation,” such as Petersen, as well as Olson and Wise.

IDPH’s recognition of the enforceability of the smoking ban on the entire indoor and outdoor campus of every college and university in the state was of vital importance not only to those institutions’ scores of thousands of students and employees (as well as their alumni and visitors and patients at the University of Iowa Hospitals and Clinics), but, since Iowa was pioneering in this area, also to higher education throughout the country as a model. Nevertheless, despite its unprecedentedness, this aspect of the law, which the legislature never debated, also never attained the public salience that several other statutory provisions generated, which form the focus of the following account.

Because the legislature had defined numerous terms in the Smokefree Air Act with operationally sufficient specificity, IDPH was able to adopt them verbatim. Among the terms left undefined by the law, however, two definitions proposed by the agency proved to be especially contentious—“grounds of any public universities.”

87 As ARRC itself pointed out: “the school grounds restriction is very broad and would appear to include the entire campus; there is nothing in the Act that indicates that the term ‘school’ is limited to K-12 or public schools.” Iowa General Assembly, Administrative Rules Review Committee, Rules Digest, June 2008, at 1, on http://www.legis.state.ia.us/lsadocs/ARR/ARRDigest/2008/ADJAR011.PDF. ARRC repeated this note in connection with the rules’ next appearance on its agenda. Iowa General Assembly, Administrative Rules Review Committee, Rules Digest, Oct. 2008, at 4, on http://www.legis.state.ia.us/lsadocs/ARR/ARRDigest/2009/ADJAR002.PDF


89 Email from Bonnie Mapes to Marc Linder (Sept. 11, 2008) (not identifying the source of the clarification).

90 Email from Bonnie Mapes to Marc Linder (Sept. 15, 2008). Because she failed to “keep notes on every contact I had with legislators about the rules as we were drafting them,” Mapes said that she was unable to state which specific issues she discussed each time. Id.

91 See above ch. 35.
buildings” and that part of “bar” which specified “the serving of food is only incidental to the consumption” of alcoholic beverages without fleshing out “incidental.”92 The former stimulated considerable controversy among many state and especially local government entities that owned those public buildings and would be liable for enforcing the smoking bans on their grounds; by and large IDPH afforded them the accommodations they requested. In contrast, the latter—on which hinged whether outdoor smoking would be prohibited as in restaurants—ignited intense and explosive opposition from numerous bar owners (and a few of their legislative representatives), whose noisy resistance did not prompt IDPH to modify its original definition.

Resolving legislative intent with regard to college and university campuses was a straightforward task compared to figuring out what “[t]he grounds of any public buildings owned, leased, or operated by or under the control of the state government or its political subdivisions”93 was designed to cover. Analysis was complicated by the quasi-prankish genesis of the provision as an amendment to Petersen’s study bill, which Republicans hoped would directly embarrass the governor, indirectly embarrass Democrats, and/or even contribute to the bill’s demise. Ferreting out legislative intent was further impeded by the fact that the floor discussion—especially in the House, where the amendment originated—was confused and/or disingenuous: because Soderberg, the Republican who offered the amendment, neither made an effort to clarify what he meant to cover beyond the grounds of the governor’s mansion (on which Governor Culver’s wife would be prohibited from smoking) nor could afford to taint his party’s self-cultivated image as protector of Iowans’ liberties, while anti-smoking Democrats, though apparently grateful that it was Republicans who had broken non-smoking ground on which the majority party had feared to tread outdoors, were manifestly unwilling to antagonize, even further, scores of thousands of smokers by taking responsibility for imposing a ban on smoking in outdoor areas on public land that might rival the universal ban on college campuses that slipped through without any fanfare, floor debate failed to produce any clarification of the scope of coverage.94

By May, when IDPH was forced to struggle with answering questions from the public and drafting a definition for its rules, House floor manager Olson weighed in with his perspective, which, while hardly authoritative, was nevertheless more straightforward than his evasive remarks on the House floor had been. Expressing confidence that the definition would be “reasonable and
practical,” he assured a public radio audience that: “We’re not talking about not being able to smoke in an entire state park or in [sic] a state campground. What we’re talking about is not being able to smoke in a building on public grounds and then some kind of defined perimeter around it which would be then the public grounds determination.” How he knew that the legislature intended to protect everyone everywhere on the University of Iowa campus (which, at 1,900 acres, is larger than many parks) from exposure to secondhand smoke, but did not intend to protect children at picnic tables or on trails in parks, he did not reveal. Mapes, who was formally in charge of the rulemaking process, also took pains to reassure people “looking at the law thinking it probably covers a lot more than it may end up covering.” Why the text of the law would persuade readers that it prohibited smoking in more places than IDPH had apparently already determined to be covered she no more explained than why that part of the rulemaking process was catering to the small minority of smokers.

In the event, the department’s draft rules defined “Grounds of any public building” to mean “an outdoor area of a public building that is used in connection with the building, including but not limited to a sidewalk immediately adjacent to the building; a sitting or standing area immediately adjacent to the building; a patio; a deck; a curtilage or courtyard; a swimming or wading pool; or a beach, or any other outdoor area as designated by the person having custody or control of the public building.” The rule then went on to confer discretion on this person “to exclude from the designated grounds of any public building a parking lot, the course of play at a golf course, a hiking trail, locations of an individual campsite or campfire, or a lake, river, or other body of water.”

Interestingly, IDPH held the May 6 meeting “before we developed any definitions.” At that meeting the Iowa League of Cities, a “couple of major universities,” and the Iowa Department of Natural Resources “expressed concern” about the scope of the statutory term “grounds of any public buildings.” For example, the League asked whether it would include an entire (government-owned) golf course, since most golf courses had a clubhouse and/or restrooms, or an entire park, including all of its trails and campsites, since parks often had shelter houses, lodges and restrooms. The nature of the League’s concern was

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89Email from Bonnie Mapes to Marc Linder (Aug. 20, 2009).
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crucial: “Our view was that governmental entities might find it very difficult to enforce the smoking ban in these locations.” In other words, cities’ concern was not driven by the desire to implement the legislature’s intent to protect nonsmokers from secondhand smoke exposure in certain outdoor areas, but by their own enforcement, resource, and budgetary priorities, and perhaps as well by fear of alienating smokers and/or law enforcement agents, who might not have wanted to confront violators. In the event, “[i]n response, the Dept. of Public Health included a definition of the phrase...in its rules.”

Asked about the statutory warrant for permitting those in control of buildings to exempt, for example, a golf course, the bill’s chief sponsor and driving force, Janet Petersen, devised the justification that it had been discussed during floor debate. Although it is true that the House did have a colloquy on golf courses, Petersen suppressed—if she was ever aware of and remembered—the information that that point, raised by Representative Raecker with Olson, was, as analyzed in detail earlier, left hanging without any resolution whatsoever, Raecker asserting that a golf course was covered as the grounds of a public building, and Olson denying that it was a “place[ ] of public assembly” (a term that did not even survive in the final bill text). Raecker not only confirmed this account, but charged that if the rule was written more “liberally,” it did not correspond to the wording of the statute. Confronted with the fact that Olson had never engaged, let alone contradicted, Raecker’s interpretation, and asked whether this ambiguous legislative history justified IDPH in authorizing local governments to exempt golf courses, neither Petersen, nor Wise, nor Connolly ever responded.

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100 Terry Timmins and Jessica Harder, “Workshop Presentation: Where There’s Smoke...Workshop on Iowa’s New Smokefree Air Act” at 7 (Iowa League of Cities, n.d. [ca. June 2008]), on http://www.iowaleague.org/downloads/Workshops/Materials/2008/Conference/Handouts/WhereTheresSmokeHO.pdf (visited Aug. 20, 2009). According to the author of these remarks, who had attended the meeting, it was not clear whether IDPH would have provided a definition if no one had raised concerns. Telephone interview with Jessica Harder, Des Moines (Aug. 20, 2009). Mapes stated that a definition would have been “needed” even if no one had raised issues because the Act did not define the term. Email from Bonnie Mapes to Marc Linder (Aug. 20, 2009).

101 Telephone interview with Janet Petersen, Des Moines (June 6, 2008). She also mentioned hiking trails and parking lots. Remarkably, a representative of the Alcoholic Beverages Division at the May 6 IDPH meeting expressed a preference for including parking lots in the ban on the grounds of “public perception.” [Aaron Swanson], SAA Meeting n.p. [at 3] (May 6, 2008) (copy furnished by IDPH).

102 See above ch. 35.

103 Telephone interview with Scott Raecker, Des Moines (June 7, 2008).

104 Email from Marc Linder to Janet Petersen (June 6 and 7, 2008). Petersen, Wise,
The definition as a whole went a long way toward accommodating the Iowa League of Cities, whose members’ divergent views—some supported local control while others preferred statewide regulation so that city officials would not appear as the “bas guys”—had deprived the organization of the unity that effective legislative lobbying required. Consequently, the “imperfect statute” that the legislature enacted left the League with a final opportunity to fashion a sufficiently uniform position on the basis of which to seek a more favorable outcome from the rules writing process. In view of the different “kind of climate” that prevailed in various cities, depending in large part on the size of the city, the lowest common denominator that members were able to achieve focused on flexibility. Indeed, that key notion was raised by a representative of the League at the May 6 IDPH meeting, who requested the agency not to “rule too broadly” and to give cities “flexibility” with regard to parks and golf courses.

Early on in the process ILC’s governmental affairs counsel submitted to IDPH its comments on the smoking ban rules. The League was concerned that the “undefined term” would have “great impacts on the way cities are required to enforce these laws [sic], and it needs clarification.” As an example of such impacts, ILC mentioned parks, beaches, golf courses “or other outdoor areas not mentioned specifically in the law if there happens to be a ‘public building’ somewhere on those properties.” Cities, in other words, were concerned only with limiting their obligations under the new law to the apparent exclusion of the resulting health consequences for nonsmokers. The League’s proposed “solution” was a definition that included “the area immediately adjacent to a public building in which occupants of the building or members of the public could be expected to congregate in connection with the purpose or use of the building, and includes that area immediately adjacent to a public building, which if used for smoking...
would cause smoke to infiltrate the building through doors or windows.” The virtue of this language was its creation of “needed flexibility for cities.” The “flexibility” that use of the term “congregate” would have granted city governments would also have diminished the number of nonsmokers entitled to a smokefree walk from the outer perimeter of the grounds of public buildings into the buildings inasmuch as individual people (or even groups) walking would not have been congregating. The League’s proposal deprived nonsmokers of considerable protection from secondhand smoke exposure outdoors that IDPH’s draft definition provided precisely because it ignored the purpose of such outdoor protection. Instead, it erroneously treated the “grounds of any public building” ban as serving merely to prevent smoke from wafting into public buildings. Also expressive of “flexibility” was the conferral of a significant dose of local control: those cities that “wanted to strengthen the smoking ban in areas otherwise exempt from the prohibitions of smoking” could simply pass ordinances banning smoking in parks or on golf courses. Interestingly, rather than disposing of the issue in its own proposal, the ILC merely posed the question as to whether, if the grounds of a public building encompassed “public rights of way, like sidewalks or streets,” they were “exempt from the ban....”

While IDPH draft accommodated the League of Cities by empowering governments to exempt not only golf courses, but parking lots, hiking trails, campsites, and various bodies of water, it did not adopt the restrictive...
“congregate” or “infiltrate” language that would have diluted protection for nonsmokers. Moreover, by failing to address expressly the issue of “public rights of way, like sidewalks,” but by including “sidewalks immediately adjacent to the building” in the draft rules, IDPH implicitly answered the ILC’s question: they were not exempt—until the Department reversed its position later in the rulemaking process.111

As far as the sub-definition of “bar” was concerned, IDPH defined the “serving of food [is only] incidental to the consumption of alcoholic beverages” to mean “food preparation that is limited to the service of ice, pre-packaged snack foods, popcorn, peanuts, and the reheating of commercially prepared foods that do not require assembly, such as frozen pizza, pre-packages sandwiches, or other prepackaged, ready-to-serve products.”112 This definitional focus on the type of food preparation rather than the proportion of total bar revenue accounted for by food—“[a]n establishment which prepares food on site is considered a restaurant for the purposes of the Smokefree Air Act, even if that establishment has a liquor license”113—did not faze some bar owners,114 but the uproar that it provoked among some bar owners would manifest itself at the Administrative Rules Review Committee meeting on June 11.


IDPH also did not fully accommodate the League regarding another definition. ILC was concerned that the statutory requirement (§ 6(3)) that owners “shall clearly and conspicuously post in and at every entrance” to an outdoor no-smoking area a no-smoking sign, “if not reasonably interpreted could require excess signage, excess costs, and detrimentally impact the aesthetic qualities of some city areas. Imagine a wide open area near a city building on which many sidewalks provide access onto the grounds of the public building. Would cities have to post a sign at each and every point where the public might decide to cross over onto the grounds?” The League’s proposed solution was a definition according to which not every access point should be considered an entrance, which would “mean ‘a door, gate or other main pathway which serves as a designated or obvious access point into’” covered public places, outdoor areas, or grounds of public buildings. Iowa League of Cities, “Comments: Rulemaking HF2212 statewide smoking ban” at 2 (Apr. 8, 2008) (copy furnished by IDPH). Instead, IDPH defined the term as including “the commonly understood points of entry and exit to and from an outdoor area such as a driveway, sidewalk, pathway, access road, gate, or dedicated point of entry.”


One draft rule that seriously weakened the Smokefree Air Act—and that, astonishingly, prompted little comment—dealt with the enforcement obligations of those in control of smoking-prohibited places. The statute itself provided that they “shall inform persons violating this chapter of the provisions of this chapter.” The proposed IDPH rule reconfigured this aspect of the enforcement process thus:

An employer, owner, operator, manager, or person having custody or control of a place where smoking is prohibited under 2008 Iowa Acts, House File 2212 shall inform any individual smoking in a place where smoking is prohibited that the individual is violating the Smokefree Air Act and shall request that the individual stop smoking immediately.

a. If the individual refuses to stop smoking, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited should discontinue service to that individual.

b. If the individual refuses to stop smoking, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited may request that the individual leave the area where smoking is prohibited.

c. If the individual refuses to leave the area where smoking is prohibited, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited may notify the state or local law enforcement agency with jurisdiction over the area where smoking is prohibited.

A critique of the regulation together with a request that the Administrative Rules Review Committee discuss the matter and urge IDPH to strengthen the enforcement process was sent to Petersen, the bill’s chief sponsor, and the committee’s co-chairs, Philip Wise and Michael Connolly:

[T]he draft rules that the IDPH posted on its website on May 29...seriously weaken the overall enforcement process. The only direct enforcement obligation that the draft rules impose on owners et al. is to tell violating smokers that they are violating the law and to request that they stop smoking immediately. If smokers refuse to stop smoking or ignore the owner’s request, the owner has no obligation to take any further steps to insure compliance—he is not even required to notify law enforcement. ...

This hands-off approach is deeply flawed: not only is it an open invitation to collusion between smokers and owners to defeat the smoking ban, but it throws the whole social-psychological burden of enforcement on individual members of the public to confront belligerent smokers by reporting the violation to law enforcement in the face of owners’ passivity. Although involvement by the public would be welcome, many people are very

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reluctant to become informers even when they can do so anonymously. In contrast, owners (e.g. of bars) perform quasi-law enforcement functions vis-a-vis customers et al. on a regular basis and are accustomed and expected by the public to do so.\textsuperscript{117}

The following day Mapes was asked: “Did IDPH make it merely discretionary (rather than mandatory) for an owner to notify law enforcement if someone refused to comply with a request to stop smoking where it was prohibited because IDPH believed that it lacked the authority to make it mandatory—or for some other reason?”\textsuperscript{118} Her response—that “[t]he only instances in which we were able to use the word “shall” instead of “may” or “should” are for those stipulations stated explicitly in the legislation”\textsuperscript{119}—prompted the further question: “By that logic, where are the ‘stipulations stated explicitly in the legislation’ authorizing IDPH” to authorize local governments to exempt parking lots, golf courses, and hiking trails? In addition, Mapes was asked whether a bar owner would be complying with his obligations under the new law if, after telling belligerent smokers that smoking was unlawful and requesting that they stop immediately, he did nothing further in response to their continued smoking.\textsuperscript{120} At this point the director of the Tobacco Use Prevention and Control division shifted into that’s-over-my-pay-grade mode: “This is not my logic. This is the AG’s determination.”\textsuperscript{121} One final effort to elicit a substantive response—“It doesn’t matter whether it’s yours or theirs—the point is whether that’s the only possible interpretation of the law and whether the narrow interpretation makes enforcement much more difficult than the legislature envisioned”—failed: “Then I suggest you ask the bill sponsors about whether they share your concerns.”\textsuperscript{122}

\textsuperscript{117}Email from Marc Linder to Janet Petersen, Philip Wise, and Michael Connolly (June 3, 2008).
\textsuperscript{118}Email from Marc Linder to Bonnie Mapes (June 4, 2008).
\textsuperscript{119}Email from Bonnie Mapes to Marc Linder (June 5, 2008). Interestingly, although Jonathan Carlson, the University of Iowa’s representative at the meeting on May 6, 2008, took the position that the university would be complying with its statutory obligation if one of its agents told a violator to stop smoking and then walked away after the violator indicated that he would not comply, he reported the day after the meeting that Mapes seemed to believe that owners might have more of an obligation and that IDPH might use its authority to motivate owners to enforce more thoroughly by issuing civil citations. Telephone interview with Jonathan Carlson, Iowa City (May 7, 2008).
\textsuperscript{120}Email from Marc Linder to Bonnie Mapes (June 5, 2008).
\textsuperscript{121}Email from Bonnie Mapes to Marc Linder (June 5, 2008).
\textsuperscript{122}Email from Marc Linder to Bonnie Mapes (June 5, 2008).
\textsuperscript{123}Email from Bonnie Mapes to Marc Linder (June 5, 2008).
Two days later bill sponsor Wise responded to the aforementioned critique:

I have spent a significant amount of time pursuing the enforcement issue with Legal Counsel for the ARRC, the Department of Public Health, the office of the Attorney General, and with Rep. Petersen. Following is my conclusion.

While I don’t personally disagree with your concerns about the owner’s relatively limited role in enforcement, that is what we passed. The rules that indicate the owner “shall” do something are based upon statute. The rules that indicate the owner “may” do something, in other words discretionary in nature, are beyond what we passed into law. It would be inappropriate, therefore, to mandate through administrative rules that the owner discontinue service, require the offending party to leave the area, or notify law enforcement. To do so would require a future General Assembly to amend the statute to include those mandatory activities on the part of the owner.124

Two days before the scheduled ARRC meeting a final effort, based on administrative law, was made to persuade Wise to revise his narrow view of an administrative agency’s powers of statutory interpretation:

Section 8(1) of the new statute provides that: “The department of public health shall adopt rules to administer this chapter, including rules regarding enforcement.”

This legislative mandate to the DPH to adopt rules to administer this chapter, including rules regarding enforcement, CANNOT mean that DPH has power only to issue rules that are totally identical to the words of the statute. If that were the case, there would be absolutely no point in delegating power to the agency to issue enforcement rules because those rules would already exist in the words of the statute. Therefore, it must be the case that the legislature delegated DPH some power to issue rules that TO SOME EXTENT go beyond the words of the statute in order to enforce the law. The only question is: TO WHAT EXTENT?

We already know that the DPH believes that it has some power to deviate from the precise words of the statute because three of its draft enforcement rules do just that:

153.5(4)
“a. If the individual refuses to stop smoking, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited should discontinue service to that individual.
b. If the individual refuses to stop smoking, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited may request that the individual leave the area where smoking is prohibited.
c. If the individual refuses to leave the area where smoking is prohibited, the employer, owner, operator, manager, or person having custody or control of the place where smoking is prohibited may notify the state or local law enforcement agency with jurisdiction over the area where smoking is prohibited.”

124Email from Phil Wise to Marc Linder (June 7, 2008).
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There is absolutely nothing in the statute that says a building owner should stop serving a violating smoker. There is absolutely nothing in the statute that says a building owner has discretion to request the smoker to leave the smoking-prohibited area. There is absolutely nothing in the statute that says a building owner may call law enforcement.

Nevertheless, DPH added these discretionary rules and apparently you agree that DPH has the power to do so even though the statute makes no reference to such actions by owners.

Moreover, whereas the statute merely says that “An owner, operator, manager, or other person having custody or control of a public place, place of employment, area declared a nonsmoking place pursuant to section 142D.5, or outdoor area regulated under this chapter shall inform persons violating this chapter of the provisions of this chapter,” the draft rules, 153.5(4), say: “An employer, owner, operator, manager, or person having custody or control of a place where smoking is prohibited under 2008 Iowa Acts, House File 2212 shall inform any individual smoking in a place where smoking is prohibited that the individual is violating the Smokefree Air Act and shall request that the individual stop smoking immediately.”

The statute does NOT say that an owner must request a smoker to stop smoking at all, let alone immediately. Yet DPH believes—and presumably so do you—that it has the discretion to interpret the statute to empower it to deviate from the words of the statute in order to enforce the law by making explicit what is implicit in the law by requiring owners to tell violators to stop smoking immediately.

The question therefore is: Once you’ve agreed that, despite the absence of any statutory mention of such action, the DPH has the power to tell a building owner that s/he has the AUTHORITY to call law enforcement when a recalcitrant smoker refuses to stop smoking, is it absolutely clear under administrative law that DPH would be going too far by telling the building owner that s/he has the DUTY to call law enforcement?

There is a strong basis for concluding that DPH would NOT be going too far. First, DPH is not going beyond the words of the statute in requiring, for example, a person, on whom the statute does not impose any duty, to do something. Thus, if the DPH had drafted a rule requiring all the other customers of a restaurant/bar observing a violation to call law enforcement, many people would probably conclude that the statute did not confer that much power on the agency. Second, the statute does impose a duty on building owners to inform violators of the statute—is requiring owners to call law enforcement so much further removed from the words of the statute than requiring owners to tell violators to stop smoking immediately that it is absolutely clear that DPH has no power to do so?

In order to answer this question, consider draft rule 153.5(1):

“The employer, owner, operator, manager, or person having custody or control of a place where smoking is prohibited under 2008 Iowa Acts, House File 2212 shall: a. Not permit smoking in a public place, place of employment, outdoor area where smoking is prohibited, or an area declared nonsmoking pursuant to 2008 Iowa Acts, House File 2212, section 5.”

Does the statute literally say that an owner of a public place “shall not permit smoking in a public place...where smoking is prohibited”? The statute says (sect. 3(1)) “a person
shall not smoke in...public places,” but does it literally say that the owner shall not permit it? If it doesn’t, DPH reasonably concluded that enforcement would be impossible without inferring that the statute meant it even [though] the statute didn’t say it in so many words. If the statute does say it, then why wouldn’t DPH be authorized to issue an enforcement rule requiring an owner who “shall not permit smoking” to call law enforcement after a noncompliant smoker has refused to stop smoking? After all, if the owner, after telling the violator to stop smoking immediately and being told by the violator that he won’t stop smoking, merely shrugged his shoulders, gave up, and did absolutely nothing more—as the draft rules now would permit him to do—wouldn’t the owner be violating his duty not to permit smoking? Isn’t calling law enforcement the very least that the owner would have to do to comply with his duty not to permit smoking?  

Wise failed to respond, and the only modification in the entire set of rules that the IDPH made in the wake of the June 11 ARRC meeting was to strike the aforementioned anomalous “should” in favor of “may discontinue service to that individual.” The most revealing commentary on this regulatory distortion of the enforcement process came from the highest legislative authority, Janet Petersen herself, who, in acknowledging that law enforcement was not perfect, explained that “we” had decided not to anger business owners by requiring them to call the police. In contrast, neighboring Minnesota was apparently less concerned about alienating them: its Clean Indoor Air Act of 2007 provided that the owner “shall make reasonable efforts to prevent smoking...by...asking any person who smokes in an area where smoking is prohibited to refrain from smoking and, if the person does not refrain from smoking after being asked to do so, asking the person to leave. If the person refuses to leave, the proprietor, person, or entity in charge shall handle the situation consistent with lawful

125 Email from Marc Linder to Philip Wise (June 9, 2008). In any event wrong was the public comment by a lawyer-bar and grill owner that the Act was not written for an owner to "notify any local enforcement agencies, since there are none that would have jurisdiction over the issue.” Mark Mershon to Iowa Department of Public Health (July 1, 2008) (copy furnished by IDPH).

126 Email from Bonnie Mapes to Marc Linder (July 1, 2008).


128 Telephone interview with Janet Petersen, Des Moines (June 6, 2008). Remarkably, at one of IDPH’s public hearings on the rules Douglas Beardsley, the director of the Johnson County Health Department, urged the agency to convert “may” to “shall” in the rules governing business owners’ obligations. Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site).
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methods for handling other persons acting in a disorderly manner or as a trespasser.\footnote{Minnesota Code, § 144.416(a)(2) (2008). As early as 1993, the Vermont public smoking law (which did not cover workplaces as such), required proprietors of covered public places to ask those who persisted in unlawfully smoking to leave the premises. 1993 Vermont Laws No. 46, § 2, at 77, 78.}

Perhaps even more destructive of enforcement\footnote{Front-line enforcement was further undermined by what was apparently a gap in the law. IDPH Rule 641—153.8(2) provides that “[a] peace officer may issue a citation in lieu of arrest pursuant to Iowa Code chapter 805 against a person who smokes in an area where smoking is prohibited...” However, the police, according to a county attorney and a police chief, with regard to such a civil offense lack the power, which they have in criminal matters, to require violators to identify themselves. Consequently, if violators refuse to present ID, the police cannot issue citations because they would not be able to identify the violators. Email from Charles Green, University of Iowa, Chief of Police, to Marc Linder (Sept. 8, 2008); telephone interview with Janet Lyness, Johnson County Prosecutor, Iowa City (Sept. 9, 2008). Minnesota avoided this problem by making unlawful smoking a petty misdemeanor. Minnesota Code § 144.417(2)(b) (2008). Two and a half months after the law went into effect, IDPH was aware of only one jurisdiction (Polk county) that had actually issued citations to smokers. Email from Bonnie Mapes to Marc Linder (Sept. 15, 2008). Seven months after the Iowa Attorney General’s Office had undertaken to answer questions concerning this gap, it responded: “1. Can it really be the case that, when a police officer personally observes someone committing a civil offense for which the police are empowered to issue a citation and which carries a $50 civil money penalty, the alleged violator is free to thwart the issuance of the citation simply by refusing to identify himself?” “Yes. The legislature has chosen to make this offense a civil citation. This is not the case of ‘a citation in lieu of arrest.’ In fact, it is similar to the provision of 453A.3 which also makes the citation given to a juvenile caught smoking a civil citation.” “2. Can the police lawfully issue, as the new idph rule 153.8(2) states, a ‘citation in lieu of arrest’ to someone whom they have no authority to arrest in the first place?” “No.” “Do the attached subsections of iowa code sect. 805.1 suggest a problem? The Minnesota public smoking law makes unlawful smoking a petty misdemeanor—does the iowa legislature need to amend the smokefree air act along similar lines to avoid the problem that the police in iowa city/johnson county have raised, or is there some interpretation of 805.8(c) that avoids the civil/criminal problem?” “The Iowa legislature could amend the statute to provide for a criminal citation, using the Minnesota law as a model, or in some other manner.” Email from Donn Stanley, Special Assistant Attorney General to Marc Linder (Apr. 13, 2009). It is noteworthy that a police sergeant and a former police detective in the Iowa City area who did not want to be identified stated that, regardless of what the aforementioned legal authorities had opined, a police officer who really wanted to issue a civil citation could find lawful means for requiring a smoking-law violator to identify him- or herself. The UI Police did not appear to have experienced such difficulties in.
with (as Wise put it) “what we passed” was IDPH’s rule dealing with the imposition of monetary penalties on those in control of smoking-prohibited places who failed to comply with their obligations. The statute itself provides that:

A person who owns, operates, manages, or otherwise has custody or control of a public place, place of employment, area declared a nonsmoking place pursuant to section 142D.5, or outdoor area regulated under this chapter and who fails to comply with this chapter shall pay a civil penalty as follows:

a. For a first violation, a monetary penalty not to exceed one hundred dollars.

b. For a second violation within one year, a monetary penalty not to exceed two hundred dollars.

c. For each violation in excess of a second violation within one year, a monetary penalty not to exceed five hundred dollars for each additional violation.\(^{131}\)

In spite of this unambiguous statutory penalty scheme, the IDPH rules provided that if IDPH determined that a complaint against a non-smoking place was credible: For the first complaint the IDPH “shall” issue a written notice of violation to the owner, including “educational materials about how to comply” and “information on whom to contact for further information and assistance for compliance”\(^{132}\); for the second complaint in one year, the IDPH “shall” issue a second notice of violation, and in addition “may authorize one or more public agencies to conduct a compliance check” and “may” pursue civil penalties or “may refer the complaint to the appropriate authority for enforcement of the civil penalties”\(^{133}\); and for the third and further complaints of a violation within one year the IDPH “shall” issue a subsequent notice of violation and “authorize one or more public agencies to conduct a compliance check,” and, in addition, “may” pursue civil penalties or “may refer the complaint to the appropriate authority for enforcement of the civil penalties.”\(^{134}\)

An hour before the Smokefree Air Act and the administrative rules went into effect Wise, Connolly, Petersen, and Olson were asked: “Where in the statute did the legislature authorize IDPH to give violators free passes by abolishing the mandatory monetary penalties in favor of education? Why did the ARRC not object to this clear ultra vires action by the agency in violation of the statutory

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\(^{132}\)Rule 641—153.8(8)(a) (July 1, 2008).

\(^{133}\)Rule 641—153.8(8)(b) (July 1, 2008).

\(^{134}\)Rule 641—153.8(8)(c) (July 1, 2008).
I have consulted with Legal Counsel to the Administrative Rules Review Committee regarding your concerns with the enforcement of the statewide smoking ban. It is fair to conclude that Counsel is not troubled by the enforcement method being proposed. To quote from his memo to me, "The Department does not levy fines . . . H.F. 2212, provides in part: 'Judicial magistrates shall hear and determine violations of this chapter.' Fines will be imposed by the courts, not the Department of Public Health. This means that the Department must institute a court action to impose a fine."

Counsel further opines, "To me, this rule seems like an attempt to educate the public and encourage voluntary compliance prior to the costly process of seeking judicial adjudication of a violation."

These administrative rule have been "filed emergency" and are in force. There is a lengthy public input process. I would invite you to participate in one of those public hearings. Following that process, final rules will come before the ARRC. That will occur sometime this fall. I would further invite you to attend that ARRC meeting.

Following the adoption of final rules, the subsequent avenue available to the public is to petition the 2009 General Assembly to amend the statute. I suspect there will be several bills filed to do that.  

On June 11, nine days after IDPH had published the draft rules on its website, the Administrative Rules Review Committee (a 10-member bipartisan legislative body, appointed by the speaker of the House and Senate majority leader, which selectively reviews rules proposed or already in effect) met to review them merely on an informal and informational basis since they had been neither filed nor published. ARRC is empowered to refer a rule at the next legislative session to the two aforementioned officers, who are then required to refer it to the appropriate standing committee. ARRC’s referral may be accompanied by a recommendation to overcome the rule statutorily. If ARRC objects to a rule on

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135Email from Marc Linder to Philip Wise, Michael Connolly, Janet Petersen, and Tyler Olson (June 30, 2008).

136Phil Wise to Marc Linder (July 3, 2008).

137Iowa Code §§ 17A.8(1) and (6) (2008). At this time the committee was composed of six Democrats and four Republicans.


the grounds that it is unreasonable, arbitrary, capricious, or otherwise beyond the agency’s delegated authority, the Committee is required to file the objection with the administrative code editor; after such filing, the agency then bears the burden of proof in any judicial review or enforcement action.\footnote{Iowa Code §§ 17A.8(8) and 17A.4(5)(a) (2008).} Finally, ARRC is also authorized, by a two-thirds majority of its members, to delay the rule’s effective date until adjournment of the legislative regular session.\footnote{Iowa Code §§ 17A.8(9) (2008).}

At the June 11 ARRC meeting IDPH official Barb Nervig reported that the drafting process had included: a review of the administrative rules of six or seven other states with comprehensive anti-smoking laws; involvement of the Centers for Disease Control and Prevention; the aforementioned meeting on May 6 with 43 participants (including representatives of the three state universities); and consideration of more than 300 public comments. The transparency of the process was underscored by the extended 66-day public comment period scheduled to last until August 6. Unsurprisingly, Nervig stressed that the department would seek to secure compliance primarily through education. Where the “pretty prescriptive” legislation—indicated by the fact that half the rules were taken directly from the statute—needed clarification, IDPH provided definitions; the two that Nervig highlighted were the aforementioned “grounds of any public buildings,” which had generated questions before and after the definition’s promulgation, and the incidentalness of serving food to the consumption of alcoholic beverages as a boundary marker between a “bar” and a “restaurant.”\footnote{Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by Joe Royce, legal counsel).} The second definition, key as it was to the determination of whether smoking was permitted in outdoor seating/serving areas, unleashed especially intense and angry reactions from bar owners.

The bar debate, which took up the lion’s share of the discussion, got underway when Republican Representative David Heaton, an opponent of the bill, asked whether the statute specifically stated that smoking was permitted in an outdoor bar.\footnote{Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by Joe Royce, legal counsel).} Nervig referred the question to the principal drafter of the rules, Assistant Attorney General Matt Gannon—intriguingly, Philip Morris had been one of his clients when he was a lawyer at the Washington, D.C. corporate law firm of Arnold & Porter\footnote{After graduation from the University of Iowa Law School in 1998 and until 2007}—whose negative answer was misleading insofar
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as the law specifically provided that smoking was prohibited in “[o]utdoor seating or serving areas of restaurants.”

Burlington Democrat Thomas Courtney, the Senate Majority Whip, who lamented that the law could mean the difference between life and death for some small bar owners, launched an attack on the irrational health consequences of the bar-restaurant distinction, which he imagined was rooted in the rules. When, for example, he noted that wait staff who had to deliver beer or pizza to an outdoor patio would not be protected from exposure to secondhand smoke, Nervig pointed out that the statute generated that outcome. As for shifting to a different criterion—percentage of sales—Gannon stated that experience in other states had proven that it was incredibly difficult to enforce and draw clear lines. (But the fact that Gannon was constrained to admit that he and his colleagues did not know the answer to Heaton’s question as to whether smoking would be permitted on the patio of a restaurant or bar that served only alcohol on the patio indicated that line-drawing was not so easy under the IDPH rule either.) Courtney’s commonsensical point that whether they served pre-packaged or prepared food, wait staff who had to take it to outdoor tables would be equally exposed to secondhand smoke prompted Nervig to respond that taverns with food were essentially the equivalent of restaurants with a liquor license, both of which together accounted for about 56 percent of the relevant establishments. Courtney then tried to cut the Gordian knot by proposing that a restaurant be defined as a place where the wait staff went among the tables and a tavern as one with a food service door where customers picked up the food so that the wait staff would not have to be exposed to the smoke. Nervig’s jocular response that under those circumstances she could see a lot of pick-up windows being built proved, as Courtney was quick to note, his whole point—that no wait staff would be breathing secondhand smoke. It was left to Senate President Jack Kibbie to lament that the legislature itself had not gone into what he called the


hamburger versus pizza issue. 147

In fact, IDPH’s basis for rejecting food as a set proportion of sales as the criterion distinguishing bars from restaurants was more complex than Gannon may have known at the time. 148 On July 2, the day after the law and the emergency rules (including the aforementioned definition of “incidental”) had gone into effect, 149 Mapes exchanged emails headed “Dram Shop” with various IDPH, AG, and ABD officials noting that: “There may be a way to use reports that bars must make to their ‘dram shop’ insurance carriers to support a percentage of sales definition. … This would still take some additional resources to manage, but not nearly as much as if we had to set up a system entirely from scratch.” Adding that she was still working with ABD on the issue and that she would have more detailed information in the near future, she cautioned that “[t]his isn’t ready to share outside our group at this point. It might not pan out.” 150 The next day IDPH’s legislative liaison emailed Mapes and the recipients of the previous emails that Republican Representative Lance Horbach had called her to “discuss the definition of bar and restaurant and provide his public input. He supports using percentage of sale and suggested using the dram shop insurance requirement. He’s an insurance agent in his other life and say that bars are provided annual audits to maintain their policy and suggests we base our enforcement on these annual audits. It was a good discussion and he admitted their [sic] are issues with the way the statute is written but asked us to consider his comments as we go through the rulemaking process.” 151 Horbach, a self-

147 Administrative Rules Review Committee Meeting (June 11, 2008) (audio tape provided by ARRC legal counsel Joseph Royce).

148 The pro-smoking group Choose Freedom for Iowa argued in a letter to ARRC that the rule was “contrary to the statute” because it used a type-of-food test stood instead of the statute’s “incidental to the consumption of alcoholic beverages” test. George Eichhorn to Michael Connolly (Oct. 8, 2008).

149 Mapes stated that IDPH had filed emergency rules because “drafting and approval of Rules normally takes 120 days, but IDPH has only 10 weeks from the time the law was signed until it goes into effect on July 1.” Tobacco Use Prevention and Control Commission, Meeting Minutes (May 30, 2008), on http://www.idph.state.ia.us/tobacco/common/pdf/053008minutes.pdf (visited Aug. 15, 2009).

150 Email from Bonnie Mapes to Brent Saron, Lynh Patterson, Matt Gannon, Tom Newton (July 2, 2008) (copy furnished by IDPH). Four minutes earlier an ABD official had emailed her: “Sounds like the majority of them have to do this, so we might be able to use their reports for their insurance classification as the basis of an application system for bars that wish to [allow smoking outdoors?].” Email from Jim Kuhlman to Bonnie Mapes (July 2, 2008) (copy furnished by IDPH) (copy lacked end of email).

151 Email from Lynh Patterson to Bonnie Mapes et al. (July 3, 2008) (copy furnished
professed “property rights guy” who noted that the legislature had never discussed its intent with regard to “incidental,” later stated that in his telephone conversation with IDPH, the agency had admitted that it had overstepped its authority in writing this rule and was willing to listen to arguments for changing it.152

On the same day that Mapes sent the aforementioned email the Iowa Restaurant Association submitted a request to the agency that it carry out a regulatory analysis of the rules.153 By the time IDPH published the regulatory analysis later that summer, it explained its reasons for not having adopted a percentage of sales definition as its way of satisfying the statutory requirement that it provide a “description of any alternative methods for achieving the purpose of the proposed rule that were seriously considered by the agency and the reasons why they were rejected in favor of the proposed rule.”154 IDPH “did seriously consider alternatives” to its aforementioned definitions of the undefined statutory terms “bar” and “serving of food [only] incidental to the consumption of alcoholic beverages.” The latter definition, focused as it was on very rudimentary food preparation, was based on “Department of Inspections and Appeals criteria for the ‘Tavern without food preparation’ designation ‘check-off’ on food service license applications.”155 (As early as the end of May Mapes had mentioned at a Tobacco Use Prevention and Control Commission meeting “a few...definitions which have the potential for controversy, including the definition of a bar versus a restaurant.... To define a bar, the Rules utilize a classification that the Department of Inspections and Appeals includes as a check-off on their food service license applications titled “Tavern with no food preparation” that limits service of food to bar snacks and pre-packaged, commercially prepared foods.”)156 Without citing any such statutes, the Regulatory Analysis stated that the use of already existing food service or liquor license criteria was a common method used by state smokefree workplace laws to distinguish bars from restaurants, whereas Iowa lacked any liquor license type that differentiated between establishments

\[\text{Telephone interview with Lance Horbach, Tama (Aug. 16, 2009).}\]

\[\text{Public Health Department [641], “Regulatory Analysis,” IAB 31(6):644-56 at 645 (Sept. 10, 2008).}\]

\[\text{Iowa Code § 17A.4A(2)(a)(6) (2008).}\]

\[\text{Public Health Department [641], “Regulatory Analysis,” IAB 31(6):644-56 at 654 (Sept. 10, 2008).}\]

whose food sales were incidental to alcohol sales and full-service restaurants with liquor licenses. IDPH admitted, again without citing any state statutes, that “the annual percentage of food sales compared to alcohol sales” was another common method used to distinguish bars and restaurants, food sales typically being limited to a maximum of 20-25 percent of total sales.\footnote{Public Health Department [641], “Regulatory Analysis,”\textit{IAB} 31(6):644-56 at 654 (Sept. 10, 2008). The Smoke Free Illinois Act, 410 ILCS 82/10, for example, used 10 percent as the boundary marker, but not for the same purpose as the Iowa law, which appeared to be unique in banning smoking in outdoor restaurants. The Florida law used 10 percent to define exempt stand-alone bars. Florida Statutes §§ 386.203(11) and 386.2045(4) (2008).}

The Department considered this method, but concluded that it was not a “practical or effective option in Iowa” for four reasons. First, those states (which, again, IDPH did not identify) that used this percentage of sales method either had already had a system for gathering the requisite financial data from bars before they passed their smokefree workplace laws or created it as part of such legislation together with the necessary funding. In contrast, the State of Iowa lacked such a system, and although some cities did have ordinances requiring liquor licensees to submit financial records, the collection methods were not uniform. Similarly, although all liquor licensees had to maintain dram shop insurance and many insurers required them to submit liquor sales records, these requirements were also not uniform. Second, developing and implementing such a statewide collection and audit system could not have been completed before the Act’s effective date and the legislature appropriated no funds for such a project. Third, a percentage of sales criterion would impose considerable reporting and recordkeeping burdens on liquor licensees, which would be exacerbated by the need for recertification. And fourth, a percentage of sales-based enforcement system would be more “cumbersome and intrusive,” especially since law enforcement officers would not be able during an on-site inspection to determine whether the establishment was a bar or a restaurant; consequently, enforcement “would be more difficult, complex, and confusing for business owners and for the public.”\footnote{Public Health Department [641], “Regulatory Analysis,”\textit{IAB} 31(6):644-56 at 654-55 (Sept. 10, 2008). The third and fourth reasons adduced by IDPH, if empirically sound, might have weakened a counter-proposal that the agency should have issued a rule setting a maximum proportion (for example, 10 percent) of total sales accounted for by food; then, if a complaint were filed against the bar for patio smoking, the bar owner would have borne the burden of producing data showing that the bar’s food sales fell below the regulatory threshold and that it was therefore exempt. IDPH would not have had to collect statewide data, and individual bar owners, who could be presumed to know what}
Representative Horbach, who harbored no doubt whatsoever that IDPH had chosen the type-of-food-preparation criterion over percentage-of-sales precisely because it (correctly) believed that it would result in fewer outdoor patios’ being legally available for smoking, discredited these arguments as IDPH’s “blowing smoke.” He insisted that the data were readily available because all bars and restaurants rang up alcohol and food charges separately on their cash registers. Moreover, all companies writing dram shop insurance policies collected such data, using them to require higher premiums of establishments with the highest proportion of alcohol and the lowest proportion of food sales on the grounds that their customers were more likely to become drunk and engage in acts the injurious consequences of which might be charged back to the insured bars.159 Asked about Horbach’s claims, Mapes observed: “As far as I am aware, no state agency collects any information on percentage of food versus alcohol sales—and we did research this. I am not aware of how the individual businesses[‘] cash registers work.”160 In contrast, Senator Courtney, who observed that legislators had not given thought to any fixed percentage of sales because they believed that they were passing a bill that banned smoking indoors and only in “major eateries”

proportions of food and alcohol they sold, could not reasonably have complained about unfair surprise.

159Telephone interview with Lance Horbach, Tama (Aug. 16, 2009).
160Email from Bonnie Mapes to Marc Linder (Aug. 17, 2009). In response to bar owners’ self-generous proposal that 51-percent food sales be the trigger for patio smoking bans Mapes had previously stated that it “wouldn’t work because there’s ‘no system across the state for us to collect that information.’” Jennifer Jacobs, “Panel Rejects Challenge of Smoking Rule,” DMR, Dec. 10, 2008, on http://www.desmoinesregister.com. According to the ABD official in charge of the Division’s alcohol regulatory matters and drafting its regulations: “I can’t believe that any one person has information about the configuration of cash registers in approximately 5,000 on-premises licensees. In the Proposed Decision, Plaza Pantry, the City of Des Moines asked an auditor from Revenue & Finance to audit the sales to determine whether the licensee was compliant with a local ordinances requiring a specified ratio of alcohol and non-alcohol sales. The auditor found that the licensee had to enter each sale by hand, leaving it to the person making the sale to enter the type of sale. Additionally, tobacco and alcohol sales were recorded in one category. Granted, Plaza Pantry was an off-premises account, but I can’t believe recordkeeping to be much different in on-premises establishments. Insurance companies retain auditors on staff to audit the books and records of on-premises licensees in an effort to get an honest ‘take’ on the amount of alcohol sold in an establishment. The ratio of alcohol to food sales is just one of several rating criteria used by the companies and each company has a different rating scale. The information obtained by the insurance companies is considered proprietary information and generally not available to anyone outside the company.” Email from Judy Seib to Lynn Walding forwarded to Marc Linder (Aug. 19, 2009).
outdoors, expressed the opinion that IDPH officials honestly felt that the percentage-of-sales data were not trackable with the resources available to the agency.\textsuperscript{161}

Potentially the most consequential intervention at the session was the angry appearance of Representative McKinley Bailey (the only legislator present who was not an ARRC member), who had morphed into pro-smoking bar owners’ savior.\textsuperscript{162} Unequivocally, Bailey declared that in his mind and those of all of the score of legislators to whom he had spoken about the definition of a bar: “This is an absolute perversion of the legislative intent.” He related that when he had tried to persuade other legislators to vote against the bill, they told him that people would be able to smoke on patios. Consequently, these rules made liars out of him and others, who in addition had told bar owners to go ahead and build patios. As far as he was concerned, a bar was a place where more beer and liquor were sold than food—the commonsense definition for which he and others had voted. Not only was the department’s definition plain wrong, but, Bailey asserted, a number of legislators had stated that they would not have voted for the bill if they had known that IDPH would issue such a rule. In contrast, Republican committee member Linda Upmeyer, a hard-line opponent of H.F. 2212, stated that the rules were “exactly what” Olson, Mascher, and Petersen “told the Republican caucus it [the law] was going to look like.”\textsuperscript{163}

Bailey did not announce the next step on his action agenda, but, based on his performance at the ARRC meeting, rumors began circulating that he might be organizing a group to fight for a 21-and-over amendment in 2009,\textsuperscript{164} and on the eve of the law’s going into effect he declared that he would urge revision, if possible in a special session.\textsuperscript{165} (Even before the law went into effect, House Minority Leader Christopher Rants had predicted that a concerted effort to repeal casino coverage would be successful in 2009, but that at the same time an attempt would be made to add an exemption such as for age-restricted bars.)\textsuperscript{166} For the benefit of the ARRC members and the assembled news media—whose

\textsuperscript{161}Telephone interview with Thomas Courtney, Burlington (Aug. 16, 2009).

\textsuperscript{162}On Bailey’s activities regarding H.F. 2212 while the legislature was considering it, see above ch. 35.

\textsuperscript{163}Administrative Rules Review Committee meeting (June 11, 2008) (audio tape provided by ARRC legal counsel Joseph Royce).

\textsuperscript{164}Telephone interview with Kraig Paulsen, driving on I-80 from Cedar Rapids to Des Moines (Aug. 19, 2008). See below on the bills introduced in 2009.


\textsuperscript{166}Telephone interview with Christopher Rants, Des Moines (May 12, 2008).
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characterization of these tirades as mere requests for “some wiggle room in implementing new rules” did not quite capture their tone—some irate bar owners denounced the proposed definition, asserting, for example, that it was ludicrous to classify a bar, three to six percent of whose sales stemmed from food, as a restaurant. Other bar owners in attendance went off on various tangents. Joe Sturgis, the amateur oncologist who doubled as owner of the Rusty Nail in Davenport, now turned seer as well, predicting not only that the new law would “crucify” a lot of people, but also that gasoline would cost five dollars a gallon by July 1. Bill Duncan, the owner of a Fort Madison bar, 90 percent of whose customers allegedly smoked, accused the authorities of the mean-spirited act of forcing him to commit financial suicide. In particular, he purported to be scared of the scheme that permitted citizens to police the law, thus turning people against people.

Bar owners, in the words of a summary prepared by the Legislative Services Agency staff, contended that “during the legislative process they were assured that outdoor smoking at bars was protected. They further stated that the percentage of business from food sales is very small and that using a percentage as a basis of the definition of bar is the appropriate measure. Department representatives...noted that use of a percentage would greatly expand the availability of the exemption. Committee members supported the position of the bar operators, contending that legislators understood that generally speaking the outdoor areas of a bar were not going to be subject to the smoking ban. Members urged the Department to revise the definition to exclude bars that provided a limited food service.” However, because ARRC reviewed the proposal only for informational purposes, it took no formal action.

IDPH’s policy-making body, the Iowa State Board of Health, which is empowered to adopt regulations, was scheduled to adopt the emergency rules on June 11 following the ARRC meeting, but as a result of the monumental floods devastating the state, the meeting was cancelled.

As the July 1 effective date of the Smokefree Air Act approached, COBRA’s

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168 Administrative Rules Review Committee meeting (June 11, 2008) (audio tape provided by ARRC legal counsel Joseph Royce).
169 Legislative Services Agency, “Iowa Legislative Interim Calendar and Briefing,” 2008 Interim No. 2, at 6 (June 18, 2008).
leaders appeared to be losing their tenuous purchase on politico-jurisprudential reality. Agreeing with pro-smoking forces in other states that were “‘coming to a wall’” in litigation, Jonathan Van Roekel declared that COBRA had “decided to forgo attempting to gain a level playing field at the state level and intend to create a unified front against smoking bans by taking the fight nationwide and declaring the matter a personal property rights issue.” Van Roekel, who now added federal constitutional law to his multiple areas of expertise—he intended to attend law school to specialize in constitutional law—envisioned oral argument before the U.S. Supreme Court (which had “issued previous rulings siding with property owners regarding personal property rights issues”) at which COBRA’s lawyers would intone: “‘They cannot tell you what you can and cannot do with your own personal property, within reason.’” Perhaps in order to distinguish his fantasy from that of capitalists opposed to wage and hour and safety and health regulations, he reverted to his unique oncological insights: “currently, studies have not shown a positive link between secondhand smoke exposure and cancer in a work-related environment.” Imagining how well spent the “millions of dollars” would be that COBRA and its counterparts in other states would have to raise for this Supreme Court litigation, Van Roekel fantasized that “if information attesting to that [lack of evidence of the aforementioned link] can be introduced into a court of law, it would remove the foundation of the smoking ban argument and the ban would be overturned.”

The June 11 Board of Health meeting that had been cancelled was rescheduled for June 27. The previous day, House Speaker Pro Tempore Polly Bukta, who had been apologizing to bar owners in an effort to ward off Jonathan Van Roekel’s challenge for her Clinton seat, sent an email (“Importance: High”) to IDPH Director Newton in her newly fashioned capacity as her bar-owning constituents’ advocate:

Please make it clear for the bar owners who serve food, and wish to use the patio they have gone to the expense of building in preparation for the ban on smoking what they can do and cannot do. Rather than using the terms ‘packaged food,’ or ‘incidental,’ why not make it a percentage of profits from food? I, and many of the bar owners in my district[,] have NO problem with going smoke free, but feel that they are being put at an unfair

advantage [sic] because they have a grill and so [sic] some sandwich making on site. A bar next door or in very close vicinity may smoke on their patio because they serve only packaged food. Why differentiate between those with packaged food or food cooked on site when the food will be consumed in an outdoor area which the law said can be used to smoke? There will be no smoking where the food is prepared. We made the law. We must be fair to those whom we have subjected to obeying the law. I believe that the definition [sic] between what is a restaurant and what is a bar is ambiguous and outdated, and should be cleared up at the next Rules meeting. Please be reasonable and considerate of those business owners who are willing to abide by the law, and allow them to stay in business.175

An hour later Newton replied to her pleading. Rather than pointing to the inconsistency between Bukta’s acceptance of responsibility for having made the law and her ignorance of the fact that it was that law that used “incidental,” he merely informed her that her comments would be entered into the public record and added that IDPH recognized that there might be a need to amend the rules based on the public comments.176

On June 27, two days after House Minority Leader Rants had encouraged IDPH to “get off its rear end,” 177 the Board held an electronic meeting, at which it unanimously adopted and filed emergency the IDPH’s rules, whose effective date of July 1 coincided with the Act’s.178 To be sure, the process had not yet run its course because the Department was also proceeding with the adoption of rules

175Email from Polly Bukta to Tom Newton (June 26, 2008) (copy furnished by IDPH).
176Email from Tom Newton to Polly Bukta (June 26, 2008) (copy furnished by IDPH).
Bukta’s public comment as logged by IDPH later that day was somewhat different: “Please clear up the ambiguity of the definition of a bar and a restaurant by exchanging the words food as an incidental or packaged to a percentage of food served to qualify the establishment as a restaurant [sic] or bar. Iowans’ health would still be protected if food cooked on site were served on the patios, (which, by the way, bar owners have gone to considerable expense to build) because it would be a choice to eat outdoors [sic] with smoking, or in doors where there would be no smoke. I don’t agree with this fine line drawn on packaged food, or food cooked on site, and maybe that could be changed.” Polly Bukta (June 26, 2008), in IDPH, “SAA-Rules Comments” at 30-31 (CD provided by IDPH). Bukta was the only legislator whose public comment on the rules itself was logged.
by means of the non-emergency standard rule-making process\textsuperscript{179}: as ARRC chair Senator Michael Connolly reminded Iowans, following the completion of public hearings in August the agency could still revise the rules.\textsuperscript{180}

Those five regional public hearings took place on August 20, 21, and 22 through the Iowa Communications Network originating on each date in one of five cities (Iowa City, Waterloo, Des Moines, Council Bluffs, and Sioux City); the hearings were also accessible for teleconferencing participation in fixed locations in several cities and towns in each region (totaling 27).\textsuperscript{181} The hearings’ potential usefulness for calling attention to problems with the rules was in large part subverted\textsuperscript{182} by the fact that, despite Bonnie Mapes’s repeated announcements and sharp admonitions by ARRC members Representative Wise (who was retiring from the legislature) and Senator Courtney (a longtime United Auto Workers member who faced a Republican opponent for re-election who supported repeal of the law)\textsuperscript{183}—both of whom were participating from Burlington\textsuperscript{184}—the bulk of critical comments pertained not to the rules, which

\textsuperscript{179}Public Health Department [641], “Regulatory Analysis,” \textit{IAB} 31(6):644-56 at 645 (Sept. 10, 2008).

\textsuperscript{180}Jason Clayworth, “Smoking Ban Near, But Rules Aren’t Set,” \textit{DMR}, June 25, 2008, on http://www.desmoinesregister.com. IDPH announced that it would consider all written comments received through August 22, 2008, the day on which the last of five regional public hearings were scheduled. \textit{IAB} 31(3):312-13 (July 30, 2008) (ARC 6990B).


\textsuperscript{182}A certain sterility resulted from Mapes’s rule, enunciated at the outset, that she would not respond to comments and that no debate (between speakers) was allowed. Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site).

\textsuperscript{183}See above this ch. Later Courtney welcomed revocation of Larry Duncan’s liquor license: “This is a great day for restaurant and bar owners in our community who are playing by the rules.” William Petroski, “Bar Loses Liquor License over Smoking Ban,” \textit{DMR}, Apr. 9, 2009, on http://m.desmoinesregister.com/news.jsp?key=442386&rc=ln (visited Aug. 15, 2009).


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were the only subject of the hearings, but to the Act itself, over which IDPH had no jurisdiction.\textsuperscript{185} Wise may have been “frustrated” because 90 percent of speakers did not talk about the rules,\textsuperscript{186} but leaders of the bar-owner rebellion reveled in repeating their already well-known denunciations such as Larry Duncan’s that Iowans, without any input, had had the ban rammed down their throats. Ironically, however, whatever articulateness and legitimacy the heroically outraged bar owners such as Duncan and Joe Sturgis may have lacked for their claims that the whole law was unconstitutional was more than compensated for by Wise (one of the bill’s strongest supporters) and Courtney, who echoed the arguments of some other attending bar owners—and thus parted company with some non-bar-owning nonsmokers who commented that patios should be smokefree—that the rules regarding smoking on outdoor patios had gone further than the statute and urged the Department to take a hard look at the rule governing this particular location.\textsuperscript{187} Mapes, who had strictly complied with her own rule against commenting, offered what was by far the most interesting comment—but only during an informal one-on-one conversation at the Iowa City Public Library with the microphone turned off—in observing that the inconvenience of having to walk long distances to smoke and the resulting nonsmoking was a good outcome of the smoking ban, but that the agency did not want to appear coercive.\textsuperscript{188}

\textsuperscript{185}Quite a few of the off-topic comments stemmed not from bar owners, but enraged and inarticulate smokers who, inter alia, denounced “cigarette Nazis.” Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site).

\textsuperscript{186}Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site).

\textsuperscript{187}Email from Phil Wise to Marc Linder (Aug. 17, 2009). Wise and Courtney would have taken the position that the legislature did not authorize IDPH to ban smoking altogether on bar patios. Some attendees urged IDPH to create a distance rule to deal with this problem, but since the legislature had deleted both a 50- and a 10-foot distance ban from H.F. 2212, the agency’s power to impose one would have been dubious. See above ch. 35.

\textsuperscript{188}Interview with Bonnie Mapes, Iowa City Public Library (Aug. 20, 2008, 11:15}
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Though comparable to Wise and Courtney’s estimate of the proportion of irrelevant comments made at the public hearings, it was nevertheless astonishing that, in the course of the rule-making process, of the 1,090 public comments that IDPH received on its website between June 2 and September 30, 2008, only 125, or little more than one-tenth, specifically concerned the rules. Of these, 36 were general comments in support of the rules (many of which were cheer-leading animated by health organizations such as the American Cancer Society). Of the 70 that dealt with specific provisions in the rules, almost half (30) dealt with serving of food incidental to the consumption of alcoholic beverages (12 of which focused on the issue of food sales as a percentage of total bar sales); the only other provision to garner double-digit comments was the size of nosmoking signs required for vehicles (15); five comments each were submitted on the “grounds of any public building” and notices of violation. In contrast to the 41 pages of rules-related comments, the 358 pages of off-point emails were replete with obscene personal attacks (“You fucking fascists”), political nonsense (“This is the most communistic law I have ever known of in Iowa”), and historical nonsense (“Keep in mind the only society that banned smoking was Natzie Germany”), that Senator Courtney, based on his having smoked 35-40 years earlier, interpreted as revealing the hold that tobacco had on smokers.

On October 13, the day before ARRC was scheduled to discuss the IDPH rules, the agency announced its proposals to amend them. Although the Department yielded no ground to bar owners on the most explosive issue—the definition of “bar”—it did make two concessions with regard to enforcement procedures about which their lawyers had been complaining. First, the amended rule inserted “potential” into “written notice of violation” (153.8(8)(a)); and second, it made the description of agency actions after third and subsequent complaints consistent with that of those after second complaints (153.8 (8)(c)). The latter change in particular weakened enforcement. In response to many complaints from employers, IDPH significantly reduced the size of no-smoking signs required for vehicles (153.5(1)(c)). In order to preempt opponents’

a.m.).

189IDPH, “Iowa Smokefree Air Act: Summary of Administrative Rule Comments, June 2-September 30, 2008,” on http://www.iowasmokefreeair.gov/common/pdf/comment_summary.pdf (visited Aug. 16, 2009). To be sure, only very few comments on the meaning of “incidental” were concrete and practical. See e.g., IDPH, “SAA-Rules Comments” at 20-21 (CD provided by IDPH)

190IDPH, “SAA-Non-Rules Comments” at 210, 177, 287 (CD provided by IDPH) (two of these three commenters identified themselves).

191Telephone interview with Thomas Courtney, Burlington (Aug. 16, 2009).
(baseless) claims that “public buildings” in the statutory term “grounds of any public buildings owned, leased, or operated by or under the control of the state government or its political subdivisions” could confusingly comprehend privately owned buildings that were “public places,” IDPH added a definition of a “public building” as an “enclosed area owned, leased, or operated by or under the control of the state government or its political subdivisions” (153.2). The only change that did not constitute a concession to owners of public places and/or employers and possibly strengthened enforcement was authorizing complainants to file anonymously (153.8(5)). Once the Department had refused to accommodate bar owners on the definition of “bar” and thus on the scope of lawful patio smoking—thus remitting them to legislative recourse—the most contentious issue facing the agency was the definition of “grounds of any public buildings,” which IDPH proposed amending by excluding “a sidewalk in the public right-of-way” (153.2).

How and why this particular proposal came to the forefront sheds interesting light on the way the Iowa Department of Public Health formulated public policy by writing a definitional rule dispositively interpreting the scope of the legislature’s intent to interdict smoking on the grounds of state and local government buildings. In order to understand this amendment, it is necessary to go back to a complaint that was filed under the first version of the rules against the City of Iowa City for its failure to post no-smoking signs on the sidewalk in front of city hall. Iowa’s expansive and unique state law prohibited smoking in a number of “outdoor areas” including “[t]he grounds of any public buildings owned, leased, or operated by or under the control of the state government or its political subdivisions....” The IDPH emergency rules, which went into effect on July 1, defined such grounds, in pertinent part, to mean “an outdoor area of a public building that is used in connection with the building, including but not limited to a sidewalk immediately adjacent to the building....” Because the sidewalk in front of Iowa City city hall satisfied these definitional criteria, the city


government was violating the Smokefree Air Act by failing to post no-smoking signs “at every entrance” to this smoking-prohibited outdoor area.\textsuperscript{195} Far from being unexpected, the omission by the city government, which enjoyed an undeserved reputation as a radical foe of smoking, was consistent with a history of and contemporaneous disregard for protecting nonsmokers from secondhand smoke.\textsuperscript{196}

Nor was the failure to post inadvertent. On June 5, the city attorney had issued a memorandum to the city council, city manager, and lesser city officials summarizing the Smokefree Air Act’s direct applicability to cities and answering questions that city staff had posed. In response to a question as to whether it was lawful to “smoke on the sidewalk in front of City Hall,” the attorney asserted without explanation: “Yes. The sidewalk is right-of-way, and right-of-way is not the grounds of a public building.”\textsuperscript{197} To be sure, the city attorney was well aware,

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\textsuperscript{196}See above ch. 33.
\textsuperscript{197}Eleanor Dilkes to City Council et al., Re: Smokefree Air Act n.p. [at 3] (June 5, 2008) (copy furnished by Iowa City Legal Dept). In response to a question as to whether smoking was lawful in city plaza (a pedestrian mall owned by the city) Dilkes stated that it was lawful because “City Plaza is right-of-way, and the Act does not prohibit smoking on the right-of-way.” \textit{Id}. Elsewhere in the memo Dilkes asserted that the “Act expressly stated that the person having custody or control of an area that is not covered under the Act may declare the area to be non-smoking. Thus, the City has authority under the Act to prohibit smoking in any additional area under its custody or control. These areas include parking ramps, city plaza, and parks/open spaces not included within the definition of ‘grounds’ of a public building.” \textit{Id}. [at 1]. This statement of the law was incorrect: it did not authorize an owner to declare an area “not covered” to be non-smoking, but only an area that was “exempt”: “an owner...or other person having custody or control of an area otherwise exempt from the prohibitions of section 142D.3 may declare the entire areas as a nonsmoking place.” H.F. 2212 § 5(1) (2008)/Iowa Code §142D.5(1) (2009). The Act expressly states that only “the following areas are exempt from the prohibitions of section 142D.3,” and then enumerates 11 specific exempt areas, none of which would encompass city plaza and one of which explicitly excepts “grounds of any public buildings” from exemption (to the extent that they are places of employment): “Outoor areas that are places of employment except those areas where smoking is prohibited pursuant to section 142D.3, subsection 2.” H.F. 2212 § 4(6) (2008)/Iowa Code §142D.4(6) (2009). There is, in other words, a difference between areas that are exempt from the smoking ban and areas that are not covered by the Act. The fact that city plaza was not covered rather than exempt did not mean that the city was powerless to ban smoking there. Rather, it meant that the city lacked the power to extend the applicability of the state law to this area simply by posting the area with the statutorily required no-smoking signs pursuant to the provision that: “Smoking shall be prohibited in any location of an area declared a nonsmoking place

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as she observed in correcting a city councillor’s false claim to the contrary, “you do have the right to prohibit it in the right-of-way, but that would be a designation by you. It’s not prohibited by the statute.”

In other words, by virtue of the city’s ownership of all public sidewalks (“because we have control of your right-of-ways”), the city had—and had always had—the power to ban smoking on those sidewalks. The Iowa League of Cities issued a special report in July on SAA, which, being in part based on the Iowa City city attorney’s memorandum, would then have the responsibilities of any proprietor—inform the smoker they need to stop or leave and then call the police if the person doesn’t comply. Law enforcement has the authority to issue citations to individual smokers.” Email from Bonnie Mapes to Marc Linder (Sept. 24, 2009).

199 Transcription of Iowa City City Council Special Work Session Meeting at 35 (June 23, 2008).
adopted her position with respect to smoking on a sidewalk in front of city hall. However, some of the state’s larger cities did ban smoking on sidewalks in front of city-owned buildings, and the Iowa State Association of Counties issued a guide in which it furnished this answer, appropriately ignoring the issue of a right-of-way, to a question as to whether it was lawful to smoke on the sidewalk...

200 Iowa League of Cities, “Legislative Special Report: Smokefree Air Act” at 3 (July 2008), on

201 According to telephonic inquiries at the city clerk and/or mayor’s office on August 25, 2008, Dubuque and Davenport were such cities. Waterloo had as early as Nov. 13, 2006, banned smoking within 40 feet of any public library entrance, a distance that covered sidewalks. http://www.waterloo.lib.ia.us/library-information/policies/smoking (visited Aug. 23, 2008); email from Waterloo Public Library to Marc Linder (Aug. 23, 2008). The City of Davenport issued a general policy explaining that the city “is committed to providing its employees with a tobacco-free work environment to protect the health, welfare, and comfort of employees from the adverse effects of tobacco use.” With regard to employees: “Use of tobacco products is prohibited in all City owned and leased buildings, grounds including sidewalks, equipment and vehicles, included [sic] but not limited to parks, parking ramps, public transit stations, platforms, and shelters.” The policy further specified that “employees are not provided additional time away from work for the use of tobacco products,” and “[t]obacco cessation products are available under the City’s prescription drug insurance program for eligible employees.” Finally, violations of the policy “may result in disciplinary action, up to and including termination.” City of Davenport, Administrative Policy No. 3.14: Subject: Tobacco Free Environment (July 30, 2008) (copy furnished by City of Davenport). At the May 6 IDPH meeting a representative of the city of Des Moines urged the agency not to include sidewalks, streets, or parking lots. [Aaron Swanson], SAA Meeting n.p. [at 2] (May 6, 2008) (copy furnished by IDPH). That representative, a lawyer in the city’s legal department, later explained that the city was not in principle opposed to banning smoking on sidewalks, but wanted the “flexibility” to determine where to institute a ban. Smoking was effectively banned around much of city hall because immediately to the west lies a non-right-of-way park (Long Look Garden) extending all the way to a river, within 25 feet of which an ordinance prohibited smoking; this 25-foot zone extended to the sidewalks on the south and north sides of the building. Telephone interview with Ann DiDonato, Des Moines (Aug. 19, 2009); City of Des Moines, Municipal Code, § 74-116(a)(12), on http://www.municode.com/resources/gateway.asp?pid=13242&sid=15. After the Des Moines city council had authorized the city manager to designate the extent of the “grounds” of city buildings in order to put the city in compliance with SAA, he issued a definition that encompassed the area 25 feet around the perimeter of a building excluding parking lots and city right-of-way and the area 25 feet around all entrances to the building including parking lots and city right-of-way. Des Moines City Council, June 23, 2008, Agenda Item No. 48, Roll Cal No. 08-1146; City of Des Moines, Administrative Manual, Policy 1.16 (Feb. 2, 2009) (copy furnished by Ann DiDonato).
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in front of a county courthouse: “Maybe. The test is whether the sidewalk is immediately adjacent to, and used in connection with, the public building. If so, then the sidewalk constitutes ‘the grounds of a public building’ and smoking is prohibited.”

After the assistant city attorney had peremptorily refused to discuss the lawfulness of the city government’s not posting no-smoking signs on the sidewalk in front of city hall with a city resident, the latter contacted an official of the IDPH Division of Tobacco Use Prevention and Control, who stated that the “grounds of any public buildings” included public sidewalks and characterized the issue of right-of-way as irrelevant. At the city council special formal meeting on August 26 the same resident addressed the city council at the conclusion of the Community Comment:

I want to inform the Council that the City is currently in violation of the Smoke-Free Air Act. I’ve discussed this with the State Department of Public Health, which encouraged me to file a complaint against the City, but before doing so, I wanted to discuss the matter with you and hope that you would correct the situation and we don’t have to go through the complaint process. As you know, the, um, Smoke-Free Air Act which went into effect on July 1st banned smoking on the grounds of any public buildings. The Department of Public Health issued regulations on emergency basis, defining that term, grounds of public buildings as “an outdoor area of a public area that is used in connection with the building, including but not limited to,” and then the key terms here, “a sidewalk immediately adjacent to the building” and then lists a number of other areas which aren’t of concern right now. Uh, some of these others, uh, the City has discretion, uh, to exempt. It doesn’t have, uh, discretion to exempt sidewalks. On June 5th the City Attorney issued a memo and appended to the memo, uh, was a series of questions and answers. Two of those questions and answers were: can a person lawfully smoke on a sidewalk in front of City


203Discussion with Sue Dulek, Iowa City city hall (ca. Aug. 22, 2008).

204Telephone interview with Aaron Swanson, Des Moines (Aug. 25, 2008). Early the next morning Swanson emailed that although neither the Smokefree Air Act nor its administrative rules defined “sidewalk,” “one can use the definition of ‘sidewalk’ as written in Iowa Code Section 321.1 for the purposes of defining it in the Smokefree Air Act.” Email from Aaron Swanson to Marc Linder (Aug. 26, 2008). Iowa Code § 321.1(72) (2008) defined a sidewalk as “that portion of a street between the curb lines, or the lateral lines of a roadway, and the adjacent property lines intended for the use of pedestrians.” Iowa City, City Code, § 9-1-1 is identical.
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Hall. The answer that the City Attorney gave was: yes, because it’s a right-of-way and a right-of-way is not on the grounds of public buildings. On the other hand, a person cannot smoke, going to the other question, on the quote, this is the language in the question itself, “internal” sidewalk, for example, sidewalk, uh, leading to a parking lot because those sidewalks are immediately adjacent to and used in connection with the, uh, the public building. Now, unfortunately for this memorandum for the City, the term “sidewalk” has only one meaning. The Iowa Code has defined a sidewalk at Section 321.1, Subsection 72, and the Iowa Code of Ordinances has adopted exactly the same definition at Section 9-1-1, and this is a walk that runs from the curb line to the property line for pedestrian use. I checked a large number of leading dictionaries. Every single American English dictionary has the same definition, and more importantly, has only one definition. There is only one definition of a sidewalk, and that’s a paved path or walk for pedestrian…for pedestrians on the side of a street or road. Okay? Now, the Iowa Department of Public Health, which I contacted about this, says that this issue of right-of-way is totally irrelevant and that Section 321.1, Subsection 72, which I just cited to you, can be used as the definition for the rules, and keep in mind, please, that the Iowa Department of Health has primary jurisdiction over the, uh, administration of this statute. Now, in no fewer than 67 sections of the Iowa City Code of Ordinances is the term “sidewalk” used. Every single one of them, all of them, are consistent with the definition of sidewalk that I just gave you that’s in this State code, and is in the Iowa City Code of Ordinances. Uh, not a single one of them is consistent with the, uh, definition that the City Attorney has given with regard to “internal” sidewalks. As you can imagine from your own, uh, experience, a house owner is obligated to clear the ice and snow from the sidewalk [but] has absolutely no obligation to clear the paths, um, to the, uh, back patio from the back door. So, the City Attorney, um, is actually referring to what the rest of the, uh, world has called “walkways.” They’re not sidewalks. They’re walkways. Walkways are not addressed in the term sidewalk, uh, although smoking surely is banned on them. They are not sidewalks; by arbitrarily defining sidewalks, uh, as, uh, walkways, internal walkways, and declaring that the sidewalks that the, uh, Department of Public Health means, uh, are not covered, the City Attorney has completely turned the, uh, that part of the rule on its head. I’ve surveyed a large number of other large cities in Iowa and uh, many of them for example, Davenport, Dubuque, Des Moines, have already banned smoking on sidewalks in front of City Hall.

[Mayor] Bailey: …begin to conclude your remarks, please.

Linder: Don’t tase’ me, bro, don’t tase’ me…um, if the City Attorney’s definition were used, that would mean for example that the Public Library where the sidewalk comes up within a couple of feet of the front door of those sliding doors on Linn Street, people could smoke within a couple of feet of that door, and that clearly can’t be the purpose of the statute, especially since, uh, up until this time, there’s signs up on the doors saying that you can’t smoke within 20 feet. Now, as the…as you, Mayor, said recently, it’s not just about exposure to second-hand smoke, it’s about setting example, and surely we want to set an example, uh, in front of City Hall, and by the way, you can forget about everything I’ve just said, because it doesn’t matter whether the, um, the interpretation I’ve just given you is correct or not, because as the City Attorney has already told you, and as you’re [sic; should be “you’ve”] already done in preliminarily voting on this ordinance, you have the power to ban smoking on every sidewalk. You’ve just gone ahead and voted to ban it.
on...on the sidewalk in front of profit-making, cash register ringing stores on Clinton Street. Well, if you ban it there, you certainly have the power to ban it, uh, in front of your own building. In any case, even apart from that, there’s no doubt that the sidewalk is covered, and this is just a misinterpretation, and I would appreciate your correcting this.... [City Attorney] Dilkes: ...I don’t think Professor Linder and I have a disagreement on what sidewalk means. We have a disagreement on what “used in connection with a public building” means.\textsuperscript{205}

After the meeting the city resident asked the city attorney, who had admitted the previous day that the city did have the authority to ban smoking on city-owned land that was not the grounds of a public building,\textsuperscript{206} a number of questions by email:

You heard my comments to the city council this evening on Iowa City’s being out of compliance with the Smokefree Air Act by virtue of permitting smoking on the sidewalk used in connection with and immediately adjacent to city hall.

Do you have any basis for reading “sidewalk” out of the IDPH rule other than that adduced in your June 5 memo—namely, that “[t]he sidewalk is a right-of-way, and right-of-way is not the grounds of a public building”? Isn’t virtually every sidewalk around a government bldg a right of way? In that respect isn’t the sidewalk on Washington St in front of city hall thoroughly typical of sidewalks in general and of those in front of city halls and other government bldgs in particular? And isn’t the Iowa Attorney General’s office, which drafted the rules, to be presumed to be aware of what a sidewalk is? If so, what authorizes you to read the term out of the rule (in such a general way as to nullify it, if other cities adopted your approach, statewide) and to substitute for it “‘internal’ sidewalks”?

Please keep in mind that my comments also refer to other city buildings, including and especially the public library, where the sidewalk runs barely a few feet away from the front doors on Linn St. [A]lthough this issue is distinct, why haven’t you advised the city council that, even apart from the “grounds of any public buildings” provision, it can also ban smoking on the sidewalk in front of city hall on the same basis that you advised the council it has for banning smoking in front of privately owned stores on Clinton St--namely, that the city owns the sidewalks?\textsuperscript{207}


\textsuperscript{206}Email from Marc Linder to Eleanor Dilkes (Aug. 20, 2008) and Eleanor Dilkes to Marc Linder (Aug. 25, 2008).

\textsuperscript{207}Email from Marc Linder to Eleanor Dilkes (and Mike Wright, Amy Correia, Regenia Bailey, Matt Hayek, and Ross Wilburn) [the other two city councillors not having
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The city attorney replied that:

My opinion is that sidewalks that are located in the public right-of-way (public sidewalks) are not part of the “grounds” of a public building. Public rights of way are not an “area of a public building.” Rather, they are those areas of the streets and sidewalks between the adjacent property lines that are dedicated to public use. The public sidewalk that surrounds City Hall is not part of the City Hall property. The City could not use the sidewalk to expand City Hall, could not restrict the public from walking on the sidewalk and could not sell the sidewalk without first going through the public process of vacating the rights of the public to use the sidewalk. The line of demarcation between the grounds of City Hall and the public sidewalk is as clear as that between the private property and the sidewalk in front of a house. The owner of the house might use the sidewalk but that does not make it part of his property.

This opinion is consistent with that of the Iowa League of Cities.

Finally, you asked why I have not advised the City Council that they could ban smoking on the sidewalk in front of City Hall. I have advised the Council that although the statute does not prohibit smoking on public rights-of-way they have the authority to designate City right-of-way as nonsmoking. Indeed, the ordinance that received first reading last night includes right-of-way. I have not specifically discussed the sidewalk in front of City Hall with the Council because to date it is not one of the areas they have expressed an interest in regulating.208

The resident then asked IDPH and an assistant attorney general who had drafted the agency’s rules whether the appended city attorney’s straightforward statement that the sidewalk was not part of the grounds of city hall sufficed as a basis for a complaint or whether it was necessary to “go through the formality of recording the date and time of my observation of someone smoking on that sidewalk?”209 Mapes then queried her co-recipients: “Who is going to reply to this one? Matt, what do you think about the City’s argument? It might help us in our response to him.”210 The next day one of Mapes’s subordinates sent this concise and ambiguous response: “The complaint process is intended to find and respond to violations of the law, not to interpret disagreements with how the law is applied. If you see what you believe is a violation of the Smokefree Air Act, please submit a complaint....”211 With admirable prescience the would-be

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208 Email from Eleanor Dilkes to Marc Linder (Aug. 27, 2008).
209 Email from Marc Linder to Matt Gannon, Bonnie Mapes, Brent Saron, Aaron Swanson, and Jeremy Whitaker (Aug. 27, 2008).
210 Email from Bonnie Mapes to Marc Linder, Matt Gannon, Brent Saron, Aaron Swanson, and Jeremy Whitaker (Aug. 28, 2008).
211 Email from Aaron Swanson to Marc Linder (Aug. 29, 2008).
complainant asked: “Does your response mean that the idph has not yet decided whether the city attorney’s interpretation is wrong. Idph isn’t intending to delete “sidewalk” from its definition of “grounds of any public bldgs” is it?” And then later the same day he asked: “The city attorney has thrown down the gauntlet with her interpretation claiming that the idph sidewalk rule is on its face invalid—why not just deal with it directly?” Having received no reply to any of these questions, the resident filed the complaint, which, in order to deal with the ambiguity of IDPH’s initial response, included a report of observation of actual smoking on the sidewalk in addition to the lack of signs.

Not having received any information about the agency’s action on the complaint for more than a month, the Iowa City resident first pointed out to Mapes and her subordinates that “[a]ccording to your website, ‘The Iowa Department of Public Health, Division of Tobacco Use Prevention & Control will notify the proprietor of the public place or place of employment and/or coordinate a site visit within 15 days after receipt of a complaint,’” and then asked: Did IDPH notify the city/coordinate site visit? What is the next step and when will it happen? The next day, IDPH official Brent Saron replied: “What sidewalk in particular did you observe the people smoking? Was it the sidewalk that runs parallel to Washington Street? Or did you observe people smoking on the sidewalk that leads directly to the doorway entrance to city hall?” These irrelevant questions prompted the following response:

There is no walkway leading directly to the door (which would not be a “sidewalk”); they were smoking on the only sidewalk there—the one that runs parallel to Washington street. If there were a walkway as you asked about running from the sidewalk to the door, it would be perpendicular and not “adjacent” to the public bldg. ...

Why is the nature of this sidewalk relevant? You and I both know what this complaint is really about: the city attorney of iowa city has interpreted your rule out of existence on a statewide basis by claiming that no sidewalk that is a right of way (and that means virtually every public sidewalk) can be part of the grounds of a public bldg. Why can’t idph deal with this question directly and resolve it in principle for all the state’s thousands [of] sidewalks immediately adjacent to public bldgs?

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212 Email from Marc Linder to Aaron Swanson (Aug. 29, 2008).
213 Email from Marc Linder to Aaron Swanson (Aug. 29, 2008).
214 Confirmation receipt from iowasmokefreeair.gov, in public_complaint@iowasmokefreeair.gov to Marc Linder (Aug. 29, 2008).
215 Email from Marc Linder to Bonnie Mapes, Aaron Swanson, Brent Saron, Matt Gannon, and Jeremy Whitaker (Sept. 30, 2008).
216 Email from Brent Saron to Marc Linder (Oct. 1, 2008).
217 Email from Marc Linder to Brent Saron (Oct. 1, 2008).
After failing to acknowledge let alone respond to these questions or several reminder-emails for more than a week, on October 10, Saron finally sent this astonishing response:

[B]ased upon your original complaint, I assumed you were referring to the sidewalk that runs parallel to Washington (that spans between Van Buren and Gilbert Streets). I spoke with the Iowa City Attorney’s Office to verify whether or not this area is included within their “grounds,” and they confirmed that this area is not within the prohibition described in 142D.3(2)(e).

Thank you for your attentiveness, and your efforts to make us aware of potential violations.

IDPH’s almost humorous “Case Closed” announcement triggered this critique, which was also copied to the leading legislative supporters of H.F. 2212 and the Attorney General’s Office:

Let me get this straight: You the enforcement agency have totally farmed out interpretation of your OWN rules to the entities you’re charged with regulating? If a customer at a local restaurant complains about smoking and the owner claims that it’s an exempt casino, instead of investigating you leave it up to the owner to “confirm” that it’s an exempt casino and that’s the end of the complaint? Does the department of labor instead of interpreting its own regulations leave it up to complained-about employers to “confirm” that they are exempt from the minimum wage law? Does the dept of justice leave it up to general motors to “confirm” that it’s not covered by the antitrust laws?

... If you decide to become an enforcement agency, you will actually have to deal with the substance of the city attorney’s excuse that a sidewalk is not a sidewalk. a public sidewalk (running from curb to property line in front of a public building) is the only definition of “sidewalk” in the iowa code or the iowa city code of ordinances. “adjacent” does NOT mean perpendicular. If the idph rule defining grounds of public buildings had

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218 Email from Marc Linder to Brent Saron (Oct. 1, 6, and 9, 2008); email from Brent Saron to Marc Linder (Oct. 9, 2008) (claiming his computer had misplaced the emails).

219 Email from Brent Saron to Marc Linder (Oct. 10, 2008). It is not clear whether Saron incorrectly stated in this email that he had already spoken to the Iowa City Attorney’s Office or whether the email quoted below was manufactured to simulate a record (albeit an inconsistent one), but on Oct. 13 the Iowa City assistant city attorney emailed Saron that it was her understanding that a complaint had been filed about smoking on the sidewalk in front of city hall, adding: “It is the City’s position that the Act does not prohibit smoking on this sidewalk because it is not part of the ‘grounds’ of a public building.” Email from Sue Dulek to Brent Saron, Oct. 13, 2008 (copy furnished by IDPH).
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meant “walkway” it would have said walkway and not sidewalk.  

Mapes sought to defend her agency’s procedure:

IDPH and the AG’s office considered the opinion of the Iowa City attorney about the sidewalk in question being a public right-of-way, and we concur with the city attorney’s opinion.

When staff communicated with you to confirm your complaint, you stated that smoking was not occurring on either of the walks leading from the public sidewalk to the entrances to the courthouse [sic; should be “city hall”]. You observed smoking on the city sidewalk which is adjacent to E. Washington St. The Rules allow cities some discretion in determining what constitutes the grounds of public buildings under their control. In this case, the city attorney determined that the sidewalk adjacent to E. Washington Street is a public right-of-way and is not a sidewalk used in connection with the building and, therefore, is not part of the grounds of that public building.

Since this sidewalk can reasonably be described as a public right-of-way and is not used in connection with the building, we made the determination that smoking on that public sidewalk would not be a violation of the Smokefree Air Act.

Since neither the law nor the rules can anticipate every possible situation, we often confer with government entities, businesses, and others in the process of making a determination of whether or not a violation has occurred. Far from abrogating our responsibility to enforce the Smokefree Air Act, such consultations and discussions are necessary to carrying out that responsibility as reasonably and as effectively as possible.  

That IDPH had in fact ceded control over its enforcement to its municipal regulatees was expressly conceded by Saron 10 days later in an email to the Iowa City assistant city attorney who had asked him about the status of the complaint:

Hi Sue—based upon the information in the complaint, and the follow-up that was conducted with the complainant and with your office, we have determined that this particular complaint was invalid.

As you can imagine, every single city hall in Iowa is unique, thus 142D.3(2)(e) applies differently to each unique situation. As such, IDPH has not [sic] other alternative but to rely on and trust decisions that your city has made regarding outdoor areas that are used in connection with your city hall.

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220 Email from Marc Linder to Brent Saron and Bonnie Mapes (cc: Thomas H. Miller, Matt Gannon, Janet Petersen, Tyler Olson, Philip Wise, and Matt McCoy) (Oct. 10, 2008).
221 Email from Bonnie Mapes to Marc Linder (Oct. 10, 2008).
222 Email from Sue Dulek to Brent Saron (Oct. 13, 2008) (copy furnished by IDPH).
223 Email from Brent Saron to Sue Dulek (Oct. 20, 2008) (copy furnished by IDPH). That Saron was not acting as a rogue employee in stating IDPH’s policy of abdicating its
Mapes’s defense prompted yet another critique, the concluding prescience of which would soon surprise even its author:

What investigation did you do? How do you know the sidewalk is not “used in connection with” the bldg? All you’ve done is taken the city attorney’s word for it. Go look for yourself. What does “used in connection with” mean? I use the sidewalk in connection with the bldg every time I enter city hall as have uncounted thousands of other people. Since the rule does not define “used in connection with,” how can the city attorney know whether the sidewalk is so used? That’s for you to determine—you shld revise your rule to rule out such interpretations that exacerbate exposure to secondhand smoke.

Conferring and consulting doesn’t mean leaving the decision up to the regulatee. You’ve made no independent investigation whatsoever—all you’ve done is taken the regulatee’s word for it and you have therefore failed to perform the duty the legislature has assigned to you and exacerbated the exposure to secondhand smoke of people trying to enter/leave city hall.

Are you saying that no sidewalk that is a right of way is part of the grounds of a public building regardless of whether it’s used in connection with the bldg? That was the city attorney’s position—is that your position? If so, pls show me one sidewalk in front of a public bldg in Iowa that is not a right of way. The sidewalk in front of the public library in IC extends to within about 3 feet of the front door—it’s a right of way—is it also not “used in connection with”?

The city attorney’s interpretation has in effect read the word “sidewalk” out of your rule statewide and you have acquiesced in it without undertaking even the most cursory investigation of the facts—are you now going to delete the word from the rule? If not, pls identify any “sidewalk” in Iowa that would meet your rule’s definition.224

Mapes’s response rendered prescience as to IDPH’s conservative agenda

enforcement power to alleged violators was underscored one year later when another IDPH official, to whom Mapes had referred email correspondents during her extended absence, sought to excuse the agency’s failure to investigate another public institution’s alleged violation of its duty to post nosmoking signs: “We rely on the entity (in this case, the University of Iowa) that has custody or control of the premises to post signs at what they determine to be the common points of entry to their grounds or facilities regulated by the Smokefree Air Act.” Email from Aaron Swanson to Marc Linder (Sept. 30, 2009). To a critique of this untenable position IDPH did not respond: “I made a complaint about the lack of signage and your response is: Sorry, UI is a law unto itself—it decides whether it’s in compliance with the law; IDPH does not second guess UI’s decisions. That’s not the law, that can’t be the law, and even you know that.” Email from Marc Linder to Aaron Swanson (Oct. 1, 2009).

224Email from Marc Linder to Bonnie Mapes (cc: Brent Saron, Thomas H. Miller, Matt Gannon, Janet Petersen, Tyler Olson, Philip Wise, and Matt McCoy).
superfluous:

We reviewed an areal [sic] photo of city hall and other information before we made our determination.

And “sidewalk” has not been ruled out statewide, as you contend. There are sidewalks on the grounds of public buildings all across the state that have been determined by the authority having control of those buildings to be part of the grounds—sidewalks which are clearly used in connection with that building and are not primarily used as a public thoroughfare.225

The reply drew out the logical implications of IDPH’s position:

The city attorney’s interpretation might be plausible IF AND ONLY IF your rule read: “used EXCLUSIVELY in connection with.” It’s clear that the sidewalk in front of city hall is used by people to walk into city hall and to walk past city hall. Because your rule does NOT say “exclusively,” the sidewalk is without any doubt “used in connection with” the bldg. QED.

Do you mean it to be used “exclusively”? if so, you would have to revise the definition or issue an interpretation to that effect. But why would you mean it that way?226

And a follow-up reply on October 13 explained why the substantive change that IDPH had introduced sub rosa could not stand under Iowa administrative law without new rulemaking:

You failed to respond to most of my questions, and I repeat my request for answers to them. But right now I request that you specifically identify (i.e., name the bldg, street, and city location of) any sidewalk on the grounds of any public bldg anywhere in Iowa that meets your new definition below. I find it difficult to imagine any sidewalk that would meet your new definition other than the thoroughly atypical one of a public bldg located on a dead-end street.

As brief and inadequate as your response was, it did let the cat out of the bag—by adding the language “not PRIMARILY used as a public thoroughfare” to “used in connection with.” Since the word “primarily” is not found in the rule, you have now revealed that you have changed the definition and radically shrunk the scope of the definition in your rules by means of INTERPRETATION.

As you must be aware, the Iowa Adm Procedure Act (17A.2(11)) defines a rule this way: “Rule” means each agency statement of general applicability that implements, INTERPRETS, or prescribes law or policy….” And you are also aware that under 17A.4(1) you are required to go through the notice and comment rulemaking procedure.

225Email from Bonnie Mapes to Marc Linder (Oct. 10, 2008).

226Email from Marc Linder to Bonnie Mapes (cc: Brent Saron, Thomas H. Miller, Matt Gannon, Janet Petersen, Tyler Olson, Philip Wise, and Matt McCoy) (Oct. 10, 2008).
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when you adopt or amend such a “rule.”

In connection with that rulemaking I look forward to the opportunity to submit comments on your proposed rule, which clearly has the effect of exposing more rather than fewer people who use public bldgs to secondhand smoke. In explaining the reasons for your action will you be denying that IDPH has the power to define the grounds of a public bldg as including a sidewalk that is used (but not primarily) in connection with and is immediately adjacent to that bldg?227

IDPH, however, was literally one step ahead of its critic: that very day (October 13), in connection with the following day’s ARRC meeting, Mapes “prepared” “Proposed Amendments to Smokefree Air Act Administrative Rules,” which amended the definition of “grounds of any public buildings” by inserting the phrase, “but not including a sidewalk in the public right-of-way.”228 Interestingly, the IDPH website has retained an earlier draft of these proposed amendments, which Mapes had prepared on October 10, the day on which the above-quoted flurry of email exchanges took place. The draft was identical with regard to the other amendments, but the “grounds” definition used “other than” instead of “not including.”229 It is unclear whether the critique of IDPH’s interpretation of its definition on those very days had prompted the draft of the proposed amendment or whether Mapes had merely failed to reveal to the critic that the agency was in the process of eliminating the textual basis of the critique.

In the event, Mapes strained mightily to justify this particular proposed amendment at the ARRC meeting, which dozens of bar owners attended and lasted almost three hours.230 In response to a question by (outgoing) chairman

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227Email from Marc Linder to Bonnie Mapes (cc: Brent Saron, Thomas H. Miller, Matt Gannon, Janet Petersen, Tyler Olson, Philip Wise, and Matt McCoy) (Oct. 13, 2008).
230Jason Clayworth, “Proposed Rule Change: Smoking Objections Would Be Secret,” DMR, Oct. 15, 2008, on http://www.desmoinesregister.com (visited Oct. 15, 2008); Christinia Crippes, “Group Ponders Smoking Ban Rules,” Hawk Eye (Burlington), Oct. 15, 2008 (1A) (NewsBank). Before the rules themselves were discussed, attendees made comments on the aforementioned regulatory analysis that failed to engage one another. Supporters (such Cathy Callaway and Christopher Squier) stated that empirical studies in other states showed that smokefree laws had no financial impact on businesses, whereas bar owners and their advocates such as Rep. McKinley Bailey offered unsubstantiated anecdotal evidence of business declines in bars in Iowa. Administrative Rules Review
Senator Michael Connolly as to whether the changes were substantive or technical, Mapes declared that they were merely “technical”:

We ended up with some public buildings that front right on a public sidewalk. So you’d have the situation where someone could smoke to this corner, they’d have to not smoke on this block, and then they could smoke again on the next corner. And so to eliminate this problem we added this in the public right of way.\textsuperscript{231}

No committee member asked Mapes to explain why it was a “problem” in need of elimination that the existing rule protected people using the public sidewalk to enter and leave a public building from secondhand smoke exposure, while the emitters of those lethal toxins and carcinogens were required to cross the street. After all, IDPH’s own website referenced the surgeon general’s 2006 report on involuntary exposure as establishing both that “[b]reathing secondhand smoke has immediate harmful effects on the cardiovascular system that can increase the risk of heart attack” and that “[t]here is no risk-free level of secondhand smoke exposure. Even brief exposure can be dangerous.”\textsuperscript{232} Instead, Mapes merely noted that in proposing the amendment the agency had concurred with some city attorney’s opinion. A thoroughly confused Connolly—perhaps he was seeking to deal with cognitive dissonance by denying that the Public Health Department would have rewritten a rule pursuant to a strict no-smoking law to accommodate smokers rather than nonsmokers—asked whether it was the case, then, that it was unlawful to smoke on the sidewalk in front of a public building—“you have to be off the curb?” Disabusing him of his error—people would be permitted to smoke on the right of way—Mapes tried to insure that he and the rest of the committee understood what IDPH was doing without highlighting its counterintuitive character:


\textsuperscript{231}\textit{Administrative Rules Review Committee, Meeting (Oct. 14, 2008) (audiotape furnished by committee legal counsel Joseph Royce).}

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So you have some cities that have decided that sidewalks adjacent to the building are part of the public grounds, but they’ll have a situation where they have a major thoroughfare, basically a sidewalk, that’s not immediately adjacent to the building it’s part of the public right of way and therefore should not be counted as grounds of that public building. And that’s what this clarification is in here for. Otherwise it would have to be that that section of city sidewalk immediately in front of that public building would have to be considered part of public grounds.233

Her oblique message of acquiescence in continued public smoking where IDPH could have protected nonsmokers still not having sunk in, Mapes finally discovered a more effective framework in which to embed her apostasy when she was then asked whether it would be lawful to smoke right outside a county courthouse: “The city has some discretion in determining what constitutes the grounds of a public building. This allows them to not consider that right of way that public sidewalk as part of the grounds of a public building.” Connolly, who, along with outgoing co-chair Philip Wise, seemed much more interested in expediting the meeting than in coming to grips with substantive issues, had finally got it: “It’s a local decision, correct?” Even though the legislature had rejected the health organizations’ insistent pleas for local control, its partial resurrection by administrative rule aroused no comment. And Wise, oblivious of the backward step on which he was placing his imprimitur without any attempt at justification, chimed in: “I believe all of these changes make the rules better than they were before the public hearing.”234

The day after the ARRC meeting the news media reported that IDPH had proposed “allow[ing] cities and local governments more leeway in allowing smoking on busy sidewalks adjacent to public buildings. Currently, the law bans smoking on any sidewalk next to a building owned or operated by the government.”235 When, in response to IDPH’s proposal to redefine “grounds” so


as to eliminate dual-use sidewalks (that is, those used by both people who were entering and leaving public buildings and those who were walking by without entering the buildings) from the scope of the definition, the agency’s critic asked Mapes (telephonically) why IDPH

had decided to amend the definition of grounds of public bldg (by excluding all sidewalks in the public right of way even if they were used in connection with and immediately adjacent to the bldg) and thus to provide less rather than more protection from secondhand smoke to people entering and leaving such bldgs, you said that it would make “no sense” to make people who were smoking on such sidewalks...have to walk across the street. I replied that the sense that it would make is that it would protect me from cancer-causing smoke exposure. You then pooh-poohed my claim by reminding me that this exposure was merely outdoors. I then told you that that view of the health consequences of outdoor exposure to secondhand smoke is ignorant. You then took offense at this characterization and hung up on me.

Had you not hung up, I would have mentioned that, by the same logic, you should also be objecting to making smokers walk many blocks out of their way so that they don’t smoke on the 1900-acre UI campus (even tho, since the campus smoking ban is written directly into the statute, your agency has no power to modify it). ...I would also have mentioned a good deal more about the cumulative (and even short-term) impact of secondhand smoke exposure and atherosclerosis.²³⁶

Although Mapes’s belittlement of the seriousness of outdoor exposure was “a rather odd position to take with regard to a definition of grounds of a public bldg, which is an entirely outdoor area,”²³⁷ she failed to retract, modify, or deny having taken this position in subsequent email exchanges despite being asked to do so.²³⁸

After having secured an audio tape of the October 14 ARRC meeting, the IDPH critic posed the following question to Mapes and IDPH Director Newton:

1. Sen Connolly asked Ms Mapes whether the change in the definition of grounds of

²³⁶Email from Marc Linder to Bonnie Mapes (Oct. 15, 2008). This email was written a few minutes after the end of the telephone conversation. Mapes had taken umbrage at the comparison between her ignorance of the health impacts of secondhand smoke exposure outdoors and bar owners’ ignorance of their impacts indoors.

²³⁷Email from Marc Linder to Bonnie Mapes (cc: Tom Newton) (Oct. 16, 2008).

²³⁸Email between Marc Linder and Bonnie Mapes (Oct. 15-16, 2008). Director Newton in effect terminated this set of exchanges by declaring that “Bonnie Mapes has provided adequate responses (verbal and written) to your inquiries about our proposed amendments to the rules as presented to ARRC this past week,” which “[a]s director of the department I approved and support....” Email from Tom Newton to Marc Linder (cc: Bonnie Mapes, Matt Gannon, Heather Adams, and Barb Nervig) (Oct. 17, 2008).
public bldg was substantive or technical and Ms Mapes answered “technical,” yet she went on to explain how the result of the change could be that smoking would be permitted on the sidewalk in front of a public bldg whereas previously it would have been prohibited. How can that change possibly be merely technical and not substantive?

2. Ms Mapes further stated that under the original rule: “We ended up with some public bldgs that front right on a public sidewalk so you’d have the situation where someone could smoke to this corner, they’d have to not smoke at this block, and then they could smoke again on the next corner. And so to eliminate this problem we added this in the public right of way.” Why is it a “problem” that people entering and leaving a public bldg would not be exposed to secondhand smoke from passers-by. Why does idph consider it more important to permit some city governments’ to cater to smokers’ convenience of not having to cross the street?

3. Ms Mapes also justified the change on the basis that “you have some cities that have…a situation where they have a major thoroughfare, basically a sidewalk that’s fronting a major public street and they’ve decided that is not immediately adjacent to the bldg—it’s part of the public right of way and therefore should not be counted as grounds of the public bldg. And that’s what this clarification is here for. Otherwise it would have to be that the section of city sidewalk immediately in front of the public bldg would have to be considered part of public grounds.” Don’t you agree that Ms Mapes said here that “immediately adjacent to the bldg” and “public right of way” are mutually exclusive? Don’t you also agree that Ms Mapes said that under the first version of the rule a public sidewalk immediately adjacent to the public bldg was part of the public bldg’s grounds? And don’t you agree that unless you had changed the rule, the Washington st sidewalk in front of iowa city city hall would have to have been considered part of the grounds—unless the city had determined that it was not immediately adjacent to the bldg and unless idph had upheld that determination? And isn’t it true that instead of making any of those determinations, idph simply changed the rule, giving cities local decision making power to declare all such sidewalks rights of way not part of public bldg’s grounds? Are such decisions by cities about rights of way now unreviewable by idph or can you imagine circumstances under which idph would respond to a complaint about smoking in a right of way/public sidewalk in front of a public bldg?239

Mapes asked Newton what he wanted her “to do with this one,”240 and promised their questioner that she would let him know as soon as she got “direction” from Newton as to how he wanted her to respond,241 but she never did.

At the Board of Health meeting on November 12 Mapes presented materials with “examples of the complexity of enforcing the smoke-free campus at Iowa State University...and the city hall in Iowa City.”242 With regard to the latter

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239Email from Marc Linder to Tom Newton and Bonnie Mapes (Nov. 26, 2008).
240Email from Bonnie Mapes to Marc Linder and Tom Newton (Nov. 26, 2008).
241Email from Bonnie Mapes to Marc Linder (Nov. 26, 2008).
242Minutes, Iowa State Board of Health at 3 (Nov. 12, 2008), on http://www.idph.state.
Mapes explained that IDPH had received a complaint about people smoking on the sidewalk in front of the building. In addition to internal discussion, the agency had some communications with the city attorney, who had determined that the sidewalks on these public streets were not immediately adjacent to the public building and were not going to be counted as part of the public grounds; instead, the city attorney considered them to be public right-of-way and consequently they would not have to be smokefree. Mapes appeared to have concluded that because every city was “different,” each city government should be empowered to determine dispositively whether smoking was lawful or not. Following brief public comments, made only by anti-smoking groups (such as the Lung Association), the Board unanimously approved IDPH’s amended rules. Even news media focused on the change to the “grounds of any public buildings” definition, adding that in December the ARRC would review the proposed change “allowing local officials to decide whether smoking’s allowed on sidewalks surrounding city and county property.”

After listening to an audio tape of the Board of Health meeting, the IDPH critic asked Mapes:

I’ve been trying to listen to the tape of the mtg, which in parts is inaudible so I’m not sure I’m understanding the words, but I think I’m hearing you discuss the sidewalk in front of city hall in iowa city and saying that the city attorney had determined that the sidewalks (plural but maybe it’s singular—it is just Washington street) fronting Washington street “that aren’t immediately adjacent to the building are not going to be counted as part of the public grounds. They consider this a public right of way and these sidewalks are not going to have to be smokefree.” Did I hear the words correctly? I ask because I wonder whether this is really the city’s position or your position. If the sidewalk is NOT immediately adjacent to the bldg, that’s the end of the story isn’t it under the IDPH rule? Whether it happens to be a right of way or anything else is completely irrelevant at that point, isn’t it? is the city and are you taking the position that the sidewalk is not immediately adjacent to city hall?
Mapes responded:

I don’t have a transcript of my comments, but I was discussing some of the issues that had gone into our decision to propose the amendment concerning sidewalks in the public right-of-way. I explained that persons having control of a public building have some discretion in making the determination of what constitutes the grounds of that building and showed the Board examples of how this discretion was being applied. I used the satellite photo of Iowa City Hall as one of those examples. I do not remember if I said “sidewalk” or “sidewalks,” but I did refer to the opinion we received from the Iowa City attorney’s office that they did not consider the sidewalk along Washington Street to be part of the grounds of city hall because that sidewalk was a public right-of-way. Under the amendment we were proposing, that sidewalk would not be required to be smokefree. I do not remember the precise way in which I phrased this, but your synopsis sounds accurate. I was not working from any written script or notes.

As for your question about sidewalks which are immediately adjacent to a building, it is not “the end of the story” if a sidewalk is not immediately adjacent to a building. The rule requires all sidewalks determined to be on the grounds of a public building to be smokefree. If a city government controls a public building within a city park and determines that the entire park constitutes the grounds of that public building, then the sidewalks on those designated grounds, immediately adjacent to the building or not, would have to be smokefree (and be posted as such by the city).

IDPH’s critic asked a follow-up question that Mapes had not answered:

But disregarding parks and just focusing on the Iowa City City Hall—because at the BOH mtg you were concretely discussing the Iowa City City Hall—are you saying both that even a sidewalk that is not immediately adjacent to the bldg might be part of the grounds of a public bldg and that you are NOT taking a position one way or the other as to whether the sidewalk along Washington street is immediately adjacent? In other words, your position is that the sole reason that Washington street sidewalk is not part of the grounds of a public bldg is that it is a right of way?

However, he received only this non-answer from Director Newton:

As for the sidewalk issue you continue to ask about, I believe Bonnie has answered your question about how the decisions were made in amending the rules and addressing your complaint with Iowa City. In addition, the State Board of Health did approve the amendment without reservations, understanding that our rules cannot possibly address every “public grounds” scenario in Iowa.

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247 Email from Bonnie Mapes to Marc Linder (cc: Tom Newton).
248 Email from Marc Linder to Bonnie Mapes (cc: Tom Newton) (Nov. 24, 2008).
249 Email from Tom Newton to Marc Linder (cc: Ramona Cooper and Bonnie Mapes)
At the ARRC meeting on December 9, 2008, in the course of outlining the changes that IDPH had made to its rules in response to public comments Mapes admitted that “we heard from the city attorney in Iowa City and so we made the change that allows the sidewalks in the right-of-way not to be included in the definition” of “grounds of any public buildings.” A number of pro-smokers, such as Brian Froehlich, George Eichhorn, and members of Iowans for Equal Rights, spoke, but said nothing novel. (However, a written submission by IER included this interesting admission concerning bar owners’ opposition to the Act: “many locally owned, neighborhood hospitality trade restaurant and bar small business owners in Iowa face a tilted smoking ban policy deck that shifts the playing field competitive advantage to large chain franchise operations that were predominately smokefree before the Iowa smoking ban was passed...”)

As before, the “so-called ‘bar exemption’” was the “most controversial” rule, with owners contending that IDPH interpreted “bar” too narrowly, and the agency insisting that apart from the definition that the Department of Inspections and Appeals used for restaurant inspections there was no practical basis for creating the detailed recordkeeping and enforcement requirements.

The final ARRC meeting on the Smokefree Air Act rules ended anti-climactically. Republican Senator James Seymour, a retired hospital CEO who had consistently voted against H.F. 2212, moved to object to the rulemaking on the grounds that IDPH had not gotten the rules right on its second attempt, thus leaving the distinction between bars and restaurants unreasonable.
Seymour, whose “whole premise” was that government should not interfere with a private business, grounded his criticism of the administrative definition in the argument that “food is food,” meaning that there was no rational reason for singling out snack foods as a basis for exemption. However, he knew that his motion would not pass, and in fact only Republican Representative Heaton, another opponent of the bill, supported the motion, which failed by a vote of 2 to 6, the only other Republican present, Linda Upmeyer, voting Nay, even though she had been a vociferous opponent of the bill. ARRRC, according to Senator Courtney, though skeptical of the outdoor patio rule, ultimately did not object to it because there was so much noncompliance occurring in indoor bars at the time that members wanted to wait and see how it worked out. By the end of 2008, when Larry Duncan had still not been sanctioned for his blatant violations of the law, in the Burlington area fewer bar owners, many of whom had been complying only grudgingly anyway, remained compliant. For example at the Paddlewheel Lounge in that city a note to customers on the tables read: “Due to the lack of enforcement of the law, it has impacted our business significantly the past five months. We feel at this point that we have no choice than to allow smoking to stay on an even playing field and keep our bar in business.”

Having failed in their final attempt to persuade state government officials to re-word the rules to facilitate smoking in bars, owners vituperatively railed against the Act after the ARRRC meeting, prompting Representative Wise to administer a tutorial to them on why vilification was a “dumb” approach. “Attempting to change the (law), that means you need to get legislators on your side and insulting legislators and implying legislators are somehow corrupt if they support a smoking ban is not politically very smart.”

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258 Administrative Rules Review Committee Meeting (Dec. 9, 2008) (audio tape provided by ARRRC legal counsel Joseph Royce); Minutes of the December 2008 Meeting of the Administrative Rules Review Committee at 5 (Dec. 9, 2008), on http://www.legis.state.ia.us/lsadocs/ARR/ARRMinutes/2009/ANKKB005.PDF
259 Telephone interview with Thomas Courtney, Burlington (Aug. 16, 2009).
Bar Owners’ Unsuccessful Litigation Challenging the Smokefree Air Act’s Constitutionality

The next question is whether the asserted right to allow patrons to smoke in a public restaurant is “deeply rooted in this Nation’s history and tradition, and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.” ... The answer clearly is no. ... While tobacco smoking may have a long history, both liberty and justice will continue to exist if smoking in a public restaurant is curtailed or precluded.262

As for the argument that the ban will attract new customers, [bar owner] Kuncl is...“not sure we are going to get new customers.... It’s going to take a long time to air this place out.”263

The reason that Clinton and Burlington have become the epicenters of bar-owner resistance has to do almost completely with personality. It is just an accident of geography that the most radical individuals happen to come from those communities. You would need to employ a psychiatrist and not an economist to find the reason.264

In an attempt to thwart the enforcement that they knew would be directed against them if they continued to permit smoking in their bars once the Smokefree Air Act went into effect on July 1, the owners who were members of the Iowa Bar Owners Coalition and Clinton’s Organized Bar & Restaurant Association decided, according to Brian Froehlich, a bar owner in Wilton, to “see if we might get a judge to give us an injunction ’til we can get this thing fixed.”265 Initially bar owners, who were divided as to whether their litigation, for which they had...
purportedly raised $50,000, should focus on total repeal or eliminating exemptions, had spoken to a number of lawyers, including former Governor Tom Vilsack. Towards the end of May Vilsack stated that those who had been in touch with him “believe that a smoking ban based on public health reasons shouldn’t give certain locations immunity from the ban. ‘Saying you can’t smoke in a bar but you can smoke in the casino, that raised some serious questions about the constitutionality of the exemptions.’” Making it clear that he would attack only certain exemptions, Vilsack oddly belittled the universalizing tendency of his approach by remarking that it “‘would be sort of reinforcing the law.’” Bar owners’ attraction to him may have resulted from their absolutizing his view, about which he felt “‘very strongly,’” that “[w]hen we craft laws, even though there may be political reasons for exemptions, the Constitution may not recognize those exemptions.’” Froehlich, while characterizing Vilsack’s approach as “solid,” was nevertheless “personally apprehensive” about it; a few people did not like it and some owners were considering a different “legal angle,” but did not yet want to show their hand.266

On June 30 Vilsack told the press that although he had not yet been formally hired, he had “‘advised folks who are interested in using my services’” that “‘if I’m involved it won’t be a lawsuit that seeks to strike the law, which is what some folks want.... If I’m involved, it’ll be a lawsuit that seeks to extend the protections of the no-smoking ban to other locations, like casinos.’” He believed that a number of bar owners and others were interested in his level playing field approach, which was based on unspecified research that he had done persuading him that a “‘there is a good legal argument to be made that the smoking ban did not go far enough and needs to be extended to some of those other places where there are workers and customers who would potentially be exposed to secondhand smoke, which is the intent of the law.’” But the argument that had “‘great appeal’” to the bar owners with whom he had met was not focused on public health: “‘From an economic standpoint, those who are in the entertainment venue business, as certainly bars and taverns are, they ought to be on an equal and level playing field and no one should be given a privilege or an immunity from a law simply because they have political connections or political might that resulted in exceptions being created that make them outside the law.’” Vilsack identified the common feature in both arguments as “‘fundamental fairness to those who go to casinos, those who work in casinos and those who are competing for limited entertainment dollars.’”267

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267 O. Kay Henderson, “Vilsack May Lead Lawsuit over Smoking Ban,” Radio Iowa,
Despite Vilsack’s commercial competitiveness argument, his focus on public health was anathema to bar owners, who, through Froehlich, revealed that smoking and not equal competitive conditions was their animus: they chose former Republican state legislator George Eichhorn as best representing “what our thoughts and feelings were over Gov[ernor] Vilsack’s proposed idea, which [sic] all he wanted to do was go and make the law stronger...so that’s why we steered away from Vilsack on this.” 268 (A few weeks later, IBOC told a somewhat different story, insisting that it had not hired Vilsack because the exemptions he wanted to fight would be “overturned next legislative session without cost to our organizations. We also believe that his involvement is purely political and not for the best interest of small business owners of this state.”) 269

In terms of the ideological fit, it does seem highly implausible that repealthesmokingban.org—a website that proclaimed that the “extremists” who promoted the Smokefree Air Act “hate liberty with a passion and they will never stop until they have everything” and featured on its “Facts” page a denial of the lethality of smoking for smokers—would have posted a photo and mini-bio of Vilsack, as it did with Eichhorn, as one of “our heros [sic].” 270

Eichhorn, who, after having been crushingly defeated in a bid to be nominated for a state Senate race by a Republican convention, 271 lost his House seat in November 2006 to (fellow smoking facilitator) Democrat McKinley Bailey, 272 and then on June 3, 2009 lost the Republican U.S. Senate primary for the honor of losing to Tom Harkin, 273 was a self-professed conservative and “true strict constructionist.” 274 On Facebook Eichhorn declared himself a fan of the Heartland Institute, 275 a market-knows-best organization, one of whose hobby horses is tobacco. That part of its website, which begins, “Welcome to the Smoker’s Lounge,” is so profoundly and across-the-board drenched in primitive,
know-nothingist denial\textsuperscript{276} that it makes Philip Morris—whose “support never amounted to more than 5 percent of Heartland’s annual budget”\textsuperscript{277}—seem almost like a scientific subcontractor of the Centers for Disease Control and Prevention and the Surgeon General. Not coincidentally, Heartland’s approach found its way into at least one of Eichhorn’s briefs,\textsuperscript{278} and plaintiffs’ Recast and Substituted

\textsuperscript{276}http://www.heartland.org/suites/tobacco/ (visited July 8, 2009).

\textsuperscript{277}http://www.heartland.org/about/truthsquad.html (visited July 8, 2009).

\textsuperscript{278}In his brief in support of his clients’ (unsuccesful) request for a temporary injunction, Eichhorn wrote: “The affect [sic] of this statute on smokers is monumental. One Letter-to-the-Editor stated, ‘Many smokers today are made to feel like modern-day lepers, segregated and ostracized...[.]’” The footnoted source was “R. Connor, Letter to the Editor, The Heartland Institute, Letters to the Editor, July [8,] 2005.” Brief in Support of Application for Temporary Injunction at 15, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 31, 2008). Eichhorn suppressed the fact that R[alph] Connor was the Heartland Institute’s public affairs director so that his “letter” in fact constituted the Heartland Institute’s communication to itself. The ellipsis that Eichhorn inserted spared him the embarrassment of revealing to the judge, IDPH, the attorney general, and the world at large that his clients’ pro-smoking agenda rested on the flat-earth-society claim that secondhand smoke’s alleged lethality was a hoax—a position that even Philip Morris had abandoned: “Many smokers today are made to feel like modern-day lepers, segregated and ostracized on the basis of junk science that says secondhand smoke is a public health threat.” Connor then indulged in the following piece of preposterous charlatanry: “Most experts believe that moderate, occasional exposure to secondhand smoke presents a low cancer risk to nonsmokers.” Ralph Connor, “Smokers: Modern-Day Lepers?” (July 8, 2005), on http://www.heartland.org/full/17590/Smokers_ModernDay_Lepers.html (visited July 12, 2009). The surgeon general’s monumental scientific synthesis of the health impact of secondhand smoke exposure concluded that such exposure constituted “an alarming public health hazard” to which “there is no risk-free level of exposure,” adding that exposure killed more than 15 times more adult nonsmokers from coronary heart disease (46,000) than from lung cancer (3,000). U.S. Department of Health and Human Services, The Health Consequences of Involuntary Exposure to Tobacco Smoke: A Report of the Surgeon General iii, 11, i (2006). Immediately following the aforementioned quotation, Eichhorn offered this essentialist falsification: “With this statute, smokers are denied access to most public places.” Brief in Support of Application for Temporary Injunction at 15, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 31, 2008). The Smokefree Air Act does not deny access to any public place to smokers so long as they refrain from smoking in such a place. His claim might become relevant if the legislature ever prohibited the off-gassing of thirdhand tobacco smoke from clothing and other personal and movable property in public places. See above ch. 33. Further essentialist hyperbole was on display in the Recast Petition, which asserted that the Act “adversely affects the employability of those who choose to smoke in that employers can no longer accommodate

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Petition devoted four pages to a disjointed melange regurgitating long ago discredited (and) tobacco-industry-supported efforts at denial of the reality of the deleterious health consequences of secondhand smoke exposure.\textsuperscript{279} The petition for a temporary injunction prohibiting the Iowa Department of Public Health and the State of Iowa from enforcing H.F. 2212 and its administrative rules and for a declaratory judgment that the statute and rules were unconstitutional that was filed by IBOC, COBRA, Froehlich’s bar, and a smoker named Ron Overson in Polk County district court on July 1 bore signs of great haste and/or sloppiness (such as a typographical error in the first plaintiff’s name in the caption and misstating COBRA’s name).\textsuperscript{280} The submission was this behavior, and if a person chooses to smoke during work hours, they [sic] will be required to leave the building with all the business and health risks associated with that conduct. ... By prohibiting smoking on business premises, this Legislation is eliminating up to...20%...of Iowa’s population from providing services for hire, or from being customers.” Recast and Substituted Petition at 28, Choose Freedom Iowa v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 28, 2008). Presumably by “health risks” plaintiffs were not referring to those linked to firsthand smoking.


\textsuperscript{280}Petition, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 1, 2008). To excuse the need to file a recast petition, Eichhorn asserted that he had had only about a week to prepare the petition. Plaintiffs[‘] Resistance to Defendants’ Motion to Dismiss or Recast at 2, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 6, 2008). Brothers Larry and Bill Duncan asserted that “each filed a temporary injunction hoping the law could be put on hold until it’s [sic] constitutionality could be challenged in court. Sadly the request for the injunctions was poorly handled by the state and didn’t make it into court until nearly a
characterized by outright false assertion paired with trivial quibbling suggestive of lawyerly incompetence. For example, it asserted that the law “uses terms in a manner inconsistent with accepted public and legal usage. Smoking is prohibited in...‘Public places,’ which is not limited to governmentally owned or operated facilities. Instead, the act’s definition includes private property, private businesses and private clubs. The definition states public places are ‘an enclosed area to which the public is invited or in which the public is permitted....’” In fact, the Iowa Code was already replete with provisions using the same definition of “public place”—most notably, with regard to alcoholic beverage control and even breast-feeding. Moreover, the “public place” language, like much of the statutory text, was taken from anti-public smoking laws enacted earlier in other states such as Rhode Island (which is even titled, The Smokefree Public Place and Workplace Law) and Illinois. The first argument that plaintiffs offered in support of its petition for injunctive and declaratory relief was that the new law would prohibit people who “choose to smoke”—a phrase that cigarette manufacturers had long used instead of ‘addictively self-administer nicotine—from “enjoying” covered public places and “interfer[e] with their associational rights and...their customary practices of purchasing goods and services from other members of the public.” Moreover, the bar owners also claimed that the Smokefree Air Act “limits the liberty, freedom and choices that individuals in Iowa have historically, customarily and legally maintained.” Attempting to quantify this alleged impact, they asserted that if, as had been estimated, 20 percent of adult Iowans smoked, month after the law had taken effect. Since July 1, 2008...the Duncans have awaited their day in court. They still wait.” http://iowafreedomfighters.com/IowaFreedomFightersTrifold.pdf (n.d. [ca. mid-2009]) (visited July 21, 2009). A search of Iowa Courts Online revealed no such filings.

286A search of the Legacy database found 20,080 documents with the phrase “who choose to smoke,” many of them in connection with the industry’s efforts to pooh-pooh secondhand smoke exposure. Its real meaning was nicely captured by an R. J. Reynolds document addressing “All 50,000,000 of you who freely choose to smoke.” “Open Letter from R.J. Reynolds Tobacco Company to 50,000,000 People Who Choose to Smoke” (1990), Bates No. 507722708/9.
all of them would be “adversely affected....”{287} Ironically, as early as 1978 the general counsel of Brown & Williamson, in an internal company memo, had underscored that “[n]one of the anti-smoking ordinances in fact restricts a smoker’s right of association or assembly. None of them exclude [sic] smokers from any place or infringe the rights of smokers to associate with whom they choose and assemble where they please. Instead they regulate activity or conduct.”{288} A quarter-century later the associational argument was nevertheless litigated by a pro-smoking anti-smoking regulation group in federal court in New York State, which dismissed it out of hand in 2004. The court concluded that that state’s anti-public smoking law did “not implicate First Amendment protections with regard to assembly and association and thus, would not merit a heightened scrutiny for these claims.”{289} The bar owners’ empirical claim was, as a 2006 Iowa survey demonstrated, wildly exaggerated and untenable: 78 percent of smokers (compared to 87 percent of nonsmokers) stated that a total smoking ban

{289}NYC C.L.A.S.H., Inc v City of New York, 315 F. Supp.2d 461, 476 (S.D.N.Y. 2004). The court explained: “A critical flaw inherent in CLASH’s First Amendment arguments is the premise that association, speech, and general social interaction cannot occur or cannot be experienced to the fullest without smoking, or, conversely, that unless smokers are allowed to light up on these occasions and at these places, their protected right is somehow fundamentally diminished. Implicit in this premise is that smoking enhances the quality of the social experience and elevates the enjoyment of smokers’ First Amendment rights; in other words, that only by being allowed to smoke can smokers contribute fully and enjoy to the maximum the experience of association, assembly, and speech in public places such as bars and restaurants. CLASH’s allegation that the Smoking Bans ‘curtail’ certain activities for smokers, in essence suggests that smokers cannot fully engage in conversation and other activities in bars and restaurants unless they are permitted to smoke, or that only by being permitted to smoke in these places can they fully exercise their constitutional rights of association and speech. Without summarily dismissing all possibility that smoking may contain some scintilla of associational value for some people, there is nothing to say that smoking is a prerequisite to the full exercise of association and speech under the First Amendment. ... At best, smoking, where permitted, is but a single component of the entire realm of associational interactions that a bar or restaurant patron could experience. Other aspects include dining, drinking, conversing, viewing or listening to entertainment, and meeting other people. While the Smoking Bans restrict where a person may smoke, it is a far cry to allege that such restrictions unduly interfere with smokers’ right to associate freely with whomever they choose in the pursuit of any protected First Amendment activity.” Id. at 473.
in restaurants would have no effect on how often they ate out, while 3 percent (compared to 12 percent of nonsmokers) said that it would prompt them to eat out more often.\textsuperscript{290} Perhaps an even more impressive refutation of the bar owners’ essentialization of smokers was the finding that 52 percent of smokers (compared to 83 percent of nonsmokers) did not permit smoking anywhere in their own houses.\textsuperscript{291}

The bar owners next alleged that the law would “inflict[ ] them with [sic] a new, massive and costly regulatory regime by prohibiting them from the full use and enjoyment of their property, by diminishing the value of the real property where businesses that [sic] previously chose to sell goods and services to customers who chose to smoke...and potentially taking away their license or permit to pursue their livelihood if there are findings of non-compliance.”\textsuperscript{292} How the requirement of posting a few nosmoking signs and informing violators of the existence of the law amounted to a “massive and costly regulatory regime” plaintiffs no more explained than how this regulation differed in its impact from many other health and safety regulations.

The bar owners submitted a laundry list of alleged constitutional violations: (1) the inspection and regulatory schemes violated the due process and search and seizure clauses because compliance operations were authorized without warrants or probable cause; (2) procedural due process was violated because IDPH was empowered to determine violations “potentially without notice or opportunity to be heard by the alleged violator”; (3) Iowans were arbitrarily and unreasonably classified so as to deny them “inalienable rights of enjoying liberty, acquiring, possessing and protecting property, and pursuing and obtaining happiness, the right to pursue useful and lawful businesses without oppressive regulations”; (4) Iowans were arbitrarily and unreasonably classified in violation of the equal protection clause of the U.S. Constitution and the privileges and immunities clause of the Iowa Constitution; and (5) the free speech clause was violated.\textsuperscript{293}

\textsuperscript{290}Gene Lutz et al., \textit{Iowa 2006 Adult Tobacco Use Survey} 59, fig. 38 at 64, on http://www.csbs.uni.edu/dept/csbr/pdf/IDPH\_Adult\_Tobacco\_Survey-2006.pdf (visited July 9, 2009).


\textsuperscript{293}Petition at 12, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 1, 2008). The free speech claim had also already been rejected by the U.S. District Court for the Southern District of New York, which found that even if it “indulg[ed] the notion that smoking in a bar or restaurant embodies some shred of
In an interview two days after filing the petition, Eichhorn stressed that SAA went “far beyond” the single issue of the casino exemption, but failed to reveal how his claim that the law “‘has some very unusual features in there...strange things just in and of this law that I think are different from other states[’]” was actionable. Nor did he identify the “‘good results’” that he and his clients would get out of the suit. What he did consider to be without a “‘proper legal foundation’” was that “‘this legislation wants to go in and inspect all sorts of private property that’s never been subjected to this kind of inspection before.’”

The bar owners viewed the litigation as just “the first step” in overturning the smoking ban as a whole by means of political mobilization. COBRA president Van Roekel, who saw the law as “‘blatant discrimination against smokers’” (and thus conceded that, contrary to many denials, the owners’ resistance was indeed a defense of smoking) “‘and...a property rights issue,’” publicly announced a position that would have undermined the only argument that the state court judge later took seriously—namely, that the plaintiffs were “not contesting the casino exemption, because many members feel the exemption will be overturned in the next legislative session.” Instead, COBRA and IBOC, temporarily caught up in a post-filing collective delusion of grandeur, purported to be engaged in hiring a Washington, D.C. PR-firm “to coordinate the release of information relating to court proceedings” and recruit other organizations to join the lawsuit: “‘In essence, we are fighting for the rights of every small business in Iowa.’” The next step was political activation, “including putting candidates up for office” who would defend small business owners’ interests and rights. The “final step,” which

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expressive conduct protected under the First Amendment” and the ban imposed a burden on that expression, the law would still pass constitutional muster under “the more demanding intermediate level of scrutiny” because it was content-neutral and established reasonable time, place, and manner restrictions “substantially related to the important governmental interest of protecting individuals from the harmful effects of ETS.” NYC C.L.A.S.H., Inc. v City of New York, 315 F. Supp.2d 461, 480 (S.D.N.Y. 2004). In their Recast Petition, plaintiffs tacked on the even more implausible claim that the Act violated the commerce clause of the federal constitution by virtue of discriminating against the sale, distribution, and economic benefits of tobacco. Recast and Substituted Petition at 30.

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Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

involved “contact with interested parties in nine states” and contacting many more, was “making the matter a national issue by pooling the resources of similar organizations throughout the United States and debating the constitutionality of the ban before the U.S. Supreme Court.”

On July 21, the attorney general filed a motion to dismiss or, alternatively, to recast the petition. Dismissal was based on the argument that plaintiffs had impermissibly interwoven the statutory and agency rules/rulemaking challenges: because a petition for judicial review of agency action under the Iowa Administrative Procedure Act was the exclusive means of obtaining such review in a court of law, it could not be joined with original declaratory judgment or injunction actions and therefore had to be dismissed for lack of jurisdiction. Moreover, even if the court were nevertheless willing to construe the whole petition as one for judicial review, it would still have to be dismissed for lack of jurisdiction because plaintiffs had failed to serve the agency defendant within the 10-day statutory service requirement. Consequently, the only possible ground on which the bar owners could proceed was their constitutional challenge to the Smokefree Air Act; but since they made no allegations specific to the statute and intertwined all of them with challenges to the implementing rules, the attorney general requested that, if the court permitted the statutory challenge to proceed, it order plaintiffs to recast their petition to remove the challenges to the rules, thus making the grounds of their statutory challenge clear and giving defendants fair notice of the claims and a fair opportunity to respond.

On July 24, Polk County District Judge Douglas Staskal ordered a hearing for August 1 on the bar owners’ application for a temporary injunction prohibiting

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298 Motion to Dismiss or to Recast, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., July 21, 2008). While denying that their petition was an appeal of agency action and stating that they would not attack the rules except as “reflections on the constitutionality” of the statute, plaintiffs expressed their willingness to recast their petition, but nevertheless requested the court to deny defendants’ motion to dismiss or recast. Plaintiffs[’] Resistance to Defendants’ Motion to Dismiss or Recast at 2-3, Iowa Bar Owners Coalition [sic] v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 6, 2008). Insisting that plaintiffs’ latest filing “leaves the parties squarely on the same uncertain ground they were on at the outset of this action,” the attorney general urged the court to grant defendants’ motion to dismiss or recast. Defendants’ Reply to Plaintiffs’ Resistance to Defendants’ Motion to Dismiss or Recast at 2-3, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 22, 2008).
299 http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm
IDPH from implementing and enforcing the Smokefree Air Act. The parties agreed to proceed with this hearing “but only on the basis of the allegations that the Act is unconstitutional and not on the basis of alleged defects in the department’s rules,” and the judge approved this procedure.

In their brief opposing plaintiffs’ request for a temporary injunction the state defendants, after outlining scientific facts about the health consequences of secondhand smoke exposure, identified the fatal defects in the bar owners’ constitutional claims. Their substantive due process challenge was meritless because they failed to establish that the smoking law impinged on any fundamental right or was an irrational means of furthering the state’s interesting in reducing Iowans’ exposure to secondhand smoke for the purpose of advancing public health. The reason that the bar owners were unable to demonstrate that they had any fundamental right at stake—no court had held the right to smoke in public or to permit smoking in bars to be fundamental—was that tobacco smoking in public places, as the attorney general ironically observed, “is not implicit in the concept of ordered liberty.” Plaintiffs’ claim under the privileges and immunities provision of the Iowa Constitution (“All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens”) was also untenable because the Iowa Supreme Court had held that a party challenging a statute based on the provision “must negate every conceivable basis which may support the classification, and the classification must be sustained unless it is patently arbitrary and bears no relationship to a legitimate governmental interest.” Consequently, it was not defendants’ burden to prove that the statute was constitutional, but rather plaintiffs’ “burden to demonstrate beyond a reasonable doubt that the statute

305 Iowa Constitution, art. I, sect. 6.
violates the Privileges and Immunities Clause and to point out with particularity the details of the alleged invalidity.” Moreover, the clause “will not defeat a statutory scheme simply because it benefits certain individuals or classes more than others.” Under the traditional equal protection analysis, by which privileges and immunities challenges are tested, the court first would have to determine whether the statute created “a classification of similarly situated people who have been singled out for different treatment.” If the classes are not similarly situated, then treating them differently would not be unconstitutional; if they are, then the court has to determine whether the classification is rational; only an arbitrary classification that bears no rational relationship to a legitimate government interest would be unconstitutional. Plaintiffs had not only failed to bear their aforementioned burden, but had not even tried to demonstrate that they were part of a class that merited analysis under the privileges and immunities clause. Even if they were, however, they were not a suspect class that merited constitutionally heightened scrutiny; consequently, SAA had (and had already been shown) to satisfy only the rational basis test. Unsurprisingly, “no court employing either a privileges and immunities analysis akin to Iowa’s or a traditional equal protection analysis has overturned a similar statute on equal protection grounds.”

To be sure, the state, presumably because it bore no burden to do so, made no effort to argue that the legislature had a rational basis for classifying bars and casinos differently. Interestingly, the attorney general also made no effort to explain why a more recent aberrant Iowa Supreme Court decision, which not only rejected the U.S. Supreme Court’s analysis of equal protection, but was also at odds with its own prior decisions, did not represent a potential problem for the argument set forth in the attorney general’s brief. In Racing Association of Central Iowa v Fitzgerald, which dealt with a differential tax between racetrack and riverboat casinos, the Iowa Supreme Court held both that there was no rational basis for the legislature’s finding that the two were not similarly situated and that there was no rational relationship between the differential tax and the

306 Defendants’ Brief in Opposition to Plaintiffs’ Application for Temporary Injunction at 13-15, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 1, 2008) (quoting Perkins v Bd of Supervisors of Madison County, 636 NW2d 58, 72 (Iowa 2001) (quoting in turn earlier Iowa Supreme Court cases)). In an even older case not cited by the attorney general, the Iowa Supreme Court held that the privileges and immunities clause “does not require that all laws shall apply alike to all citizens of the State. It is sufficient if an enactment applies to all members of a class, providing the classification is not purely arbitrary but rests upon a reasonable basis. It is equally settled the Legislature has wide discrimination in determining the classes to which its Acts shall apply.” Green v Mt. Pleasant, 256 Iowa 1184, 1199 (1964).
main purpose of the legislation. Even if RACI’s point was that a statute that (1) treats differently two industries that the court finds to be similarly situated (2) in a manner that contradicts the main purpose of the statute violates equal protection, RACI’s logic still might not lead a RACI-like court to invalidate the casino exemption in the Smokefree Air Act. If the state’s argument was that the legislature exempted casinos because it needed the tax revenue, that argument might pass muster because, unlike the situation in RACI, the court could not find that this goal was not rationally served by the state’s continuing to receive the higher tax revenues from casinos that would not be possible if smoking were banned there. In other words, unless the court argued back that the goal was not rationally served because (empirically) banning smoking would not reduce revenues/tax revenues, RACI would not apply. That is to say, a RACI-like court would have to argue that casinos and bars were similarly situated with regard to a smoking ban’s impact on revenues/tax revenues. Since, in fact, the Smokefree Air Act bill was amended precisely because its supporters believed that the experience in Delaware and Illinois showed that bars were different than casinos in that the latter’s revenues were reduced by smoking bans while the former’s were not, a court would presumably be precluded from finding that casinos and bars were not similarly situated even though some scholars argued that smoking bans had not reduced casino revenues.

Although Republican House assistant minority leader Doug Struyk saw no “rational basis” defense for the State other than arguing that the absence of gambling in bars was somehow relevant, he was nevertheless dismissive of the Iowa Supreme Court decision on which bar owners must have been pinning all their hopes, calling it “a little odd” and not “mak[ing] a whole lot of sense.” Ironically, his Minority Leader, Rants, agreed that bar owners would have an uphill battle to prevail on a “rational basis” argument.

At the hearing on August 1, which lasted three hours with breaks, most of the 56 people in the courtroom—among whom were two bill drafters from the Legislative Services Agency—were bar owners. IBOC president Froehlich, the first of three bar owner-witnesses, was led through his testimonial paces by Eichhorn, who elicited the claim that most of the bar owners he had spoken to had

308 See above ch. 35.
309 Telephone interview with Doug Struyk, Council Bluffs (July 22, 2008). In addition, he saw no hope for a suit based on discrimination against smokers.
310 Telephone interview with Christopher Rants, Des Moines (May 12, 2008).
seen the number of customers drop by 25 to 50 percent and that one bar had closed because of July’s “declining profits,” which he called a “‘catastrophe.’” On cross-examination, Froehlich told Assistant Attorney General Donn Stanley that sales at Fro’s Pub and Grub had declined about 15 percent from June (the last pre-ban month) to July, but, under questioning, conceded that other factors such as high gasoline prices, the (historic) floods, and the housing crunch might also be reducing sales and patronage, prompting a few bar owners to grumble and one to whisper, “‘He’s making their case.’” Stanley’s relentless interrogation forced Froehlich to admit not only that he was still hiring, but that he had reduced the number of his employees in January, months before H.F. 2212 had even been passed. As for his scofflawdom regarding the smoking ban, Froehlich cavalierly admitted that “‘in business, we all take risks,’” which in his case included posting a sign on his door announcing that customers were entering a “‘smoking establishment’”—“‘my way of bein[g] rebellious.’” Unknown is the impression that he made on Judge Staskal by opining that hanging the mandatory no-smoking sign upside down on the inside of the front door so that customers would see it only upon exiting put him in compliance with the law.311

Eichhorn’s next witness was COBRA president Van Roekel, whose prediction that half the bars in Iowa “will close in the coming year because of the ban”312 suggested that he was as expert at economic prognosticating as he was at oncology and constitutional law or, as the director of the Alcoholic Beverages Division put it, that his prediction was “not a good gauge of reality.”313 In fact, in spite of the deepest economic crisis of the post-World War II era, the number of commercial liquor/wine/beer on premises-beer off premises licenses/permits processed rose in Iowa from 4,023 for the fiscal year ending June 30, 2008 to 4,038 for the fiscal year ending June 30, 2009.314
The third and final bar owner-witness, Amanda Albrecht, testified that her bar income at Hoss’s Saloon in Fairbank had fallen from $11,000 in July 2007 to $3,000 in July 2008, prompting her to put the bar up for sale and probably to close it for good on August 4. Her most affecting testimony she saved for a press interview in which she grieved most deeply over being torn away from experiencing firsthand the reproduction of her customer base: “Over the years I’ve been able to watch children that I knew, you know, that become drinking age and, you know, they have their 21st birthday there...and I’m not going to be able to see that (any) more.” In court Albrecht had offered what she regarded as a show-stopper: “‘We made $11 yesterday.... What more do you want to know?’ That “more” (which did not become known until much later) suggested that that tragic day on which she could no longer witness the formerly underaged turn into personified legal solvent demand for alcohol had been put off after all: the licensure records of the Alcoholic Beverages Division revealed that in November 2008, Albrecht renewed her bar’s annual liquor license, which as of July 2009 was still “active.”

Following plaintiffs’ testimony the lawyers took over, in part merely reviewing the arguments that they had already briefed. Assistant Attorney General Jeffrey Thompson dismissed the bar owners’ self-reported data as “anecdotal,” “unreliable” and ‘unverifiable.” As to the requested temporary restraining order, he observed that with 82,000 businesses covered and only 572

Activity Report Recap July 1, 2008-June 30, 2009 (emailed by ABD). Similarly, the number of commercial beer on/off premises licenses/permits processed for FY 2008 and 2009 rose from 1,085 to 1,148 and that of special-beer/wine on premises-beer off premises from 465 to 494. These three categories comprise the vast majority of licenses for bars.
complaints having been filed, issuance of an injunction would undo the improvement in public health that the new law had already effected. Eichhorn embellished the aforementioned false assertion in his brief by contending that the Smokefree Air Act “defies standard definitions of public and private properties...dating back hundreds of years.” In order to parry Thompson’s unobjectionable point that in order to secure an injunction plaintiffs would have to show irreparable harm Eichhorn claimed that: “It’s not the economic harm that we’re worried about.... If you have to tell a customer or an employee, “You can’t do that here; You [sic] have to take it outside,” will that be a customer or an employee tomorrow? It appears not to have occurred to Eichhorn that owners have a long history of informing people in their bars that they cannot engage in various kinds of behavior. Moreover, the administrative rules were so weak that they did not require owners to do anything other than inform violators that they were violating the Smokefree Air Act; they did not even require that they request violators to leave the smoking-prohibited area or that they notify law enforcement. (In sharp contrast, the Minnesota Freedom to Breathe Act provided that owners and managers “shall make reasonable efforts to prevent smoking in the public place, public transportation, place of employment, or public meeting by...asking any person who smokes in an area where smoking is prohibited to refrain from smoking and, if the person does not refrain from smoking after being asked to do so, asking the person to leave. If the person refuses to leave, the proprietor, person, or entity in charge shall handle the situation consistent with lawful methods for handling other persons acting in a disorderly manner or as a trespasser.”) Just how well the organized barkeeper resistance understood how minimal the IDPH rules had rendered owners’/employers’ obligations in this regard was unmistakably on display on signs that adorned tables at Froehlich’s bar, whose owners sarcastically reveled in their discovery of the crucial legal distinction

324See above this ch.
between the mandatory and the merely permissive:

If you are smoking you are in violation of the “Iowa Smoke Free Act.” By law we are required to tell you this. Via the administrated (sic) rules, the following actions may take place if you continue to smoke.

We MAY discontinue service to you.
WE MAY ask you to leave.
We MAY call the authorities.

[Then] Again I May Not...Have a nice day.\textsuperscript{326}

Even the press reported that “[s]imilar battles have not gone well for smoking proponents. In 2006, a federal judge in Colorado rejected an [sic] challenge to that state’s smoking ban and ruled that Colorado legislators had a rational basis to exclude casinos, as Iowa law does.”\textsuperscript{327} Although a year later Eichhorn remarked that the state “did do something interesting in offering the judge a copy of all cases that have found smoking bans constitutional,”\textsuperscript{328} at the hearing he concluded his closing remarks “by dismissing the idea that very few legal challenges of smoking bans in other jurisdictions had succeeded [sic]. He joked that ‘they didn’t have George’—meaning those other plaintiffs didn’t have him for a lawyer.”\textsuperscript{329} In fact, the federal court in the 2006 Colorado case, Coalition for Equal Rights, Inc. v Owens, both denied the plaintiff-bar (and other business) owners’ request for a temporary restraining order and granted the state defendants’ motion for summary judgment, dismissing the action. Despite opining that “[s]ince the people of the State of Colorado have managed since 1876 without a ban on indoor smoke, I do not consider the delay of a few weeks


\textsuperscript{328}Email from George Eichhorn to Marc Linder (July 14, 2009). Eichhorn was presumably referring to equal protection challenges. For extensive citation of such cases, see Defendants’ Brief in Opposition to Plaintiffs’ Application for Temporary Injunction at 8, 15, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 1, 2008).

or months to be consequential,” 330 the judge denied the motion for a TRO in large part because he found that plaintiffs’ equal protection challenge did not show a substantial likelihood of prevailing on the merits. The court reached this conclusion on the grounds that plaintiffs had misunderstood the nature of the requisite rationality that the equal protection clause demanded of the legislation in question. Their argument that the casino and other exemptions to the Colorado statute undermined its public health protective purpose and therefore could not be rationally related to this objective missed the point—repetitively prescribed by the U.S. Supreme Court—that “the relevant test is not whether the classifications imbedded in the Act are rationally related to the Government’s stated purpose. The Act survives constitutional scrutiny if its distinctions are rationally related to any conceivable government purpose, whether or not stated in the law or contained in the legislative record.” 331 Consequently, the untenability of plaintiffs’ equal protection claim was demonstrated by the government’s contention “that casinos were exempted from the Act because of their unique constitutional and statutory status in Colorado, because casino gambling has only recently become legal in Colorado, because many of the towns in which casinos are located have become dependent on the revenues they generate and because they face severe competition from Indian Reservation casinos. Even the state derives economic benefit from its licensed casinos. Plaintiffs suggest that the revenues from casinos are an improper basis for making such a distinction, but provide no authority for the proposition that a


331 Coalition for Equal Rights, Inc. v Owens, at *15-16, 2006 U.S. Dist. Lexis 42723 (D. Colo., June 23, 2006). The court quoted F.C.C. v Beach Communication, Inc., 508 U.S. 307, 315 (1993), which held (in quoting from the Court’s own precedents) that “those attacking the rationality of the legislative classification have the burden ‘to negative every conceivable basis which might support it’.... Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of ‘“legislative facts”’ explaining the distinction ‘on the record’...has no significance in rational-basis analysis. See Nordlinger v. Hahn, 505 U.S. 1, 15...(1992) (equal protection ‘does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification’). In other words, a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data. “‘Only by faithful adherence to this guiding principle of judicial review of legislation is it possible to preserve to the legislative branch its rightful independence and its ability to function.”'
consideration of fiscal impacts and cost benefit analysis is an improper basis for a Government decision under rational basis review.\footnote{Coalition for Equal Rights, Inc. v Owens, at *17, 2006 U.S. Dist. Lexis 42723 (D. Colo., June 23, 2006).} As “to say the least, far fetched” the judge treated plaintiffs substantive due process claim that owners’ alleged right to allow smoking in their bars was a “fundamental right, equivalent to the other rights the Supreme Court has deemed fundamental, such as the right to travel, the right to vote, the right to procreate, and the right to marry...”\footnote{Coalition for Equal Rights, Inc. v Owens, at *24, 2006 U.S. Dist. Lexis 42723 (D. Colo., June 23, 2006).} A few months later the court dismissed the case altogether on largely the same bases.\footnote{Coalition for Equal Rights, Inc. v Owens, 458 F.Supp.2d 1251 (D. Colo. 2006).} Of potentially great interest for Iowa was that by the time the federal appeals court affirmed the district court’s judgment in 2008 the Colorado legislature had already repealed the casino exemption.\footnote{Coalition for Equal Rights, Inc. v Owens, 517 F3d 1195 (10th Cir. 2008).}

Judge Staskal generated the most enlightening moment in the post-testimony stage of the proceeding when he “asked a question that seems to indicate he’s interested in an argument based on the unfairness of allowing smoking in [sic] the gambling floors of casinos, but barring it in bars & restaurants. ‘I never heard you say the words equal protection,’ the judge said to Eichhorn. Eichhorn indicated that was not part of his in[i]tial argument over the stay, but may be included in his subsequent briefs when the case is heard.”\footnote{Email from George Eichhorn to Marc Linder (July 14, 2009).} Failing to accommodate an adjudicator’s direct question about a line of reasoning that he apparently viewed as significant for the outcome of the case appears to be a sub-optimal litigation strategy and in his ruling three days later Staskal would pointedly remind plaintiffs just how crucial equal protection was. (Although Eichhorn later claimed that he had not presented the equal protection argument at the hearing because it “was not relevant to the Plaintiff’s [sic] request for temporary relief,”\footnote{“Iowa Bar Ownes’ [sic] First Day in Court, Fighting the Smoking Ban,” Radio Iowa, Aug. 2, 2008, on http://learfield.typepad.com/radioiowa/2008/08/iowa-bar-owners.html (visited May 22, 2009).} his clients revealed the real, substantive reason at the post-hearing press conference.) In contrast, Thompson at least offered a brief refutation of an equal protection claim by arguing that “businesses that are similarly situated are treated similarly, but...bars and casinos are ‘different animals’ citing economic evidence [that] shows that casinos would be impacted...
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differently by the law.”

Possibly revealing the state’s defense against the claim that apparently everyone but Eichhorn considered plaintiffs’ only even potentially viable argument, Thompson indicated that the reason that the legislature had exempted casinos was “the gambling taxes casinos pay to the state and studies which indicate casino patronage has dropped significantly in casinos where smoking has been banned. ‘That revenue stream is significant to the state’...” (In contrast, he stated that “studies show business goes up in bars and restaurants when smoking is banned.”) Plaintiffs were acutely alive to the importance of this argument: “At several times as Thompson was offering legal arguments for the exception for casinos, bar owners in the crowd audibly reacted. As the laughs and exclamations became more frequent as Thompson’s explanation went on, the judge interjected: ‘Keep your reactions to yourself, please.’”

At a 15-minute press conference in the rotunda of the Polk County courthouse after the hearing four leading bar-owning members of the plaintiff organizations indulged in almost nonstop braggadocio and absurdly hyperbolic claims about the economic harm that the unconstitutional law during its first month had already wreaked on and over time would continue to wreak on barkeepers all over Iowa. That nostalgia for at-will public smoking was at the forefront of their oratory was hardly surprising: after all, what else could practically unite a group of wannabe-libertarians who voluntarily chose to make their living in what “is, without a doubt, the most heavily regulated business one could choose,” about whose detailed state and local-government imposed alcohol-related prescriptions and prohibitions they had not been famous for complaining? Only when it came to smoking did it, for example, occur to Larry Duncan to pose the radical anti-regulatory question: “[W]hy do a few elitist people in the state of Iowa have the power to make up and ram through a law about my business, when they don’t have a dime in it?” To be sure, when it came to saving his liquor license, Duncan was thoroughly capable of disingenuously dismounting his high

341 Telephone interview with Lynn Walding, director, Alcoholic Beverages Division, Ankeny (July 15, 2009).
constititutional hobby horse and claiming that “he’d have no problem declaring smoking off limits in his restaurant [sic] if law makers would have [sic] not caved to lobbyists’ pressure and passed a bill that ties their hands, yet permits some businesses to allow their patrons to smoke. That’s patently unfair, Duncan says...” Lead speaker Van Roekel, striving valiantly not to drown in his self-generated bathos, intoned that the plaintiffs had begun the “fight to give back freedom to Iowans. No one should be forced to eat, drink or do business in a building that is nonsmoking.” (On its website, Choose Freedom Iowa, the newly formed umbrella organization that IBOC and COBRA co-founded and that in October was added as a plaintiff, falsified/sanitized parts of Van Roekel’s statement. In the sentence last quoted it replaced the final two words with “has smoking. No one would suggest that.”) Presumably expecting such rhetoric to resonate with non-bar-goers and whatever proportion of the state’s by now small minority of smokers were not indifferent to the health havoc that their secondhand smoke wreaked on nonsmokers, he attacked the “big brother government” that had “ripped away” the choice to shop in a store with smoking, thus revealing that, contrary to bar owners’ refrain, it was about smoking after all. Working himself into a lather, Van Roekel heroically proclaimed: “We will stop at nothing”—which threat Choose Freedom Iowa’s website unheroically deleted from the sanitized version—and announced that the bar owners would take the issue to the ballot box. In response to a reporter’s question as to why, despite Judge Staskal’s statement that he was “amenable” to an equal protection argument, plaintiffs failed to push it, especially with regard to casinos, Joe Sturgis, who owned the Rusty Nail in Davenport, revealed their pro-smoking


345http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm (Oct. 15, 2008).


agenda: rather than wanting the casinos to lose their exemption, the bar owners wanted every business to have it because the state had no more right to ban a legal activity in businesses than in private homes. Whether his incoherent rant resulted from press conference-induced euphoria, mendacity, or mental incompetence, Sturgis went on to indulge in such quasi-hallucinatory claims as that 80 percent of bar owners were still permitting smoking and that passage of the smoking law had made it impossible for Democratic legislators to campaign in Iowa, who got shut down wherever they went. Similarly, van Roekel repeated his preposterous courtroom prediction that in a year 50 percent of the state’s bars would go out of business. And Fort Madison bar owner Bill Duncan’s dedication to accuracy was on exhibit in his claim that if the legislature had been serious about health, it would not have excluded half of Iowa’s employees from the law. Duncan also delivered the peroration, a panegyric on the Iowa constitution, for which “many, many men have died fighting....” Duncan, who insisted that “[i]t’s about rights, not about smoking,”349—a position difficult to reconcile with both IBOC’s selling buttons with a pointing Uncle Sam saying, “I want you to have a right to smoke” to finance “the legal fight”350 and Choose Freedom Iowa’s website’s homepage, which was adorned with several photos glorifying smoking351—but added that “[i]t’s not illegal to smoke,” demanded that the legislators and the governor be asked and give a yes or no answer to the question: “Do you believe in the Constitution?”352

Belief in the Iowa constitution—which, despite Eichhorn’s aforementioned


citation to Iowa Supreme Court precedent to the contrary, boiled down to the bar owners’ child-like interpretation of the privileges and immunities clause\(^{353}\) as precluding any exclusions/exemptions from laws\(^{354}\)—meant upholding small business owners’ alleged right to vindicate smoker-customers’ right to smoke regardless of the morbid and mortal consequences for the former’s nonsmoking employees and customers. Bill Duncan and his brother Larry Duncan made all of these points with unreserved naivete. In an op-ed piece in the Fort Madison paper (in which he previewed his stirring paean to the “[t]housands and thousands of brave soldiers [who] have died fighting for our Constitution” and urged that Iowans “not let soldiers’ deaths and sacrifices be in vain”) Bill Duncan prefaced his quotation of the text of the privileges and immunities clause with the assertion that “any third grader that can read can tell you that the governor and legislature have shredded our constitution with the smoking ban.”\(^{355}\) (Yet even Darwin Bunner, the Burlington lawyer who would soon eclipse Eichhorn as the smoke-loving bar owners’ consigliere in chief, conceded that the provision should not be understood literally: “‘If I read the Iowa Constitution Article I, Section 6 as a lay person, it seems clear’.… However, as a lawyer, he said it’s not as black and white.”\(^{356}\) Whether he shared that insight with his client before taking the latter’s money is unknown, but in response to the district court judge’s rejection of his privileges and immunities claim and every other claim that he had made Bunner admitted that he had been spewing bravado all along: “Bunner said he was disappointed by the ruling but as an attorney he was not entirely surprised by the judge’s assessment.”\(^{357}\) Larry Duncan, who presumably credited southeast Iowa State Representative Phil Wise and Senator Tom Courtney with at least a
third grader’s reading comprehension, spun his children’s tale further by accusing
the legislators of having “‘violated the constitution. They took an oath to uphold
the constitution to make laws fair and equitable for all.’”

Wise repaid the compliment by observing that “‘[i]f anybody thinks they’re going to knock the
law off the books by that [lawsuit], they’re kidding themselves.’”

In his 10-page ruling issued three days later denying the request, Staskal
suggested that the bar owners faced a significant persuasive burden because,
despite the bracketing of agency action, the relief that plaintiffs sought “would
block the operation of a duly enacted state law, a fact that obviously directly
implicates the public interest.”

The court then considered and balanced the factors governing the grant of the
order: the extent of the likelihood of success on the merits of plaintiffs’
underlying claim and of the substantial injury and irreparable harm that plaintiffs
would suffer if the restraining order were not issued and whether, given the
impact of the restraining order on the public interest, the private litigants’ interest
might have to yield to the greater public interest. Staskal deemphasized the
likelihood of success on the merits because “the other factors to be considered
weigh strongly against the entry of a restraining order....” Eschewing “a full
blown analysis of the merits of the claims,” he concluded from a preliminary
analysis of the (aforementioned) five constitutional claims that only one—that the
Smokefree Air Act violated the equal protection clause of the U.S. Constitution
and the privileges and immunities clause of the Iowa Constitution—had a
“reasonable likelihood of success.”

Although the fact that the statute’s ban on
smoking in virtually all indoor areas and some outdoor areas was clearly
reasonably related to achieving its stated purpose of improving Iowans’ public
health by reducing the general public’s and employees’ exposure to harmful

358Joe Benedict, “Duncan Wants His Day in Court,” FMDD, Aug 21, 2008, on

359Christinia Crippes, “Group Ponders Smoking Ban Rules,” Hawk Eye (Burlington),
Oct. 15, 2008 (1A) (Newsbank).

360Ruling on Request for Temporary Restraining Order at 5, Iowa Bar Owners

361Ruling on Request for Temporary Restraining Order at 5, Iowa Bar Owners
Interestingly, plaintiffs’ supporting brief devoted less space (one page) to this alleged
constitutional flaw than any other; it quoted an Iowa Supreme Court case holding that a
classification had to be sustained unless it was clearly arbitrary and bore no rational
relationship to a legitimate governmental interest. Brief in Support of Application for
secondhand smoke made it unlikely that plaintiffs would prevail on their substantive due process claim, SAA’s exemptions for casino gambling floors (and fairgrounds) opened the possibility for plaintiffs at least to argue that “there is no rational explanation for the disparate treatment of these areas since they pose as great, if not greater [sic], a potential risk of public exposure to second hand smoke as [sic] do other similar areas where...smoking is banned” and that therefore the equal protection clause of the federal and the privileges and immunities clause of the Iowa Constitution had been violated. Although even in the absence of a “thorough explanation of the rationale for the challenged classifications” by the state Staskal “certainly cannot conclude that the defendants’ [sic; should be “plaintiffs’”] equal protection claims will prevail..., given the equal protection analysis the [Iowa Supreme] Court set forth in Racing Ass’n of Central Iowa v. Fitzgerald, 675 N.W.2d 1 (Iowa 2004), it is safe to conclude that the plaintiffs have at least a reasonable chance of succeeding on these claims because, on first impression, the exemptions appear to make the statute as a whole substantially under inclusive [sic] in relation to its stated purpose.” Despite this advisory to the state that it devise a more robust justification for the casino exemption if it wished to prevail on the merits, the judge concluded that “the likelihood of success factor weighs only slightly in favor of entering a restraining order.”

The judge found that the bar owners did not offer strong evidence that they had or would suffer substantial economic harm from the smoking ban both because the testimony of their only two witnesses as to a “dramatic loss of revenue” was “anecdotal and unsupported by any kind of business records” and because they also “acknowledged the possibility that other factors could have played a role in the loss of revenue.” Moreover, the state’s “anecdotal evidence in the form of newspaper articles” indicated that some bars’ and restaurants’ revenues had actually increased since the ban had gone into effect. The state’s evidence was reinforced by the presentation of reliable studies of smoking bans around the United States showing that generally they had not had a negative

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362 Ruling on Request for Temporary Restraining Order at 6-7, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 4, 2008). To be sure, under clear U.S. Supreme Court precedents: “A State...has no obligation to produce evidence to sustain the rationality of a statutory classification. ‘[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.’... A statute is presumed constitutional...and ‘the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,’...whether or not the basis has a foundation in the record.” Heller v Doe, 509 US 312, 320-21 (1993).

With regard to the third factor, irreparable harm, the state argued that the bar owners had failed to satisfy the requirement because the only injury that they alleged was financial damage that could remedied by monetary payments. While acknowledging the correctness of this statement of the law in general, Judge Staskal observed that, under Iowa Supreme Court precedent, extreme financial loss could constitute irreparable harm. The question then became whether the bar owners had demonstrated such loss. However, all that their testimony showed was that a single bar owner stated that the ban had had such a drastic effect on her business that she was forced to close and try to sell it. Had plaintiffs been able to marshal evidence of such a “widespread and general impact,” then they “could probably be said to have made a showing of irreparable harm. But there is no such evidence...” The plaintiffs’ remaining evidence of adverse impact goes no further than showing that the law has resulted in decreased revenue at many establishments, causing the termination of employees but not resulting in the destruction of businesses.” Putting the factor totally out of the bar owners’ reach was implementation of the requirement that the court balance the harm prevented by issuing the restraining order against that which would be caused by not issuing it: although there was evidence that issuance “may well prevent continued harm to many businesses...having overwhelmingly more weight is the fact that” issuing the restraining order “would prevent the Act from providing the public health benefits which justified its adoption.” Because there was no evidence that the legislature’s finding that secondhand smoke causes disease in nonsmokers was untrue, the court concluded that: “It practically goes without saying that interference with a law that is designed to prevent disease...would cause harm that weighs very heavily against entry of an order blocking its operation.” Consequently, on balance, the irreparable harm factor also weighed against issuing the restraining order.\footnote{Ruling on Request for Temporary Restraining Order at 7-9, Iowa Bar Owners Coalition v. Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Aug. 4, 2008).}

At the outcome of consideration of the fourth and final factor, the impact of a restraining order on the public interest, Judge Staskal had already strongly hinted. In addition to the public’s “strong interest in enjoying the health benefits” that the Smokefree Air Act was designed to promote, the other way the public interest was implicated—and it too weighed against issuing the restraining order—was “the absence of interference by the judicial branch with the operation of duly enacted laws. The legislature, not the judiciary, is the voice of the people

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on policy matters.” And although the plaintiffs were correct in contending for the public’s interest in invalidating unconstitutional laws, “the only viable constitutional complaint” that Staskal was prepared to acknowledge, even preliminarily, namely, the law’s alleged underinclusiveness, was a “defect, if it exists” at all, that “does not denigrate the legitimacy of the policy generally underlying the act.” In a very significant advisory to the bar owners, the judge underscored that their argument with the greatest likelihood of success on the merits “ultimately argues in favor not of eliminating the smoking ban but of extending it to additional areas that are now exempt. Thus, even if the Act’s exemptions make it unconstitutionally discriminatory, blocking its operation would still frustrate the will of the people.” In the end, then, the question was not even close: “the balance of relevant factors tips strongly against” plaintiffs’ request.\textsuperscript{365}

Judge Staskal’s message to the bar owners that the best they could hope to achieve with their equal protection claim was a ruling that SAA’s underinclusiveness would be remedied by eliminating the casino exemption essentially called their bluff: if they were really concerned about the alleged unfair competition that it caused for bars, resulting in—as many legislators had claimed\textsuperscript{366}—the flight of a financially disastrous proportion of their customers to casinos, then they should be satisfied; but if they were in fact pursuing the resumption of smoking (and not only in bars), as their Complaint suggested, then their judicial victory would be Pyrrhic because it would merely vindicate Vilsack’s litigation strategy, which they had already rejected, and hand Senate Democrats, Peterson, Olson, and other House advocates of quasi-universal coverage the law’s application to casinos that legislative Realpolitik, under pressure from casino capital, had denied them. Moreover, judicial extension of coverage to casinos was precisely the outcome Representative Struyk had warned against when he offered his (unsuccessful) amendment to make H.F. 2212 non-severable so that if a court invalidated any provision, the whole law would be struck down.\textsuperscript{367} Without the casino exemption as a whipping boy, bar owners,


\textsuperscript{366}See above ch. 35.

\textsuperscript{367}See above ch. 35. Since the casino owners were presumably able to see as many moves ahead as Struyk, it is unclear why they did not request the few House Democrats representing casino district who insisted on a casino exemption (which would be vulnerable to judicial invalidation) instead simply to vote against the bill altogether. Possibly these representatives had a sufficient number of anti-public-smoking constituents
like Republican legislators, deprived of their only even marginally plausible fairness argument, would have been compelled to rely on their reactionary, pecuniarily self-interested, flat-earth-society defense of smoking regardless of the disease and death that it inflicted on their employees and customers. (Plaintiffs did in fact refuse to “concede” that the Smokefree Air Act’s purpose of reducing the general public’s and employees’ level of exposure to secondhand smoke was a “valid” statement of governmental interest.) Consequently, since bar owners’ best or perhaps only chance of prevailing on the merits entailed a strengthening of SAA that was anathema to them, it is puzzling that they did not dismiss their action already at this point before it boomeranged on them. The same day that Staskal issued his ruling Choose Freedom Iowa issued a press release calling it “just one small step back in the fight to return freedom to the citizens of Iowa.” Adopting the cigarette manufacturers’ decades-old accommodationist propaganda, embellished with the weasel word “forced,” it insisted that: “No one should be forced to eat, drink or do business in a building that has smoking. No reasonable person would suggest it. And no one should tell citizens where they can eat and drink if they choose to smoke in a business that

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369 Asked directly to solve this puzzle, Eichhorn weakly responded that a ruling on a temporary restraining order was no basis on which to draw valid conclusions about the merits of a case. Somewhat more forthcoming was his admission that “my clients’ concerns were to level the playing field in a different manner than Attorney Vilsack and some other groups/persons. Although their position is a possible result of any litigation on equal protection grounds, we were trying to attack the legislation in a more complete manner.” Email from George Eichhorn to Marc Linder (July 14, 2009). The director of the Alcoholic Beverages Division offered an intriguing conjecture based on a recent trip to Burlington and the casino there, where the smoke was so thick that he surmised that many smoking bar-goers had switched to doing their drinking there. He speculated that as a result of such defections bar owners were actually in favor of striking the casino exemption, but that they did not want to appear as the ones pushing that anti-casino position. Walding himself hoped that a court would invalidate the exemption. Telephone interview with Lynn Walding, Ankeny (July 15, 2009).
chooses, as part of their own business model, to allow it.”370

On August 29 plaintiffs filed a Recast and Substituted Petition from which the state sought an order removing references to the IDPH rules.371 Following a hearing on December 10, Staskal, giving the bar owners’ argument372 the benefit of the doubt, on January 2, 2009, denied the state’s motion to strike on the grounds that the IDPH rules were relevant evidence of the statute’s meaning, but at the same time ruled that plaintiffs could not challenge the administrative rules in this case.373

At the end of December Staskal had set the case for an estimated five-day trial beginning on June 29, 2009, but in March Eichhorn withdrew as plaintiffs’ attorney,374 and at a status conference hearing on April 7, Judge Glenn Pille, who replaced Staskal, ordered plaintiffs’ counsel to file a written appearance, absent which he would dismiss the case with court costs assessed to plaintiffs. On May 5 he did dismiss the case without prejudice.375 The bar owners, despite their boasts of mobilizing 200,000 freedom-loving Iowans, dropped the case because they “couldn’t pay the high legal bills anymore” and their lawyer’s love for the constitution was apparently not great enough to persuade him to pursue this noble


371Defendants’ Combined Motion to Strike, Motion for More Specific Statement, and Motion to Dismiss at 3-5, on Defendants’ Combined Motion to Strike, for More Specific Statement and to Dismiss, Choose Freedom Iowa v Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Nov. 3, 2008).

372Plaintiffs’ Resistance to Defendants[’] Second Combined Motion to Strike, Motion for More Specific Statement, and Motion to Dismiss at 2, Choose Freedom Iowa v Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Nov. 12, 2008); Brief in Support of Plaintiffs’ Resistance to Defendants[’] Second Combined Motion to Strike, Motion for More Specific Statement, and Motion to Dismiss at 3-7, Choose Freedom Iowa v Newton, Civ. No. [EQ]CE59509 (Polk Cty Dist. Ct., Nov. 12, 2008).


374Without explaining why he had withdrawn, Eichhorn stated that: “In the state case I withdrew as counsel and the plaintiffs chose to focus on the pending license revocation proceedings. They dismissed the state case.” Email from George Eichhorn to Marc Linder (May 28, 2009).

cause pro bono. “[W]e were fighting for everyone in the state,” said Joe Sturgis, “and there wasn’t [sic] enough people supporting it. It’s an expensive lawsuit and we just ran out of funds.”

Brian Froehlich agreed that money played a part, but insisted that in part the reason for dismissal was “that we’ve got people out there who have now got a legitimate case...regarding the constitutionality of the smoke ban.” Those people were Froehlich himself and Larry Duncan, whose liquor licenses the ABD had suspended for 30 days and revoked, respectively, and who had filed petitions for judicial review. Though this litigation was all about his undoing the suspension of his license, Froehlich persisted in projecting himself as an altruist: “I am still working hard to make sure that the people of Iowa are represented properly and that this issue gets brought to court.” However, in a more lucid moment Froehlich admitted that: “There’s other people now that are personally involved in trying to save and protect their business.... We don’t all need to be having a court date, so we’re shifting efforts and support to those who are going to get this into court just on the basis of protecting their business from being shut down and closed. ... We don’t need to have 60 million court dates out there.”

The additional 42 cases that at this point were wending their way through ABD’s administrative process testified to Attorney General Tom Miller’s declaration that “we will not allow a small minority to flout” the law. And Froehlich and Duncan, once again, made it clear that the infirmity of the law that they would continue to defy assiduously transcended the unequal protection that they purported to be challenging. For the former “it’s about telling adults that they can’t no [sic] longer make up their own minds and their own decisions and government has to step in and be our mothers and fathers.”

Duncan’s litigation horizon stretched

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377Christinia Crippes, “Court Challenge Dropped,” Hawk Eye (Burlington), May 13, 2009 (1A) (NewsBank).
379Christinia Crippes, “Court Challenge Dropped,” Hawk Eye (Burlington), May 13, 2009 (1A) (NewsBank).
380For example, “Duncan...said he’d have no problem declaring smoking off limits in his restaurant [sic] if lawmakers would not have caved to lobbyists’ pressure and passed a bill that...permits some businesses to allow their patrons to smoke.” Steve Delaney, “Flaw in the Law—When They Convene Again, Lawmakers Should Remove Exemptions to Smoking Law,” Hawk Eye (Burlington), Sept. 14, 2008 (1A) (NewsBank).
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even further, encompassing “not only all the civil rights, but also interstate commerce, tobacco is not illegal....”

While IBOC and COBRA were winding down their state court action, Larry Duncan was initiating a similar federal action that was filed, in Eichhorn’s words, “immediately before the State tried to revoke Otis Campbell’s...liquor license” and is discussed below.

Enforcement

[T]here won’t be a smoking police.

We’re not gonna be as prescriptive as you may want us to be.

You do not have squads of tobacco police out roaming the streets trying to catch violators.

Whether the law is unconstitutional because it excludes one class of business is hardly certain. After all, many state laws are uneven. One denies 18- to 20-year-olds the right to drink. That clearly discriminates against citizens who have otherwise been declared adults with the right to vote, go to war or prison, be sued, incur debt and to raise children.... Bar owners may not like the 21-only law but presumably most obey it because to not do so can put them out of business. And despite the tyranny of discriminating against under age [sic] imbibers, no one has successfully challenged its constitutionality under state or federal law. But in West Burlington you can now obey the state laws you choose to and ignore those you detest. ... That was essentially what the city council said...in voting 3-1 to...let Duncan continue to allow smoking in his establishment in defiance of...state law....

On June 27, 2008, at the special telephonic conference meeting of the Iowa
State Board of Health (the IDPH’s policy-making body) at which it unanimously adopted and filed emergency the agency’s Smokefree Air Act rules. Mapes noted that state health officials expected authorities to issue no more than 75 citations and fines—winned down from 3,000 to 4,000 complaints and supported by 800 on-site compliance checks—during the first year of the Smokefree Air Act’s operation. (In the event, from July 1, 2008 to June 30, 2009, IDPH received 3,318 complaints, of which it deemed 2,100 valid, in response to which it sent 1,417 Notice of Potential Violation letters, and conducted 325 compliance checks.) Though based on her “[d]iscussions with other state program managers in states with smokefree workplace laws,” this


390 Iowa Department of Public Health Division of Tobacco Use Prevention & Control, Iowa Smokefree Air Act: First Year Report figs. 2 and 3 at 9, fig. 10 at 12, fig. 15 at 14 (Aug. 2009), on http://www.iowasmokefreeair.gov/common/pdf/smokefree_summary_2009.pdf (visited Aug. 31, 2009). Three-fourths of valid complaints were made by the public, while one-fourth came from inspector reports. Id. fig. 4 at 10. Of 1,062 “businesses” (which included government entities) that received a first NOPV letter 216 (or 20 percent) also received a second NOPV. The number of third, fourth, fifth, and sixth to ninth NOPV letters was 85, 29, 14, and 11, respectively. Id. fig. 12 at 12. See also IDPH Press Release: “Compliance High in First Year of Smokefree Air Act” (June 30, 2009), http://www.idph.state.ia.us/common/press_releases/2009/20090630_smokefree.asp (visited Aug. 9, 2009). These data refer only to owners/managers of covered public places and do not include citations issued to individual smokers, about which local authorities were under no obligation to report to IDPH. Email from Bonnie Mapes to Marc Linder (Sept. 15, 2008).

391 Email from Bonnie Mapes to Marc Linder (Aug. 7, 2009). As early as February 21, 2008—almost seven weeks before the legislature passed SAA—IDPH’s public information officer told the press that “Iowa would probably follow the lead of other states in enforcement” and “would focus primarily on education, and not citations....” Jason Clayworth, “Smoking Ban Seen as Likely to Pass,” DMR, Feb. 21, 2008 (B1) (ProQuest). In response to that official’s statement that the department’s “research uncovered that the most effective method used by states that had enacted similar laws...is education,” he was asked for the sources showing that education was the most effective method to achieve
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volume, since it could, nevertheless, not have plausibly corresponded to the many thousands of citable violations by individual smokers and owners of public places that any enforcer would reasonably have anticipated, presumably reflected some policy decision and/or allocation of agency budgetary and staff resources. That a certain vision of enforcement—namely, “inspir[ing] compliance through education rather than penalties”—underlay these seemingly arbitrary limitations emerged from Mapes’s declaration that “[y]ou’re not going to be cited by roving bands of tobacco police if they see there’s not a sign in your window,” “but there’s still the possibility that we could end up with people getting citations and being fined,” but “you’re going to have to work pretty hard to get one” by “choos[ing] to brazenly violate the new smoking

392 To be sure, according to a contemporaneous iowa press report, from the Minnesota Freedom to Breathe Act’s effective date of October 1, 2007 through the latter part of February 2008, the state Health Department had received fewer than 100 complaints, only one of which resulted in a citation. Jason Clayworth, “Smoking Ban Seen as Likely to Pass,” DMR, Feb. 21, 2008 (B1) (ProQuest). In fact, from Oct. 1, 2007 to Feb. 28, 2008 the MDH received 114 complaints, sent 98 notice of alleged violation letters (which were “educational” and required no response), 10 request for information letters (which did require a response from regulated party), and issued two correction orders and one non-forgivable administrative order. Email from John Olson, enforcement coordinator, Indoor Air Unit, MDH, to Marc Linder (Aug. 11, 2009). However, “the lion’s share” of complaints/citations were received/issued by local law enforcement and neither the state Health Department nor any other entity kept track of local enforcement; in addition, the statewide data encompassed only complaints/citations pertaining to owners since only local enforcement deals with individual smokers. Telephone interviews with Tom Hogan, director, indoor environment, and Dale Dorschner, supervisor, indoor air, Minnesota Department of Health, St. Paul (Aug. 10, 2009). The enforcement coordinator stated that the first year was “almost a grace period.” Telephone interview with John Olson, St. Paul (Aug. 11, 2009).


394 Jeff Eckhoff, “Forecast: In 2 Years, Smoke Ban Will Thrive on Its Own,” DMR, June 28, 2008 (B1) (ProQuest).


396 Jeff Eckhoff, “Forecast: In 2 Years, Smoke Ban Will Thrive on Its Own,” DMR,
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prohibition” because there would be “some initial forbearance for first-time and maybe even second-time offenders.” Violators would “probably get a warning” rather than a monetary penalty for first offenses since IDPH’s “whole emphasis, at least for the first few months, is educate, educate, educate because we know—except for the very small percentage of people who might want to take some kind of public stand and that’s not very many ’cause it hasn’t been in any other state—we know that if we can do that, we’re going to gain compliance.” Whether Mapes was being overly optimistic and whether she foresaw the extent and intensity of some bar owners’ resistance is unclear, but as the volume of administrative hearing complaints would soon reveal, she correctly understood that they were informationally incorrigible. Based on the patterns established in other states that had already gone through the enforcement process of a statewide smoking ban, she predicted only 200-300 checks in the second year. Mapes then boldly climbed way out on a limb to predict that: “By the third year it’s become the community norm and there’s virtually nothing that needs to be done.”

Such predictions did not reassure the American Cancer Society’s lobbyist, Peggy Huppert, who told the Board that its advocates were “distressed when they hear bar owners say “we’re not going to comply with this law, come and make me” or police chiefs say “I’m not going to enforce the law.” ACS did not have to look any further than the relatively sophisticated Iowa City Police Department. Despite the fact that IDPH rules stated that the department, pursuant to section 9(7) of SAA, “designates the law enforcement authorities of the state and of each political subdivision of the state to assist with the enforcement of 2008 Iowa Acts, House File 2212. A peace officer may issue a citation in lieu of arrest pursuant to Iowa Code chapter 805 against a person who smokes in an area...
where smoking is prohibited.” Sergeant Troy Kelsay misinformed the public through the news media that: “If, as a patron in a restaurant or bar, you are offended [by someone smoking], you shouldn’t call the police.... You should address the issue with the management, and the establishment should handle it like any other unruly patron.”

The assurance, which was more akin to a self-fulfilling prophecy, that enforcement would not be implemented by smoking police turned out, unsurprisingly, to be more accurate than the prediction of minimal and rapidly declining violations—in the absence of strict enforcement. One interesting example of deviations from both the assurance and the prediction took place at Parking Ramp II of the University of Iowa Hospitals and Clinics, where until August 2009 the hospital and central administrators and their police force, despite the fact that complaints about this location accounted for more than one-third of all smoking-violation complaints that the campus police received between July 1, 2008 and June 30, 2009, turned a blind eye to the massive and continuous smoking—evidenced by thousands of cigarette butts—that took place also so close to the doors leading into the hospital that the odor penetrated into the building. After repeated requests to administrators to enforce the law were ignored, an account of the pervasive and (un)civil disobedience together with an appeal to a receptive member of the Board of Regents from Iowa City, who also chaired the Board’s Hospital Committee and raised the issue a few days later with the university president and the top of the hospital hierarchy at a Board meeting, prompted the finally publicly embarrassed bureaucrats to order the police into Ramp II where they actually issued $50 citations to three smokers. The

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[402] Christopher Patton, “Local Police Take Light-Handed Approach to Smoking Ban,” DI, July 3, 2008, on http://www.dailyiowan.com (bracketed words in original). Kelsay added that if owners “refuse to enforce the ban, they will be subject to penalties.... However, such issues will be referred to” IDPH, “which will take the lead in ensuring business compliance.” Assuming that the student reporter accurately reproduced Kelsay’s statement, it remained a mystery by whom owners’ violations would be “referred” to the agency since he had already told “offended” customers not to bother the police.

[403] Calculated according to UI Department of Public Safety, “Prohibited Smoking Calls” (print-out sold by UI DPS) (75 of 223).

[404] Nine months into the ban, the chief of the UI police stated: “My directions to my officers are to not write citations.” Jennifer Delgado, “Where There’s Smoke, No Fines,” DI, Mar. 24, 2009 (1A:2-5). See also “Laura Klairmont, “Police Not Issuing Smoking Citations,” DI, Dec. 19, 2008, on http://www.dailyiowan.com. Whereas the University of Iowa had not issued any citations on any of the thousands of occasions on which smokers had violated the law during its first year, it issued two on July 14 (Scott Raynor, “1st UI
university president told the Regents that “the issue is more people who are unaware of the rules and are willing to comply when approached by UI police,” while her defeatist vice president for medical affairs insisted that “‘[w]e are working with...[the] Department of Public Safety...to review this issue, but we will never resolve it. There will always be people that smoke.” The president’s statement raised an interesting epistemological question inasmuch as it was difficult to imagine how the president imagined that she could possibly know that most violators were unaware of the ban since she and her subordinates virtually never interacted with, let alone scientifically surveyed, them. That any University of Iowa employee or student was unaware would have been extraordinarily implausible; and if any hospital visitor or patient was unaware, such ignorance would have largely been the result of the university’s failure to have posted any no-smoking signs in the areas of heaviest smoking in the ramp.

Smoke Tickets Issued,” *DI*, July 17, 2009 (1A:6)) and then on August 4 issued the three mentioned in the text; on August 5 it issued four more at other locations (including one in another UIHC parking ramp). Data communicated telephonically by the records division of UI DPS (Aug. 7, 2009). That the three were issued on August 4, the day before the Regents meeting, was presumably related to the email to Regent Downer, which he also asked to be sent to the CEO of the UIHC and the Vice President for Medical Affairs. Email from Marc Linder to Robert Downer, Jean Robillard, Ken Kates, and Paul Rothman (July 31, 2009).


Similarly, the hospital’s spokesperson alleged that “[m]ost people are compliant when told of the no-smoking rule.” “UI Hospitals Step Up Enforcement of People Caught Smoking,” *Gazette* (Cedar Rapids), Aug. 5, 2009, on http://www.gazetteonline.com. In fact, the experience of many non-police employees of the University, whom the university president has instructed that it is their responsibility to enforce the law, has been that fellow university employees either ignore or react hostilely to requests that they comply with the smoking ban. The UIHC CEO’s statement that “UI Police are also issuing citations to people who continue to smoke after they are warned of the policy” left unanswered the question as to why people smoking just inches from a no-smoking sign needed to be warned. *Id.*

The university did not even begin to post signs in the ramp until August 7, 2009, and even when the manager of parking operations was walking through the ramps that day with signs to post, he had to be reminded of the crucial importance of posting one at the location where more smokers congregated than anywhere else. Moreover, he had removed the one useful sign on the inside of the hospital door instructing those exiting that smoking was prohibited outside, while leaving in place the decal facing outside that actually encouraged unlawful smoking in the ramp by informing those entering the building, “No Smoking, Please Extinguish Materials Outside,” thus falsely implying that smoking outside
Moreover, her additional claim that "I think our Department of Public Safety is doing everything it can to try and enforce these rules" was risible since they had done virtually nothing during the first 400 days of the law’s existence when alone in the hospital ramps probably hundreds of thousands of cigarettes had been unlawfully smoked. And even the mini-flurry of ticketing that took place on August 4-5 in the wake of the Regents’ expression of displeasure unsurprisingly turned out to be little more than a Potemkin Village: the police issued no tickets on August 6, 7, or 8, although smokers, including UIHC employees, continued violating the law openly and belligerently. The total of five additional citations that the UI police issued campus-wide through August 20 did not even equal the number of people observed smoking unlawfully on level 2 of Ramp II within a period of a few minutes on any day.

the hospital building in the ramp was permitted. When the official sought to justify removal of the first sign on the grounds that it did not conform to the requirements of the IDPH rules, he had to be told that they did not require removal of additional signs that provided helpful information tailored to the locality. He did, however, remove the misleading sign. Discussion with Jeff Rahn (Aug. 7, 2009, 2:00-2:30 p.m.).


409 Alone on one half of Ramp II Level 2 the number of cigarette butts on the ground was estimated to be about 2,000 even a few days after the police had begun issuing tickets. (Around noon on Aug. 8, 2009, about 50 butts were counted on average in each of several equal segments of which there were 40.) According to the operations manager, the ramps were swept every day or two. Interview with Jeff Rahn (Aug. 7, 2009).

410 E.g., on August 7 within a period of a few minutes six people were observed smoking on Level 2 of Ramp II; when the manager of the ramp told two of them that smoking was illegal, they told him that they did not care and that they had been smoking there for three months. He called the police who, however, arrived after they had left. The policeman (J. Voeller) stated, inter alia, that hospital employees were the worst offenders. On Saturday August 8 six more people were observed smoking in the same location; the two most belligerent smokers were hospital cafeteria employees. On the additional citations, see Samantha Honken, “Smoking War Continues,” *DI*, Aug. 21, 2009 (1A:4-6). Almost two weeks later, when a local reporter finally visited the ramp and observed that “the no-smoking signs were charred with the black residue of snuffed-out tobacco,” the total number of citations had increased by only three to 15. Josh O’Leary, “UI Begins Citing Smokers on Campus,” *ICP-C*, Sept. 3, 2009, on http://www.press-citizen.com. This web of nonfeasance came full circle when, by coincidence, IDPH, in response to several complaints, conducted a site inspection of the University of Iowa, including the ramp, on the same afternoon as the local reporter’s visit, but the inspector reported that “[n]o evidence of smoking was evident.” If there was in fact no such evidence, that pristine state may have been the result of yet another Potemkin village created by the University of Iowa.
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In the event, from the outset the complaints of potential violations—240 of which were received during the first 11 days—conformed to the expected pattern in that bars and restaurants accounted for almost three-fourths of the initial 21 violation notices (which, as noted above, IDPH on its own had turned into “educational notice[s]”) sent out by mid-July. (During the entire first year of the law’s operation bars/restaurants accounted for 61 percent of all valid complaints, 52 percent of all Notice of Possible Violation letters, and 84 percent of all compliance checks.) During the Act’s first month the agency logged a total of 540 complaints, deeming 57 of them serious enough to merit a first notice of potential violation and two a second notice. From the fewer than 1,000 complaints that the IDPH had received by September 1—which resulted in only six site visits by law enforcement—its director concluded that education had been effective in enforcing the law.

made possible by IDPH, which not only gave the alleged violator advance notice of the inspection, but, “[b]y request,” permitted its inspector to be “escorted” by the UI official in charge of complying with the law. Iowa Smokefree Air Act Complaint & Compliance Program Site Visit Report/Complaint Report, University of Iowa (Sept. 2, 2009 14:00). In contrast, IDPH does not permit complainants to accompany inspectors. Email from Bonnie Mapes to Marc Linder (Sept. 25, 2009).


413 Iowa Department of Public Health Division of Tobacco Use Prevention & Control, Iowa Smokefree Air Act: First Year Report fig. 5 at 10, fig. 11 at 12, fig. 16 at 14 (Aug. 2009), on http://www.iowasmokefreeair.gov/common/pdf/smokefree_summary_2009.pdf (visited Aug. 31, 2009). Retail stores/services accounted for the second highest proportions of valid complaints and NOPV letters—12 percent and 21 percent, respectively; private/membership clubs accounted for the second highest proportion of compliance checks—5 percent. Id. The divergence between percentage of valid complaints and that of NOPV letters was in part explained by the fact that a letter may have been based on more than one complaint. Id. at 12. Asked whether there was any way to distinguish between bars and restaurants, the director of the Division of Tobacco Use Prevention and Control stated: ‘There is no way to easily and reliably separate bars and restaurants. The ‘tavern without food preparation’ designation on food service licenses is voluntary. Business with liquor licenses got the bulk of the complaints, but most of those establishments are restaurants with liquor licenses and not bars as defined by the SFAA.” Email from Bonnie Mapes to Marc Linder (Aug. 31, 2009).


415 IDPH Press Release: “Smokefree Law Enforcement Efforts Ongoing” (Sept. 4,
The bar owners’ state court lawsuit, while pursuing the objective of invalidating SAA altogether, also served the purpose of outflanking the administrative enforcement process that the IDPH, ABD, and Attorney General’s office had initiated in order to secure compliance by those openly and blatantly flouting the smoking ban.\footnote{State of Iowa, Alcoholic Beverages Division, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Hearing Complaint, Docket No. D-2008-00080 (n.d. [Sept. 3, 2008]), Exh. A, on http://www.iowaabd.com/smokefree/otis_campbells.pdf.} Larry Duncan assumed a pioneering role by permitting smoking in his bar in West Burlington from the ban’s very first day of operation. From July 1 to August 9 he racked up 50 complaints.\footnote{http://www.iowa.gov/government/ag/latest_news/releases/apr_2009/Smokefree.html (visited Aug. 5, 2009).} (In comparison, his closest competitor for Iowa’s most prominent scofflaw, Brian Froehlich in Wilton, was virtually a model of compliance with only seven...
On two occasions West Burlington police officers personally observed people smoking openly inside Duncan’s bar. IDPH, based on these numerous complaints, issued him three Notices of Potential Violation; having manifestly failed to have gotten his attention, the agency informed him on August 20 that that day’s third Notice had been forwarded to local law enforcement for further action.

Coincidentally, that very evening the West Burlington city council had on its new business agenda consideration of renewing the liquor license for Duncan’s bar. Because of the many complaints that the city had received about Duncan’s failure to comply with the smoking ban, what might otherwise have been a routine renewal process turned contentious, thrusting the southeast town of about 3,000 near the Mississippi River onto “the front lines” of the smoking battle. The 66-year-old Duncan, who regarded the complaints as “badges of honor in the war to repeal” a law that had been “rammed down small business owners’ throats “in order to benefit a handful of people,” apparently did not view the untold number of customers whose exposure to sickening secondhand smoke he had made possible over 14 years as having in any way undermined his self-vindicated role of “good community steward.” Duncan may have expected all Iowa constitution lovers to “stand up and fight this,” but the violations had in fact prompted police chief Alex Oblein to decline to sign off on the renewal. Because the city council was already known not to be of one mind on the matter, and every day people had been calling the city administration “mad” that Duncan had been getting away with his civil disobedience, while others were saying “Screw the State,” the city administrator expected the polarization to generate a big crowd packing city hall.

The three-hour debate did not disappoint—at least not for Duncan, whose license was set to expire on August 30. In a letter to the council, Oblein had recommended non-renewal based on the numerous complaints and potential violations, some of which he had personally observed, when, at the request of the ABD, he performed an on-site inspection during which he found customers


smoking, ash trays on tables, and no required no-smoking signs posted. Oblein wanted it clearly understood—saying it earlier that morning at a statewide IDPH public hearing (via the fiber optic Iowa Communications Network) on amendments to the proposed SAA rules and repeating it at the city council meeting—that he did not want to be the smoking police, especially in businesses.421 The willfulness of Duncan’s violations was the decisive point for the police chief.422 Council member Rick Raleigh, having seen this kind of law work in other states, felt that Duncan should comply with it; in contrast, his colleague Rod Crowner understood Oblein’s position, but nevertheless did not feel that the city should revoke a liquor license for a smoking violation. To the council an unrepentant Duncan “openly stated that he will continue to allow patrons to smoke....”423 To be sure, he was sufficiently in touch with local political realities, especially after the mayor had chided both the state and Duncan for putting the city in a “‘bad situation,’” to know to apologize to the mayor and council for having “placed them in the middle of his crusade against the smoking ban.”424 Despite the police chief’s having personally witnessed violations and Duncan’s just having publicly admitted that he had violated and would continue to violate the law, Eichhorn asked the council to approve the license because the bar had never been “officially sited [sic] for breaking the law. ... Until a judicial magistrate determines there is a violation, he feels that no violation exists.” A number of bar owners, including Sturgis, also spoke up on Duncan’s behalf. Although the entire council agreed that Duncan should comply with the until it was changed, three of the four members present nevertheless voted to approve the renewal.425 Ostensibly the reason for the approval was, as one of the three-

421Iowa Department of Public Health, Public Hearing for Amendments to Proposed Rules to the Smokefree Air Act (Aug. 20, 2008) (based on notes taken at the Iowa City site); Christinia Crippes, “Ban Continues to Divide People,” Hawk Eye (Burlington), Aug. 21, 2008) (1A) (NewsBank); Jeff Abell, “Council Gives Bar Nod,” Hawk Eye (Burlington), Aug. 21, 2008 (1A) (NewsBank).


424Jeff Abell, “Council Gives Bar Nod,” Hawk Eye (Burlington), Aug. 21, 2008 (1A) (NewsBank).

425City of West Burlington, Regular Council Meeting, [Minutes], Oct. 20, 2008, on http://www.westburlington/archive/minutes/2008/Aug%2020.pdf. Despite his public admissions against interest, Duncan claimed that he had “‘not been given due process...and these complaints are suspect.’” Jeff Abell, “Council Gives Bar Nod,” Hawk Eye (Burlington), Aug. 21, 2008 (1A) (NewsBank).
member majority, "amid thunderous applause," put it, that "I don't have anything in front of me that shows me...any liquor violations. ... If the state was very serious about wanting to enforce this [smoking law], they could do it at any time. I don't have a lot of faith in my state government. I don't see where little West Burlington, Iowa, should be the one to take this up." 426 Seemingly, only German immigrant, Mayor Hans Trousil427 understood the relevant provisions of the Iowa Code: "Part of the liquor license criteria is that someone who wants a liquor license is not supposed to violate any laws. Any way you cut it, he has violated the law. I don't think the right message is allowing a bar across the street from City Hall to continue to break the law." 428 (Police Chief Oblein also understood, but nevertheless did not fault the council for renewing Duncan’s license, even though it sent “the wrong message to the community.”) 429 Unsurprisingly, given this attitude, the city government did not believe that it itself needed to comply with the law: it permitted smoking on the steps of city hall—in which many in the audience engaged during a break 430—in violation of the law’s prohibition of smoking on the grounds of public buildings. 431

To the West Burlington city council’s abdication of its responsibility to “take action against a local bar owner who refuses to obey a statewide smoking ban” IDPH responded the very next day that it was “very concerned” about Duncan’s blatant disregard of the law, but apart from indicating that the department was discussing the matter with the city and on the state level, its spokesperson declined to reveal what its next steps would be, although he mentioned the possibility of the state’s denying the license for noncompliance. Following in the

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427 http://www.westburlington.org/city_council/bios_photos.htm

428 Jeff Abell, “State to Decide Action Against Bar Owner,” *Hawk Eye* (Burlington), Aug. 22, 2008 (1A) (NewsBank). According to Iowa Code § 123.30(2) (2008): “No liquor control license shall be issued for premises which do not conform to all applicable laws, ordinances, resolutions, and health and fire regulations.” According to IAC § 185—4.2(1) (2008): “The interior and exterior of all licensed premises shall be kept clean, free of litter or rubbish, painted and in good repair. Licensees and permittees shall at all times keep and maintain their respective premises in compliance with the laws, orders, ordinances and rules of the state, county and city health and fire departments and the Iowa department of inspections and appeals.”


431 H.F. 2212, § 3(2)(e); IAC, Rule 641—153.2.
foot (in mouth) steps of President George W. Bush, Duncan exulted: “‘Bring it on. If it stinks, it stinks, and this law stinks to high heaven.’” He then reverted to incoherence by admitting, yet again, that he was allowing customers to smoke in his bar, and then about-facing and, once again, complaining that: “‘I haven’t violated anything. ... I have never been told who my accusers are. I have never been given due process.’” Duncan’s self-crucifixion campaign, which he persisted, ad nauseam, in characterizing as “‘about protecting the constitutional rights of you, me and everybody in Iowa,’”432 did not sit well with at least some of his competitors in adjoining Burlington. One of them remarked that it “‘really irks the (expletive) out of me. I don’t support the smoking law either, but I’m following it. ... I’m losing customers because they can smoke over there.’”433

Another who agreed with Duncan that the law was unconstitutional but was nevertheless complying with it “‘because it’s the law,’”433 resented the fact that smokers’ migration to Duncan’s bar was “‘taking money out of my pocket.’” As was the case with others of his public statements, Duncan’s reaction to the charge that renewal of his license had created “‘an unfair playing field’” that benefited (only) him stood reality on its head: asserting that “the law was meant to pit bar owners against each other,” he “suggested other bar owners follow his lead”—an invitation to join his race to the bottom that was not universally welcomed.433

On September 3 the Iowa Department of Public Safety filed a complaint with the ABD administrator declaring that 48 public complaints had been filed against Duncan’s bar and grill alleging that he had permitted smoking on the premises and requesting that the administrator suspend and/or revoke Duncan’s license for his “open and continuing failure to comply with all applicable provisions of the Smokefree Air Act.”434 Rather than forcefully warning scofflaws that the end of their civil disobedience was imminent, ABD Administrator Walding merely observed that the attorney general’s filing of the complaint put business owners on notice that the state was “prepared to enforce the Smokefree Air Act.” He did add, however, that Duncan was “‘paving the way’” for six more bar owners who were going down the same road to a noncompliance hearing. Reveling in the opportunity to play a B-movie Robin Hoodish desperado, Duncan wallowed in nonsense and incoherence: incapable of accepting the state’s initiation of the

432Jeff Abell, “State to Decide Action Against Bar Owner,” Hawk Eye (Burlington), Aug. 22, 2008 (1A) (NewsBank).
revocation proceeding as the straightforward (albeit overdue) enforcement action it was, he by turns accused the government of “trying to make an example of him to scare others from joining his cause” and “trying to force me to eat crow and bow down to them like they were the queen.” But this self-sacrificer was having none of it: “I’m standing up for everyone in Iowa. I am fighting for everyone who loves the constitution.”435 In fact, he was not even speaking for all bar owners: “He’s angered competitors who are following the controversial law. Doesn’t care.”436 Walding, however, was as good as his word: a week later the Department of Public Safety filed a virtually identical complaint against Froehlich.437

And on Larry Duncan’s violations went. At the second law enforcement site visit that Chief Oblein made on September 24 he again observed customers openly smoking (and again he failed to issue them citations) and Duncan confirmed to Oblein on the spot that he knew about the violations. Then on October 30, the day before Duncan’s administrative hearing on the complaint, Oblein witnessed another customer smoking whom no employee asked to stop, but the police chief cited neither the smokers nor the employees nor Duncan.438 A week before the October 31 hearing, Eichhorn filed a complaint in federal court for the Southern District of Iowa largely replicating the IBOC/COBRA Polk County case, whose focus on agency rules had been procedurally stymied. The federal case was designed with the urgent practical purpose of preempting the administrative enforcement process that might lead to the revocation of Duncan’s liquor license—or, as the Iowa Attorney General put it: “Rather than seek to fully litigate the merits of its statutory and constitutional claims through the ongoing administrative disciplinary action, the Plaintiff opted instead to pursue federal litigation.”439 It alleged that the state agency action was unconstitutional and

439Brief in Support of Motion to Dismiss at 3, Coordinated Estate Services, Inc., d/b/a
denied Duncan his procedural due process rights under SAA and that the statute itself violated the U.S. Constitution both for the same reason and because it violated the latter’s equal protection, privileges and immunities, and interstate commerce clauses.\footnote{Complaint at 1-2, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, Oct. 24, 2008).}

Eichhorn was unable to stitch together this pleading without resort to such falsification as asserting that the law “requires” employers and owners “to affirmatively stop smokers” from smoking in prohibited places,\footnote{Complaint at 6, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, Oct. 24, 2008).} whereas in fact the statute merely required them to inform smokers that the latter were violating the law,\footnote{Iowa Code § 142D.8(3) (2009).} and the IDPH rules added the requirement that they “request that the smokers stop smoking immediately.” If smokers persisted, employers/owners had no obligation to do anything—not even to call the police or inform IDPH.\footnote{IAC § 641-153.5(4) (2008).}

Disingenuousness also characterized Duncan-Eichhorn’s assertion that the Smokefree Air Act violated procedural due process because its “enforcement system deprives the alleged violator of the names of witnesses..., thereby denying the alleged violator the right to confront witnesses....”\footnote{Application for Temporary Restraining Order and Preliminary Injunction at 3, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, Oct. 24, 2008).} Since Duncan not only admitted, but proudly, publicly, and ad nauseam boasted that he was permitting smoking “in order to get cited and open the door to a challenge in state court,”\footnote{Amy Lorentzen, “Judge Considers Case of Bar Violating Smoking Ban,” Clinton Herald, Nov. 1, 2008, on http://www.clintonherald.com (visited July 18, 2009). Why a week after Eichhorn had filed the federal court action Duncan was referring to state court is unclear.} and the ALJ in his license suspension/revocation proceeding found that he “concedes that he and his employees have been permitting customers to smoke on the licensed premises,”\footnote{Proposed Decision at 9, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2008-00080 (Iowa Department of Commerce, Alcoholic Beverages Div., Jan. 2, 2009).} he had no need to confront witnesses: his defense of unconstitutionality—which had nothing to do with the police chief’s personally having observed him violating the law—could not, pursuant to the Iowa Supreme
Court precedent, be adjudicated by an administrative agency, but could be raised and preserved for judicial review. In light of his continual self-glorification for permitting smoking in defiance of the law, his sworn affidavit complaining that “the State is waging a campaign of accusations to hold my business...up to public ridicule and scorn without allowing us any way of disputing their accusations” was nonsensical.

Duncan’s commerce clause claim was not only a product of a desperate throwing-in-the-kitchen-sink approach, but also, once again, clearly underscored that resisting bar owners’ real demand was not for a ‘level playing field,’ but for at-will smoking. The section on the commerce clause, factoids supporting which occupied 13 of the complaint’s 32 pages, insisted that not only the Smokefree Air Act, but also the state’s recently increased cigarette tax and even its fire-safe cigarette law were part and parcel of the state’s “systematic effort to burden and discriminate against tobacco products,” which was unconstitutional because the “asserted public health concern is insufficient to permit this violation of the Commerce Clause, in that the factual basis for its claims are disputed by the United States, members of the scientific community, the Courts, and others”—assertions that revealed Eichhorn as a master in equal measure of constitutional commerce clause law, the science of the health consequences of involuntary smoke exposure, and elementary English grammar.

All this flat-earthism served only as filler to get to the point, which was a request for a preliminary injunction (which had been unavailing before Judge Staskal) to “bar the...ABD from conducting an evidentiary hearing on the merits of the pending DPS complaint” and to spare Duncan revocation of his liquor license. The district court denied Duncan’s motion for a temporary restraining

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447 Salsbury Laboratories v Iowa Dept of Environmental Quality, 276 NW2d 830, 836 (Iowa 1979).
order on October 30.\textsuperscript{453}

The following day Duncan had his hearing before the ALJ in his liquor license case. In case Duncan felt deprived of the opportunity to confront witnesses, Police Chief Oblein appeared and testified that just the previous day he had, at the state’s request, done a site check at Duncan’s bar, where he observed smoking in prohibited areas, the presence of ashtrays, and the absence of no-smoking signs. To be sure, Oblein added that no citations had been issued against the bar because the West Burlington city council believed that the state should conduct enforcement: “Duncan has made it clear he’s going to challenge the smoking ban, and the city can’t afford to pursue the case. ‘They made the problem, they should be the one to handle it.’”\textsuperscript{454} The real reason for the city government’s refusal to issue a citation was that “West Burlington does not have a city attorney, and the city council fears it could cost them thousands of dollars in attorney fees if they issue a citation to the licensee, and it becomes a test case for the constitutionality of the Smokefree Air Act.”\textsuperscript{455} In contrast, if West Burlington prevailed, “the city would only get a $100 fine.”\textsuperscript{456}

On January 2, 2009, state Administrative Law Judge Margaret LaMarche ordered that Duncan’s liquor license be suspended for a minimum of 30 days for his intentional violations of the Smokefree Air Act and his “defiance” of a duly enacted statute because he “disagreed[d] with the legislature’s rationale for a statute....” The ALJ thereby accepted the Department of Public Safety’s argument that Duncan’s open defiance of the health law and rules applicable to licensed premises requires a penalty sufficient to deter similar violations by other liquor licensees.” This consideration was reinforced by the patent unfairness of allowing Duncan to gain business at the expense of compliant competitors. At the end of the minimum 30-day period the suspension, LaMarche ordered, “may be

\textsuperscript{453}Clerk’s Court Minutes, Coordinated Estate Services, Inc. v Walding, Case No. 3:08-cv-00138 (S.D. Iowa, Oct. 30, 2008). Although the minutes stated merely that the motion had been denied, the judge, according to a later brief submitted by the state, citing the \textit{Younger} abstention doctrine, allowed the ABD’s administrative disciplinary action against Duncan to proceed. Brief in Support of Motion to Dismiss at 3, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138, 2009 WL 960942 (S.D. Iowa, Jan. 20, 2009).


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lifted” if Duncan removed all ashtrays, posted the required no-smoking signs, and gave ABD “a sworn written statement of commitment to comply with the provisions of the Iowa Smokefree Air Act at all times in the future,” absent which “the suspension shall continue until” Duncan demonstrated compliance.457 (The same day the ALJ issued a proposed decision in Froehlich’s case ordering a 21-day suspension.)458 Still unbowed and having yet to ingest the slightest sliver of crow, Duncan manfully told the press that he would continue to fight the smoking ban “until he draws his last breath.” Nor could anything less be expected from Iowans’ outsized hero who, along with his wife and lawyer Bunger, “wor[ied] about what other personal freedoms will be taken away if people don’t fight this.” Just about the only thing that could “frustrate[ ]” this champion of civic virtue was that he had not realized that instead, as his wife put it, of getting a $100 ticket and going to court “so the people can tell us if it’s right or wrong,” he was now on the verge of having his liquor license yanked on a bar that netted (after sales taxes) $1.2 million annually.460

This feigned surprise was typical for bar owners. A somewhat more candid tale of woe was told by one of Duncan’s confreres near Des Moines: “‘I thought it was going to be like the seat belt law, you know, or some of the other laws they don’t enforce’.... He admits he didn’t pay much attention to Iowa’s Smoke Free Air Act and let customers light up in his bar up until last month. ‘I was just

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457Proposed Decision at 17, 18-19, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2008-00080 (Iowa Department of Commerce, Alcoholic Beverages Div., Jan. 2, 2009). SAA provides that a violation by an owner of a covered place “may result in the suspension or revocation of any permit or license issued to the person for the premises on which the violation occurred.” Iowa Code § 142D.9(4) (2009).


seeing what they were gonna do. I thought the first fine was $100. If I knew I was going to lose my license, we would never smoke in there.” Walding captured their attitude: “‘It was sort of a dare, show us what you were going to do.’”

A $1,000 fine and a week’s suspension of the liquor license became a teachable moment for the violator: “‘We’ll make sure no one smokes in there.’”

It is difficult to reconstruct the logic that underlay owners’ claims that the Smokefree Air Act failed to put them on notice as to the potential economic consequences of permitting smoking in their bars. After all, the statute clearly specified that: “If a public place is subject to any state or political subdivision inspection process or is under contract with the state or a political subdivision, the person performing the inspection shall assess compliance with the requirements of this chapter and shall report any violations to the department of public health or the department’s designee.”

...And even more unmistakably and transparently it brought to readers’ attention that: “In addition to the penalties established in this section, violation of this chapter by a person who owns, operates, manages, or who otherwise has custody or control of a public place, place of employment, area declared a nonsmoking place pursuant to section 142D.5, or outdoor area regulated under this chapter may result in the suspension or revocation of any permit or license issued to the person for the premises on which the violation occurred.”

The claim of unfair surprise was, moreover, completely undermined...
by the full quotation, in italics, of this latter provision in the Notice of Potential Violation letters that the IDPH sent to bar owners about unlawful smoking on whose premises the department had received complaints.\textsuperscript{466}

The critical importance of enforcement of the Smokefree Air Act at the state government level became obvious in the wake of the fiasco in West Burlington, where the city council not only renewed scofflaw Duncan’s liquor license, but the city government “decided not to enforce the law at all” because, not having a staff attorney, it would have to pay an attorney $180 an hour to secure a $100 penalty from a non-compliant bar owner. As City Administrator Dan Gifford told the attorney general’s office: “‘You have attorneys that work for you. You guys come and do it because this is your law.’”\textsuperscript{467} Perhaps in reaction to such resistance, in November Attorney General Miller sent a letter to Iowa’s 99 county attorneys explaining that in “the event that civil enforcement is necessary, your assistance will be essential. ... It is in everyone’s best interests to have local city or county attorneys pursue these civil actions wherever possible. However,...where local attorneys are...unwilling to prosecute retail violators, then my office will undertake the necessary action to enforce the law.” In case concern for public health and public service was not persuasive, Miller reminded the attorneys that the law provided that “if local authorities are involved in the enforcement...any civil penalties levied shall be deposited in the general fund of the...city or county.”\textsuperscript{468} Ironically, parts of this letter were taken verbatim from a similar letter that Miller had sent to city and county and attorneys in 2001 requesting their assistance in prosecuting retailers who sold tobacco products to minors and announcing that if they were unwilling, Assistant Attorney General...
Local government refusal to enforce SAA appeared to assume a more ominous level at the outset of 2009 when County Attorney Mark Walk of Mitchell County (along the Minnesota border) wrote a letter to Attorney General Miller declaring that “he thinks the law is unjust, and that he won’t enforce it until it applies to all workplaces.” Despite this appeal to equal protection, Walk also adopted a position long propagated by cigarette companies and more recently picked up bar owners: he regarded the ban as “unjust because individual business owners are being denied the opportunity to decide whether a legal product can be consumed in their businesses.” In conformity with the manufacturers’ old voluntarist line, he also allowed as if a bar owner chose to prohibit smoking and asked the local authorities to pursue a customer who was smoking, “we would” (though in fact residents told the press that they were unaware of any violations despite Walk’s “promise not to penalize them”). Republican Senate Minority Leader Paul McKinley, who found the law “very, very troubling,” refused to pass judgment on officeholders who had to determine for themselves whether they were “doing the right thing.” In sharp contrast, his Democratic counterpart, Michael Gronstal, was “personally annoyed that county attorneys are unwilling to enforce a duly passed state law, whether they like it or not. If they want to pass laws, they should run for the Legislature.” Taking a longer view, Gronstal remarked: “Certainly this law is fairly controversial, but I’m reasonably confident that over a relatively short time most folks will come to their senses and say, “I guess we have a legal responsibility to enforce this law.” ... After a bar or two lose their liquor licenses, any scofflaw bars will begin obeying the law, Gronstal predicted. ‘I think it’ll take a little while for everybody to come on board...but I think they will when people realize the law isn’t going away.’

Walk may, at least in his uninhibited loquaciousness, have been an outlier. (In April, after a state senator had accused Attorney General Miller of hypocrisy for threatening to remove from office a county recorder who refused to issue a marriage license to a same-sex couple but not Walk, the latter sent out an email stating: “I have not refused to enforce the smoking ban,’...adding that he had assisted the Mitchell County Department of Health in enforcing the ban. ‘...I
have stated that in certain situations I felt that the law was not proper and would not enforce it in those situations; however, that situation has never occurred. To the best of my knowledge, Mitchell County is 100 percent in compliance with the law. My stand was largely symbolic. It was to bring attention to a law that was influenced by the tremendous power of the gambling industry.”) However, seven months into the law the Des Moines Register reported that “in certain parts of Iowa” smokers knew that “they can defy the smoking ban—and local authorities won’t do much to stop them.” For example, in Hampton, in north-central Iowa, “police have never dished out a $50 ticket although everyone from City Council members to the police chief has known for months that bar-stool rebels there are flouting the law.” The police chief’s statement that it was not his job to enforce the law resonated with a Republican city council member and smoker who regarded the ban as a “‘joke’.... If you don’t want to see nude dancing, don’t go to a strip club. If you don’t want to smell smoke, don’t go to a bar.” A call to the state by a Democratic nonsmoking council member prompted the police chief to backtrack to the extent that he agreed at the very least to “order his officers not to walk away from an obvious violation.” The Republican sheriff of a small county on the Missouri border was not reluctant to share with the press his disagreement with the law, which was “‘just another infringement on private businesses’ rights,’” though he would check out a smoking complaint if state officials asked him to do so. Statewide, although violations had been “spotted at 460 businesses and other public places...local authorities have not taken action against a single one.” Such inaction, whether caused by “the expense of enforcement...or sheer distaste for the law itself,” prompted Bonnie Mapes to lament that “[w]hat’s breaking down at this point is the local action, the city and county attorneys taking action.” Nevertheless, based on a total of 1,866 complaints of potential violations, IDPH sent out a first warning letter to those 460 businesses; that they represented not even one percent of all 82,000 covered workplaces could also be regarded as an indicator of widespread compliance (rather than widespread acquiescence in or collusion with widespread violations).

Of the 50 hearing complaints against liquor licensees that the attorney general filed with ABD on behalf of the Department of Public Safety through the beginning of August 2009, the six bars located in Burlington and West Burlington
accounted for more than those of any other city (the four in Waterloo being the second highest number) and Des Moines County also led all other counties with seven. In all, the southeastern Mississippi River counties running from Clinton to Lee accounted for 14 and, if Wapello (Ottumwa) is included, the southeastern quadrant accounted for 18 hearing complaints. In all, the targeted bars were located in only 27 of Iowa’s 99 counties. In the entire western part of the state (that is, west of Polk County), only six of 43 counties were affected, only one of which involved more than one hearing complaint. Outside of southeastern Iowa, many of the remaining hearing complaints were filed against bars in smaller towns. Interestingly, no hearing complaints were filed against liquor licensees in any of the three state university college towns (Iowa City, Ames, or Cedar Falls), which were bar rich. To be sure, whether these geographic distributions


477 ABD, “Iowa SFAA Status Report” (Aug. 4, 2009), on http://www.iowabdc.com/files/client_files/211/1129/SFAAcases.pdf. If Appanoose, Monroe, Mahaska, and Poweshiek counties in the southeastern quadrant are included, the total reached 24. The only county between Clinton and Lee in which no bar was the object of a hearing complaint was Louisa, although IDPH did refer one non-compliant bar to the attorney general’s office, which by Aug. 4, 2009 had not filed a hearing complaint. The only western county with more than one hearing complaint was Dickinson on the Minnesota border; all three complaints involved bars in the Lake Okoboji resort area. Ironically, seven weeks into the operation of the new law, Republican Representative Mike May related that none of the 25 bars in the vacation town of Okoboji (where he himself owned a motel/resort) had complained to him. Telephone interview with Mike May, Spirit Lake (Aug. 18, 2008). Yet as early as July 13, 2008, the police observed people smoking
reflected differential degrees of compliance, collusion, indifference, or intimidation of customers, or sheer serendipity is unknown.

Bar owner resistance in small towns away from the Mississippi River may be illustrated by Centerville, a county seat of about 6,000 inhabitants in south-central Iowa near the Missouri border. Gordie Long was another constitutional literalist who believed that neither she nor any other barkeeper deserved a liquor license suspension for violating the Smokefree Air Act, which was “‘unjust’” and “‘unfair’”: “‘What’s fair for one is fair for all is what the Constitution says.’” One of her local competitors may have understood that after an adjustment customers would “‘end up getting used to’” the ban, but Long publicly announced her intention to violate the law from the very first day:

“They’re trying to take away my livelihood and it makes me damn mad.... I’m more than aware that I’m going to lose customers. I have a lot customers that don’t smoke at home, they smoke at the bar. It’s definitely going to hurt business. I’m 61 years old and all I want to do is retire from here but now it’s going to be hard”.... Long has proof that some of her customers feel the same way. She has a petition with over 100 signatures that she recently sent to the state. “I buy my cigarette license and I buy my alcohol license. Now they’re walking in my door, telling me what I can and can’t do at a place that I pay taxes on”.... Long also feels that it’s unfair that smoking is still allowed at places like casinos. “I know I pay less taxes than a casino but I still say that’s discrimination. As far as I’m concerned we run the same type of business....” Although the smoking ban went into effect at 12:01 a.m. this morning, Long has other plans. “My ash trays are going to be out. I pay the taxes from the front door to the back door”....

Already on July 11 IDPH sent Long a first notice of potential violation based on a customer’s observation of smoking on July 2 and lack of no-smoking signs. After having racked up several more complaints in short order, Long received a second notice of potential violation, which was being forwarded to local law enforcement for further action. On August 27 a Centerville police officer, in the bar on an unrelated matter, smelled smoke, saw ashtrays with butts on the bar, and


customers with cigarette packs in front of them. When told to get rid of the ashtrays and that smoking was prohibited, the quick-witted owner, inverting the National Rifle Association’s mantra, replied: “‘we’re not smoking, the cigarettes are.’” Nor was the treasure chest of humor exhausted: two ABD investigators making an enforcement site visit on September 15 observed the front door sporting a (non-conforming) sign stating “‘no smoking courtesy of the communist party.’” Despite the visibility of the smoke in the bar and dining room Long insisted that “she was trying to comply with the law....” And on and on it went for months. When a food inspector in late November saw three customers and the bartender smoking and told the latter that she would report the smoking, the bartender replied: “‘[W]hatever[,] we have been turned in 3 other times.’” As late as January 2009 Long, not having grown tired of her joke, was still displaying only her communist party signs. At length, the state government did lose its patience: in April an ALJ issued a proposed order suspending her liquor license for 30 days,\(^\text{480}\) which, counseled by the ubiquitous Darwin Bünger, she appealed.\(^\text{481}\) Interesting light is shed on the evolution of the enforcement strategy being pursued by the Attorney General’s Office by an unusual proceeding that bypassed enforcement by means of liquor license suspension/revocation by the ABD. The Attorney General’s office had sent Long a “petition it was preparing to file in Appanoose County District Court alleging a first violation” on Aug. 27. Long signed a settlement agreement and paid a $100 penalty pursuant to § 9(2) of SAA\(^\text{482}\) in lieu of going to court.\(^\text{483}\) Asked about this unusual procedure,\(^\text{484}\) the


\(^{484}\)In an April 2008 press release Attorney General Miller stated that his office had sought civil penalties for 11 violations of the Smokefree Air Act in addition to liquor license cases. Office of the Attorney General, “Liquor Licenses Revoked, Suspended for Violations of the Smokefree Air Act,” Apr. 8, 2009, on http://www.iowa.gov/government/ag/latest_news/releases/apr_2009/Liquor_Licenses_Revoked.html. Of the other 10 cases five were settled and the penalty paid; four were deferred or dropped
public information officer replied: “The SFAA provides a number of enforcement tools, including a civil penalty. When Public Health referred the Gordie’s case to us, we offered Mr. [sic] Long the chance to pay a civil penalty for a [sic] SFAA violation. Mr. [sic] Long paid the penalty, and thus we did not have to file the civil suit in Appanoose County. Subsequently, Mr. [sic] Long’s repeated violations were referred to ABD for liquor license action. We’ve learned that liquor license actions are our most effective deterrent to violations by establishments with such licenses.”

One of the attorney general’s learning moments may have involved high-profile resister Brian Froehlich, who did not begin to take the law seriously until he realized that his liquor license and thus the whole basis of his business was at risk: “Froehlich continued to permit smoking on the licensed premises after the law went into effect. Mr. Froehlich thought that his violation would be punishable by a $100 monetary penalty and testified that he was willing to ‘take the $100 fine to protect my business as long as I could.”

because the business closed or a new owner had taken over; and one was referred to the Clinton County attorney, who won a judgment. Two of the five settling businesses were non-bars USF Holland and Electrolux. Email from Bill Roach, Iowa Attorney General’s Office, to Marc Linder (Aug. 3, 2009). The judgment in the only case that was actually filed was a small claim for $100 plus $113.88 in costs. State of Iowa v Grafitti, Inc., Case 07231 SCSC048786 (Clinton Cty, July 13, 2009), on http://www.iowacourts.state.ia.us/ESAWebApp/TIndexFrm.

Email from Robert Brammer to Marc Linder (July 28, 2009).

State of Iowa, Alcoholic Beverages Division, In re Froehlich Properties, Inc. d/b/a Fro’s, Proposed Decision at 3, Docket No. D-2008-00089 (Jan. 2, 2009), on http://www.iowaabd.com/smokefree/fros_proposed_decision.pdf. Although Froehlich admitted that “[t]hrough public documents and other sources it has been shown that...Fro’s did violate the Iowa Smoke Free Air Act,” his use of the passive voice masked his own responsibility for his strategic blunder: “It has always been understood that any violation of the Iowa Smoke Free Air Act was to be handled by the IDPH and that civil penalties for not enforcing [i.e., complying with] were to come from this department.” Since Froehlich had violated the law daily for months, his outrage at not having received three citations/money penalties before rightfully having his liquor license suspended/revoked was misplaced. State of Iowa, Alcoholic Beverages Division, In re Froehlich Properties, Inc. d/b/a Fro’s, Respondents [sic] Reply Brief and Argument at 1, 2, Docket No. D-2008-00089 (n.d. [Jan. 30, 2009]), on http://www.iowaabd.com/files/client_files/711/1176/fros_frosbrief.pdf. His having jumped to this false conclusion was akin to his wife’s (and co-owner’s) explanation that since Judge Staskal had taken no action at the hearing on August 1, 2008, they put the ashtrays back out on the bar. State of Iowa, Alcoholic Beverages Division, In re Froehlich Properties, Inc. d/b/a Fro’s, Proposed Decision at 6, Docket No. D-2008-00089 (n.d. [Jan. 2, 2009]), on http://www.iowaabd.com/files/client_
Arguably the most absurd effort at finding a “loophole” in the law can be credited to a topless bar in Des Moines, which became the first liquor establishment in central Iowa to place its license in jeopardy. However, it was precisely the alleged loophole’s transparently groundless character that raised the issue of the competence of IDPH’s Division of Tobacco Use and Prevention Control, which, instead of seeing through this sham instantaneously, seriously engaged with it for two months. After the enactment of the law, the owner, Rick Goulden, “studied” it, concluding that he could render smoking lawful by taking advantage of the exemption for retail tobacco stores, as implausible as that analysis might have been since such a store was statutorily defined as one used primarily for the sale of tobacco products, to which the sale of other products was incidental. Oddly, although he developed this insight without benefit of legal counsel, “[i]n making this determination, Mr. Goulden...talked with Bonnie Mapes, Director” of the Division. In order to implement this scam, Goulden “instituted certain new business practices,” which an ABD administrative law judge in a huge understatement was to characterize as “contrived.” The pivot for the hoax was simply hanging a sign declaring the premises a “‘private dance club/tobacco outlet, smoking optional,’” followed by the sale of single cigarettes and “‘cigarette and drink combos,’” the pricing of which was designed to enable him to meet IDPH’s rule defining “incidental to the sale of tobacco products” as not more than 20 percent of the tobacco store’s gross revenues. Astonishingly, Mapes—according to Goulden’s testimony that

files/854/458/fros_proposed_decision.pdf


489 H.F. 2212, § 4(3).

490 H.F. 2212, § 2(18).


the ALJ cited without indicating that IDPH challenged it—instead of informing him that he was engaged in an unlawful act, appeared to be operating as his business consultant: “Ms. Mapes expressed doubt to Mr. Goulden that his pricing of single cigarettes would achieve the desired result as she thought his prices were too high and a deterrent to sales.” Undeterred by the advice, Goulden proceeded to permit smoking in his make-believe tobacco store, prompting a first notice of potential violation as early as July 11 based on law enforcement officers’ observation of smoking on July 6 and racking up a total of 10 complaints through August 28. A second notice of potential violation followed on August 29 after law enforcement officers on August 19 had not only observed further smoking, but had been told by the bartender that the “establishment is a ‘safe haven for smokers’” and that “the owner did not intend to comply with the Act because he was getting licensed as a retail tobacco store.” And so it went until a third notice of potential violation was issued at the end of September for smoking observed on September 5 by the Polk County sheriff’s office, which also issued five civil citations to persons violating the law. Shortly after this inspection Goulden again spoke to Mapes, who finally told him that “she had been researching whether he could sell single cigarettes at his establishment” and informed him that Iowa Code chapter 453A prohibited their sale. After writing down the code section that Mapes’s prodigious researches had unearthed, Goulden stopped selling cigarettes and started complying with SAA. Nevertheless, the ABD ALJ issued a proposed decision ordering a 21-day liquor license suspension for the earlier repeated violations after the Department of Public Safety had argued that a penalty was required both to deter similar violations by other licensees and to undo the unfairness involved in allowing Goulden to realize an economic benefit by virtue of violating the law.

495 State of Iowa, Alcoholic Beverages Division, In re Boot Hill Enterprises, Inc., d/b/a Outer Limits, Proposed Decision at 5, 6, 7, 8, Docket No. D-2008-00092 (Apr. 21, 2009), on http://www.iowaabd.com/smokefree/outerlimits_proposed.pdf. The ALJ interpreted the bartender’s statement that the owners were trying to get a tobacco sales license as an “admission by staff of the licensee...that licensee had actual knowledge that it did not, as yet, qualify for the retail tobacco store exemption.” Id. at 15.

496 State of Iowa, Alcoholic Beverages Division, In re Boot Hill Enterprises, Inc., d/b/a Outer Limits, Proposed Decision at 15-16, Docket No. D-2008-00092 ([Apr. 21, 2009]), on http://www.iowaabd.com/smokefree/outerlimits_proposed.pdf. Preposterously, Goulden’s lawyer claimed in his brief that the ALJ’s decision “supports the fact that the Outer Limits did qualify as an exempt tobacco outlet. The problem with Rick Goulden’s effort is that he was selling individual cigarettes which is illegal in Iowa. Outer Limits’ position is that it did not violate the Smokefree Air Act—period.” State of Iowa, Alcoholic Beverages Division, In re Boot Hill Enterprises, Inc., d/b/a Outer Limits,
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(That Mapes had been unaware of the ban on selling cigarettes in packages with fewer than 20 was both astonishing and puzzling since it had been enacted on her watch just a year earlier as part of the very high-profile bill that increased the cigarette tax from 36 cents to $1.36. 497 Far from being some obscure and minor provision, this prohibition was an increasingly important element of the national tobacco control movement’s program for making cigarettes less accessible to children, for whom the purchase of a single cigarette was a low-price first-step. For this reason the Institute of Medicine in 1994 had recommended passage of such bans by all the states 498 and the Food and Drug Administration had included it in its tobacco regulations in 1995, which were struck down. 499 Nevertheless by 2008 the American Lung Association was able to report: “Twenty-two states prohibit the sale of cigarettes in packs containing less than 20 cigarettes. Nineteen states and the District of Columbia prohibit the sale of single cigarettes. Fourteen states require cigarettes to be sold in a sealed package that is provided by the manufacturer and that contains the health warning required by federal law. Eleven states require cigarettes to be sold in the original, sealed package.” 500 In Iowa, however, the triggering motivation for this prohibitory control lay elsewhere: lacking in the original Senate Study Bill 1055, 501 it was requested by the Iowa Department of Revenue in order to “handle an issue related to the distribution of samples that are less than 20 per pack,” which had been “a problem for the Department in the past.” 502 This administrative tax collection issue 503 coincided with the attorney general’s...
“concern[ ] with single cigarettes and other smaller sizes being more readily available and thus easier to obtain by underage smokers.” At the time IDPH was also aware of the issue and its proposed resolution.

In the event, more and more bar owners in Burlington decided to emulate Duncan in leveling down rather than up. By December 2008, Des Moines County (of which Burlington was the county seat), which was only the state’s 12th largest in terms of population, had received the second greatest number of notices of violation (30) behind Polk County (76), which had a population almost nine times larger (because the state capital and largest city, Des Moines, was located in it). The press conjectured that the reason may in part have been the lack of enforcement, the prime example of which was the fact that Duncan had yet to be fined or lose his liquor license. The problem in West Burlington and Burlington was exacerbated by Police Chief Oblein’s and Police Chief Dan Luettenger’s erroneous imputation of a catch-22 to the Smokefree Air Act administrative rules, according to which the police “are supposed to go in only once the owner has asked the smoking patron to leave and that person refuses.” But where owners themselves failed to comply and were “‘not calling us and saying ‘Boy I’m having a problem in here; people won’t quit smoking,’” it was “‘kind of hard for me to go in and say that person violated the law.’” As for prosecuting the business itself, IDPH was as yet unaware that any county attorney had done so. Des Moines County Attorney Pat Jackson had chosen not to prosecute such civil infractions both because he had no statutory duty to do so and was “‘pretty busy

504Email from Kris Bell, Iowa Senate Democratic Staff senior research analyst, to Marc Linder (July 30, 2009).

505Telephone interview with David Casey, Iowa Department of Revenue, administrator for tax compliance, Des Moines (July 31, 2009). Later Mapes (incorrectly) stated that: “The prohibition against selling cigarettes in packs of less than 20 was in Iowa code before the 2007 tax increase was passed. For how long before, I do not know. I assume the language was simply carried forward from the earlier code language.” When asked whether she knew where in the Code the provisions had been she replied: “No, I don’t. This is a legislative research question.” Email from Bonnie Mapes to Marc Linder (July 27, 2009). No such regulation imposing a floor on the number of cigarettes that could be sold at one time to one person existed before 2007. Telephone interview with David Casey, Des Moines (July 31, 2009).
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It is difficult to discern the interpretive logic that could have led the police chiefs to this do-nothing conclusion. After all, smoking in an area in which it is prohibited is a distinct violation independent of whether the owner complies with or violates his own duty to inform the person violating the law of the provisions of the law. Were the former’s unlawfulness dependent on owner compliance, collusion would undermine the law, such subversion being precisely the effect of Oblein’s and Luettenger’s misinterpretation. Not all police officers adopted this approach. For example, shortly after 1:00 a.m. on October 10, 2008, having been told that the police had received complaints of smoking in a certain bar, Grinnell police officer Dan Johnson looked in a window, saw two customers smoking, walked in, told both of them and the bartender that smoking was prohibited there, and issued citations to the smokers. On December 14 he returned, saw a customer smoking at the bar, who, on seeing him, extinguished her cigarette. The same bartender told Johnson that he had a highlighted copy of the law that stated that he “‘may’ ask patrons who are smoking to stop or leave.” Apparently unimpressed, Johnson issued a citation to the customer, who remarked that the bartender had never asked her to stop smoking.  

Systematic enforcement of the law was exceptionally on display in Webster City, a town of about 8,000 in central Iowa, in which the police chief, ironically, was “not necessarily in favor of the law,” did not welcome devolution of enforcement from IDPH to the local police, was chiefly concerned with the unfair competitive effects of violations by some bar owners, and did not even ticket individual smokers in bars. After learning from his night-duty sergeant that police had been finding smoking going on in bars 90 percent of the time they checked, Police Chief Mike McConnell “decided to have police officers check all of the city’s bars every night after a bar doing the more serious stuff” of criminal cases.506

506Christinia Crippes, “DMC Has 2nd Most Smoking Ban Violations,” Hawk Eye (Burlington), Dec. 13, 2008 (IA) (NewsBank). On county population, see Iowa Official Register: 2005-2006, at 304-305 (vol. 71). According to IAC § 641-153.8(2) (2008): “[T]he department designates the law enforcement authorities of the state and of each political subdivision of the state to assist with the enforcement of 2008 Iowa Acts, House File 2212. A peace officer may issue a citation in lieu of arrest pursuant to Iowa Code chapter 805 against a person who smokes in an area where smoking is prohibited pursuant to 2008 Iowa Acts, House File 2212, and such person shall pay a civil penalty pursuant to Iowa Code section 805.8C(3)”a” for each violation.”


508Telephone interview with Mike McConnell, Webster City (Aug. 7, 2009).
owner complained that a number of local bars were permitting smoking.” Then at the end of January he “sent a letter to all liquor licensees informing them that, effective February 6, 2009, the Iowa Smokefree Air Act would be strictly enforced with zero tolerance.” Not coincidentally, hearing complaints were filed in quick succession against three bars in this small town (which was, ironically, represented in the Iowa House by the law’s zealous opponent and small bar owner’s advocate, McKinley Bailey), in part as a result of the implementation of the nightly police inspections.

In Burlington, too, after ABD had issued administrative hearing complaints to four bars, city officials in April “would not intervene to stop bar owners from allowing patrons to violate” the ban. One city council member, a small-business owner who believed bar owners’ claims that allowing smoking was a “‘matter of survival,’” “railed” against the law: “I won’t support this council taking action against people who are just trying to earn a living on behalf of a stupid law like this.” The Burlington four accounted for half of the state’s recently filed complaints, bringing the statewide total to 38. The Attorney General’s office displayed flexibility cum firmness in expressing willingness to negotiate with bar owners, instancing a recent settlement with a bar in Ottumwa calling for a seven-day liquor license suspension and $1,000 fine. In the event, after Burlington native Walding’s agents verified that the bars were in compliance—“‘[i]t would be a revocable offense if they mislead us’”—within a few months a total of 22

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512 Jeff Abell, “Council Stays Out of Smoking Ban Fight,” Hawk Eye (Burlington), Apr. 1, 2009 (1A) (NewsBank).


other bars, including the four in Burlington, took the same deal.\footnote{Iowa SFAA Status Report (July 24, 2009), on http://www.iowaabd.com/smokefree/SFAA cases.pdf.}

Meanwhile, with the ALJ’s proposed sanctions against Duncan stayed pending the ABD administrator’s review,\footnote{Status Report Re: State Administrative Proceedings, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, n.d. [Apr. 6, 2009]).} on April 7 U.S. District Court Judge John Jarvey issued an order granting defendants’ motion to dismiss plaintiff’s damage claims against ABD Administrator Walding and IDPH Director Newton in their individual capacities because they had absolute immunity, but denying it as to the claim against defendant Mapes for her alleged publication of information about Duncan’s suspected violations. Consequently, because this one damages claim survived, the court, rather than dismissing Duncan’s claim for declaratory relief (that the Smokefree Air Act violated the Commerce, Equal Protection, and Privileges and Immunities Clauses of the U.S. Constitution) on the grounds that such relief would interfere with pending state administrative-judicial proceedings, as the Younger abstention doctrine would have directed, the court stayed the federal case until the state proceedings (including any state court adjudication of plaintiff’s claim that the Act was unconstitutional) were concluded.\footnote{Order at *1, *9, Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. Action Case No. 3:08-CV-138 (S.D. Iowa, n.d. [Apr. 7, 2009]).}

The very next day, April 8, 2009, Walding modified the ALJ’s order imposing a 30-day suspension as inadequate because Duncan’s “blatant, intentional and on-going violations” were a “direct assault on both the Iowa Smokefree Air Act and the Iowa Alcoholic Beverage Control Act.” Because his “open defiance of the health law and rules requires a penalty sufficient to deter similar flagrant violations” by Duncan and other licensees in the future and “Duncan’s unapologetic willingness to ignore statutes and rules applicable to the operation of Licensee’s business does not inspire confidence that the Licensee can be trusted to comply with all requirements for holding a liquor license in the future,” Walding ordered his license revoked.\footnote{Administrator’s Final Order at 15-16, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2008-00080 (Iowa Alcoholic Beverages Div., Apr. 8, 2009).} (At the same time Walding modified the ALJ’s proposed order to impose a 30- rather than a 21-day
suspension on Froehlich, which the latter called "a real kick in the knees," while repeating the cigarette industry’s longtime refrain that "[i]t’s not about smoking, it’s about the rights we keep getting taken away from us every day." 

[W]ith much reluctance but little choice Walding acted vis-a-vis a licensee who had "stated in no uncertain terms that he is unyielding in his refusal" to comply with the Smokefree Air Act and "given every indication that he would continue on with his full frontal assault" on the law “once his license is reinstated.”

Against the background of these indictments of Duncan’s absolutist positions Walding’s conciliatory about-face was surprising: he was “open to considering a future Request to Rescind Revocation and would be willing to consider reinstating” his license if he met two conditions. “First and foremost,” Duncan had to “provide assurance” to Walding that he would comply with the Smokefree Air Act (and all requirement of the Alcoholic Beverage Control Act) “at all times in the future.” And second, Duncan “will be expected to serve a period of suspension in proportion to” his violations of the two laws as later determined by Walding. In other words, Walding was leaving it up to Duncan to decide whether the revocation became permanent or “a step toward proper compliance with Iowa law.”

If Walding’s offer of a last chance was motivated by the “goal and intention” of gaining “compliance with the law” rather than handing out penalties, it did not immediately prompt any accommodation on the part of Duncan, whose initial response conformed to his media verbal m.o.: “As far as I’m concerned this administrative deal is absolutely a circus.”

In contrast, Attorney General Miller availed himself of the revocation order to warn other bar owners that the same fate awaited them: “‘Liquor license holders are obligated to obey all Iowa laws as a condition of their privilege to hold a license. We are determined to enforce this new law—because it is the law, and because it saves lives. The huge majority of Iowa businesses are obeying the


523Christinia Crippes, “Duncan’s License Revoked over Smoking Ban,” Hawk Eye (Burlington), Apr. 9 (1A) (NewsBank).
law, and we will not allow a small, vocal minority to flout the law.”**524** Miller then went on to undermine his office’s reputation for integrity and competence by making the nonsensical assertion that: “‘The adult smoking rate in the state has dropped from 19% to 14% over the last two years—in part because the Iowa Smokefree Air Act has encouraged people to quit.”**525** As Miller’s source, the *Iowa 2008 Adult Tobacco Survey*, itself noted in italics no fewer than three times: “The data for the Iowa 2008 ATS were collected from April 4 through June 9, 2008. Therefore, the findings do not provide information about changes in behaviors or attitudes of adult Iowans as a result of the Iowa Smokefree Air Act which became effective July 1, 2008.”**526** Despite the fact that the hierarchy of the Attorney General’s Office had been informed of this error,**527** Miller repeated it on the first anniversary of the effective date of the Smokefree Air Act: “‘What it’s done is contribute to an incredible drop in smoking in our state.... I don’t think it’s been highlighted enough, but smoking went from 19% of the adult population (in 2007) to 14% (in 2009).’”**528**

Revocation caused alcohol to stop flowing in his bar and forced him to admit

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525This statement was contained in the version of the press release that Assistant Attorney General Donn Stanley emailed on April 13, but appears to have been removed from the version on the AG’s website. It does appear, however, on another version of the April 8 press release: http://iowapolitics.com/index.iml?Article=154873 (visited Aug. 1, 2009). Miller also repeated it a week later in a press release on the occasion of an ALJ revocation of the license of the especially recalcitrant VFW Post in Ottumwa: http://www.iowa.gov/government/ag/latest_news/releases/apr_2009/Smokefree_Ottumwa.html (visited May 22, 2009). Miller’s nonsensical claim was embellished by Special Assistant Attorney General Donald Stanley, who asserted that the drop was “due in no small part to the Iowa Smoke Free Air Act....” Email from Donald Stanley to Marc Linder (Apr. 13, 2009).

526G. Lutz et al., *Iowa 2008 Adult Tobacco Survey* vii, 37, 41 (Feb. 2009), on http://www.idph.state.ia.us/tobacco/common/pdf/ATS_2008_Final_Draft.pdf. IDPH’s tobacco cessation coordinator did not even expect the smoking ban law to have a large impact on smoking prevalence: “‘[W]e are not going to have the surge like with the tax.... It makes it a little inconvenient. Over time it may nudge people to quit.’” Brian Morelli, “Smokers Adjusting to Ban,” *ICP-C*, July 17, 2008, on http://www.press-citizen.com (quoting Jeremy Whitaker).

527Email from Marc Linder to Donn Stanley, Jeffrey Thompson, Matt Gannon, Jeffrey Peterzalek, John Lundquist, Robert Brammer, Bill Roach (Apr. 17, 2009).

that “the battle may be lost,” but Duncan insisted that the “war against the Smokefree Air Act is not over.” The following day he filed an application with ABD for a stay of the revocation order pending judicial review, and then Bunger and Eichhorn filed the same application for him in Des Moines County District Court on April 15, which repeated his untenable constitutional challenge to SAA on the grounds that it violated the Commerce Clause by restricting the market for tobacco in Iowa and announced that Duncan would file a petition for judicial review of the revocation, which followed two days later. In response, Walding initially stated that he would await that court’s ruling. Increasingly detached from jurisprudential and extra-foral reality, Duncan confused his own concern with the $20,000 reduction in business brought about by the revocation of his liquor license with Iowans’ alleged concern with the consequences of his having prioritized smoking over selling alcohol, and regurgitated his shibboleth: “‘I think people have totally had enough. Now I think they’re really realizing, at least many are...this is about the Constitution. It’s not about smoking.’” Similarly, his self-mesmerizing incantation, based on the alleged unconstitutionality of the disparate treatment of casinos and bars, that “[w]e’re going to win this. We’re the state’s worst nightmare,” obscured his own worst nightmare—revocation of his liquor license. Whereas for months he cried crocodile tears over the citations he had not received, in fact, “[b]ecause of the gap between the violation and [nonexistent] punishment, Burlington area bars lost any incentive to comply with the ban.... ‘It was only when they took off the liquor license on the wall that

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529Christinia Crippes, “Duncan’s License Revoked over Smoking Ban,” Hawk Eye (Burlington), Apr. 9 (1A) (NewsBank).

530Application for Stay Pending Judicial Review of Agency Action at 3, 8, 1, Coordinated Estates Services, Inc., d/b/a Otis Campbell’s Bar & Grill v Iowa Department of Commerce, Civil No. CVEQ008591 (Des Moines County Dist. Ct., Apr. 15, 2009); Petition for Judicial Review of Agency Action, Coordinated Estates Services, Inc., d/b/a Otis Campbell’s Bar & Grill v Iowa Department of Commerce, Civil No. CVEQ008591 (Des Moines County Dist. Ct., n.d. [Apr. 17, 2009]). The ABD website lacks the application that Duncan filed with the agency. It is unclear how Duncan’s lawyers believed they were enhancing his chances for securing a stay by claiming that throughout the ABD proceedings he had “[i]n his defense...maintained that the passage of the Act was highly political....” Application for Stay Pending Judicial Review of Agency Action at 5-6, Coordinated Estates Services, Inc., d/b/a Otis Campbell’s Bar & Grill v Iowa Department of Commerce, Civil No. CVEQ008591 (Des Moines County Dist. Ct., Apr. 15, 2009).

531Christinia Crippes, “Duncan Pushes for a Court Battle,” Hawk Eye (Burlington), Apr. 16, 2009 (1A) (NewsBank) (ellipsis in original).

[they] brought us to our knees.” No one was more acutely aware of ABD’s crucial enforcement role than Walding: with bars and restaurants accounting for 53 percent of all 1,015 business to which IDPH sent notices of potential violations during the law’s first year of operation, Walding knew that “license revocation fears have helped compliance immensely”—to the extent that “we’re starting to see that the resistance is kind of burning out throughout the state.” And the nightmare lived on since, as Walding observed, if the courts ultimately upheld or invalidated only exemptions, “then the ABD can impose the suspensions or revocations when it chooses. ‘Once it’s decided, it’s over.... We have complete control once it’s gone through the whole process.’” Moreover, Duncan’s obsession blinded him to the fact that far from being any kind of nightmare at all, a decision by the Iowa Supreme Court striking down the casino exemption would hand the anti-smoking legislators, whom he and his fellow barkeepers incessantly excoriated, the expanded coverage that majority rule had put beyond their reach, thus bringing Iowa that much closer to a universal ban on indoor smoking in public places. As they could have learned from House Speaker Murphy on the eve of the Act’s going into effect: “[L]awmakers anticipated a potential legal challenge and carefully crafted the ban. Should a court eventually rule that drawing a distinction between casinos and bars is discriminatory, the result would be banning smoking in casinos rather than allowing smoking in bars.... ‘We made sure of that’...”

Despite Duncan’s continued bravado, on April 17, Walding granted a conditional stay pending judicial review of the agency’s action even though Duncan had failed to satisfy the four-part statutory test. Without revealing his reason(s), Walding expressed his willingness to grant the stay “subject to one condition”—already suggested in the final order—namely, that Duncan agree to comply with the Smokefree Air Act during the pendency of the appeal. Why Walding would have conferred such administrative mercy on an applicant who

536Christinia Crippes, “Paddlewheel Takes Deal,” Hawk Eye (Burlington), May 13, 2009 (2A) (NewsBank).
had not only “not...sufficiently made the case for the granting of a stay,” but had
“elected to follow a risky course of action, thereby placing his liquor license at peril” by having “mistakenly assumed that he can ignore the law until the statute
is declared to be constitutionally valid” he did not explain until much later. Asked whether it had been a foregone conclusion that if he had not granted a stay, the district court would have, Walding replied: “No, in fact the Division, through the
Iowa Attorney General’s Office, has an established practice of resisting judicial stays whenever the state does not grant a stay. As the goal all along has been SFAA compliance, and not to put licensees out of business, I deemed the stay appropriate provided the licensee could assure me of his future compliance. Frankly, I also deemed it a victory to gain the compliance of the ban[]’s leading protagonist. Nor was I interested in making the licensee a martre [sic] for his cause and constituency.” The deal was sealed the next morning when Duncan, eating the crow he had sworn would never touch his lips, faxed Walding a handwritten note agreeing to “abide by”—which arguably fell short of the condition that he “comply with”—SAA from that moment until the Iowa courts made a final determination as to its constitutionality. Duncan sought to make it clear that he had not bowed down to the wannabe “queen” after all by claiming

538Order Conditionally Granting Stay, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2008-00080 (Iowa Alcoholic Beverages Div., Apr. 17, 2009). The four statutory factors that a court was required to consider and balance before granting a stay of agency action were: (1) extent to which plaintiff was likely to prevail on merits; (2) extent to which applicant would suffer irreparable harm if relief was not granted; (3) extent to which granting relief would substantially harm other parties; and (4) extent to which public interest relied on by agency sufficed to justify agency action. Iowa Code § 17A.19(5)(c)(1)-(4) (2009).

539Email from Lynn Walding to Marc Linder (Aug. 1, 2009).

540L. Duncan to Administrator Walding (Apr. 18, 2009), attached to Order Conditionally Granting Stay, In re Coordinated Estate Services, Inc. d/b/a Otis Campbell’s Bar & Grill, Docket No. D-2008-00080 (Iowa Alcoholic Beverages Div., Apr. 17, 2009). See also Christinia Crippes, “Alcohol Served Again at W.B. Bar,” Hawk Eye (Burlington), Apr. 19, 2009 (3A) (NewsBank). Larry Duncan appeared to renege on that promise when he insisted that “‘[i]f the people of Iowa have a say and can vote on the constitutionality of it [i.e., the smoking ban in bars and restaurants], they [i.e., the State of Iowa] could design a law around that, I’ll be smoke free.’” “Bar Owner Takes State to Court over Smoking Ban,” KWQC (Davenport) (Nov. 25, 2009), on http://www.kwqc.com (visited Dec. 5, 2009); http://www.smokersinfo.net/bar-owner-takes-state-to-court-over-smoking-ban/ (visited Feb. 1, 2011). Duncan’s reading level—“A 4th grader could read the constitution and know this law is not constitutional. It’s not fair and equitable for everybody”—can be gauged by the fact that Iowans have no right to pass on laws’ constitutionality.
that he had “chosen to comply with the act” on his own terms—namely, “[n]ow that I have accomplished my goal of getting this question of constitutionality of the Smokefree Air Act to the...District Court level...”541 Walding’s press release, archly titled, “Otis Campbell’s Goes Smoke Free,” made it clear that the state apparatus had retained the upper hand: “After over nine months of open defiance of the Smokefree Air Act...owner L.A. ‘Larry’ Duncan has agreed to obey the smoking ban, at least for now.”542

A few days after nibbling on the faux crow, Duncan reassembled his Freedom Fighters for All Citizens of Iowa for “a whole lot of venting frustration” cum fundraising, presumably to pay the fees for lawyer Bunger, who was present “acting as a voice of calm amongst the panic of the bar owners, who fear they’re losing their business at a rate that will cause them to close their doors for good.” The hyperventilatory hyperbolic mood was set by a retired army major who predicted that “‘[t]his battle is going to...get uglier’” and Duncan’s own bar manager, who declared that he was “fighting the statewide smoking ban for the sake of his children’s freedom.”543 Perhaps the group’s out-of-touchness was best exemplified by the defrocked commander of Veterans of Foreign Wars Post No. 775 in Ottumwa, yet another center of resistance in the state’s southeastern quadrant.544 At a juncture when about half of the states had already enacted statewide smokefree laws and more were in the pipeline, Dennis Whitson assured his ilk in attendance that “‘the nation is watching what we’re doing here, and if we lose this the whole nation is going to lose.’”545 Some insight into the Freedom Fighters’ collective psyche can be gleaned from his views and behavior. After the VFW Post had racked up five notices of potential violations,546 Commander Whitson admitted that he had not been complying with the law and testified at an
administrative hearing on March 16 that “he cannot in good conscience send a veteran outside to the parking lot to smoke.” Little wonder that the ALJ in her Proposed Decision ordered the VFW Post’s license revoked. For his part, Whitson also took the naïve line that the Act was unconstitutional because it set “the interests of some businesses above others,” throwing in the non sequitur that a “high school debate class could have passed a more comprehensive law than the Legislature did.” Whitson’s scofflawry was too much even for the State VFW, which removed him from his position for having broken the law and violated the organization’s bylaws, and being an “embarrassment to the V.F.W.” Whitson apparently went off the deep end of rugged individualism, complaining that “[w]e have lost the ability to take care of ourselves. That is why our post chooses to ignore this unconstitutional law, because we still have that choice.” He saw the perpetrators of the Smokefree Air Act as promoting the advent of apocalyptic “One world government.”

In latter half of April, as Duncan’s prosecution shifted into state and federal court constitutional adjudication, enforcement officials finally focused on Des Moines County, the epicenter of “the uprising” with Otis Campbell’s leading the charge. Perhaps this slashing editorial in the Burlington press in March helped motivate IDPH/ABD to crack down inn Des Moines County:

Duncan has refused to ban smoking in his Otis Campbell’s Restaurant and Bar in West Burlington. Though the local police investigated and found the law was being disobeyed,

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the City Council lacked the guts to back a citation that would require Duncan to go to court, which is where he hopes to prove the ban unconstitutional but likely will not.

Rather than boldly tackle the affront to law and order, the city pushed into the lap of the Iowa Alcoholic Beverages Division the question of whether Duncan should forfeit his liquor license for being a blatant scofflaw. The agency suspended his license for not complying but Duncan remains open for business—and his smoking customers’ pleasure—while his appeal is working through the legal system. ...

Every day, down the street from West Burlington City Hall, the law against smoking in public places is being broken. Other bars have joined the revolt. No one seems to care.

In a dozen counties valid complaints had been filed against a larger proportion of businesses, but Des Moines County businesses had recorded the greatest number of complaints. This southeastern county was selected because it had displayed “the strongest resistance” to the Act, but if ABD discovered “pockets of resistance” elsewhere, Walding was prepared to extend the pilot program to such counties too. Having sent two agents who checked eight establishments there and found five violating the smoking ban, Walding decided to carry out more targeted investigations. Taking a longer view, he drew a comparison to the earlier experience with the seatbelt law, stressing that it had taken a while for the public to “recognize that paradigm shift in thinking.”

In a press release on April 20, Walding announced that ABD planned to check all 68 of the county’s on-premises licensed establishments; the initiative would continue until the compliance rate improved, leaving the non-compliant to face administrative hearing complaints. Ratcheting up the pressure, he suggested that those who settled before the hearing could expect a seven-day suspension and $1,000 civil fine, while licensees found in violation after a hearing faced a 30-day suspension if they then became compliant and the risk of revocation if they did not. (To be sure, by settling, bar owners in some cases were in a position to

552Mike Sweet, “Dubious Fighters,” *Hawk Eye* (Burlington), Mar. 8, 2009 (8A) (edit.)
subvert the suspension’s deterrent effect by negotiating for its scheduling for a week when they took vacation or made repairs, as Walding put it, “‘so it isn’t a total loss for them during that period.’”)557 On April 28 ABD initiated a pilot program of random site visits in Des Moines County to be continued over a number of weeks “‘until we get full compliance.’”)558 To a meeting the previous day of business owners preoccupied with the disparity between casinos and bars Burlington native Walding, with brutal frankness uncharacteristic of Iowa bureaucrats, left absolutely no doubt as to the smokeless future that rendered their rhetoric and resistance obsolete: “‘If your business model is based on smoking, it’s an archaic business model.’” He also passed a similar judgment on their litigation strategy by noting that even if the casino exemption were judicially invalidated—“something...a lot of us are hoping—the ban would remain otherwise intact.559 In a piquantly titled up-beat press release (“Des Moines County Licensees Stomp Out Cigarettes’) Walding was “‘thrilled’” by the 81-percent compliance rate, which was a “huge step forward,” especially since none of the 11 non-compliant bars had been found allowing smoking, but instead had violated signage or ashtray provisions. Since ABD had forewarned bar owners of the looming inspections, he had expected a high compliance rate and announced that the random checks would continue until full compliance was attained.560 To be sure, Walding decided to “‘focus...on the problem, where it should be’” so that checks would “cease for those bars that have corporate policies in place to ban smoking or that have no residual tobacco scent lingering.”561

At the same time, despite the publicity surrounding this targeted enforcement effort, the Department of Public Safety filed administrative hearing complaints with ABD against bars in two other southeastern towns (Keokuk and Donnellson)

557Christinia Crippes, “Paddlewheel Takes Deal,” Hawk Eye (Burlington), May 13, 2009 (2A) (NewsBank).

558Christinia Crippes, “State Plans Bar Checks,” Hawk Eye (Burlington), Apr. 21, 2009 (1A) (NewsBank).

559Christinia Crippes, “Smoking Ban Checks Begin Today in DMC,” Hawk Eye (Burlington), Apr. 28, 2009 (3A) (NewsBank).


561Christinia Crippes, “Smoking Ban Compliance Up to 81 Percent,” Hawk Eye (Burlington), May 5, 2009 (1A) (NewsBank).
for the first time.\textsuperscript{562} Faced with this metastasis, Walding explained the phenomenon as in part resulting from the serendipity of what had been (at least until the previous week) a complaint-driven system. More ominously, however, he also regarded it as "'kind of the resistance effort of the Freedom Fighters kind of centralized out of southeast Iowa.'\textsuperscript{563}

During the second week of ABD’s checks in Des Moines County the compliance rate edged up to 85 percent, but at one of the violators an investigator observed people openly smoking without any attempt by the licensee’s employees to correct the violations.\textsuperscript{564} Then during third week in mid-May, the compliance check program “hit a wall,” prompting Walding to observe that “'[w]e took a heavy dose of some hard medicine here.'\textsuperscript{565} Not only did the compliance rate plummet from 85 to 54 percent, but at three of 11 violators investigators witnessed smoking, including in one case by the bartender at a VFW Post in Burlington;\textsuperscript{566} another represented recidivism from the previous week and led to the filing of a administrative hearing complaint;\textsuperscript{567} the seventh against a bar in Des Moines County.\textsuperscript{568} During the remaining three weekly checks the ABD observed no more smoking and the compliance rates rose to 80 and 96, and finally reached the goal of 100 percent in the sixth week.\textsuperscript{569}


\textsuperscript{563}Christinia Crippes, “Smoking Ban Compliance Up to 81 Percent,” \textit{Hawk Eye} (Burlington), May 5, 2009 (1A) (NewsBank).


\textsuperscript{565}Christinia Crippes, “Bars Slip in Latest Checks,” \textit{Hawk Eye} (Burlington), May 20, 2009 (1A) (NewsBank).


\textsuperscript{567}Hearing Complaint at 4, In re Jan Beach, d/b/a Bucktail Lodge, Docket No. D-2009-00063 (Iowa Alcoholic Beverages Div., n.d. [May 29, 2009]).


\textsuperscript{569}Iowa Alcoholic Beverages Division, “Des Moines County Tobacco Enforcement
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

The turnabout in the one-time “‘hotbed area’” Walding attributed in part to owners’ having learned from Duncan’s and Froehlich’s cases that violating the Smokefree Air Act could bring significant economic consequences beyond a $100 penalty in its wake. Compliance was also promoted by owners’ perception that competitors were “not profiting or benefiting by violating the law....” And, finally, the real-world experience that their own compliance did not hamper their business removed yet another motivation for cheating: “‘At the end of the day, despite some of the warnings, the sky didn’t fall,’ Walding said. “To my knowledge, we haven’t had any bars drop out or lose enough business that they’re throwing in the towel. That really hasn’t happened. The “Chicken Little” philosophy really hasn’t materialized.” He acknowledged that the state was unable to calculate accurately whether any bars had gone out of business and whether such exits were attributable to the smoking ban, but Walding was of the opinion that “[t]o the extent that anything is having an impact on licensees, it’s three things and that’s recession, recession, recession.” Significantly, in Burlington, the vortex of the alcoholic rebellion against the Smokefree Air Act, a search by the city clerk’s office “did not yield any liquor licensed establishments going out of business during the last year.”

As for the need to replicate the special Des Moines County enforcement regime elsewhere in Iowa, by August 2009 Walding was not aware of any other area of the state with a concentration of disobedience as great as that which had existed in Des Moines County. In addition, the overall compliance rate among bars in the state has shown a marked improvement since the administrative sanctions were meted out this past spring. That said, I plan to closely monitor the compliance rate as the inclement weather approaches. Right now it is fairly easy for a bar to comply as patrons can simply walk outside of a licensed premises to light up. Whether


570Christinia Crippes, “ABD Checks Yield 100 Pct Compliance,” Hawk Eye (Burlington), June 10, 2009 (3A) (NewsBank).

571Christinia Crippes, “Bar Check Efforts Rise,” Hawk Eye (Burlington), June 2, 2009 (1A) (Newshark).

572Christinia Crippes, “ABD Checks Yield 100 Pct Compliance,” Hawk Eye (Burlington), June 10, 2009 (3A) (NewsBank).


that remains the case when winter returns remains to be seen. If not, the random checks may expand to another area of the state.⁵⁷⁵

Some bar owners violating the Smokefree Air Act sought to justify their offenses by stylizing them as noble and courageous acts of civil disobedience. Their lawyer reinforced this narrative. Speaking at a fundraising rally that one of his clients, Larry Duncan, and his Freedom Fighters for All Citizens of Iowa organized to collect the money to pay him, Darwin Bunger first claimed that he was “not fighting the smoking ban for the fees, but rather because as a citizen he feels the state is not right.” Why under these idealistic circumstances he had not accepted the cases pro bono he failed to explain, but he did tell the pro-smoking crowd that at church on Sunday he had opined that he would win.⁵⁷⁶ Even the Burlington press recognized that “[f]ortunately, Duncan has local attorney Darwin Bunger, who not only represents him but believes in his cause.” As a true believer Bunger appears to have forgotten that Iowa was not a nation: “The legislators have a legal and moral obligation to do the best of their ability when passing a law to comply with the supreme law of the land, the Iowa Constitution.”⁵⁷⁷ However, “many of them knew at the time” that the Smokefree Air Act “probably was, or even in their hearts knew was unconstitutional...and we just have to reign [sic] in on that kind of conduct.”⁵⁷⁸ Bunger was such a full-service lawyer that, after a Burlington city council member had characterized the law-breaking bar owners as creating anarchy,⁵⁷⁹ he published a letter to the editor glorifying the violators: “By a slim majority, Iowa Legislators passed the Smoke Free [sic] Air Act. Many of them voted for the act knowing or suspecting that the Act was in violation of the Iowa Constitution. Others should have known it, if they really did not. That tyrannical action by the legislators in violation of their sworn oaths to uphold the Iowa Constitution was the father of any alleged anarchy. The people and their Constitution must take precedence over any given legislature or legislator in a free society.”⁵⁸⁰ Having

⁵⁷⁵Email from Lynn Walding to Marc Linder (Aug. 3, 2009).
⁵⁷⁶Christinia Crippes, “Duncan Rallies Support,” Hawk Eye (Burlington), Apr. 23, 2009 (1A) (NewsBank).
⁵⁷⁷Christinia Crippes, “Otis Campbell’s Owner Keep Fighting,” Hawk Eye (Burlington), Jan. 9, 2009 (1A) (NewsBank).
⁵⁷⁹Jeff Abell, “Council Stays Out of Smoking Ban Fight,” Hawk Eye (Burlington), Apr. 1, 2009 (1A) (NewsBank).
⁵⁸⁰Darwin Bunger, “Tyrannical Action,” Hawk Eye (Burlington), Apr. 6, 2009, on
baptized his client a virtuous tyrannicide and made common cause with him, Bunger nevertheless failed to explain how legislators “should have known” the Iowa Supreme Court would hold that exempting casinos was unconstitutional when the weight of the Court’s privileges and immunities precedents spoke against such a conclusion, the attorney general took that position, and none of the many state anti-smoking laws had been invalidated.

Hyperbole—if Bunger and Eichhorn were even self-conscious enough to perceive that figures of speech that an audience cannot take literally constitute an inept litigational strategy vis-a-vis judges—also pervaded the brief that they submitted to the Des Moines County District Court in Duncan’s constitutional challenge to SAA. Typical were the assertions, for example, that were supposed to shore up the claim that the statute was unconstitutional because it violated the federal Commerce Clause. They climaxed in the bizarre, ignorant, false, and illiterate declaration that: “This statute is not different than if [sic] Kentucky decided that corn was unhealthy [sic] and passed a law prohibiting (or severely restricting) its consumption. Both interfere with interstate commerce. A state cannot remove themselves [sic] from the free market that formed this country.”

In turn, Bunger-Eichhorn rested their triumphant call for invalidation on their delusional assertion—for which they cited no source whatsoever and which even Philip Morris’s website rejected—that the science concerning secondhand smoke is well known and widely accepted.


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582 “Public health officials have concluded that secondhand smoke from cigarettes causes disease, including lung cancer and heart disease, in non-smoking adults, as well as causes conditions in children such as asthma, respiratory infections, cough, wheeze, otitis media (middle ear infection) and Sudden Infant Death Syndrome. ... “Philip Morris USA believes that the public should be guided by the conclusions of public health officials regarding the health effects of secondhand smoke when deciding whether to be in places where secondhand smoke is present, or if they are smokers, when and where to smoke around others. Particular care should be exercised where children are concerned and adults should avoid smoking cigarettes around them.

“We also believe that the conclusions of public health officials concerning environmental tobacco smoke are sufficient to warrant measures that regulate cigarette smoking in public places. We also believe that where cigarette smoking is permitted, the government should require the posting of warning notices that communicate public health officials' conclusions that secondhand smoke causes disease in non-smokers.”

smoke was “not conclusive. The State argues cause and effect when there is nothing more than correlation. In fact, there is compelling expertise and expert testimony available showing that the alleged ‘science’ relied upon by the legislature to assert the claim of concern for the public and employee health is merely conjecture....” Duncan’s lawyers eloquently displayed their own multiple expertises by observing that the “legislatively relied upon ‘science’ is more in the realm of antidotal [sic] information and self reporting.” Hence their non-joke about the corn-free Kentucky act (for which they provided no antidote).

However, Bunger-Eichhorn had to pile up far more utter nonsense in order to reach this punch-line. In particular, in the end they did not even shy away from planting the seed of suggestion to readers that state cigarette taxes (which Iowa had pioneered in 1921) were unconstitutional interferences with interstate commerce. Their childish primitive claims stumbled along these lines. Suppressing the fact that many other states had initiated similar and more far-reaching interventions without having been sanctioned for interfering with interstate commerce, they began with Iowa’s “systematic effort to burden and discriminate against tobacco products,” of which SAA was but “one example” of the state’s “trying to stop the lawful consumption of tobacco products.” Initially, Bunger-Eichhorn were content to state that the Legislative Services Agency had apprised the legislature (on April 9, 2008, the day that legislature passed H.F. 2212) that LSA estimated that the law would reduce the dollar amount of cigarette sales by four percent. (In fact, this figure scarcely even merited the label of an estimate. This number emerged from information provided by the Illinois Department of Revenue, less than three months after the Smoke-Free Illinois Act had gone into effect on January 1, 2008, to the Iowa Department of Revenue. However, rather than having even been derived from Illinois’ very short-run data, the 4.0 percent figure originated in a nine-year-old World Bank report based on unidentified studies based on unexplicated methodologies. 586


584 See above chs 15 and 19.


586 Mary Beth Mellick, “HF 2212—Smoking Ban in Public Place (LSB 5743 CH)” (Fiscal Note Version—Conference Committee Report), Fiscal Services Division, Legislative Services Agency (Apr. 9, 2008), on http://www3.legis.state.ia.us/fiscalnotes/data/82_5743CHv0_FN.pdf; telephone interviews with Mary Beth Melnick and Jeff Robinson, Des Moines (Dec. 1 and 3, 2009). According to Senior Legislative Analyst Jeff
Indeed, the LSA merely “assumed” a 4.0 percent drop.\textsuperscript{587} Bunger-Eichhorn then transmogrified this scanty assumption into the legislature’s “intention that people not participate in the commerce of tobacco products” and, without any evidence, risibly asserted that the “Anti-Smoking Act tries to prevent most usage of tobacco products....”\textsuperscript{588} Duncan’s lawyers also claimed that there was “ample evidence this statute seeks to interfere with, and unconstitutionally hinder, the commerce of tobacco and should be ruled to violate the commerce clause” on the grounds

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Robinson, the assumption arose as follows: “If there are fewer places in Iowa where cigarettes can be legally consumed, it is assumed the result will be fewer cigarettes smoked and fewer cigarette sales. The [Iowa] Department of Revenue provided the estimate for reduced cigarette sales, and that estimate is a reduction in cigarette sales of 4.0%. The Department cites a study by the World Bank [that] estimated that smoking bans reduce cigarette consumption in the range of 4% to 10%.” Jeff Robinson to Representative Phil Wise, Subject: Economic Impact Calculations for HF 2212 (Public Indoor Smoking Ban Bill) at 1 (Mar. 17, 2008) (copy furnished by Jeff Robinson). The World Bank report merely stated without furnishing any sources that: “A second effect of smoking restrictions is that they reduce some smokers’ consumption of cigarettes and induce some to quit. In the United States, such restrictions have reduced tobacco consumption by between 4 and 10 percent, according to various estimates. For such restrictions to work, it appears that there must be a general level of social support for them, and an awareness of the health consequences of exposure to environmental tobacco smoke. Outside the United States, there are comparatively few data on the effectiveness of indoor smoking restrictions.” World Bank, Curbing the Epidemic: Governments and the Economics of Tobacco Control ch. 4 (1999), on http://www1.worldbank.org/tobacco/book/html/chapter4.htm. The Department of Revenue and LSA opted for the lower end of the range merely because it sounded better, though Robinson did not believe that the legislature would have defeated the bill had LSA opted for 10 percent. Telephone interview with Jeff Robinson, Des Moines (Dec. 1 and 3, 2009). Any robust estimate would have to have taken into account the proportion of public places that had been smoke-free before the law went into effect and how extensive the ban was. For the claim that per capita cigarette consumption of the entire adult population of the United States would decline 4.5 percent if all workplaces that were not smokefree banned smoking, see Caroline Fichtenberg and Stanton Glantz, “Effect of Smoke-Free Workplaces on Smoking Behaviour: Systematic Review,” British Medical Journal 325:188 (July 27, 2002).
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that the passage in 2007 by the same elected General Assembly of bills to increase the tobacco tax and to create fire-labeling requirements on cigarettes “demonstrate a legislative intent to diminish to the greatest extent possible or even destroy the Iowa market for legal tobacco products.” These assertions were as absurd as Bunger-Eichhorn’s false claim to the court that they were directly supported by (“See”) two U.S. Supreme Court decisions, which in fact not only had absolutely nothing to do with them, but dealt exclusively with an aspect of interstate commerce that was totally lacking in the case of the SAA—namely, discrimination against out-of-state business and in favor of local business. Unsurprisingly, the bar owner’s lawyers did not even try to account for why the cigarette tax in no other state had—despite the facts that in 21 states it was higher than Iowa’s and in all states amounted to more than $15 billion annually, every state except Wyoming has passed a fire-safe cigarette law, and most and a growing number of legislatures had passed statewide nosmoking laws—been held to be an unconstitutional interference with interstate commerce.

The only legal argument on which Duncan might even have had the slightest shred of a chance of prevailing would, as has already been noted, have been a Pyrrhic victory for him and other bar owners, since even the invalidation of the exemption of casinos on equal protection grounds would merely result in their coverage, not in bars’ exemption.


590 http://www.tobaccofreekids.org/research/factsheets/pdf/0267.pdf (visited Dec. 2, 2009). At $4.25, the combined New York State/City tax was more than three times higher than Iowa’s.


594 As the State argued: “Should the Court ultimately conclude that the State of Iowa could not rationally exempt these dissimilar entities from regulation... the Iowa ABD’s disciplinary action against Otis Campbell’s would still stand.” Respondent’s Brief in Support of Resistance to Petition for Judicial Review at 40 n.7, Coordinated Estate Services Inc., d/b/a Otis Campbell’s Bar & Grill/Aunt Bea’s Cafe v Iowa Dept of Commerce, No. CVEQ008591 (Des Moines Cty Dist. Ct., July 24, 2009).
Bunger and Eichhorn remained in their hyperbolic prime at the two-hour hearing before Des Moines County District Judge Mary Ann Brown on November 17. Eichhorn, for example, claimed that the enforcement procedure was flawed because “basically” ABD “has pursued what I would consider a terror-type approach, much like the (Internal Revenue Service)... They want to terrorize people so that they will comply, and they will pretty much do what they need to do to get there.” Gamely trying to defend the casino exemption, Assistant Attorney General John Lundquist argued that the economic impact of gambling revenues on the state—citing a study indicating that prohibiting smoking in casinos would reduce state revenues by 10 percent or $31 million—made casinos different, whereas the revenue impact of the smoking ban in bars and restaurants was zero. Unfazed by his lawyers’ legal position that the casino exemption violated the state and federal constitutions, Duncan was content to proselytize for make-believe nineteenth-century rugged-individualist profit-making: he did not “want to take away gambling business’s [sic] right to allow smoking. He just wants all business owners to have the right to operate their establishments as they

Commerce, No. CVEQ008591 (Des Moines Cty Dist. Ct., Sept. 4, 2009). Nevertheless, the State failed to come to grips with the major doctrinal issue that Duncan’s lawyers raised. To state that a “desire to maintain the economic vitality and success of Iowa’s licensed casinos is a valid and rational reason for the Legislature to exclude casino gaming floors from the Smokefree Air Act’s regulation” simply because the “State of Iowa and its political subdivisions directly benefit from the operation” of the casinos inasmuch as they use the resulting tax revenue for numerous construction and job programs (id., at 46-47), does not address the question as to whether the similar-situatedness as between regulated bars and exempt casinos must relate to what the legislature designated as “[t]he purpose” of the SAA—namely, “to reduce the level of exposure by the general public and employees to environmental tobacco smoke in order to improve the public health of Iowans” (H.F. 2212, § 1(3))—or whether this other purpose that it serves (namely, maintaining the state’s tax revenues) is wholly unrelated to the statutorily identified purpose, thus rendering the discrimination between casinos and bars “wholly arbitrary” because “such a classification is not based on anything having relation to the purpose for which it is made.” Smith v Cahoon, 283 US 553, 567 (1931) (quoting Air-Way Electric Appliance Corp. v Day, 266 US 71, 85 (1924)). The State might have bolstered its argument had it specified that some of the tax revenue that would have been lost as a result of casino coverage would have been used for programs to improve the public health of Iowans. This language from the statutory purpose might also have aided the State’s argument: since casino owners claimed that a very high proportion of their customers were out-of-state visitors and since improving non-Iowans’ health was not a statutory purpose, a smoking ban in casinos was not a high priority.

Judge Brown’s ruling four and a half months later, though not well researched, did not need to be in order to reject out of hand Bunger-Eichhorn’s plethora of absurd, threadbare, and frivolous arguments. As predicted earlier, the only one that she even took seriously—calling it “the Bar’s...most compelling...argument” was possible only in comparison to the lawyers’ otherwise wholly implausible ones—was the equal protection claim based on the casino exemption. Because Brown found no credible argument that smokers were a suspect or even quasi-suspect class, she was able to use the “very deferential standard known as the rational basis test,” under which Duncan bore the very
heavy burden of refuting every reasonable basis on which the differential classification might be sustained. The threshold issue that the Bar had to resolve in its favor was that it was similarly situated to the locations exempt from the SAA. Although the court quickly decided that bars were not similarly situated to any of those locations (such as limousines, retail tobacco stores, or fairgrounds), it conceded that casinos presented the closest question, but even the “several superficial similarities to bars and restaurants” (which it did not reveal) could not hide the crucial facts that only casinos were licensed for gambling and the tax and regulatory structures were “radically different.” Judge Brown could have disposed of the case at this point, but, proceeding on the assumption that bars were similarly situated to the exempt locations, she scrutinized the rational basis for the legislature’s classification. “Simply put,” the “plausible policy justification” that the court identified was that “the State would lose too much money by banning smoking in gambling areas” and that this money was “spent in a variety of ways that directly benefit the citizens of Iowa.” In other words, Brown failed to engage the aforementioned jurisprudential question as to whether the similar-situatedness has to relate to the legislature’s designated statutory purpose or whether the other purpose of maintaining the state’s tax revenues is wholly unrelated to SAA’s purpose, thus arbitrarily discriminating between casinos and bars because that classification is unrelated to the purpose for which it is made.

In a parting shot at a litigant and his lawyers for the quality of whose legal arguments she had not even bothered trying to conceal her contempt Judge

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603 Coordinated Estate Services v. Iowa Department of Commerce, Ruling and Judgment on Petition for Judicial Review, No. CVEQ008591, slip. op. at 27-28 (Iowa Dist. Ct for Des Moines Cty., Mar. 31, 2010). Even under the “toothier” Iowa (as contradistinguished from federal) equal protection standards Judge Brown found that the classifications passed muster as rationally related to a legitimate governmental purpose. Id. at 29-31.
604 For example, Brown referred to “what can only be an attempt to distract the Court, the Bar begins its written argument with a lengthy recitation of ancient
Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

Brown closed by underscoring that even if she had found that the law did unfairly discriminate between Duncan’s bar and casinos, “the Bar would still lose...its liquor license...because...the remedy would be for the Court to strike the constitutional provision from the statute,” thus banning smoking in the casinos. 605

Stressed, inter alia, by legal fees, Duncan gave up. Bunger, who opined that if his client “continued to fight and continued to lose, it ‘would kill him,’” may have been trying to keep his stake alive—“seven bars across the state...have asked for a judicial review of the case, a few of which are represented by Bunger”—by professing a belief that “the case has a chance at the Iowa Supreme Court level.” 606 In the event, these bar owners, having learned from Duncan’s expensive lesson, abandoned Bunger, who himself in a bravado-less interlude conceded that the Iowa Supreme Court “may well have sustained the district court” 607 (if a paying client had enabled him to satisfy his curiosity). With judicial dockets cleared and bar owners’ rebellion subdued, Walding’s prediction rang true: “As we look back in another decade from now, we’re never going to believe that it ever was any other way than smoke-free.” 608

Leery Legislative Leadership Prevents Floor Debate of Bills to Strengthen or Weaken the Act During the 2009 Session

Gronstal predicted...that there will be a lot of talk in the 2009 legislative session about

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605 Coordinated Estate Services v. Iowa Department of Commerce, Ruling and Judgment on Petition for Judicial Review, No. CVEQ008591, slip. op. at 27-28 (Iowa Dist. Ct for Des Moines Cty., Mar. 31, 2010). Brown hinted that in order to achieve such an outcome, “the real party in interest”—namely, one “being denied the protection from second hand smoke that is offered to others”—would have to mount an equal protection challenge to the law. Id. at 32. Why that party (presumably a casino gambling floor worker) would fare any better under her legal analysis she did explain.


expanding or doing away with the state’s smoking ban, but not much action. “My prediction is that there won’t be consensus found on the issue and that nothing will happen on it.”

Even as the legislature was still debating H.F. 2212 some members declared—in part to rebut Republican charges of hypocrisy—their resolve to return in 2009 to push for coverage of casinos. Health organizations, too, quickly announced a similar intention. For example, already by June the American Lung Association, which had been willing to let the bill go down to defeat for its exemption of casinos, was planning how to persuade legislators to extend the prohibition to casinos. Even some legislators who were not outspoken bill backers expected the exemption to be repealed in 2009. Opponents of some provisions of the Smokefree Air Act, who were content to revert to the days when Iowa’s air was less free of tobacco smoke, were also gearing up for revisions. Democratic Representative McKinley Bailey, who had so energetically annoyed his caucus with his nearly successful crippling attacks on the bill, was prepared to urge his colleagues (as early as at a special session in 2008, if one were called to deal with the destruction wrought by unprecedented flooding) to amend the statute to preclude IDPH’s “absolute abuse of power” in defining the bars that would be barred from permitting smoking on their outdoor patios. He nevertheless conceded at a local legislative forum in September that he saw “little chance” of repeal.

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610 See above ch. 35. Republicans should have been pressed to deal with their hypocrisy if they had refused to vote to cover casinos after having continually berated Democrats in 2008 for having exempted them. Ironically, when asked in 2009 whether he would vote to amend the law to cover casinos, Republican Senator James Seymour instinctively worried instead about being charged with hypocrisy if he voted for coverage despite his “whole premise” that government should not interfere with private businesses. Telephone interview with James Seymour, Woodbine (Aug. 17, 2009).


613 See above ch. 35.


Shortly thereafter Representative Brian Quirk, one of the few Democrats to vote against H.F. 2212,616 launched a (quickly deflated) trial balloon: in order to remedy the “inequity between casinos and bars” and to “ease bar owners’ concerns,” a small group of legislators was “quietly assembling a compromise to allow gambling devices in adult-only establishments....” Permitting video Keno would, he insisted, “go a long way toward keeping their [bars’] doors open.”617 Van Roekel and Sturgis, leaders of Choose Freedom Iowa, saw this initiative, which was merely “an effort to respond to voter angst over” the ban, as “grasping for solutions” by “big government legislators” who had finally been forced to acknowledge that the bar owners had been right all along that the law would create problems for small businesses.618

Despite the initial flurry of amendatory preparations, a month before the elections anti-smoking forces understood that further progress toward statutory perfection would probably have to be suspended. The American Cancer Society’s lobbyist, for example, believed that at the 2009 legislative session (and perhaps for some time thereafter) anti-smoking groups’ chief task would be defending SAA from efforts to water it down rather than expanding its coverage by striking the casino exemption.619 That Democrats somewhat increased their control of both chambers for the 2009-10 session (from 53-47 to 56-44 in the House and from 30-20 to 32-18 in the Senate)620 may have confirmed Gronstal’s and McCarthy’s aforementioned prognoses that voters would not punish the party by electing Republicans with a mandate to restore public secondhand smoke exposure, but the legislative leadership refused to interpret the enlarged majority—or even the electoral losses by all candidates who specifically challenged incumbents on the basis of their votes for H.F. 2212621—as the occasion for completing the unfinished work of 2008 by repealing the exclusion of the casinos’ gambling floors, which the law’s supporters and McCarthy himself

616See above ch. 35.
617“Video Gaming Deal in Works for Bars?” Telegraph Herald (Dubuque), Sept. 16, 2008 (D5) (NewsBank).
619Telephone interview with Stacy Frelund, ACS, Des Moines (Oct. 2, 2008).
620http://www.legis.state.ia.us/aspx/Legislators/LegislatorInfo.aspx
621“Talk @ 12,” WSUI (Iowa City), June 30, 2009, 12:00-1:00 p.m. (statement by Peggy Huppert, director of government relations, ACS).
deemed its most serious defect in need of correction. At the beginning of December McCarthy noted that there “‘may be some advocacy groups who don’t want the law touched for fear that it will open up a Pandora’s box,’” but he still lacked a sense as to where they or the Democratic caucus was at on the issue.

By mid-December the press was reporting that both Democratic and Republican legislators had already drafted bills running the gamut from extending the smoking ban to casino gambling floors to facilitating smoking on outdoor bar patios. At the very end of 2008, just two weeks before the 83rd General Assembly convened, Governor Culver not only predicted that the casino exemption “will not be changed anytime soon... ‘I think it’s more likely we’ll leave it alone for a while,’” but attributed this outcome not to legislative calculation, but to popular satisfaction with a new equilibrium: “‘I think most Iowans believe that it’s a pretty good balance right now.’” Without unpacking this “balance” and explaining why the majority of state residents would have believed that casino corporations’ blunt power to hold the bill’s passage in the House hostage represented a desirable result, Culver went so far as to adopt pro-smoking forces’ market-knows-best excuse for opposing smoking bans altogether: “‘What’s more likely is that the casinos will go nonsmoking on their own,’” and in any event, “[i]t’s kind of a misconception that if you go to any casino, it’s all smoke-filled.” How low he had set his public health sights was on display in his expectation that casino management would adopt the wholly discredited designated smoking areas regime (that constituted the rotten core of Iowa’s law from 1978 until 2008) by “carving out smoke-free zones,” which apparently conformed with the expectation of the “‘general public’” that “‘there will be limited smoking and no smoking in most public places.’” Nor did he perceive any urgency since he had “not heard enough of an outcry to prompt him to suggest that lawmakers make casino gambling floors smoke-free” and “[u]nless

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and until that changes, I think we’ve probably gone a lot further than most people would’ve thought.’’ The governor, who well into the 2008 session had supported only local preemption repeal without taking a position on a statewide ban, may well have included himself among that majority. Characterizing the smoking ban even without casino coverage as “extremely progressive,” he exaggerated Iowa’s achievement by claiming that “we’ve done what 40 or more states have not done....’’

Perhaps Governor Culver might have been willing to reconsider his self-satisfied attitude toward the “‘pretty good balance’” that condemned casino workers to continued exposure to secondhand smoke had he understood that air pollution (as measured by respirable suspended particles and carcinogenic particulate polycyclic aromatic hydrocarbons) even in well-ventilated casinos with nonsmoking areas is so heavy that a study in Pennsylvania by one of the world’s leading researchers in this discipline estimated that it would cause six deaths annually per 10,000 casino workers from secondhand smoke-induced heart disease and lung cancer—or five times the death rate from disasters in coal mines, Pennsylvania’s most dangerous industry.

Whether they were merely going through the motions or harbored the hope that political serendipity might yet resurrect bills that had been deemed stillborn even before they were introduced, advocates of both progress and regress filed a number of measures to amend the Smokefree Air Act. Perhaps emboldened by a New Year’s poll in the Cedar Rapids Gazette revealing that 70 percent of respondents favored legislative action in 2009 to ban casino smoking, Democrat Mark Smith of Marshalltown, who had been conflicted about his role in creating the exemption for the veterans home there in 2008, announced a few days before the 83rd General Assembly opened that he would file a bill in the House to repeal the casino exemption: “Our goal was to assist with workers having to work long hours in smoke-filled environments...so I just felt that should be extended to casino workers.” Mindful, however, of leadership’s “warnings that it is unlikely to pass,” he admitted that he was “‘not hopeful that it’s going to go very far....’’
On the session’s very first day, the American Cancer Society’s legislative update reported that “protecting” (rather than extending) the Smokefree Air Act was its highest priority in light of the Democratic leadership’s feeling that “it’s best not to take it up this session” because “there is a significant risk that the law could be weakened” if it were brought up. Thus, for the time being compliance and education would be the focus. The same day outgoing Representative Philip Wise, who had loyally assumed the task of pushing the amendment to exempt casinos in the House Commerce Committee, delivered the same message from a different perspective in admonishing his former colleagues that: “‘When you pass landmark legislation—and by [sic] anyone who knows anything about political and governmental history, that smoking ban was landmark legislation—...legislators simply do not revisit it the next year, unless there is some kind of technical flaw that has to be fixed.’” Wise’s wisdom notwithstanding, that same day Smith, with no co-sponsors—“I wanted to pre-file the bill and did not have access to other members during the time we were not in session. I wanted to make sure the bill got in early to promote interest in it. I believe Tyler Olson was interested in signing on and maybe others”—introduced H.F. 6, which with admirable brevity consisted of one short sentence striking § 142D.4(10), the casino exemption. Unsurprisingly, already the next day lobbyists for two casinos declared against it and within a month nine more followed suit in addition to the Iowa Gaming Association.

The House leadership promptly took the opportunity to remark that smoking bills would not be debated. House Speaker Pat Murphy—who in 2008 received $23,000 in campaign contributions from a casino PAC and who, according to

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631Peggy Huppert, ACS, Iowa Director of Government Relations, Iowa Legislative Update (emailed to Marc Linder, Jan. 12, 2009). ACS’s other legislative priority was insuring continued funding for tobacco control programs in the wake of the depletion of tobacco trust fund (created by the Master Settlement Agreement) and the need to compete for appropriations from the general fund.

632See above ch. 35.


634Email from Mark Smith to Marc Linder (July 6, 2009).


637The Peninsula Gaming Employees PAC originated in the company owning the Diamond Jo casino in Dubuque (Murphy’s hometown) and Worth. The PAC’s name was misleading since the lion’s share of the ca. $56,000 contributions to the PAC stemmed
the American Cancer Society “looks out for the casinos”: “The problem was in the House...mainly because the Speaker (Pat Murphy) wanted an exemption”638—“‘strongly doub[ed]’” it because some people “‘want to gut the ban,’” while Majority Leader McCarthy filed the imperative for inaction under the rubric, “let ‘sleeping dogs lie.’”639 (Other anti-smoking Democrats suggested that the legislature would not revisit the Smokefree Air Act until court challenges to its constitutionality had been resolved.)640 McCarthy’s further explanation that the health groups themselves were not pushing an amendment was circular since their stance was derivative of leadership’s nose counting, but the Cancer Society presented its own voting analysis, which ominously suggested that, no matter how tenuous the previous year’s legislative majority had been, it had shrunk beyond the vanishing point in 2009. Peggy Huppert, ACS’s director of government relations, argued that “an amendment that would have allowed smoking in all bars lost by only one vote in the...House.... And the make-up of the Legislature has now changed. Of the 12 Republicans who voted for the smoking ban last spring, almost all chose not to seek re-election in the fall. ‘They knew when they voted they were retiring and that was part of the reason they could vote yes.’... Ten Democrats voted against the smoking ban, ‘so it was really, truly the Republican support that pushed it over the edge.’”641 Later she observed even more bluntly

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638 Email from Peggy Huppert, Iowa Director of Government Relations, ACS, to Marc Linder (July 14, 2009).
641 Jennifer Jacobs, “Iowa Smoking Ban Probably Won’t Be Debated This Year,” DMR, Jan. 15, 2008, on http://www.desmoinesregister.com. Huppert’s account of the amendment in 2008 was inaccurate, though her point remained vital. By 2 votes (49-51) Struyk’s amendment to exempt bars and restaurants while they denied admission to those
that 2008 had represented an especially propitious political constellation that, since it could not be replicated in 2009-10, made extreme caution imperative lest good amendatory intentions pave the road to dilution or even repeal urged by a vocal minority of “many Iowans talking to Iowans”: “We should not take this law for granted. If we do, we could lose it. I have no doubt that if the bill passed last year were to come to a vote in the Iowa House today, it would not pass due to the change in membership.”

The ACS official in charge of field government relations fleshed out what the changing membership meant: “12 moderate Rs voted for the bill last year—10 of them are gone, replaced by more conservative colleagues. Ten Ds voted against the bill. They are still there, and are joined by two more conservative Ds who said they would have voted against it. Most advocates inside and outside the chamber agree that the bill would not pass this year.” To be sure, this lethal arithmetic did not deter the Cancer Society (or the Heart or Lung Association) from having its lobbyists declare in favor of Smith’s bill.

How these numbers might have played themselves out in a re-run of the 2008 House vote is instructive. Of the 15 newly elected House members, eight signed on among the 51 co-sponsors in 2009 of McKinley Bailey’s bill, H.F. 211 (discussed below) to repeal the ban on smoking in outdoor areas of restaurants. Of these eight, four replaced retiring representatives who on the final House vote (54-45) on H.F. 2212 on April 8, 2008, provided the requisite constitutional majority—without whose votes the bill would have lacked the 51st vote. One of those two newly elected conservative Democrats (who co-sponsored Bailey’s bill) may have been Sharon Steckman of Mason City, an ex-smoker who declared that she probably would have voted against H.F. 2212, which she resented for having ruined bars 99.9 percent of whose customers were smokers, and at most would have voted for coverage of indoor restaurants. After having staunchly

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642 Peggy Huppert, [ACS] Iowa Director of Government Relations, Iowa Legislative Update 7 (emailed to Marc Linder, Mar. 2, 2009).

643 Email from Stacy Frelund to Marc Linder (Mar. 3, 2009).

644 http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Matt&Service=Declarations&frame=1 (visited July 1, 2009). Lobbyists for CAFE and the Iowa Medical Society and Iowa Osteopathic Medical Association also declared for it.

opined that bar owners should be allowed to make the rules, she nevertheless
coned, in response to a question, that she did not oppose laws requiring them
to wash glasses; asked why smoking should be treated differently, she
triumphantly observed that unwashed glasses spread disease. The sequitur as to
whether secondhand tobacco smoke did not also spread disease was met
conversation-ending belligerence.646

A week later Smith’s H.F. 6 was assigned to what predictably became its final
destination, a House Commerce subcommittee—consisting of the Act’s two chief
House advocates, Janet Petersen, Tyler Olson, and pro-smoking Republican Matt
Windschitl647—which would be the grave of all House smoking bills. Petersen,
the Commerce Committee chair, told the press that she would “likely nix the bill
in subcommittee,” adding to Wise’s and leadership’s reasons the desire “‘to give
Iowans a chance to get used to the law before we delve back into that legislation
again.’” Yet another basis for refraining from repealing the casino exemption
was offered by the Iowa Gaming Association, whose president, Wes Ehrecke,
refurbished his prior year’s argument by opining that such a step, “‘[i]n times of
tough economic budget crunches...might not be the most prudent thing to do.’”

In contrast, Smith explained that “‘choosing between conflicting and competing
values’” was part and parcel of governance, and, venturing out on a fiscal limb
where no supporter of H.F. 2212 had dared to go in 2008, at last rejected potential
financial impact as an impediment and proclaimed a healthful work environment
“paramount.”648 Near the end of January, the Senate companion bill to H.F. 6 was
introduced by Joe Bolkcom and 15 other Democrats, including such strong
supporters of the Smokefree Air Act as Quirmbach, Appel, and McCoy.649

Although fully aware that the bill would never come to a floor vote, Bolkcom
speculated that “if we had a pure vote on this we could pass it. It would be close”
in the Senate, but that it probably could not pass the House.650

Despite the Democratic leadership’s signals that it would not permit any

646 Telephone interview with Sharon Steckman, Mason City (June 1, 2009).
649 S.F. 57 (Jan. 27, 2009, by Bolkcom); Senate Journal 2009, at 143 (Jan. 27).
650 Email from Joe Bolkcom to Marc Linder (Feb. 26, 2009). In 2011, with
Republicans controlling 60 House seats, Smith introduced the same bill, which numerous
casino lobbyists quickly declared against, while a number of health organizations (such as
ACS, AHA, and ALA) supported it. H.F. 21 (Jan. 12, by M. Smith); House Journal 2011,
at 62; http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service=
DspReport&ga=84&type=b& hbill=HF21.
amendments to be debated, forces seeking to undo the Smokefree Air Act were hardly quiescent. On January 17, at the session’s first legislative forum in Burlington, Des Moines County—which ABD’s administrator would soon call the county that “probably...had the strongest resistance to the Smokefree Air Act”651—Republican Thomas Sands, a loan officer, real estate appraiser, and farm owner652 representing a southeastern Iowa House district, was exposed to two “primary issues on the minds of local residents”—the new smoking law and the onrushing recession. Unsurprisingly, according to the local press, Sands, together with Democratic Senator Thomas Courtney and Representative Dennis Cohoon, were questioned about the law by Larry Duncan, the owner of Otis Campbell’s Bar and Grill in West Burlington, who had been openly violating the smoking ban since the day it went into effect.653 Like several other high-profile bar owners engaging in and organizing resistance to SAA, Duncan imagined himself on the cutting edges of oncology (his “high-quality air systems are adequately protecting workers and customers”)654 and constitutional law. Unlike them, however, he immortalized his critique of the received wisdom in these fields in an affidavit that he provided in his federal lawsuit contesting the law’s constitutionality:

I have reviewed some of the alleged health information about exposure to “second hand smoke.” It doesn’t make sense to me that if some people can smoke all their life and not get cancer that [sic] exposure to “second hand smoke” causes all sorts of problems. Regardless, I would like the opportunity and right to invite business customers onto my private business property, sell to and serve such customers as I see fit, and permit them to use Otis’ by smoking if they and I find it acceptable. I see no reason why the State should find a health reason to shut down this aspect of my business and allow other places in Iowa to sell and serve food and beverages to smokers—especially when they have not made the type of investments that my business has for exhaust and ventilation systems.655

655 Affidavit of Larry Duncan at 6 (Oct. 28, 2008), Coordinated Estate Services, Inc., d/b/a Otis Campbell’s Bar & Grill v. Walding, Civ. No. 3:08-CV-138 (S.D. Iowa, Davenport Div.).
After Courtney had observed that one of the session’s bills would remove the casino exemption, 67-year-old Duncan, who purportedly had not smoked in 37 years, replied: “‘Dang it, I’m not here to take away from the casino. That’s going to take away hundreds of thousands of more dollars.’”656 This reaction was self-contradictory since, as his lawyer had told the press, the casino exemption was “one big part” of Duncan’s argument in his federal lawsuit that the law was unconstitutional.657 If Duncan’s objective in claiming that the law unconstitutionally denied him equal protection658 was in fact to level down rather than up (that is, to exempt bars, restaurants, and every other business as well as casinos rather than to ban smoking everywhere), then perhaps the resisters’ mantra that “‘[i]t’s not about smoking, it’s about the rights we keep getting taken away from us every day’”659 was somewhat less than candid.

Sands, who during his re-election campaign in 2008 had presumably calculated that his hyperbolical assertion that “‘[w]hen I read the bill [H.F. 2212] for the first time, I knew it was the most horribly written bill I have seen in my six years up there’”660 would go over well with his audience, announced at the forum that, because he regarded the law as unconstitutional and as “‘another way the government is overstepping its rights,’” he might come forward with two bills. Yet even he was hedging his bets: although people’s mood about the law had “‘changed significantly...[w]hether it's enough of a groundswell to change it remains to be seen.’”661

The dissatisfaction that bar owners had expressed at the aforementioned Administrative Rules Review Committee hearings during 2008 concerning IDPH’s definition of a “bar” and the permissibility of smoking on outdoor patios was translated into a number of bills. Muscatine House Democrat Nathan


Reichert introduced one that sought to deal with the dispute by redefining a bar as deriving 50 percent or more of its annual gross revenues from the sale of alcoholic beverages for on-premises consumption (on whose outdoor patio smoking would be lawful) and a restaurant as an eating establishment deriving 50 percent or more of its annual gross revenues from the sale of food (on whose patio smoking would be prohibited). The bill, which would also have repealed the casino exemption,\(^{662}\) falling between two stools, promptly harvested the opposition of lobbyists for both the Lung, Heart, and Cancer organizations and the casinos.\(^{663}\)

House Republican Mike May, who had ultimately voted for H.F. 2212 in 2008, tried to resolve the dispute over the definition of “bar” by repealing the ban on patio smoking altogether and re-exposing all outdoor restaurant customers to secondhand smoke. He, too, paired this move with repeal of the casino exemption,\(^{664}\) and succeeded, again, in provoking the Lung-Heart-Cancer groups and the casinos to direct their lobbyists to declare against it.\(^{665}\) May, who had tried and failed to recruit (even) one Democrat as a cosponsor, insisted that he was “trying to be consistent with science” in the sense that a ban on smoking in casinos was dictated by health considerations whereas (he erroneously opined) there was “no empirical evidence” that outdoor smoking harmed anyone.\(^{666}\)

A much more radical House bill was introduced by Republicans Sands and Windschitl, which would have permitted smoking in any enclosed area of a public place or place of employment to which only people 21 and over were invited and allowed entrance.\(^{667}\) Apparently too huge a step backwards, their bill attracted the support only of lobbyist for the Iowa Restaurant Association and one casino.\(^{668}\)

If the foregoing bills gained no co-sponsors, Democrat McKinley Bailey’s

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\(^{663}\) [http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Matt&Service=Declarations&frame=1](http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Matt&Service=Declarations&frame=1). The only lobbyist to declare for it represented Allied Charities of Iowa.


\(^{666}\) Telephone interview with Mike May, Spirit Lake, IA (July 2, 2009). On May’s misinformation concerning the science of outdoor smoke exposure, see above ch. 35. May was also a strong opponent of casinos, which he regarded as sucking discretionary income out of rural areas.


came with a ready-made majority of 51—24 other Democrats and 26 Republicans, some of whom had voted for H.F. 2212 in 2008, some against, while others had favored less comprehensive bills. In only partial keeping with Bailey’s aforementioned attacks on IDPH’s rule defining “incidental” in the statutory definition of a “bar” (“an establishment where one may purchase alcoholic beverages...for consumption on the premises and in which the serving of food is only incidental to the consumption of those beverages”), H.F. 211 struck all the language after “premises” and the prohibition of smoking in outdoor seating or serving areas of restaurants and then added as the twelfth exemption from the statute “[t]he outdoor seating and serving areas of bars and restaurants” unless smoking were prohibited in such an area pursuant to another section of the statute. Oddly, whereas Bailey had previously focused on the allegedly unrealistic administrative definition of “bar,” which resulted in the imposition of smoking bans in the outdoor areas of too many bars, now he not only leveled down by proposing to eliminate the ban for outdoor restaurants and bars, but also, at least to the press, falsely claimed that “lawmakers never intended those areas to be a part of the ban”—although the statute expressly and incontestably did cover outdoor restaurant areas. Instead of facing this insurmountable textual contradiction of his position, Bailey argued that “the proof” that legislators lacked such an intention was “sort of the diverse nature of the 51 co-sponsors. We have members who never voted for any version of the smoking ban. We have members who have voted for every version of the smoking ban who’ve signed on. ... We don’t think that the bill we passed is being followed.”

In point of fact, it was unclear how many of his co-sponsors even realized that they were supporting the forced re-exposure of nonsmokers to secondhand smoke in outdoor restaurants. Bailey may have predicted that if his bill did reach the House floor, it would receive at least 70 votes, but, given the buyer’s remorse, confusion, and misunderstanding about the bill displayed by some of its co-

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671 H.F. 211 (Feb. 5, 2009, by Bailey et al.); House Journal 2009, at 275. The bill also would have permitted actors in live theater to smoke if smoking were integral to the script.
673 James Lynch, “Smoking Legislation Blocked in House,” Gazette (Cedar Rapids), Feb. 11, 2009 (5A) (NewsBank). May did not cosponsor Bailey’s bill simply because Bailey had not asked him; had he been asked, he would have seriously considered it. Telephone interview with Mike May, Spirit Lake, IA (July 2, 2009).
sponsors when asked why they supported repeal of the ban on smoking on outdoor restaurant patios and resumption of exposure of nonsmokers to secondhand smoke, it is unclear whether Bailey would really have been able to count on all 50 of them on a floor vote, especially since some signed on to the bill in large part because they regarded a measure that would not be voted on as a costless way of propitiating some constituents. Three Democrats who had voted for H.F. 2212 in 2008 exemplified these reactions. Speaker Pro Tempore Polly Bukta explained that she had lined up behind H.F. 211 for the sake of several bar-restaurant-owner-constituents in Clinton who felt that, in reliance on H.F. 2212, which the administrative rules later showed to have been misleading, had built nice patios out in open areas where no one would be hurt by smoke. Nevertheless, Bukta, who wished that smoking were banned everywhere, also expressed the wish that she had never co-sponsored the bill, which she knew was not going anywhere. Assistant Majority Leader John Whitaker, who was more interested in bars than restaurants, believed that smoking was already prohibited in outdoor areas of all bars under SAA. Democrat Doris Kelly, whose husband had died five years earlier of lung cancer and who would ban smoking everywhere, also pointed out that legislators run some bills just to show their constituents even though they knew the bills were not going anywhere. She opined that the administrative rules had changed the statutory definition of “bar,” but Kelley, too, did not understand that the effect of Bailey’s bill would have been to repeal the smoking ban outdoor restaurant patios.

Whatever number of votes Bailey imagined he had, Petersen made it clear that H.F. 211, like the other amendatory bills, was unlikely to get out of subcommittee, let alone to floor debate. Moreover, Speaker Murphy announced that the House would not debate the bill because “‘there’s no support in the Senate. [I]f the Senate’s not going to do it why waste our time.’”

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674 Telephone interview with Polly Bukta, Clinton (June 2, 2009). Democrat Rick Olson, a co-sponsor who did understand what H.F. 211’s impact on outdoor restaurants would be (and who in 2008 had sponsored Bailey’s amendment to exempt bars and 21-and-over restaurants), also emphasized that H.F. 211 was not going anywhere. Telephone interview with Rick Olson, Des Moines (June 2, 2009).

675 Telephone interview with John Whitaker, Hillsboro (June 1, 2009).

676 Telephone interview with Doris Kelley, Waterloo (June 1, 2009). A newly elected Democrat also did not understand that Bailey’s bill would have deprived outdoor restaurant customers of protection and placed them in the same position as outdoor bar customers. Telephone interview with Sharon Steckman, Mason City (June 1, 2009).


678 Darwin Danielson, “House Leader Says Smoking Ban Changes Won’t Be Debated,”
H.F. 211’s many legislative backers, only the Iowa Restaurant Association’s and American Legion’s lobbyists declared for it, while the health groups all declared against it.\textsuperscript{679}

Asked after the end of the session why, if his dispute with IDPH was over the definition and treatment of bars, he nevertheless proposed abolishing the ban on smoking on outdoor restaurant patios,\textsuperscript{680} Bailey—to whose re-election campaign Altria Group, Inc. (f/k/a Philip Morris) contributed $250 in 2008\textsuperscript{681}—replied:

The Department of Public Health stated that the reason they did not distinguish between bars and restaurants on an income basis in line with the true definition of incidental was because they had no way of doing so. It is a silly response as the percentage of income has to be given on Dramshop insurance forms but since they claim they can’t tell the difference we applied it to everyone. If the department would acknowledge that they can tell the difference and stop making up definitions for incidental that have no grounding in the English language or legal terminology than [sic] there would be no need for the legislation at all and we could put the whole thing behind us and move on to more important issues. If they don’t change it we will get it passed this way sooner or later.\textsuperscript{682}

Bailey may have made his point that he was able to recruit a bare majority to water down the law, but he did not stop other, more radical, pro-smoking bills from being filed. Republican Senator Brad Zaun, who in 2008 had vociferously advocated on behalf of a 21-and-over exemption, joined by three other Republicans and Democrat Bill Dotzler (who had pursued the same agenda in 2008), redefined a “bar” to mean establishments 60 percent or more of whose gross revenue was derived from selling alcoholic beverages for on-site consumption, struck the ban on smoking in outdoor areas of restaurants, and, most importantly, exempted 21-and-over bars.\textsuperscript{683} Like Bailey’s bill, it garnered supportive lobbying declarations only from the Iowa Restaurant Association and

\begin{itemize}
  \item \textsuperscript{679}http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Matt&Service=Declarations&frame=1.
  \item \textsuperscript{680}Email from Marc Linder to McKinley Bailey (June 2, 2009).
  \item \textsuperscript{681}http://www.iowa.gov/ethics/viewreports/vsr_contributions/2008vsr_contributions.pdf.
  \item \textsuperscript{682}Email from McKinley Bailey to Marc Linder (June 8, 2009).
  \item \textsuperscript{683}S.F. 158 (Feb. 16, 2009, by Zaun et al.); Senate Journal 2009, at 302. Republican Kettering then filed a bill that differed only by virtue of requiring such exempt bars also to use air filtering/ventilation in accordance with standards adopted by IDPH. S.F. 180 (Feb. 18, 2009, by Kettering); Senate Journal 2009, at 341.
\end{itemize}
American Legion, but broad opposition from health organizations.\footnote{http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Matt&Service=Declarations&frame=1. Only the American Legion lobbyist declared for S.F. 180.} Another approach was tried by Republican Representative Jeffrey Kaufmann and his first-term Republican colleague Nick Wagner, who sought to try to undo the “unfair situation between bars and casinos”\footnote{“Reps. Propose Changes to Smoking Bill” (Feb. 25, 2009), http://iowahouserepublicans.com/wp-content/uploads/2007/06/smoking.pdf (visited July 3, 2009).} by striking the casino exemption and replacing it with an exemption for the gaming floor of casinos “exclusive of any restaurant located within the gaming floor which is an enclosed area and subject to the prohibitions of section 142D.3” and bars but only “as long as any prohibition against smoking or exemption from the prohibition against smoking...applies equally to both...locations.”\footnote{H.F. 358 (Feb. 18, 2009, by Kaufman and Wagner); House Journal 2009, at 425.} To be sure, purporting to be indifferent as to whether casinos and bars were both covered or exempt, so long as they were treated in the same way,\footnote{Telephone interview with Nick Wagner, Marion (July 6, 2009).} Kaufmann and Wagner did not explain why, if their objective was “basic fairness,”\footnote{“Reps. Propose Changes to Smoking Bill” (Feb. 25, 2009), on http://iowahouserepublicans.com/wp-content/uploads/2007/06/smoking.pdf (visited July 3, 2009).} they did not create fairness for nonsmokers by simply banning smoking in both locations rather than also permitting both to be exempt.\footnote{http://iowahouserepublicans.com/wp-content/uploads/2007/06/nicks-news-week7.pdf (visited July 3, 2009).} Lobbyists for all but two casinos (owned by the same company) were “undecided” on this initiative, which the health organizations, as was to be expected, declared against.\footnote{http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Matt&Service=Declarations&frame=1.}

The most radical bill of all was introduced by 13 Republicans led by Thomas Sands which would have repealed the whole Smokefree Air Act and reinstated the feckless designated smoking areas bill in effect until 2008.\footnote{H.F. 362 (Feb. 18, 2009, by Sands et al.); House Journal 2009, at 425.} Three co-sponsors were in their first term; the other 10, including Sands, had all voted against H.F. 2212 on final passage. He claimed to have found Democratic sympathizers, but some “refused to sign on over fears of what the Democratic leadership would think.”\footnote{Christinia Crippes, “Sands’ Bill Calls for Smokefree Air Act Repeal,” Hawkeye (Burlington), Feb. 20, 2009 (1A) (NewsBank).} In explaining his repeal bill as the fulfillment of a promise to constituents, Sands repeated his nonsensical claim that the law was “simply
unenforceable”—whereas in fact bar owners, the principal complainers, asserted that the law was all too enforcible. Indeed, the chief constituent Sands had in mind was the state’s most prominent smoking scofflaw, Larry Duncan, the owner of a bar in West Burlington, whose liquor license had been suspended and would soon be revoked. Duncan, in accordance with his flat-earth-society view of the harmlessness of secondhand smoke, rejoiced: “‘We’re totally after a rescind of the law.... That way nobody gets hurt.’” To support Republican legislators’ efforts, Duncan was promoting a trek to the legislature by business owners and others favoring outright repeal, by which time he aspired to present a petition with 200,000 signatures. Duncan opined that bar owners’ frustration, brought on by what his lawyer Bunger characterized as “their Legislature’s...high-handedness and arrogance,” would “help his cause by getting more people to collect signatures” for the petition. Such politics allegedly reflected the results of an admittedly unscientific survey that Sands (who was also busy helping Duncan and his self-anointed freedom fighters arrange their day at the capitol) had been conducting among his constituents: in response to the question as to whether the legislature should amend the law to ban smoking on casino gaming floors, exempt bars but not restaurants, or repeal the law altogether, a majority plumped for repeal, casino coverage gaining second place. The majority of Sands’s participating constituents were presumably a special breed: only the American Legion supported Sands’s repealer, which the health organizations (together with the casino in nearby Clinton) opposed, and by the next legislative forum on February 21, Sands was compelled—even in advance of Duncan’s march on Des Moines—to concede to his constituents that it was
Republicans introduced two more pro-smoking bills following the repeal measure. No lobbyist declared for former House Minority Leader Christopher Rants’s bill to exempt theatrical productions (which was already contained within H.F. 211), which the health organizations opposed. And finally, first-term representative Jason Schultz, a self-professed “Christian libertarian conservative” who was already co-sponsoring Bailey’s and Sands’s bills, proposed a measure that would have repealed signage requirements. Schultz, who would have preferred total repeal of the law, had named his bill the “Submission Sticker Removal Act” (which had been omitted in drafting but which he wanted to reinsert when he refiled the bill in 2010) in order to point out that the function of the signs—which he deemed “offensive to the max”—was merely to document to the world that the business owner had been forced to submit to government interference with his use of his private property. Based on his assumption that everyone in Iowa already knew where smoking was prohibited, Schultz denied that the removal of signs would minimize information available to the public about where smoking was and was not lawful so as to promote confusion, non-compliance, and unenforceability, and, in any event, the amendment would not prohibit willing owners from posting signs. He acknowledged that the underlying premise of his bill (that the business owner should decide whether to permit smoking and even if he lacked the information to make that decision in accordance with public health considerations, customers could refrain from frequenting his business if they did not like his decision—a position that he took to the extreme of acquiescing in chain smoking in hospital rooms in the presence of new-borns if the administration did not ban it) was at odds with SAA’s substance and spirit, but his purpose was to initiate a discussion. He also conceded that he had failed to do so and his bill attracted absolutely no supportive lobbyist declarations, but solid health organization opposition. Neither these nor any other smoking-related proposal managed to get out of subcommittee.

700H.F. 461 (Feb. 26, 2009, by Rants); House Journal 2009, at 593
701Telephone interview with Jason Schultz, Schleswig (July 6, 2009).
703Telephone interview with Jason Schultz, Schleswig (July 6, 2009).
705Among these stillborn bills were one introduced late in the 2009 session and two
Two days before “Duncan and his entourage” had their big day in the statehouse, Mike Sweet, editorialist and columnist for the Burlington *Hawk Eye*, unleashed a ruthlessly excoriating attack on the “Freedom Fighters” in particular, but, by extension, on virtually all opponents of smoking laws:

They will confront legislators with a metaphorical restaging of the Boston Tea Party. Their battle cry is not “no taxation without representation.”

It’s “Free us to commit suicide,” and more to the point of the whole distasteful matter, allow us to abet homicide. ...

Owners like Duncan who are disobeying the ban claim the state has no right to tell them how to run their businesses.

That’s ridiculous. Federal, city and state governments have always set rules by which businesses operate. It’s in the public’s interest. The current economic meltdown shows what happens when they don’t.

Governments tell businesses to collect and pay taxes. They require fire alarms, sprinkler systems, exit signs and insurance. Government sets health standards that require a clean kitchen, employees to wash their hands after going to the toilet, and not spitting in the customer’s food.

No reasonable establishment would allow customers to harm other customers with a whop to the head with a beer bottle or a pool cue. Nor would they permit customers to stab customers or shoot them.

And yet the crux of the smoking debate is that businesses have the right to turn public places into gas chambers. Spewing arsenic, cyanide, toluene, methane, ammonia, carbon monoxide and hundreds of other deadly gases into the nostrils and lungs of nonsmokers at the next table or working behind the bar.  

With this rousing send-off (which the chairman of the Commission on Tobacco Use Prevention and Control called “courageous” and suggested be published in every newspaper in Iowa) the Freedom Fighters finally embarked on their rendezvous with constitutional destiny in Des Moines in the Capitol during the 2010 session. H.F. 731 (Mar. 16, 2009, by Paulsen) would have exempted residential treatment facilities affiliated with Alcoholics Anonymous; *House Journal 2009*, at 804. H.F. 2105 (Jan. 21, 2010, by Kaufman, Wagner, and Schultz) would have required every gambling license application referendum to include a separate proposition on approval or disapproval of the smoking ban; *House Journal 2010*, at 136. H.F. 2227 (Feb. 1, 2010, by Chambers, Zirkelbach, Windschitl, and Bailey) would have exempted certain veterans organizations posts from the smoking ban except when used for functions to which the general public was invited; *House Journal 2010*, at 210.


Administrative Rules for, Barkeepers’ Challenge to, Enforcement of Smokefree Air Act

rotunda, where, ironically, as House Majority Leader McCarthy had poignantly observed in 2008, the tobacco smoke had once been so thick that he was unable to see the dome.\textsuperscript{708} The movement’s atavistic character was perfectly captured by one of its members: “Tired of standing outside in inclement weather to enjoy a cigarette, Tom Tow stepped inside the Capitol Tuesday to tell legislators to repeal the state indoor smoking ban. ‘I’m not a child.... The state’s trying to tell me what to do and where I can do it.’” Only about 100 smokers and/or business owners—about 0.05 percent of the total number of petition signers for which the group had hoped—gathered in the Statehouse in support of repealing the Smokefree Air Act and in favor of “‘freedom of choice for bar owners...and their patrons.”\textsuperscript{709} The autopolydidact Duncan modestly allowed as “‘I am not the most educated person in this room but I think a long time before I completed my education, I could read that to know that this law was not constitutional’”—and, once again, the fatal defect consisted in the casino exemption. During the hour-long assembly\textsuperscript{710} Duncan, based on no data and “[d]espite polls showing strong statewide support for a smoking ban,” claimed that SAA was unpopular and that legislators who supported the unconstitutional bill would “pay a political price”\textsuperscript{711}—a forecast/threat that he and other smoking facilitators had already made in vain in 2008. Demonstrating a mastery of science and medicine unblemished by even a trace of commercial self-interest, Duncan also “questioned oft-quoted figures regarding how many people die from secondhand smoke, as well as a conspiracy against curing cancer.”\textsuperscript{712} The pro-smoking mindset was nicely projected by Dennis Whitson, commander of the Veterans of Foreign Wars post in Ottumwa, who in a few days would be appearing before an ABD ALJ because the police had repeatedly observed people smoking there (the smoking bartender on one occasion blurting out “‘oh shit’” as she saw the officer enter) and whose liquor license the ALJ would propose revoking in April.\textsuperscript{713} Ex-soldiers

\textsuperscript{708}See above ch. 35.


\textsuperscript{710}Jason Clayworth, “About 100 Rally Against Smoking Ban,” \textit{DMR}, Mar. 10, 2009, on http://www.desmoinesregister.com


\textsuperscript{712}Christinia Crippes, “Freedom Fighters Take on Des Moines,” \textit{Hawk Eye} (Burlington), Mar. 11, 2009 (1A) (NewsBank).

\textsuperscript{713}Proposed Decision at 6, 19, \textit{In re Larry D. Harding Quartermaster d/b/a Veterans of Foreign Wars No. 775, Docket No. D-2009-00023} (Iowa Department of Commerce, Alcoholic Beverages Div., Apr. 14, 2009)
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apparently suffering wounds left and right in Ottumwa, Iowa, he allowed as: "Every film you have ever (seen), whether it be fiction or factual, of a military operation a wounded man always had a cigarette in his mouth and now they want to take that away. I think it’s wrong. ... The men and women of the V.F.W. fought for the constitution...fought for life, liberty and the pursuit of happiness and our illustrious Democratic Party seems to think that means they can turn us into a socialist state and I don’t think that can happen...not as long as I’m alive." 714

Shortly after the suicide-committing/homicide-abetting freedom fighters had made their pitch in the now-smokefree rotunda on behalf of resurrecting the good old days when they were free to spew their toxins and carcinogens at will, all the smoking bills were dead in subcommittee for the 2009 session.715 Later, after adjournment, Senator Thomas Courtney from Burlington, the epicenter of bar-owner civil disobedience, opined that the bar owners’ pending court challenges were “the reason” for the legislature’s abstention: “I still think the courts will rule that we need to get it out of the casinos.... [T]here’s a lot of folks in the Legislature [who] would like to do something about the outdoors part, and once it’s (the court cases are) settled, I think we may do that.” 716 Janet Petersen, the chief sponsor of H.F. 2212 and House Commerce Committee chair, differed regarding the causality, timing, and outcome. On the first anniversary of the law’s effective date, she predicted that in order to allow for an “adequate transition period,” no push would be made to remove exemptions until 2011, but even then she did not believe that the legislature would revisit other issues such as the ban on smoking on certain outdoor patios.717

Even some inveterate enemies began to accept the law to the extent of not demanding its total repeal. For example, in the course of the law’s operation, even the bar owners’ opposition to the Smokefree Air Act underwent a certain mellowing in the sense that it morphed into a 21-and-over adult entertainment position. On the occasion of the law’s first anniversary, a leader of the Iowa Bar

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 Owners Coalition, Brian Froehlich, a self-professed “‘freedom fighter’” for “‘business rights,’” summoned up the rationality to concede that no one was opposed to a smoking ban, for example, in restaurants, hospitals, grocery stores, or gas stations.\textsuperscript{719}

\textbf{More Stasis Even with a Large Republican House Majority in 2011}

Troy Stremling, governmental affairs director for Ameristar Casino, said casino interests oppose the expansion because businesses should have the right to decide what goes on in their businesses.

“We’ve been opposed to all smoking bans.... It’s a business rights issue. We have a right, as long as smoking is legal, to decide what goes on in our business.”\textsuperscript{720}

If the House Democratic leadership in 2009 sought to keep amendatory bills to add casino coverage to the Smokefree Air Act off the agenda lest uncontrollable legislative momentum transmogrify them into anathematic repeal vehicles, it might have been expected that when Republicans captured a 20-vote House majority (and narrowed Democrats’ Senate lead to 26-24) for the 2011 session,\textsuperscript{721} the anti-smoking movement would have had a considerable incentive to resist the temptation of opening Pandora’s box. But perhaps viewing Senate Majority Leader Gronstal as a safeguard against any runaway House bills, advocates forged ahead. A month after the disastrous 2010 election, which saw Democrats yield 16 House and 6 Senate seats to Republicans, Senator Quirmbach shared with the Tobacco Use Prevention and Control Commission his judgment that while he did not foresee SAA’s repeal, he also did not think that the casino issue would “move forward.” Undeterred by this news, Commission Chair Cathy Callaway insisted that closing the exemption “is still a goal and seems to have support from both sides of the legislature.”\textsuperscript{722}


\textsuperscript{719}“Talk @ 12,” WSUI (Iowa City), June 30, 2009, 12:00-1:00 p.m.


\textsuperscript{722}Tobacco Use Prevention and Control Commission Meeting Minutes 2 (Dec. 3, 2010), on http://www.idph.state.ia.us/tobacco/common/pdf/012811_minutes.pdf.
As in 2009, Representative Mark Smith early in January introduced a bill to repeal the casino exemption, which once again was interred in a subcommittee. Callaway nevertheless told the Commission at the end of January that she was talking to legislators about eliminating the exemption. Adroitly, in the latter part of February, the Iowa Tobacco Prevention Alliance released the results of a survey conducted two weeks earlier of 500 registered voters in Iowa that found that 63 percent wanted SAA expanded to cover non-tribal casinos (and 79 percent felt that the law had “made Iowa a better place to live,” though oddly only 73 percent did not want the law repealed). Presented by Callaway at a statehouse news conference, the data release prompted press coverage and even editorial support. Perhaps the greatest propaganda coup achieved by the anti-smoking movement was the statement the same day by Dr. Mariannette Miller-Meeks, a conservative Republican ophthalmologist, former Iowa Medical Society president, University of Iowa medical professor, retired Army lieutenant colonel, and twice-defeated congressional candidate, whom newly re-elected Governor Branstad had nominated as IDPH director. At her confirmation hearing before the Senate Human Resources Committee Meeks declared: “‘If you all vote to push smoking out of casinos, we’ll make sure that happens’… She prefers education and prevention efforts to reduce smoking but added that ‘sometimes you have to pass laws.’ Miller-Meeks said raising the cigarette tax and banning smoking in the workplace probably has done more to reduce smoking than anything else.”

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723 House Journal 2011, at 62, 202 (Jan. 12, Feb. 1) (H.F. 21, by M. Smith). Numerous casino lobbyists quickly declared against it, while a number of health organizations (such as ACS, AHA, and ALA) supported it. [URL]

724 Tobacco Use Prevention and Control Commission Meeting Minutes 2 (Jan. 28, 2011), on [URL]

725 Iowa Tobacco Prevention Alliance, “79% of Iowa Voters Agree: Smokefree Air Act Has Made Iowa Better” (Feb. 23, 2011), on [URL]


727 “It’s Time to End Smoking Loophole for Iowa’s Casino’s,” Globe Gazette (Mason City), Feb. 27, 2011 (edit.), on [URL]

728 Mike Wiser and James Lynch, “Bills Would Extend Smoking Ban to Casinos,” SCJ, Feb. 27, 2011, on [URL]
himself, during his 2010 campaign for years 17-20 of his governorship—during his four previous terms as governor he had adopted an anti-tobacco position—stated that he supported the statewide smoking ban, would not sign a repeal, and would support extending the ban to the gambling floors of casinos.\footnote{Rod Boshart, “Culver, Branstad Support Casino Smoking Ban,” W.C., Sept. 9, 2010, on \url{http://wcfcourier.com/news/local/article_cfd83114-bcd3-11df-8cbd-001cc4c03286.html}; O. Kay Henderson, “Expect Smoking to Continue in Casinos,” Radio Iowa (Dec. 30, 2010), on \url{http://www.radioiowa.com/2010/12/30/expect-smoking-to-continue-on-casino-floors}. An IDPH employee who wished to remain anonymous stated that Branstad’s stance was the only reason that Miller-Meeks supported a casino ban.}

Ironically, all but one of the remaining anti- and pro-smoking bills were introduced by Republicans and met the same fate as Smith’s (though two of the highest-profile anti-smoking Democrats used a different amendatory procedure for attempting to repeal the casino exemption). The anti-smoking measures included a smoking ban within 100 feet of an entrance to a hospital or long-term care facility\footnote{House Journal 2011, at 323, 364 (Feb. 15, 17) (H.F. 274, by James Van Engelenhoven).} as well as a Senate and House bill replicating Smith’s.\footnote{Senate Journal 2011, at 369, 388 (Feb. 22, 23) (S.F. 283, by Randy Feenstra); House Journal 2011, at 442, 447 (Feb. 25, 28) (H.F. 412, by Kevin Koester). According to Koester: “My bill has minor differences [only in the title] at request of the IA Lung Association. Rep. Smith and I are in different political parties and the ILA also wanted a sponsor from the majority party in the House.” Email from Kevin Koester to Marc Linder (May 11, 2011). A House Democrat speculated that as an educator and “one of very few reasonable Republicans in the legislature,” Koester “probably has real anti-smoking sympathies.” Email from Nate Willems to Marc Linder (May 11, 2011).} Randy Feenstra, the senator who introduced the casino exemption repealer, was an anti-union Republican—unions’ “power has become so great that the unions have lost their initial reason for existence (giving a voice to the worker)”\footnote{Randy Feenstra, “Union Laws and Iowa” (Feb. 22, 2011), on Randy Feenstra, New Generation Republican Blog, on \url{http://newgenerationrepublican.com/blog/?m=201102}.}—animated by the “‘level playing field’” argument that casinos held an “unfair advantage” over nearby restaurants or bars.\footnote{“It’s Time to End Smoking Loophole for Iowa’s Casino’s,” Globe Gazette (Mason City), Feb. 27, 2011 (edit.), on \url{http://www.globegazette.com}.} Although Feenstra had initially declared that the bill was gaining bipartisan support and that prospects for passage were “‘pretty good,’”\footnote{Rod Boshart, “Survey: Nearly Two-Third [sic] of Iowans Favor Expanding Smoke Ban to Casinos,” Q-CT, Feb. 23, 2011, on \url{http://www.qctimes.com}.} once the measure had missed the March 4 deadline for securing committee approval in order to survive—and a week earlier Gronstal had said
that “he wouldn’t go to extraordinary lengths to press” the Senate committee to act—Feenstra tried a different tack by offering the text of his very brief bill as an amendment to a gambling bill. Ironically, however, Democratic Senate President Kibbie, in response to an objection raised by a Democratic senator, ruled it non-germane.

Nor was Feenstra the first to attempt this procedural work-around. Back in March, Senate Democrat McCoy, a long-time anti-smoking legislator, offered an amendment during a subcommittee hearing on a gambling bill to subject casinos to the no-smoking law, but the chair, Senator Dotzler—whose pro-tobacco stance in 2008 has been detailed—refused to accept amendments. Then during floor debate on a gambling bill in the House on May 3, Petersen, SAA’s chief advocate in 2008, offered an amendment that would have shortened the process of county-level voter approval of licenses if the casinos prohibited smoking, but it lost on a voice vote. Undaunted, Petersen, joined by seven other Democrats (including Smith and Tyler Olson), immediately offered a variant that would have directly inserted repeal of the casino smoking ban exemption into the bill, but the speaker ruled that it was not germane. Her attempt to overcome this obstacle by suspending the rules ran aground on an almost perfect party-line procedural vote of 40 to 55.

The pro-smoking bills were fewer and less diverse than in 2009. The chief vehicle was largely a re-run of Zaun’s 2009 bill, which: exempted bars—defined as deriving 60 percent of their gross revenues from alcoholic beverages consumed on premises—that excluded persons under 21; permitted smoking in parts of

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restaurants in which alcoholic beverages could be bought and consumed; and 
repealed the smoking ban in outdoor seating/serving areas of restaurants.739 This 
time round Zaun was able to mobilize nine other Republican co-signers, but only 
the Iowa Restaurant Association’s lobbyist declared for the bill.740 The only other 
let’s-bring-back-secondhand-smoke-exposure bill was introduced solo by House 
Democrat Kurt Swaim, a quondam senior staff attorney in the Northeast regional 
office of the Legal Services Corporation of Iowa,741 who in 2008 had voted twice 
against SAA.742 His measure would have exempted from the smoking ban any 
public place that restricted entry to persons 18 and over and ensured that the 
smoke from such smoking did not infiltrate into smoking-prohibited areas.743 No 
lobbyist even bothered to declare for it or its Senate counterpart filed by Zaun and 
two other Republicans.744

Thus ended for 2011 the unsuccessful efforts to strengthen or dismantle SAA. 
This stand-off did not leave anti-smoking Democrats of one mind as to what the 
future held for tobacco control. At one extreme, a Senate assistant majority 
leader, asked whether House Republicans had the votes to repeal parts or all of 
the law, confidently responded: “Not going to happen. Branstad has said he is 
opposed and people like smokefree places a lot.”745 At the other extreme, a House 
member, reckoning that Republicans had about 45 House votes for repeal, 
speculated that if they gained control of the Senate they might repeal the whole 
act.746 Injecting further uncertainty into this perspective, yet another House 
Democrat, when prompted by a query as to whether there were enough 
“unreasonable” Republicans in his chamber to repeal the law or major parts of it, 
responded: “Maybe if it was a priority of their leadership, but it does not seem to 
be.” But in response to the suggestion that House Republican leaders might have 
refrained from pushing repeal simply because it would have squandered political 
resources since Senate Majority Leader Gronstal had the power to thwart passage, 
he cautioned: “They are already looking at their 2013 agenda when they hope to

739Senate Journal 2011, at 130,179 (Jan. 24, 27) (H.F. 81, by Zaun et al.).
740http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=Lobbyist&Service =DspReport&ga=84&type=b&hbill=SF81
741http://www.house.iowa.gov/swaim/?page_id=3
742See above ch. 35.
744Senate Journal 2011, at 438, 457 (Mar. 1, 2) (S.F. 352, by Chelgren, Zaun, 
Sorenson).
745Email from Joe Bolkcom to Marc Linder (May 10, 2011).
746Telephone interview with David Jacoby, Coralville (May 9, 2011).
have defeated Gronstal and taken control of the Senate too.”

Any future effort to re-impose involuntary exposure to tobacco smoke on the vast majority of non-smoking Iowans who were looking forward to life without it would have to explain why some capitalists’ (empirically baseless) profit-based demands for the resumption of laissez-faire should trump the astonishing public health consequences of the statewide smoking ban in public places. Replicating results that have been recorded elsewhere under similar bans, a recent study determined that during the first two years of the law (July 2008-June 2010) hospitalizations for tobacco related diseases are well below those of the previous three years. More than 10,100 hospitalizations among Iowa residents are estimated to have been prevented because of the Iowa Smokefree Act. ...

- Hospitalization for acute myocardial infarctions or heart attacks declined 8%....
- Hospitalization for other forms of coronary heart disease...declined 31%....
- Hospitalization for congestive heart failure declined 10%....
- Hospitalizations have also been reduced for chest pain/angina (down 21%), peripheral circulatory disease (down 26%), transient ischemic attacks (down 10%) and smoking-related conditions in newborns (down 10%).

- Tobacco related admissions declined at more than twice the rate (10.7%) of all hospital admissions (4.7%)....

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747Email from Nate Willems to Marc Linder (May 11, 2011).
748See Institute of Medicine, Secondhand Smoke Exposure and Cardiovascular Effects: Making Sense of the Evidence (1909).
749“Tobacco Control Makes a Difference!” on http://www.iowasmokefreeair.gov/common/pdf/other/sfaa_brief.pdf (visited May 12, 2011). Two of the study’s co-authors stressed that the data in the final, peer-review-edited version might differ somewhat and conceded that if the large drop in in-state cigarette sales translated into a large decline in smoking prevalence, the decline in hospitalizations might also, to some unquantifiable extent, reflect a decline in firsthand smoking. Telephone interviews with Dr. William Haynes, Department of Internal Medicine, University of Iowa (May 17, 2011), and JoAnn Muldoon, IDPH, Des Moines (May 17, 2011). As of mid-December 2011 the authors had still not analyzed the complete database and did not anticipate submitting the article for publication until February 2012 at the earliest. Telephone interview with JoAnn Muldoon (Dec. 15, 2011).